

IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 2038 of 2018

Plaintiff: BankIslami Pakistan Limited
Through Mr. Arshad Tayebaly, Advocate.

Defendant No.1: Visa International Service Association
Through Barrister Jamshed Malik, Advocate.

Defendant No.2: 1Link (Private) Limited Through
M/s. Kazim Hassan, Shahan Karimi and
Rashid Mehar, Advocates.

Defendant No.3: JP Morgan Chase Bank National Association
Through Mr. Ijaz Ahmed, Advocate.

Defendant No.4: Faysal Bank Limited Through
Mr. Taha Alizai, Advocate.

For hearing of CMA No. 17648/18. (U/O VII rule 10 CPC)

Dates of hearing: 10.05.2019

Date of Order: 31.05.2019

Muhammad Junaid Ghaffar J.- This is an application (CMA No. 17648/2018) under Order VII Rule 10 of Civil Procedure Code, filed on behalf of Defendant No.1, seeking return of the Plaint to the Plaintiff for its presentation before the Court having appropriate jurisdiction in this matter.

2. Learned Counsel for Defendant No.1 submits that the Defendant No.1 is managing a global payment system through credit and debit card facility worldwide, whereas, it does not have any presence in Pakistan, and operates from California USA. Per learned Counsel, the Plaintiff agreed to be a licensee of Defendant No.1 as well as member of *Visa and Electron Card Program* and *Plus Program*, both of which are governed by Membership and Trademark License Agreement dated 19.06.2018 (perhaps the correct dated is 19.06.2008) and the relationship

between Plaintiff and Defendant No.1 can only be governed by this Agreement. Per learned Counsel in the said Agreement in Clause-10 for choice of law and forum, it has been agreed that this Agreement shall be interpreted according to internal laws of State of California, whereas, parties hereby submit to the jurisdiction of the Courts in State of California; hence notwithstanding the fact that the cause of action, as alleged, has accrued within the territorial jurisdiction of this Court, the matter in question cannot be adjudicated by this Court and parties are required to approach the Court in California. Per learned Counsel, the State of California is the chosen jurisdiction by consent and once the Plaintiff had agreed to such a clause, they cannot now come before this Court in violation thereof. According to him, Defendant No.1 only enters into an Agreement of this nature with the parties when they consent to this jurisdiction clause, and once the Plaintiff had agreed, only then they were given this facility to become member of their transactions; hence, the Plaintiff is now barred from violating the same. Per learned Counsel there is a series of judgments of this Court, whereby, it has been consistently held that once the parties agree and consent to a chosen forum, they are bound by such condition and cannot back away. In support of his contention he has relied upon the cases of ***M.A. Chowdhury v. Messrs Mitsui O.S.K Lines Ltd. and 3 others*** reported as **PLD 1970 Supreme Court 373, CGM (Compagnie General Maritime) v. Hussain Akbar** reported as **2002 CLD 1528, Light Industries (Pvt.) Ltd. through Director v. Messrs ZSK Stickmaschinen GmbH and another** reported as **2007 CLD 1324, Messrs Raziq International (Pvt) Ltd. through Vice President v. Panalpina Management Ltd.** reported as **PLD 2014 Sindh 175, Global Quality Foods Pvt. Ltd. through Company Secretary v.**

Hardee's Food Systems, Inc. reported as **PLD 2016 Sindh 169**,
Muhammad Irfan Ghazi v. IZO SPA and 4 others reported as **2016**
CLD 1481.

3. On the other hand, learned Counsel for the Plaintiff has contended that the Agreement in question being relied upon by Defendant No.1 is only an Agreement to use the Trademark *Visa* of Defendant No.1 for which parties had agreed to submit to the jurisdiction of the State of California. However, in the present dispute, such Agreement is not applicable and is rather irrelevant. According to him as per Clause 2 & 3 of the Agreement, it is clearly stated that it governs the relationship of the parties only to the extent of use of license mark by the Plaintiff and owned by Defendant No.1, whereas, the present grievance of the Plaintiff is in respect of transactions made through its Visa Debit Cards and such dispute falls outside the scope of the Trademark Agreement. According to him the settlement of payment of the Plaintiff through Defendants No.1 & 2 is not covered by the said Agreement; but by the Visa Agreement dated 27.07.2005 through which, the Plaintiff acquired the connectivity to the Defendant No.1's system through Defendant No.2 by executing the Participation Memorandum dated 12.08.200; hence the application for return of the Plaintiff is misconceived. He has further argued that as per Clause-31 of this Agreement, it has been clearly provided that it shall be governed by the laws of Pakistan and the Courts at Karachi shall have the jurisdiction. In view of such position he has prayed for dismissal of the application.

4. I have heard the learned Counsel for Plaintiff and Defendant No.1 and perused the record. The Suit has been filed by the Plaintiff against

Defendant No.1 as well as three other Defendants and it is the case of the Plaintiff that various transactions were made on the Visa Debit Cards issued by it to its customers, which were fraudulent and were done, notwithstanding the fact that the Defendants were informed in advance that these Cards have been blocked and they should also act accordingly. However, it is the case of the Plaintiff that such directions were not complied with and the transactions were permitted and now the Plaintiff claims that Plaintiff is not liable to settle or pay for these transactions. On perusal of the prayer clause "a", it reflects that the Plaintiff seeks a declaration that it is not liable to settle or pay these illegal transactions. Insofar as the application in hand is concerned, the same relies upon a Membership and Trademark License Agreement dated 19.06.2008 entered into between Defendant No.1 and the Plaintiff and perusal of the same clearly reflects that it is in respect of Membership and Trademark License Agreement, whereby, *Visa* has agreed and permitted the Plaintiff to use two programs i.e. *Visa and Electron Card Program* and *Plus Program*. Clause-2 & 3 of the Agreement deals with grant of License and ownership of Marks, whereas, Clause-5 deals with Infringement proceedings and Clause-6 deals with compliance of Rules and Regulations and in Clause-10, the parties have agreed for Choice of Law and Forum. When the Agreement in question being relied upon by Defendant No.1 is minutely examined, it reflects that it has got nothing to do with any settlement of payments and is rather only in respect of the Visa Membership and usage of the Logo and Trademark of Visa in Pakistan. Neither the terms of Settlement have been provided; nor there is any other clause in the Agreement, which deals or could have dealt with the present issue, as noted hereinabove. The Plaintiff's case is only in respect of payment and

settlement of the alleged fraudulent transaction to the Defendants and for such purposes, the Plaintiff has contended that the relationship in respect of settlement is governed by another Agreement entered into by Defendant No.2 and Plaintiff dated 27.07.2005 and by execution of a Participation Memorandum dated 12.08.2008, which permits the Plaintiff to have connectivity to the system of Defendant No.1 through Defendant No.2 and in Clause-31 of the said Agreement, the parties have agreed regarding governing law and jurisdiction, whereby, the Agreement is to be governed by the laws of Islamic Republic of Pakistan and Courts of law at Karachi, shall have jurisdiction. In Clause-3, the settlement procedure has been provided and the mode and manner, in which, the transactions are to be settled by each participating member. On perusal of this Agreement and its comparison with the Agreement relied by the Defendant No.1, to me it seems that the present dispute and the prayer clause in the Plaint has no nexus with the Agreement being relied upon by Defendant No.1, whereas, it is more appropriately to be governed by the Agreement being relied upon by the Plaintiff.

5. It may also be observed that admittedly cause of action has accrued within the territorial jurisdiction of this Court, whereas, learned Counsel for Defendant No.1 has contended that his client has no agreement with Plaintiff in respect of the settlement of claims and the dispute in hand; however, it appears that though may be directly, Defendant No.1 has no Agreement with the Plaintiff, but there is one Agreement placed on record by the Plaintiff as well as Defendant No.2 and 4, who are signatories to this Agreement, wherein, VISA means *VISA International a company incorporated under the laws of the United States of America...*, VISA facility means *the facility to be made available to Cardholders pursuant to this Agreement*; VISA Fees means *fees payable pursuant to the VISA*

Operating Manual in respect of services provided by VISA, as may be amended from time to time; VISA Module means the software component deployed at ILink Switch to enable connectivity with VISA Network; VISA Network means the network established to connect the VISA system with ILink Switch and finally VISA Settlement Account means the account maintained by each Participating ILink Member (Plaintiff) with the Settlement Bank (Defendant No.4) for the purposes hereof.

Now if the case of Defendant No.1 is that all these transactions are being entered into by the parties to this Suit without its authority then it is not believable, and if so, then what action has been taken by them. The Agreement of Settlement between Defendant No.2 & 4 appears to have been entered into with the consent of Defendant No.1, whereas, it is not denied by Defendant No.4 that payments and settlement has to be credited in the account of Defendant No.1. Therefore, the objection of lack of jurisdiction of this Court appears to be misconceived and is hereby repelled.

6. In view of hereinabove facts and circumstances of this Court, and for the reasons that the Agreement, on the basis of which the present application has been filed, has no nexus with the dispute in this plaint, the listed application is hereby dismissed, whereas, the case law relied upon by the learned Counsel for the Defendant No.1 has no relevance; hence not applicable.

7. Application bearing CMA No.17648/2018 filed under Order VII Rule 10 CPC stands dismissed.

Dated: 31.05.2019

J U D G E

Ayaz.