# IN THE HIGH COURT OF SINDH AT KARACHI

H. C. A. No. 241 of 2010
[**Syed Asadul Haq** *versus* **Balochistan Glass Limited**]

**Present:**
**Mr. Irfan Saadat Khan, J.**
**Mr. Muhammad Faisal Kamal Alam, J.**

| | | |
|---|---|---|
| Dates of hearing | : | 04.08.2020, 18.08.2020 and 09.09.2020. |
| Date of Decision | : | 30.09.2020. |
| Appellant | : | Syed Asadul Haq, through Chaudhry Abdul Rasheed, Advocate. |
| Respondent | : | Balochistan Glass Limited, through Mr. Masood Khan Ghory, Advocate. |

## JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** Through the present Appeal, Appellant has challenged the order dated 15.10.2010 ("**Impugned Order**") passed on C.M.A. No.4941 of 2008, under Order VII, Rule 10 of CPC, preferred by present Respondent, which was allowed and the claim of present Appellant was split into two; a part of which to be tried by this Court on its original side and the other part by the Court of competent jurisdiction at Sheikhupura City. Consequently, plaint was partly returned to be presented in the Court at Sheikhupura.

2. The relevant facts for decision of this Appeal is that Appellant and Respondent entered into two agreements dated 01.05.2003 ("**First Agreement**") and 02.05.2003 ("**Second Agreement**"), *inter alia*, for providing trained workers / manpower to Respondent for loading, unloading and sorting and packing of products at its Glass Factory in Hub Baluchistan.

3. By the correspondences of 04.05.2005 (Annexure 'A/3' with Appeal), the Respondent terminated above contract, because due to its

financial problem, Respondent was not in a position to accept revised payment terms of Appellant.

4. Apparently, number of letters were exchanged between the parties hereto, primarily, for settling dues of Appellant. Some of the correspondences are available in record (letters dated 01.09.2004, 20.11.2004 and 13.12.2004. Eventually, Appellant filed Suit No.1129 of 2007 in this Court for recovery of Rs.27,21,847/- together with damages of Rupees Ten Million, which was contested by the Respondent through Written Statement as well as above C.M.A. (filed by present Respondent), which was granted vide impugned order.

5. Chaudhry Abdul Rasheed, Advocate, has argued that once the figure of outstanding amount as communicated to present Appellant by Respondent vide its correspondence of 16.08.2005, and accepted by the former (present Appellant), then Appellant is not required to pursue its claim in both jurisdictions of Karachi and Sheikhupura, as observed in the impugned order. Further submitted, that despite acknowledging the claim of Rs.27,21,847/- (Rupees Twenty Seven Lac Twenty One Thousand Eight Hundred Forty Seven only) by Respondent in its above correspondence, the same was not paid till date and if the Appellant is to contest the claim in the two separate trial Courts of Karachi and Sheikhupura, then it would cause a great hardship to Appellant. He has further argued that the case of Appellant is covered by Section 63 of the Contract Act, 1872. In support of his arguments, he has cited the following reported decision_

> **A. I. R. (35) 1948 Sindh 91**
> **[***Sabaldas Janjimal and others v. Sobhokhan and others***]**

6. On the other hand Mr. Masood Khan Ghory, Advocate for the Respondent, supported the impugned decision and argued that undisputedly in the Second Agreement, when it is clearly stated that with regard to any

claim pertaining to factory premises of Respondent at Sheikhupura, Courts at Sheikhupura shall have exclusive jurisdiction, then the present Appellant had wrongly filed the Suit No.1129 of 2007 in this Court, instead of filing the same before the Court of competent jurisdiction at Sheikhupura. Legal team of Respondent has relied upon the following case law, which is already mentioned in the impugned order_

1. **2004 M L D page-662**
   [*Chaudhry Mehtab Ahmad and another v. Mir Shakeel-ur-Rehman and 4 others*];

2. **1992 SCMR page-1174**
   [*Messers Kadir Motors (Regd.) Rawalpindi v. Messers National Motors Ltd Karachi*];

3. **1987 SCMR page-393**
   [*State Life Insurance Corporation of Pakistan v. Rana Mohammed Saleem*];

4. **2010 MLD page-1015 (Karachi)**
   [*Saleem Mehtab v. Messers Refhan Best Food Limited Company*]

7. Arguments heard and record perused.

8. The relationship between Appellant and Respondent are governed by the above referred two “Contracts / Agreements” of 01.05.2003 and 02.05.2003 (*First and Second Agreements*, respectively), available in the record of present Appeal. The First Agreement is signed on behalf of Respondent by its Manager of the Factory situated at Hub, District Labella Baluchistan, referred as **‘Unit No.1’** in the Impugned Order. In terms of clause-16, the tenure of contract was of nine months, mutually renewable. Clause-17 relates to termination. It is appended with a “schedule-Annexure A”, in which details of workers and their remuneration is mentioned. The Second Agreement states that <u>it is made at Sheikhupura</u> and it is signed by the General Manager of Plant / Factory of Respondent, which is situated near Lahore Sheikhupura Road, referred as **‘Unit No.2’** in the Impugned Order. Clause-10 of this Agreement states that the Court at Sheikhupura shall have exclusive jurisdiction for any litigation arising out of this Second

Agreement. Admittedly, on 04.05.2004 Respondent terminated the contract. This correspondence is at page-57. At the bottom of this Termination Letter, the Head Office address is of Karachi (D-66, Block-9, Chaudhry Khaleeq uz Zaman Road, Clifton Karachi). Reason for this termination as mentioned in the above correspondence was, that due to financial problem of Respondent, it could not agree to the revised terms and conditions as suggested by the Appellant. It means that there was no complaint about the services provided by the Appellant to Respondent.

9. As stated in the foregoing paragraphs, few correspondences were exchanged between the parties hereto for payment of outstanding dues. The last correspondence from the side of Appellant is of 13.12.2004 (Annexure 'A/7' of the memo of Appeal) addressed to Respondent at its aforementioned Head Office address. In this letter, it was requested that an amount of Rs.27,21,847/- is long overdue, payable by Respondent. Perhaps, the most significant document is the correspondence/letter of 16.08.2005, also referred to by the learned counsel for the Appellant in his arguments, which is at page-83, **Annexure 'A/8'** with the memo of Appeal. In this letter the Respondent has sought confirmation from Appellant about the payable amount [by former to the latter], in order to comply the directions of the auditors of Respondent for preparation of the financial statements. According to this document, the Respondent has stated that as of 30.06.2005, an account balance of Rs. 27,21,847/- is payable to Appellant. After acknowledging the said amount, the present Appellant has signed this document, which also bears the receiving signature of 'Farooq Ali and Company', the Chartered Accounts Firm of Respondent Company. This is the same figure regarding which the Appellant was and in fact is pursuing the Respondent to pay the amount. *Secondly*, the above correspondence (Annexure A/8) is issued from the Head Office of Respondent Company,

situated in Karachi (address already mentioned in the foregoing paragraphs).

10. The legal team of Respondent has controverted the above document. To appreciate their objection to this document, Written Statement of Respondent, available in the record, is also examined. In paragraph-11, the Respondent has not disputed the authenticity of the above correspondence of 16.08.2005, but has averred that the above document was in connection with the statutory audit and the said letter is not an acceptance of liability. At the most an issue can be framed in this regard and parties may lead the evidence. *Prima facie*, the stance of Respondent appears to be misleading, ***inter alia***, because the above correspondence concerning balance confirmation is issued after internal scrutiny of record of Respondent Company and that is why, the first two lines of this correspondence read as under_

> "*Our auditors, Faruq Ali & Co. Chartered Accountants, are auditing our financial statements and wish to obtain direct confirmation of the amount Payable by us of the date indicated below*."

11. Adverting to the case law referred to in the Impugned Order, gist of which is, that when parties mutually agree that although action can be brought before courts in multiple jurisdictions, but a particular Court which has otherwise jurisdiction to try a cause, is mentioned in the Agreement for the purpose of adjudicating disputes, then such clause in an agreement is not adversely affected by Section 28 of the Contract Act, as it cannot be construed as a restraint to a legal proceeding, is an established principle, but the same is not applicable to the present case for the reasons mentioned in this Decision.

12. Notwithstanding to the above, the present case has two distinctive features; ***firstly*****,** present Appellant has not filed two separate claims arising

out of the two separate Agreements, viz. First and Second Agreements, as referred above, relating to the two Units No.1 and 2, but, the undisputed record shows that a singular claim of unpaid dues has been pursued for the past many years; ***secondly,*** even the above confirmation balance document of 16.08.2005 (**Annexure A/8**), in which total lump sum payable amount of Rs.27,21,847/- is mentioned, which has been issued by Respondent Company from its Head Office at Karachi, the Respondent Company has not bifurcated the undisputed figure of Rs.27,21,847/- between its two industrial Units No.1 and 2 (*ibid*) but mentioned this figure as a singular outstanding amount. This is the same amount which is mentioned in the Prayer clause of plaint of above ***Lis*** instituted by Appellant. There is some force in the arguments of learned counsel for the Appellant, that when the main claim of Appellant is itself reflecting in the record of Respondent (in the above Letter of 16-8-2005), then filing another case/suit in the court at Shaikhupura would be an exercise in futility. ***Thirdly,*** even the last paragraph of the Impugned Order contains an observation, that plaint may be presented in the competent Court of Sheikhupura "*for the recovery of money if any due.......*".

14. In view of the above discussion, apparently no separate dues are recoverable in respect of Second Agreement about Unit No.2 (at Sheikhupura) as Appellant has agreed to the above outstanding amount mentioned in the correspondence dated 16.08.2005, of the Respondent Company. If in these circumstances, the Appellant is directed to file a separate claim in the Court at Sheikhupura, we are of the considered view, it would cause immense hardship to the Appellant. Facts of present case / Appeal fall in exception to the rule laid down in the cited case law. **Admittedly,** both Appellant and Respondent have offices in Karachi and already in the Impugned Order, it has been decided that claim with regard

to First Agreement will continue in this Court in the shape of afore-mentioned ***lis***; thus, it would be in the interest of justice that the entire claim may be tried in this Court, if at all both or either of the Parties want to further contest the matter.

15. With regard to the claim of damages, if the Appellant intends to pursue it, can be decided in the afore-said Suit pending adjudication in this Court.

16. The upshot of the above is that the Impugned Order dated 15.10.2010 is partly set aside to the extent of filing another plaint in the Court at Sheikhupura; to this extent, this Appeal is partly accepted.

17. An observation made herein is of tentative nature and would not influence the trial of main Suit No. 1129 of 2007.

18. Parties to bear their respective costs.

**Judge**

**Judge**

Karachi,
Dated: 30.09.2020.

***Riaz / P.S.***