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JUDGMENT SHEET
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

C.R.No.691 of 2012

Taisei Corporation

Vs.

A.M.Construction Company (Pvt.) Ltd.

J U D G M E N T

Date of hearing	27-04-2012
Petitioner by	Kh. Ahmed Hussain, Advocate
Respondent by.	Mr. Uzair Karamat Bhandari, Advocate

NASIR SAEED SHEIKH, J: The petitioner Taisei Corporation is stated to be a Japan based company and acquired a project for carrying out the improvement works of Kararo-Wadh section of National Highway N-25 in the province of Balochistan. The sub-contract dated 19.5.2007 was executed between the petitioner and the respondent No.1 whereby the petitioner entrusted this project to the respondent No.1 upon the terms and conditions incorporated in the sub-contract. An arbitration clause regarding the settlement of disputes between the parties was incorporated in para-19 of the sub-contract according to which the parties agreed to get any controversy under the sub-contract resolved through the arbitration of an Arbitrator to be appointed by International Chamber of Commerce and the place of the arbitration was further agreed to be at Singapore. The sub-contract executed between the parties contained a special condition 3.4 which reads as follows:-

“The priority of sub-contract documents is:-

(a) The Contractor’s Letter of Acceptance,

- (b) *Special Conditions of Subcontract,*
- (c) *General Conditions of Subcontract,*
- (d) *Subcontract Specifications,*
- (e) *Subcontract Drawings*
- (f) *The Subcontract Bill of Quantities (included in the (a))*
- (g) *Correspondences”*

Further the documents enumerated above were treated as part of the Sub-contract Agreement as per clause 2 of the Sub-contract dated 19.5.2007. Both the parties agreed upon the general conditions detailed from paras 1 to 22 of the sub-contract and also upon special conditions attached with the main sub-contract. The main sub-contract contained clause 3.2 as follows:-

*“**Governing Law:**The law to which the Subcontract is to be subject and according to which the Subcontract is to be construed shall be as specified in Special Conditions of the Subcontract.”*

The Special conditions contain clause 3.2 which reads as follows:-

*“**3.2.** The Governing Law shall be the law in force at the time in Pakistan.”*

2. Certain disputes arose between the parties which could not be resolved amicably. Resultantly the respondent No.1 forwarded a request dated 17.12.2008 for arbitration alongwith the statement of claims to the Secretariat of International Court of Arbitration and the respondent No.2 was appointed as the sole Arbitrator. The arbitration proceedings were undertaken by the Arbitrator with the participation of both the parties at Singapore. On 09.09.2011 the Arbitrator delivered an Award the intimation of which was conveyed to the Respondent at Lahore through a letter dated 09.09.2011 addressed by the Secretariat International Court of Arbitration. The Arbitrator in the award while passing award rejected all the claims as raised by the respondent No.1 except one and at the same time allowed certain counter claims raised by the petitioner against the respondent No.1. A

direction was issued in the award to the respondent No.1 to pay a sum of Rs.158,135,576/-. The award also held the respondent No.1 liable to pay costs of the arbitration to the tune of Rs.23,073,952.50 as well as the costs of the arbitration proceedings comprising fee and expenses of the Arbitrator as well as the International Court of Arbitration administrative expenses (US \$ 42500).

3. The respondent moved an application under section 14 of the Arbitration Act 1940 before the learned Civil Judge at Lahore in order to challenge the award and prayed for issuance of a direction to the arbitrator to file the Award in the Court so that the objections in this regard can be raised before the Court as per the Act of 1940. Para-9 of the application moved by the respondent No.1 contained the following grounds for moving the application:-

“9. That the Applicant intends to challenge the Award and to file its objections in this regard. It is the Applicant’s position that the Arbitrator has misconducted herself as well as the arbitration proceedings, that the Award is invalid, contrary to the laws and public policy of Pakistan, unenforceable and merits to be set aside, and that the matter deserves to be remitted/referred to arbitration for reconsideration. The applicant reserves the right to initiate and file all appropriate proceedings in this regard, once the award and the entire record of the arbitration proceedings is submitted before this court as prayed hereunder. The instant application is therefore being filed without prejudice to the rights of the Applicant to challenge the arbitration proceedings and the Award and seeking all appropriate reliefs.”

4. In paragraphs No.10 and 11 of the application following contentions were raised for invoking the jurisdiction of the Civil Courts at Lahore and these paragraphs are reproduced below:-

“10. That the cause of action for this application arose in favour of the Applicant and against the Respondents when the Applicant learnt that the Award had been made through the letter dated 9 September 2011. The instant application is being made within the limitation period prescribed by law.

11. That the Applicant has its registered office within the territorial jurisdiction of this court; the letter dated 9 September 2011 regarding the rendering of the Award by the arbitrator was also received within the territorial jurisdiction of this court, which even otherwise has jurisdiction over the subject matter of the reference as a part of the cause of action arose in Lahore (e.g. through receipt of correspondence, negotiations, meeting etc.) Accordingly, this court has jurisdiction in the matter.”

The application moved by the respondent No.1 thus contained the following prayer:-

“In the light of the foregoing, it is most respectfully prayed that the Respondent No.2, the Arbitrator, be directed to file the Award or a signed copy thereof, together with the entire record of the arbitration proceedings, including but not limited to all depositions, witness statements, expert reports and documents filed or produced before the Arbitrator, and orders passed or directions issued by the Arbitrator, in this court.”

It is an admitted position by the parties that on 22.9.2011 when the application u/s 14 of the Arbitration Act 1940 was moved by the respondent No.1 before the Civil Courts at Lahore neither the petitioner nor the Arbitrator has initiated any proceedings for the enforcement of the award in question in any court in Pakistan.

5. The petitioner appeared in the Civil Court at Lahore with an application under Order VII Rule 10 of CPC supported by an affidavit dated 27.10.2011. The petitioner raised two

objections upon the jurisdiction of the Civil Court at Lahore one on the ground that the Courts at Lahore lack territorial jurisdiction to entertain the application u/s 14 of the Arbitration Act 1940 moved by the respondent No.1 and secondly that the award as announced by the Arbitrator is a "foreign award" regarding which exclusive statutory jurisdiction under the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award Act, 2011 (the 2011 Act) is conferred upon a High Court. The petitioner contended in para-5 of the affidavit that the honourable High Court of Sindh at Karachi had the territorial jurisdiction to entertain this matter and the petitioner **intends** to invoke the jurisdiction of the honourable High Court of Sindh at Karachi by filing award in the said Court.

6. It would be advantageous to reproduced paragraphs No.3, 4 & 5 of the affidavit dated 27.10.2011 submitted by the petitioner in support of the application under Order VII Rule 10 of CPC praying that the plaint as instituted before the Civil Court at Lahore be returned on the above grounds:-

3. That no cause of action has arisen at Lahore. The Respondents do not reside or carry on business in Lahore. The Sub-Contract Agreement between the parties was not executed at Lahore and neither has any breach occurred in Lahore. Therefore, this Hon'ble Court has no territorial jurisdiction to adjudicate this matter.

4. The Respondent No.1 has its regional office in Karachi. The Sub-contract Agreement between the Applicant and the Respondent No.1 was executed at Karachi. Since the Respondent No.1 does not reside or carry on its business in Lahore neither has any cause of action accrued at Lahore, therefore the Applicant has wrongly invoked the jurisdiction of this Hon'ble Court.

5. That the Award is a 'foreign award' under section 2(e) of the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award Act, 2011 (the 2011 Act) therefore

jurisdiction to adjudicate matters in relation thereto, as per section 3 of the 2011 Act, has been vested in a High Court. Accordingly, the Hon'ble High Court of Sindh at Karachi has territorial jurisdiction to entertain this matter. The Respondent No.1 intends to invoke the jurisdiction of the Hon'ble High Court of Sindh at Karachi by filing the Award in Court."

7. The respondent No.1 contested this application by controverting the contents of paragraphs No.3, 4 & 5 of the affidavit specifically. It was vehemently reasserted in the reply by the present respondent No.1 that the Civil Court at Lahore has the jurisdiction because the sub-contract was partly concluded in Lahore through exchange of correspondences which included communication of the acceptance of the offer. It was further reasserted in the reply by the respondent No.1 that the cause of action with respect to the dispute under the sub-contract also arose in Lahore, numerous meetings were held at Lahore to settle the controversy raised between the parties. The respondent No.1 also alleged that the breaches of the sub-contract by the petitioner caused loss and injury to the respondent No.1 at Lahore. Regarding the objection raised by the petitioner of lack of jurisdiction of the civil court at Lahore on statutory grounds the respondent No.1 reiterated in reply to para-5 of the affidavit that the award announced by the Arbitrator is not a "foreign award" as alleged. It was reiterated by the respondent No.1 that it is a "domestic award" and the sub-contract agreement between the parties specified the governing law to be the law of Pakistan. It was also contended by the respondent No.1 in reply to para-5 of the affidavit that the Act of 2011 was not in field in December 2008 when the arbitration proceedings in the matter were initiated and that the respondent No.1 have vested rights to challenge the award in question on the grounds set out in the Arbitration Act 1940 which provisions of the Arbitration Act of 1940 have no parallel /corresponding provisions in the Act of

2011 as well. It was also pleaded by the respondent No.1 that the rights available to the respondent No.1 under the Arbitration Act 1940 remain intact and available to the respondent No.1 particularly because of the fact that the Act of 2011 has not repealed the Arbitration Act of 1940. The vesting of the statutory jurisdiction with the High Court of Sindh at Karachi was also specifically denied by the respondent No.1. It was further contended by the respondent No.1 that although the High Court of Sindh at Karachi does not have the jurisdiction to adjudicate upon the matter yet mere intention to invoke the jurisdiction of the High Court of Sindh at Karachi cannot divest the civil court at Lahore of its jurisdiction to take cognizance of the matter at the instance of a prior application moved by the respondent No.1. The petitioner submitted a rejoinder to the reply of the respondent No.1 by controverting the contentions raised by the respondent No. 1.

8. The learned Civil Judge Lahore after hearing the arguments of both the parties rejected the application moved by the petitioner under Order VII Rule 10 of CPC vide order dated 28.1.2012. The learned Civil Judge in the impugned order held that the cause of action in favour of the respondent No.1 to move the application u/s 14 of the Arbitration Act 1940 has partly arisen in Lahore. It was further held by the learned Civil Judge that the award in question is a domestic award and it was not a foreign award and that the civil court at Lahore has the jurisdiction to entertain the objections upon such an award as it is governed by the provisions of Arbitration Act 1940. The learned Civil Judge also held that mere subsequent institution of application u/s 6 of the Act 2011 before the High Court of Sindh at Karachi as claimed by the petitioner in the rejoinder dated 10.12.2011 does not require the civil court to stop the further proceedings at Lahore.

9. Through the instant Civil Revision the petitioner who is the respondent No.1 in the application u/s 14 of the

Arbitration Act 1940 moved before the civil court has assailed the order dated 28.1.2012 passed by the learned Civil Judge rejecting the application under Order VII Rule 10 of CPC as moved by the petitioner for the return of the above application under Section 14 of the Act of 1940.

10. Notice was issued to the respondent No.1 in this matter by this Court.

11. The petitioner through C.M.No.3-C of 2012 dated 14.4.2012 requested for placing on record the documents annexed with the C.M. which are part of the record of the learned trial court Lahore which C.M. was allowed by this Court subject to all just and legal exceptions vide order dated 17.4.2012.

12. It is contended by the learned counsel for the petitioner that the sub-contract dated 19.5.2007 was executed at Karachi which contained an arbitration clause that arbitration proceedings were agreed to be conducted at Singapore; the place of work to be undertaken by the respondent No.1 under the sub-contract is located at Balochistan therefore the courts at Lahore do not have any territorial jurisdiction. The learned counsel relied upon the provisions of the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award Act, 2011 (the 2011 Act) to argue that the special statutory jurisdiction has been created by the above Act of 2011 in the matter which is conferred upon the High Court and the petitioner has invoked the jurisdiction of the honourable High Court of Sindh at Karachi therefore the proceedings as initiated by the respondent No.1 through moving application u/s 14 of the Arbitration Act 1940 are *coram non judice*, without lawful authority and the application moved by the respondent No.1 was liable to be returned. The learned counsel contended that the impugned order passed by the learned Civil Judge rejecting the application of the petitioner under Order VII Rule 10 of CPC be declared illegal.

13. The learned counsel for the respondent No.1 has raised preliminary objection upon the maintainability of the instant Civil Revision by contending that it is instituted by one Liaqat Hussain s/o Ghulam Muhammad who does not appear to be a duly authorized person by Taisei Corporation the petitioner. The learned counsel in this respect referred to the power of attorney claimed by Liaqat Hussain a copy of which has been placed at page-88 of this Civil Revision which power of attorney according to the learned counsel for the respondent No.1 is attributed to one Tsutomu Takayama posing as the General Manager of Taisei Corporation. The learned counsel for the respondent No.1 contended that this General Manager Tsutomu Takayama has himself produced Notarial certificate dated 14.10.2011 before a Notary Public for creating an authority in his own favour from Taisei Corporation which is not apparently sufficient to prove the creation of a valid authority in favour of the said Tsutomu Takayama from the Taisei Corporation and further that on the basis of such a notarial certificate and the power of attorney attested by Notary Public no valid authority can be said to have been created in favour of Liaqat Hussain to institute the instant Civil Revision before this Court as the connection of the attorney holder Tsutomu Takayama with the petitioner Corporation was not legally and factually established.

14. The learned counsel for the respondent No.1 in order to meet the arguments of the learned counsel for the petitioner as raised regarding the territorial as well as the statutory jurisdiction of the civil court at Lahore contended that the petitioner company is admittedly based in Lahore and the entire correspondence finally resulting into the execution of the sub-contract was exchanged to and from Lahore by the respondent No.1 company with the petitioner Corporation. It was further contended that part payment under the sub-contract was also received by the respondent No.1 from the petitioner at Lahore. The learned counsel contended that the

correspondences exchanged between the parties under the sub-contract was agreed to be treated as part and parcel of the sub-contract and therefore the cause of action has arisen partly at Lahore which was sufficient for conferment of the territorial jurisdiction upon the Lahore civil courts. Regarding the objection of lack of statutory jurisdiction the learned counsel for the respondent No.1 contended that the award in question was based upon a sub-contract which specifically provided an agreement between the parties regarding the governing law of the sub-contract to be the Pakistani law and applying above principle the award in question as announced by the Arbitrator was a domestic award and not a foreign award. The learned counsel for the respondent No.1 placed his reliance with emphasis in support of his above contention upon the judgment reported as **HITACHI LIMITED AND ANOTHER VS. RUPALI POLYESTER AND OTHERS (1998 SCMR 1618)**. The learned counsel for the respondent No.1 further contended that the Act of 2011 was enforced through a notification published in the official gazette dated 19.7.2011 and its provisions cannot be allowed to be interpreted in the manner so as to jeopardize the vested rights available to the respondent No.1 under the laws of Pakistan particularly under the Arbitration Act 1940. The learned counsel in this respect referred to an Email addressed by the Arbitrator dated 26.11.2010 placed at page 229 of the C.M.No.3-C/2012 whereby it was communicated by the Arbitrator that the “award has to be rendered on or before 31 January 2011 as per ICC Secretariat letter dated 19 October 2010” (R/A). The learned counsel contends that the arbitration proceedings were closed on 12.1.2011 as per message sent through the Email dated 19.5.2011 placed at page-231 of the C.M.No.3-C/2012. (R/B). The learned counsel contends that on this date i.e. 31st January 2012 the Act of 2011 was not enforced and had the award been announced on time by the Arbitrator, the award must have been treated as an award under the

domestic law of Pakistan as the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award Act, 2011 (the 2011 Act) was enforced on 19.7.2011 as per notification placed on the record by Civil Revision petitioner itself in the bundle of documents at page 43. The learned counsel for the respondent No.1 contends that it is not the fault of the respondent No.1 that the announcement of the award has been delayed till 09.9.2011 by the Arbitrator and this late announcement of the award would not bring the award so announced to be governed by the provisions of the Act of 2011. It is further argued by the learned counsel for the respondent No.1 that the provisions of Arbitration Act 1940 having not been specifically repealed by the Act of 2011 therefore the rights available to a party under an arbitration agreement itself agreed to be governed by Pakistani law by the parties, cannot be said to have been lost merely because there was a provision in the Act of 2011 that the said Act applies retrospectively to the arbitration agreements made before, or after the date of enforcement of the Act of 2011. The learned counsel contended that it is settled proposition of law that the parties are to be governed in accordance with the law which is in force at the time the agreement between the parties forming subject matter of the controversy is executed. The learned counsel contended that the respondent No.1 rightly invoked the jurisdiction of the civil court at Lahore for enforcement of the vested right available to the respondent and the learned Civil Judge lawfully declined the acceptance of the application moved by the petitioner under Order VII Rule 10 of CPC before the learned Civil Judge for the return of the application u/s 14 of the Arbitration Act 1940.

15. The learned counsel for the petitioner took further chance by arguing that not only the provisions of Act of 2011 gave retrospective effect to the Act in respect of the arbitration agreements executed prior to the enforcement date of the Act but also argued that the Act of 2011 was in fact a subsequent

final statute legislated on the subject through an Act of Parliament whereas prior to that the same provisions as incorporated in the Act of 2011 were promulgated through Ordinances with successive intervals from the year 2005 onwards. The learned counsel for the petitioner contended that first of such Ordinances was enforced on 14.7.2005 therefore even at the time of the execution of the sub-contract agreement in question between the parties which admittedly took place on 19.5.2007 the same provisions as incorporated in the Act of 2011 stood legislated and enforced through successive Ordinances.

16. Arguments of the parties have been heard and record perused.

17. The preliminary objection raised by the respondent No.1 about the non-maintainability of the instant Civil Revision on the ground that it is not instituted by a duly authorized person on behalf of Taisei Corporation is a question which is not relevant before this forum. The petitioner moved an application under Order VII Rule 10 of CPC before the learned Civil Judge through the same attorney Liaqat Hussain s/o Ghulam Muhammad who claimed in his favour a due authorization from the petitioner Taisei Corporation. The learned Civil Judge rejected the application moved by the petitioner through the said attorney on merits vide impugned order dated 28.1.2012. The petitioner has assailed the impugned order dated 28.1.2012 through the instant Civil Revision instituted through the same attorney who moved the application before the learned Civil Judge under Order VII Rule 10 of CPC. Any further objections regarding the status and authority of the said person can be raised before the learned Civil Judge by the respondent at a proper stage which objection shall be decided by the learned Civil Judge after framing the necessary issue on the point and allowing the parties to produce their respective evidence on the controversy.

This objection of the learned counsel for the respondent is presently repelled.

18. After hearing the arguments of the learned counsels for the contesting parties on the other two points relating to the merits of the instant Civil Revision and also after perusal of the available record the following admitted facts are noticed:-

- (i) The respondent No.1 was a sub-contractor for the project in question which sub-contract was executed between the parties at Karachi on 19.5.2007.
- (ii) The project subject matter of the sub contract was to be executed in the Province of Balochistan.
- (iii) The petitioner is a Japan based company having its one of the offices at Karachi. The respondent No.1 which is the sub-contractor company has a permanent office at Lahore.
- (iv) The execution of the sub-contract between petitioner and the respondent No.1 was preceded by numerous letters exchanged between the petitioner and the respondent No.1 from their respective offices and sub offices regarding the settlement of the terms and conditions of the sub-contract.
- (v) The sub-contract was supplemented by special conditions incorporated in the document dated 01.5.2007 and its clause 3.4 enumerated the correspondences between the parties as one of the priority of sub-contract document agreed to be treated as part of the main sub-contract.
- (vi) The governing law regulating the terms and conditions of the sub-contract executed between the parties was agreed to be the law of Pakistan.

- (vii) The sub-contract contained the special arbitration clause in its para 19.1 which clause envisaged the serving of a notice of any dispute arising between the parties of the sub-contract for amicable settlement and if such an effort does not produce any expected results, the arbitration proceedings through the offices of International Chamber of Commerce were to be commenced by appointment of one or more Arbitrators under the rules of Conciliation and Arbitration of the ICC and the place of the arbitration proceedings was agreed to be at Singapore.
- (viii) All the notices to be given either to the contractor i.e. the petitioner and the sub-contractor i.e. the respondent No.1 in respect of the terms and conditions of the sub-contract were agreed to be sent by post, cable, telex or facsimile transmission to or left at the principal place of business of the contractor or the sub-contractor as the case may be as per clause 20.1 of the conditions of the sub-contract.
- (ix) A request for arbitration alongwith statement of claims was addressed by the respondent No.1 sub-contractor from its Lahore office through correspondence dated 17.12.2008 to the International Court of Arbitration ICC.
- (x) The arbitration proceedings were conducted at Singapore by the sole Arbitrator/respondent No.2 appointed by ICC. The arbitration proceedings were originally directed to be concluded by the Arbitrator and the award has to be rendered by the Arbitrator on or before

31.1.2011 as per ICC Secretariat letter dated 19.10.2010.

- (xi) The sole Arbitrator announced the award dated 09.9.2011.
- (xii) The Secretariat of International Court of Arbitration Asia office sent the notification of the final award dated 09.9.2011 to the respondent No.1 at its principal office at Lahore.
- (xiii) The respondent No.1 moved an application u/s 14 of the Arbitration Act 1940 on 22.9.2011 before the learned Civil Judge Lahore.
- (xiv) The petitioner moved an application under Order VII Rule 10 of CPC 1908 with a supporting affidavit dated 27.10.2011 before the learned Civil Judge Lahore
- (xv) A Suit No.1311 of 2011 was instituted by the respondent No.1 in the High Court of Sindh at Karachi in the form of a petition u/s 6 of the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Award Act, 2011 (the 2011 Act) on 01.11.2011.

19. The learned Civil Judge vide order dated 28.1.2012 dismissed the application under Order VII Rule 10 CPC moved by the petitioner.

20. The instant Civil Revision was preferred before this Court against the order dated 28.1.2012 on 28.2.2012 vide diary No.19645.

21. The provisions of Order VII Rule 10 of CPC have been invoked by the petitioner through a written application before the learned Civil Judge which reads as follows:-

“10. Return of plaint. - - (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Procedure on returning plaint.- (2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.”

The provisions of Order VII Rule 10 of CPC as reproduced above are in fact the incorporation of the fundamental principle of law that only a Court or Tribunal having the jurisdiction to entertain and adjudicate upon a matter is competent to proceed with the matter and if an objection to the competence of the institution of the suit before a Court of law under the CPC is raised and the objection is sustained, the Court is to return the plaint for its presentation to the Court in which the suit should have been instituted. The petitioner thus moved the application before the learned Civil Judge at Lahore for return of the application moved u/s 14 of the Arbitration Act 1940 by the respondent No.1 on the grounds as incorporated in the supporting affidavit that the courts at Lahore have neither territorial jurisdiction to entertain such an application as moved by the Respondent No.1 nor the court at Lahore has the statutory jurisdiction to entertain the application u/s 14 of the Arbitration Act 1940.

22. In order to truly understand the concept of the application of the provisions of Order VII Rule 10 of CPC the case law has settled the methodology by laying down the law that for the purposes of deciding the application under Order VII Rule 10 of CPC the contents of the plaint as presented in the Court are only to be looked into particularly if the objection qua the jurisdiction as raised is to be decided only on the basis of legal arguments addressed by the parties. If the question of jurisdiction requires probing into some disputed facts, then the matter has to be resolved after framing of necessary issue and recording of evidence of the parties. Reliance in this respect is placed upon the judgments reported as **SHAH MUHAMMAD VS. KHUSHAL MUHAMMAD AND 3**

OTHERS (1981 CLC 1191), MESSRS AGRICIDES (PVT.) LTD. VS. MESSRS ALI AGRO SUPPLY CORPORATION LTD.(1988 CLC 59), MISS SHAH BEGUM VS. ASHRAF ALI NAZ (PLD 1993 KARACHI 151), DR. MUHAMMAD SALEEM KHAN VS. AMANULLAH KHAN (1998 CLC 1995,) AHMED NAWAZ AND 4 OTHERS VS. ABDUL KHALIQUE AND 13 OTHERS (2002 MLD 1783) and AZIZ BIBI AND OTHERS VS. AIJAZ ALI AND OTHERS (2007 YLR 21).

In the instant case as far as the question raised by the petitioner in the application under Order VII Rule 10 of CPC regarding the lack of territorial jurisdiction is concerned the respondent No.1 in the application moved u/s 14 of the Arbitration Act 1940 specifically contended in paras 10 and 11 of the application the following facts which are necessary to be repeated and are reproduced:-

“10. That the cause of action for this application arose in favour of the Applicant and against the Respondents when the Applicant learnt that the Award had been made through the letter dated 9 September 2011. The instant application is being made within the limitation period prescribed by law.

11. That the Applicant has its registered office within the territorial jurisdiction of this court; the letter dated 9 September 2011 regarding the rendering of the Award by the arbitrator was also received within the territorial jurisdiction of this court, which even otherwise has jurisdiction over the subject matter of the reference as a part of the cause of action arose in Lahore (e.g. through receipt of correspondence, negotiations, meeting etc.) Accordingly, this court has jurisdiction in the matter.”

23. It is interesting to note that in para-3 of the affidavit dated 27.10.2011 submitted by the petitioner alongwith the application under Order VII Rule 10 of CPC the following

contentions have been raised regarding the lack of territorial jurisdiction of the Civil Court at Lahore:-

“3. That no cause of action has arisen at Lahore. The Respondents do not reside or carry on business in Lahore. The Sub-Contract Agreement between the parties was not executed at Lahore and neither has any breach occurred in Lahore. Therefore, this Hon’ble Court has no territorial jurisdiction to adjudicate this matter.”

It is important and interesting to note that the petitioner in the affidavit dated 27.10.2011 did not even controvert the permanent office of the Respondent No.1 to be in Lahore wherefrom all the necessary correspondence between the parties has been exchanged. In this respect I would like to refer to the general conditions of the sub-contract dated 19.5.2007 in which the sub-contractor has been defined in the definition clause 1.1 of clause 3 to mean A.M. Construction Company Pvt. Ltd. The clause 20.1 of the general conditions of the sub-contract is also relevant which is reproduced:-

*“20.1 **Giving of Notices and Instructions**:-All notices to be given to either the Contractor or the Subcontractor and all instructions to be given to the Subcontractor under the terms of the Subcontract shall be sent by post, cable, telex or facsimile transmission to or left at the principal place of business of the Contractor or the Subcontractor, as the case may be, or such other address as the Contractor or Subcontractor shall nominate for that purpose.”*

The term sub-contract has further been specifically projected in the contract agreement to mean A.M. Construction Company Pvt. Ltd. of 1 KM Main Raiwind Road, Atchison Colony, Opposite Hyundai Showroom, Lahore. In this context following admitted documents which are available on the record of the Civil Revision are relevant:-

- (i) Letter dated 03.01.2007 addressed by the Project Manager of petitioner-corporation to

A.M. Construction Company Pvt. Ltd at Lahore under the head Quotation of Major Improvement Works. The name of the project has also been specified to be the improvement of Kararo-Wadh Section of National Highway N-25.

- (ii) Letter dated 03.1.2007 addressed by the petitioner to the respondent No.1 furnishing the revised general conditions of the agreement to the respondent No.1.
- (iii) Letter dated 03.2.2007 which contained the following facts regarding bid opening for the project in question:-

“Please be informed that your company is the 1st lowest bidder of our Project for the Major Improvement Section of Kararo-Wadh Section of National Highway N-25, we would like to start the negotiations on the subject works with you on 12th February 2007.”

We appreciated your cooperation for providing quotation of this Project.”

- (iv) Letter dated 10.2.2007 by the petitioner addressed to the respondent No.1 for certain clarifications in the quotation furnished.
- (v) Letter dated 19.4.2007 addressed by the petitioner to the respondent No.1 about the details of the equipment list for the project. This letter was specifically addressed to the respondent No.1 at its address A.M. Construction Company Pvt. Ltd. of 1 KM Main Raiwind Road, Atchison Colony, Opposite Hyundai Showroom, Lahore.
- (vi) Letter dated 19.4.2007 addressed by the Project Manager of the petitioner to the respondent No.1 sending draft conditions of

the sub-contract to the respondent No.1 for the project in question.

- (vii) Letter dated 27.4.2007 addressed by the petitioner to the respondent No.1 regarding the method statement and deployment of equipment and manpower at the project in question by the respondent No.1.
- (viii) Letter dated 01.5.2007 addressed by the petitioner to the respondent No.1 communicating for closing the sub-contract agreement for the project in question with the respondent No.1.
- (ix) Letter dated 01.5.2007 addressed by the petitioner to the respondent No.1 regarding the correction of the performance after scrutinizing the draft security.
- (x) Performance bond dated 12.4.2007 submitted by the respondent No.1 as a sub-contractor reflecting its registered office at Atchison Colony, 1-KM Raiwind Road, Near Fatima Masjid, Lahore.
- (xi) Letter dated 11.5.2007 addressed by the petitioner to the respondent No.1 regarding the settlement of the method statement, deployment of equipment and manpower upon the project in question with some details.
- (xii) Letter dated 15.5.2007 addressed by the petitioner to the respondent No.1 regarding earthwork (bill No.1) and Sub base work (Bill No.2) and its detail.
- (xiii) Letter dated 16.5.2007 addressed by the petitioner to the respondent No.1 intimating the acceptance of the revised list of equipment for the execution of the sub-contract

submitted by the respondent No.1 to the petitioner No.1.

(xiv) The notice dated 17.12.2008 containing request for Arbitration addressed by the respondent No.1 to the International Court of Arbitration and International Chamber of Commerce in the name and on behalf of the respondent specifying its address as 901-C Canal View Housing Society, Lahore Pakistan.

(xv) The written intimation/notification dated 9.9.2011 of the award from the Secretariat International Court of Arbitration Asia office addressed to the respondent No.1 through Chief Executive Sh. Muhammad Younas 1-KM from Thokar Niaz Baig on Main Raiwind Road, Lahore Atchison Colony, Opposite Hyundai showroom in front of Fatima Masjid Lahore Pakistan.

24. All the above documents placed on the record of the Civil Revision by the petitioner through C.M.No.3-C/2012 moved in the instant Civil Revision No.691/2012 leave no doubt that the petitioner-corporation fully acknowledged and admitted the working place for carrying on its business by the respondent No.1 at the address mentioned to be at Lahore.

25. Although the final execution of the agreement of sub-contract took place at Karachi but the execution of the sub-contract was preceded by numerous letters and correspondences exchanged between the two parties from their respective working places/offices as mentioned in the letters regarding settlement of different terms and conditions and clarifications for finalization of the project in question. These letters and correspondences which have been treated as part of the sub-contract in the conditions as well as in the special conditions of the sub-contract in question are to be treated as

the documents forming part of the execution process of the sub-contract between the petitioner and the respondent No.1.

26. The learned Civil Judge after relying upon the relevant case law on the subject particularly the judgment reported as **MESSRS BRADY & CO. (PAKISTAN) LTD. VS. MESSRS SAYED SAIGOL INDUSTRIES LTD. (1981 SCMR 494)** observed as follows at the end of para-4 of the order dated 28.1.2012:-

“In 1981 SCMR 494, it has been held by the august Supreme Court of Pakistan that conjunction “or” separates all the three clauses i.e. (a), (b) & (c) of Section 20 of CPC and plaintiff has three options therein to sue including option where the cause of action wholly or in part arises. From the discussion made above and in the light of the case laws referred above, it is established that part of cause of action to A.M.Construction Company arises at Lahore, so Civil Courts at Lahore, have jurisdiction to proceed with the matter.”

27. The term execution of an agreement between the parties means not only the placing of signatures upon the document but also includes the process of making the two signatories of the agreement to fully understand and comprehend the different terms and conditions of the agreement finally concluded. These correspondences and letters exchanged by the petitioner and the respondent No.1 therefore cannot be lost sight of for determining the territorial jurisdiction of the Court before whom the controversy is agitated. The respondent No.1 admittedly has its principal office at Lahore and carries on its business in the address mentioned in all the correspondences by the petitioner at Lahore some of which document are noted and detailed above therefore I have no doubt in coming to the conclusion that the cause of action certainly partly accrued regarding the sub-contract within the territorial jurisdiction of the Lahore Court

where the application u/s 14 of the Arbitration Act 1940 was instituted by the respondent No.1.

28. The second objection raised by the petitioner that the learned Civil Judge at Lahore does not possess the statutory jurisdiction to entertain the application u/s 14 of the Arbitration Act 1940 moved by the respondent No.1 is concerned, this objection as raised has also no legal merit. The Act of 2011 is a short statute and its main text is reproduced:-

ACT NO.XVII OF 2011

An Act to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards.

WHEREAS, Pakistan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;

WHEREAS, it is expedient to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the said Convention and for matters connected therewith;

It is thereby enacted as follows:-

1. Short title, extent, application and commencement.-

(1) *This Act may be called the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011.*

(2) *It extends to the whole of Pakistan.*

(3) *It shall apply to arbitration agreements made before, on or after the date of commencement of this Act.*

(4) *It shall not apply to foreign arbitral awards made before the 14th day of July, 2005.*

(5) *It shall come into force at once.*

2. Definition.- In this Act, unless there is anything repugnant in the subject or context,-

(a) *“Article” means an Article of Convention;*

(b) *“Contracting State” means a State which is a Party to the Convention;*

- (c) *“Convention” means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958, set forth in the Schedule to this Act;*
- (d) *“Court” means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; and*
- (e) *“foreign arbitral award” means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.*

3. **Jurisdiction of Court. –**

- (1) *Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.*
- (2) *An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.*
- (3) *In the exercise of its jurisdiction, the Court shall,-*
 - (a) *follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and*
 - (b) *have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908).*

4. **Enforcement of arbitration agreements.-**

- (1) *A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to say*

the proceedings in so far as they concern that matter.

- (2) *On an application under sub-section (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, in operative or incapable of being performed.*

5. *Furnishing of documents.-*

- (1) *The party applying for recognition and enforcement of foreign arbitral award under this Act shall, at the time of the application, furnish documents to the Court in accordance with Article IV of the Convention.*

6. *Enforcement of foreign arbitral award.-*

- (1) *Unless the Court pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan.*
- (2) *A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.*

7. *Unenforceable foreign arbitral awards.-**The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.*

8. *Inconsistency.-**In the even of any inconsistency between this Act and the Convention, the Convention shall prevail to the extent of the inconsistency.*

9. *Powers to make Rules.-**The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.*

10. *Repeal and saving.-*

- (1) *The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as “the Act”) is hereby repealed.*
- (2) *Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made-*
 - (a) *before the date of commencement of this Act; and*
 - (b) *within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Act.*

Section 3 of the Act of 2011 as produced above confers upon the Court constituted under Section 2(d) of the Act of 2011 the exclusive jurisdiction with respect to the matters relating to or arising from the Act of 2011. Section 14 of the Arbitration Act of 1940 is not one of such kind of legal proceedings which have been visualized or given to be decided by the Court constituted under the Act of 2011. It is thus unequivocally clear that there was no justification for the petitioner to have raised an objection under Order VII Rule 10 of CPC upon the application moved by the respondent No.1 before the Civil Court at Lahore as in case the learned Civil Judge returns the proceedings initiated by the respondent No.1 u/s 14 of the Arbitration Act 1940, there is no legal competence for the Court constituted u/s 2(d) of the Act of 2011 to entertain the said application u/s 14 of the Arbitration Act of 1940.

Section 4 of the Act of 2011 is not relevant for this controversy as it only relates to the power of the Court to refer the parties to arbitration and is exercisable prior to the passing of the award.

Section 6 of the Act of 2011 deals with the powers of the Court defined in section 2 clause (d) which is a High Court and such other superior court in Pakistan as may be notified by the Federal Government of Pakistan in the official gazette to recognize and enforce a foreign arbitral award. It is a matter of

record that no application before any court as constituted u/s 2 (d) for the recognition and enforcement of the award in question as foreign arbitral award was moved by the petitioner till the institution of the application u/s 14 of the Arbitration Act of 1940 by the respondent No.1. Section 10(1) in this context attains great importance in which only Arbitration (Protocol and Convention) Act of 1937 has been repealed. The provisions of Arbitration Act of 1940 have not been at all touched what to say of being repealed by section 10 of the Act of 2011. There are no parallel provisions provided in the Act of 2011 envisaging the various rights created in favour of a party affected by an award to seek the remedies provided for in the Act of 1940. To be more specific there is no provision equivalent to section 14 of the Arbitration Act 1940 read with section 30 and 33 of the Act of 1940 in the Act of 2011. The legislature having not specifically repealed the provisions of Arbitration Act of 1940 therefore the remedies which are available to the respondent No.1 u/s 14 of the Arbitration Act 1940 cannot be said to have been lost by enforcement of the Act of 2011. No jurisdiction has been conferred upon the Court constituted u/s 2(d) of the Act of 2011 to entertain the application of the nature of Section 14 of the Arbitration Act 1940. The court constituted u/s 2(d) of the Act of 2011 has been created with specific limited powers of giving recognition and enforcement to a foreign arbitral award, if the said Court does not refuse to recognize a particular foreign award. The general powers conferred upon the ordinary civil courts u/s 14 of the Arbitration Act of 1940 and the other provisions of the said statute remain available to a party affected by an award therefore the plea raised by the petitioner that the civil courts at Lahore has no statutory jurisdiction to entertain the application u/s 14 of the Arbitration Act of 1940 is without any merits. The learned Civil Judge certainly does not have the powers which are envisaged by section 6 of the Act of 2011. The respondent No.1 invoked the provisions of

section 14 of the Arbitration Act 1940 with the prayer clause as reproduced above which application could not have been entertained by the Court constituted u/s 2 (d) of the Act 2011. The learned Civil Judge in this context was fully justified to reject the application moved by the petitioner under Order VII Rule 10 of CPC for the reasons stated by this Court as above in addition to the grounds mentioned in paras-5 & 6 of the impugned order dated 28.1.2012. In this context the factum of the institution of an application by the petitioner u/s 6 of the Act of 2011 before the High Court of Sindh at Karachi on 01.11.2011 certainly is a subsequent step after the institution of the application moved by the respondent No.1 u/s 14 of the Arbitration Act of 1940.

29. The question as to whether the Arbitration agreement providing expressly for the governing of the sub-contract in question by the Pakistani law has any implication upon the determination of the Award in question to be a foreign arbitral award or domestic award is now taken up. In this context the principle can very well be relied upon as expressed in the law laid down by the honourable Supreme Court of Pakistan in a celebrated judgment **HITACHI LIMITED AND ANOTHER VS. RUPALI POLYESTER AND OTHERS (1998 SCMR 1618)**. The relevant page is 1681 where the honourable Supreme Court of Pakistan held as follows:-

“We may observe that it is evident from the above various treaties of the authors of standing and of international repute and the above-discussed case-law that if there is no express agreement between the parties as to the law governing arbitration agreement, the law which governs the main agreement will also govern arbitration agreement if the arbitration clause is embedded as a part of the main agreement. In the present case Article 13 of the agreement, which contains the arbitration clause, is a part of the main agreement and, therefore, in the absence of any contrary express agreement between the parties,

Pakistani law will also govern the arbitration agreement in view of Article 16.7 of the agreement which provides that “contract shall be governed and construed by the Pakistan Law.” We have already held so hereinabove for the reasons recorded.”

The honourable Supreme Court of Pakistan further in paragraph No.15 at page 1684 of the reported judgment specifically touched the points in the following manner:-

“15. We are inclined to hold in the present case since the arbitration is subject to the I.C.C. Rules and as the seat of the arbitration is London, the procedural matters would be governed by the I.C.C. Rules and curial law of England and that English Courts will have jurisdiction as indicated above. We are not inclined to subscribe to the view that this jurisdiction of the English Courts in respect of curial law will be concurrent with the Pakistani Courts for the reason that the Pakistani substantive law governs the arbitration agreement. Theoretically the above view of the Indian Supreme Court may be correct but it is not practicable. The Courts of the seat of the arbitration can deal with procedural matters more effectively and conveniently.

Additionally the parties by agreeing the application of the I.C.C. Rules and London as a seat of arbitration in fact expressly/implicitly agreed that the English curial law would govern the arbitration. This view is also in line with the preponderance of view reflected in the above various treaties. But we are in agreement with the view of the Indian Supreme Court expressed in the case of National Thermal Power Corporation v. Singer Company and others (supra) that the Courts of the seat of the arbitration have limited jurisdiction to procedural matters covered by the curial law. The same will include, the manner in which reference is to be conducted, the procedural powers and duties of

the arbitrator, questions of evidence, the determination of the proper law of the contract if it is not expressly agreed by the parties as defined by Sir Michael J. Mustill and Stewart C. Boyd in their above treatises.

However, the validity of the arbitration agreement; the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the Tribunal; the question whether the award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation or arbitrate future disputes, are not the matters covered by curial law, but are governed by the proper law of the arbitration agreement as opined by the above learned authors in the above treatise titled "The Law and Practice of Commercial Arbitration in England" (Second Edition). The same view is expressed in the "Russel On Arbitration, 21 Edition (supra). However, it may be mentioned that Alan Redfern and Martin Hunter in the treatise titled "Law and Practice of International Arbitration (Second Edition) (supra) under the caption "Place of Challenge" have stated that "A challenge to the validity or effect of an award is addressed to a Court of competent jurisdiction. In general, this will be a Court at the place in which arbitration is held." But the learned authors have not clarified, whether it would be so, even in a case in which the proper law governing the contract and Arbitration Agreement is of a country other than of the country, where the arbitration is held."

In paragraph No.16 of the judgment the honourable Supreme Court of Pakistan thus concluded as follows:-

"Since we have held that in view of section 9(b) of the Arbitration (Protocol and Convention) Act, 1937 the two awards in question cannot be

treated as foreign awards as the same are made on an arbitration agreement governed by the laws of Pakistan, it must follow that the same are domestic awards and the provisions of the Act (Arbitration Act, 1940) would be applicable. This was even conceded indirectly by Mr. Bandial when he submitted that before the commencement of the arbitration proceedings an application under section 33 of the Act for challenging the existence or validity of the arbitration agreement or to determine its effect could have been filed. In our view, if an application under the above section was competent prior to the commencement of the arbitration proceedings in England, there cannot be any legal basis to urge that the Pakistani Courts had ceased to have jurisdiction upon the commencement of the arbitration proceedings in England in respect of the matters which fall within their jurisdiction. It may be pointed out that it is an admitted position that till today no application relating to arbitration in question has been filed in an England Court, and, therefore, it cannot be urged that there may be conflicting orders/judgments.”

In the light of the pronouncement by the honourable Supreme Court of Pakistan, in the present case the parties having specifically agreed that the sub-contract shall be governed by the Pakistani law the Award in question is undoubtedly a domestic Award to be dealt with in accordance with the Pakistani law agreed between the parties at the time when the sub-contract was being settled and finally executed between the parties in the year 2007. It is also important to note that the petitioner did not raise any objection to the jurisdiction of the Pakistani Courts in this matter and further did not insist that the Award can only be assailed in the seat of the arbitration i.e. Singapore. Additionally the circumstances which persuaded this Court to arrive at the above conclusion

is that even the Arbitrator did not elect to file the Award in question directly in the High Court of Sindh. Even the I.C.C. did not send this Award for enforcement and implementation to the High Court of Sindh or for that matter to the High Court of Punjab by invoking the provisions of section 6 of the Act of 2011. Rather the I.C.C. sent an intimation of the notification of the Award to the respondent No.1 at Lahore. The moving of an application u/s 6 of the Act of 2011 by the petitioner later on than the application having been moved by the respondent No.1 before the learned Civil Judge would not divest the Civil Court at Lahore of its jurisdiction to entertain and adjudicate upon the controversy moved through an application which otherwise was not entertainable by the Court constituted under section 2 (d) of the Act of 2011.

30. In view of all the above circumstances the instant Civil Revision instituted by the petitioner has no merits and objections raised by the petitioner upon the institution of the application u/s 14 of the Arbitration Act of 1940 by the respondent No.1 before the learned Civil Judge Lahore have been rightly repelled and the application moved by the petitioner under Order VII Rule 10 of CPC has been correctly rejected by the learned Civil Judge through the impugned order dated 28.1.2012 which calls for no interference by this Court. The instant Civil Revision is accordingly **dismissed** with no orders as to costs.

(NASIR SAEED SHEIKH)
JUDGE

Announced in open Court on 14.05.2012

JUDGE

Approved for reporting.

•AMJAD•