

Judgement Sheet

LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

RFA No.258418 of 2018

M/s. Digital Links (Pvt) Ltd, etc.

Versus

M/s. Hangzhou Hikvision Digital Technology Co, etc.

JUDGMENT

Date of hearing	29.09.2020
Appellants by:	Mian SultanTanvir Ahmad and Mr. Habib Mubashar Ullah, Advocates.
Respondents by:	Barrister Aun Ali Raza and Syed Muhammad Kaswar Gardezi, Advocates

SHAHID WAHEED, J:- The plaintiffs have brought this appeal in which a very simple question has been raised as to whether the Trial Court without recording evidence could have determined the place where the plaintiffs should have instituted their suit. The facts and circumstances that have given rise to this question are as follows. On 1st January, 2011 defendant No.1, namely, Hangzhou Hikvision Digital Technology Company Ltd, through an agreement appointed the plaintiffs as exclusive distributor to promote and sell its products in Pakistan. This agreement was valid till 31st December, 2014 and one of its conditions was that the suits permitted to be brought in any court would be venued in P.R. of China as jurisdiction as final. The plaintiffs claimed that upon expiry of the said agreement, relationship, agency rights and distributionship was established and governed through another agreement which came into being by correspondence and e-mails exchanged between the parties and when defendant No.1 in the year 2016 resiling from the agreement appointed defendants No.2 and 3 as distributors, a cause arose which led them to institute the suit, giving rise to this appeal, seeking decree for specific performance of the agreement and also for declaration to the effect that appointment of defendants No. 2 and 3 as distributors of defendant No.1 was illegal with a further prayer that defendant No.1 be restrained from

distributing its products through any other person except the plaintiffs. Upon filing of contesting written statement, defendant No.1 filed an application under VII Rule 10 CPC for return of the plaint on the ground that suit as per agreement dated 1st January, 2011 was competent in any court of China. Resisting the ground for return of plaint, the plaintiffs made reference to the subsequent agreement and requested the Trial Court to assume jurisdiction to adjudicate on the dispute. It is to be noted that the question of returning the plaint under Order VII rule 10 CPC arises only when there is another Court in which the suit should have been instituted and when there is no other Court where the plaint can be presented, the suit will be dismissed.¹ It appears that the Trial Court was aware of this principle of law and thus on its conclusion that neither it had the jurisdiction to hear the parties to the dispute nor could the plaintiffs present their plaint to any Court of Pakistan it dismissed the suit while allowing application under Order VII Rule 10 CPC vide order and decree dated 10th December, 2018. The Trial Court in its order has stated the reason which prevailed upon it to draw the above stated conclusion and that is that “*subsequent agreement executed between the parties are in sequel of the first agreement which has not been cancelled by way of subsequent agreement. Hence, principle of novation is not applicable hereto*” So, this appeal.

2. Challenging the decree dated 10th December, 2018 it is firstly contended on behalf of the plaintiffs that since the subsequent agreement having no exclusionary clause ousting the jurisdiction of Pakistani Courts had replaced the earlier agreement dated 1st January, 2011, it could not be held that jurisdiction of the Trial Court was barred; and secondly, without granting opportunity to the plaintiffs to produce evidence it could neither be held that the first agreement dated 1st January, 2011 was not cancelled nor that the principle of novation was not applicable.

3. As we understood, the case of the plaintiffs is based on two agreements, to wit, the agreement which was executed on 1st January, 2011 and the other agreement which came into existence through alleged

¹ *Messrs Haji Moosa Haji Omar and others v The Federation of Pakistan* (PLD 1956 Karachi 356)

Dada Limited v Pakistan (PLD 1959 Karachi 264)

exchange of correspondence/e-mails between the parties to the suit and according to the plaintiff it had superseded the earlier agreement. If it was so, the question of territorial jurisdiction had to be decided on the basis of three principles of law. The first principle is that a contract by correspondence is made at the place where the letter of acceptance is posted.¹ Second principle is that to prove a novation, four elements must be shown, that is, (a) the existence of a previous valid agreement; (b), the agreement of the parties to cancel the first agreement; (c) the agreement of the parties that the second agreement replaces the first one; and, (d) the validity of the second agreement.² From a legal standpoint, in the present case, the burden was upon the plaintiff to prove not only the alleged second agreement but also the place where it was accepted so as to establish the territorial jurisdiction of the Court through clear satisfactory evidence. Our examination of the facts and the principle of law applicable thereto suggests that question of jurisdiction, in the attending circumstances, was a mixed question of facts and law, which could only be resolved upon appraisal of evidence to be led by the parties to the suit. This course of action was not adopted by the Trial Court and thus, its conclusion cannot be approved.

4. The third principle to be considered relates to the interpretation of the clause in the agreement dated 1st January, 2011 providing “*that all suits permitted to be brought in any Court would be venued in P.R. of China has jurisdiction as final.*” For the order to be proposed, we would not dilate upon this principle lest it should prejudice case of either of the parties to the suit. However, it is suffice to say that the Trial Court would examine the validity and applicability of the said clause in the agreement in the light of Section 28 of the Contract Act, 1872 and its interpretation made in different cases particularly the case of M.A. Chowdhury³ wherein the Hon’ble Supreme Court declined to approve the tendency where the jurisdiction of all Courts

¹ The Firm Hira Nand Murti Dhari through Murti Dhar v. The Firm Gurmukh Rai Radhakishen through Radhakishen (AIR 1923 Lahore 427)
Firm Kanhaiwalal vs. Dineshchandra (AIR 1959 Madhya Pradesh 234)
Lahore Development Authority v. Sunbeam Corporation (Regd.) (PLD 1984 Lahore 430)
M/s Progressive Constructions Ltd v. Bharat Hydropower Corporation Ltd. (AIR 1996 Dehli 92)

² Mst. Waris Jan and another v. Liaqat Ali and others (PLD 2019 Lahore 333)

³ M.A. Chowdhury v Messrs Mitsui O.S.K Lines Ltd and 3 others (PLD 1970 SC 373)

within the country is taken away and exclusive jurisdiction is given to a foreign Court by a contract.

5. We are conscious of the fact that the instant matter should be decided at the earliest as it pertains to commercial dispute and one of the parties is a foreign company and thus, in furtherance of this spirit and realizing that evidence in this case would be in the form of documents, we asked learned counsel for the defendants that if he admits the documents attached to the plaint then we decide the question of jurisdiction here but he said that he had no instructions to admit or deny the documents. This reply of the defendants' counsel leaves no option for us but to make an order of remand.

6. Objection as to territorial jurisdiction is definitely a threshold question and the same is required to be decided at the earliest without taking a step further in the proceedings. So, we accept this appeal and by setting aside the decree issued through the order dated 10th December, 2018 remit the matter to the Trial Court with a direction to decide the application under Order VII Rule 10 CPC afresh after framing issue and providing opportunity to the parties to the suit to produce evidence in support of their claims. Since it is commercial dispute, Trial Court shall make an endeavour to decide the application under Order VII Rule 10 CPC within a period of one month.

7. Parties are directed to appear before the Trial Court on 27.10.2020. No order as to costs.

(CH. MUHAMMAD IQBAL)
JUDGE

(SHAHID WAHEED)
JUDGE

Approved for reporting.

JUDGE