

A. B. C. Laminart Pvt. Ltd. and Another

Vs

A. P. Agencies, Salem

Civil Appeal No. 2682 of 1982

(G. L. Oza, K. N. Saikia JJ)

13.03.1989

JUDGMENT

K. N. SAIKIA, J. –

1. This is an appeal by special leave from the judgment and order of the High Court at Madras dated November 4, 1989 in C.M.A. No. 218 of 1978 allowing the appeal and setting aside the judgment of the subordinate judge at Salem in Original Suit No. 302 of 1975 on the preliminary question of jurisdiction.

2. The first appellant is a manufacturer and supplier of metallic yarn under the name and style 'Rupalon Metallic Yarn' having its registered office at Udyognagar, Mohamadabad, Gujarat within the jurisdiction of the civil court of Kaira. The second appellant is a sister concern of the first appellant doing business with it. The respondent is a registered partnership firm doing business in metallic yarn and other allied products at Salem.

3. The first appellant entered into an agreement with the respondent on October 2, 1974 whereunder the appellants were to supply 500 bobbins of Rupalon Metallic Yarn to the respondent at the rate of Rs. 35 per bobbin as stipulated in different clauses of the agreement. Clause 11 of the agreement provided as follows :

Any dispute arising out of this sale shall be subject to Kaira jurisdiction.

4. Disputes having arisen out of the contract the respondent filed a suit, being Original Suit No. 302 of 1975, against the appellants in the Court of Subordinate Judge at Salem for the recovery of a sum of Rs. 1,63,240 claiming to be the balance of the advance remaining in the hands of the appellants and also sum of Rs. 2,40,000 towards damages. The appellants took a number of defences and also took a preliminary objection that the Subordinate Judge at Salem had no jurisdiction to entertain the suit as parties by express contract had agreed to confer exclusive jurisdiction in regard to all disputes arising out of the contract on the civil court at Kaira.

5. The trial court, inter alia, framed issue No. 2 as follows :

Issue No. 2. Has the court no jurisdiction to entertain or try this suit ?

The learned court treating it as a preliminary issue in its judgment dated April 18, 1978 found that it had no jurisdiction to entertain the suit in view of clause 11 and accordingly it returned the plaint for presentation in the proper court. The respondent appealed therefrom, in C.M.A. No. 218 of 1978, to

the High Court of Madras which by the impugned judgment and order dated November 4, 1980 allowed the appeal, setting aside the judgment of the trial court with a direction to take the plaint on file and dispose of the suit on merits on other issues. Hence this appeal.

6. Mr. Pinaki Misra, the learned counsel for the appellants, submits that clause 11 of the agreement having provided that any dispute arising out of this sale shall be subject to Kaira jurisdiction, the parties are bound by it and the suit could therefore have been filed only within Kaira jurisdiction and not at Salem, and as such, the High Court committed error of law in setting aside the trial court judgment and in directing the court at Salem to entertain the suit. Mr. S. S. Javali, the learned counsel for the respondent, submits that what is being called clause 11 of the agreement was only one of the general terms and conditions of the sale and not a clause in the agreement itself it was not exclusive so as to take away all jurisdiction except that of Kaira.

7. The first question to be decided, therefore, is whether clause 11 as aforesaid formed part of the agreement. Mr. Javali submits that Ex. B-1 is an order of confirmation No. 68/59 dated October 2, 1974 from the Sales Executive for the first appellant to the respondent acknowledging the receipt of their order and registering the same subject to the terms and conditions 'overleaf'. The general terms and conditions printed overleaf included the aforesaid clause 11. We are unable to agree. Admittedly the parties have transacted the business on inter alia basis of clause 11. There is, therefore, no escape from the conclusion that clause 11 formed part of the agreement and the parties would be bound by it so long as they would be bound by the contract itself. It is not open to the respondent to deny existence of clause 11. The submission of Mr. Javali has, therefore, to be rejected.

8. The next question is whether clause 11 is valid, and if so, what would be its effect? As clause 11 formed part of the agreement it would be valid only if the parties could have validly agreed to it. It is common knowledge that the law of contract only prescribes certain limiting principles within which parties are free to make their own contracts. An agreement enforceable at law is a contract. An agreement which purports to oust the jurisdiction of the court absolutely is contrary to public policy and hence void. Each of the citizens has the right to have his legal position determined by the ordinary tribunal except, of course, in a contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which disputes in respect of the contract shall be subject. "It has long been established", say Cheshire and Fifoot, "that a contract which purports to destroy the right of one or both of the parties to submit questions of law to the court is contrary to public policy and is void pro tanto." However, arbitration is statutory mode of settlement; and as a matter of commercial law and practice parties to a contract may agree as to the jurisdiction to which all or any disputes on or arising out of the contract shall be subject.

9. Section 28 of the Indian Contract Act, 1872 provides that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent. This is subject to exceptions, namely, (1) contract to refer to arbitration and to abide by its award, (2) as a matter of commercial law and practice to submit disputes on or in respect of the contract to agreed proper jurisdiction and not other jurisdictions though proper. The principle of Private International Law that the parties should be bound by the jurisdiction clause to which they have agreed unless there is some reason to contrary is being applied to municipal contracts. In *Lee v. Showmen's Guild of Great Britain* ((1952) 1 All ER 1175, 1181 : (1952) 2 QB 329 : (1952) 1 TLR 1115) Lord Denning said :

[P]arties cannot by contract oust the ordinary courts of their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void.

10. Under Section 23 of the Indian Contract Act the consideration or object of an agreement is lawful, unless it is opposed to public policy. Every agreement of which the object or consideration is unlawful is void. Hence there can be no doubt that an agreement to oust absolutely the jurisdiction of the court will be unlawful and void being against the public policy. *Ex dolo malo non oritur actio*. If therefore it is found in this case that clause 11 has absolutely ousted the jurisdiction of the court it would be against public policy. However, such will be the result only if it can be shown that the jurisdiction to which the parties have agreed to submit had nothing to do with the contract. If on the other hand it is found that the jurisdiction agreed would also be a proper jurisdiction in the matter of the contract it could not be said that it ousted the jurisdiction of the court. This leads to the question in the facts of this case as to whether Kaira would be proper jurisdiction in the matter of this contract. It would also be relevant to examine if some other courts than that of Kaira would also have had jurisdiction in the absence of clause 11 and whether that would amount to ouster of jurisdiction of those courts and would thereby affect the validity of the clause.

11. The jurisdiction of the court in matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors.

12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such fact, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

13. Under Section 20(c) of the Code of Civil Procedure subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1988 added Explanation III as under :

Explanation III. - In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely :

(1) the place where the contract was made;

(2) the place where the contract was to be performed or performance thereof completed;

(3) the place where is performance of the contract any money to which the suit relates was expressly or impliedly payable.

14. The above Explanation III has now been omitted but nevertheless it may serve as a guide. There must be a connecting factor.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where action are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

16. So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the court. If under the law several courts would have jurisdiction and the parties have agreed to submit to one of these jurisdiction and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdiction cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy. Would this be the position in the instant case ?

17. In *S. Manuel Raj & Co. v. J. Manilal & Co.* (AIR 1963 Guj 148 : (1963) 4 Guj LR 540) where one of the parties to the contract signed an order form printed by the other party containing the words "subject to Madras jurisdiction" and sent the order form to the other party it was held that the party must be assumed to have agreed that Madras was the place for settlement of the dispute and it was not open to that person who signed the order form of the opposite party containing the printed words to show that printed words were not part of the contract and that those words in the contract was to exclude the jurisdiction of other court and to keep sole jurisdiction to one court. It was observed that the object of printing such words, as "subject to Madras jurisdiction" in the contract was to exclude the jurisdiction of other courts and to give sole jurisdiction to one court and it was in consonance with the commercial practice in India. Similarly in *Sri. Rajendra Mills v. H. V. M. Hazi Hassan Dada* (AIR 1970 Cal 342 : ILR (1969) 2 Cal 142) where there was a contract between the

plaintiff and defendant 1 under which the parties agreed that all suits arising on or out of the contract, would be instituted in the Court at Salem, the Division Bench held that it was true that the suit could have been instituted either at Salem or at Howrah under Section 20(c) of the Code of Civil Procedure, as the cause of action, admittedly arose in part in both the places and it was therefore a case where two courts had concurrent jurisdiction and, in such a case, it was open to the parties to make a choice restricting the court in which the suit under or upon the contract could be instituted. In other words, both the courts having territorial jurisdiction, the parties by their agreement waived their right, to institute any action, as aforesaid except at Salem. It was observed that under those circumstances it was not open to the plaintiff to object to the order for return of the plaint for presentation to the court at Salem as the choice of forum in case of alternative forums lies with the plaintiff and the plaintiff having debarred or precluded itself from going to any other court except at Salem which would be a proper court as against the defendants it would not be just to allow the plaintiff at the instance of any other party or under cover of its objection to institute the suit except in the court at Salem.

18. In *Hakam Singh v. M/s. Gammon (India) Ltd.* ((1971) 1 SCC 286 : (1971) 3 SCR 314) the appellant agreed to do certain construction work for the respondent who had its principal place of business at Bombay on the terms and conditions of a written tender. Clause 12 of the tender provided for arbitration in case of dispute. Clause 13 provided that notwithstanding the place where the work under the contract was to be executed the contract shall be deemed to have been entered into by the parties at Bombay and the court in Bombay alone shall have jurisdiction to adjudicate upon. On dispute arising between the parties the appellant submitted a petition to the court at Varanasi for an order under Section 20 of the Arbitration Act, 1940 that the agreement be filed and an order of reference be made to an arbitrator or arbitrators appointed by the court. The respondent contended that in view of the clause 13 of the arbitration agreement only the courts at Bombay had jurisdiction. The trial court also held that the entire cause of action had arisen at Varanasi and the parties could not by agreement confer jurisdiction on the courts at Bombay which they did not otherwise possess. The High Court in revision held that the courts at Bombay had jurisdiction under the general law and hence could entertain the petition and that in view of clause 13 of the arbitration agreement the petition could not be entertained at Varanasi and directed the petition to be returned for presentation to the proper court. On appeal therefrom one of the questions that fell for consideration of this Court was whether the courts at Bombay alone had jurisdiction over the dispute. It was held that the Code of Civil Procedure in its entirety applied to proceeding under the Arbitration Act by virtue of Section 41 of that Act. The jurisdiction of the court under the Arbitration Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code of Civil Procedure. By the terms of Section 20(a) of the Code of Civil Procedure read with Explanation II thereto the respondent company which had its principal place of business at Bombay was liable to be sued at Bombay. It was held that it was not open to the parties to agreement to confer by their agreement jurisdiction on a court which did not possess it under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try the suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such courts was not contrary to public policy and such an agreement did not contravene Section 28 of the Contract Act. Though this case arose out of an arbitration agreement there is no reason why the same rule should not apply to other agreements insofar as jurisdiction is concerned. Without referring to this decision a Division Bench of the Madras High Court in *Nanak Chand Shadurain v. T. T. Elect. Supply Co.* (AIR 1975 Mad 103 : (1974) 2 MLJ 431) observed that competency of a court to try an action goes to the root of the matter and when such competency is not found, it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter

which parties could waive and it is in this sense if such jurisdiction is exercised by courts it does not go to the core of it so as to make the resultant judgment a nullity. Thus it is now a settled principle that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements.

19. In *Naziruddeen v. P. A. Annamalai* ((1978) 2 Mad LJ 254 : AIR 1978 Mad 410) the question was whether Rule 35 of U.P. State Lottery Rules, 1969 confined the jurisdiction only to Lucknow. The rule said :

35. Legal jurisdiction in all matters concerning the State lottery shall be Lucknow.

The sole question for consideration therefore was whether the above rule had the effect of vesting exclusive jurisdiction only in the courts in Lucknow and thereby taking away the jurisdiction which the subordinate judge court at Vellore could have if it was established that the lottery ticket was stolen within the jurisdiction of that court from the first respondent. Held, it was well established that the jurisdiction of a civil court can be taken away only by an express provision or by necessary implication and ouster of a jurisdiction of civil court should not and ought not be inferred from an ambiguous provision. In that particular case it was common case of the parties that Rule 35 did not expressly take away the jurisdiction of any other court, and vest the exclusive jurisdiction only in the courts at Lucknow. A note of caution was sounded by M. P. Thakkar, J. as he then was, in *Snehalkumar Sarabhai v. E. T. Orgn.* (AIR 1975 Guj 72) observing that the ouster clause could operate as estoppel against the parties to the contract, but it could not tie the hands of the court and denude it of the powers to do justice. Ordinarily, it was observed that the courts would respect the agreement between the parties which was borne out of the meeting of their minds out of consideration of convenience, but the courts were not obliged to do so in every case; and that a new approach to the question deserved to be made where the ouster clause was "calculated to operate as an engine of oppression and as a means to defeat the ends of justice". In such a case the free consent may be wanting and injustice may be avoided.

20. When the court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ouster expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other courts. Thus, in *Salem Chemical Industries v. Bird & Co.* (AIR 1979 Mad 16 : (1978) 2 Mad LJ 189) where the terms and conditions attached to the quotation contained an arbitration clause provided that : "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the court at Calcutta, and when a part of the cause of action had arisen at Salem, the court there had also jurisdiction to entertain the suit under Section 20(c) of the Code of Civil Procedure.

21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause

is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

22. Coming to clause 11 we already found that this clause was included in the general terms and conditions of sale and the order of confirmation No. 68/59 dated October 2, 1974 with the general terms and conditions was sent from Udyognagar, Mohamadabad, Gujarat to the respondent's address at 12 Suramangalam Road Salem, Tamil Nadu. The statement made in the special leave petition that Udyognagar, Mohamadabad, Gujarat is within the jurisdiction of the civil court of Kaira has not been controverted. We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus Kaira court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by clause 11 it would not absolutely oust the jurisdiction of the court and, therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be constructed to have excluded the jurisdiction of the court at Salem. In the clause 'any dispute arising out of this sale shall be subject to Kaira jurisdiction' ex facie we do not find exclusionary words like 'exclusive', 'alone', 'only' and the like. Can the maxim 'expressio unius est exclusio alterius' be applied under the fact and circumstances of the case ? The order of confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factor were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the court at Salem which court otherwise had jurisdiction had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court.

23. In the result, this appeal fails and is dismissed. We, however, leave the parties to bear their own costs.

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