

M/S. Instruments Incorporated Vs. M/S. Industrial Cables (India) Ltd. and Others

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Court : Karnataka

Decided On : Feb-29-1996

Reported in : AIR1996Kant360; ILR1996KAR1893; 1996(3)KarLJ422

Judge : Mohamed Anwar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 7 and 20 - Order 7, Rule 10-A - Order 43, Rule 1; [Indian Contract Act, 1872](#) - Sections 28

Appeal No. : M.F.A. 609 of 1991

Appellant : M/S. Instruments Incorporated

Respondent : M/S. Industrial Cables (India) Ltd. and Others

Advocate for Def. : Shekar Shetty, Adv.

Advocate for Pet/Ap. : S.V. Shastry, Adv.

Judgement :

1. This appeal by the plaintiff in O. S. No. 2738/81 on the file of the X Additional City Civil Court, Bangalore is filed challenging its order dated July 9, 1990 passed on issue No. 4 on the basis of evidence therein, which was framed on the point of jurisdiction, holding that in view of the relevant contractual clause relating to the

place of suing in case of dispute arising out of the suit transaction between the parties, it has no jurisdiction to entertain the plaintiff's suit; and, accordingly, notifying the plaintiff under Order 7, Rule 10-A(a) of the Code of Civil Procedure (C.P.C. for short) to represent his plaint to the proper Court.

2. The facts giving raise to this appeal may be stated as under :

The plaintiff is a proprietary concern engaged in manufacturing of the industrial devices called 'Flow Meters' for oils, petroleums etc., and in dealing thereof. Its office is located at Bangalore.

3. Respondents Nos. 1 and 2 were defendants in the said O.S. No. 2738/81. They are referred to hereinafter as D1 and D2, respectively. D1 is a private company engaged in industrial activity. It is located at Rajpur of Patiala District in Punjab State. D2 is its Purchase Manager. Plaintiff sent leaf-lets to D1 advertising its products and soliciting purchase orders from it. Then D1 wanted the plaintiff to send its quotations for its consideration to place purchase orders with plaintiff for its said products.

4. Accordingly, Ex.P2 quotation dated 3-7-1980 was sent by plaintiff to D1 furnishing the particulars of the products and the price thereof. It was a general quotation. In response thereto, D1 sent its Ex.P3 purchase order dated 11-7-80 for supply of two Oil Flow Meters described therein. The plaintiff promptly despatched the said meters to D1 through railway together with connected papers for payment of the bill amount towards the price thereof. The plaintiff's said bill was duly honoured and paid by Df through the concerned bank at Patiala. Again D1 placed its 2nd purchase order under Ex.P5 bearing No.PGS/OS/105/25001 dated 25-7-1980 with plaintiff for supply of two Oil Flow Meters described therein of the price of Rs. 7,557/- and Rs. 8,062/- respectively. The said Flow Meters, stated in Ex.P5 were also despatched by plaintiff to D1 through railway from Bangalore on 5-8-1980 as borne out by the plaintiff's Ex.P8 carbon copy of the relevant document titled 'Godown Slip'. Undisputedly, this godown slip is also called the 'Despatch Memo'. Original of Ex.P8 was also sent by the plaintiff with the relevant bank papers to the concerned bank at Rajpura for payment of the bill amount by D1. This bill in respect of 2nd consignment despatched under Ex.P5 dated 25-7-1980

was not honoured by D1 on the ground that on taking delivery of said first consignment the same was found not satisfying the specification stated in the relevant D1's purchase order.

5. Thereafter, repeated demands with defendants were made by the plaintiff to make payment for the said second consignment supplied by him. Notices were also exchanged between the parties. When D1 failed to make payment of the said consignment, the plaintiff filed his said suit i.e., O.S. No. 2038/1981, in the Court below for recovery of a sum of Rs. 20,534.90 from defendants towards the value thereof, inclusive of the sales tax and interest at 18% p.a. from the date of despatch of the said goods till 6-8-1980, and for future interest, costs etc.

6. The defendants contested the plaintiff's suit on various grounds. They raised the objection, inter alia, on maintainability of the suit in the Court below on the ground that in view of the relevant clause No. 14 contained in Ex.P5 purchase order relating to the jurisdiction of the Court, the Civil Court at Rajpura alone has the jurisdiction to try the suit and the Court at Bangalore gets no jurisdiction to entertain the same.

7. On the basis of respective pleadings of the parties the trial Court raised several issues for determination. The relevant issue No. 4 on the point of its jurisdiction was framed as follows:--

'Whether this Court has no jurisdiction to try the suit?'

8. Then it proceeded with the trial of the suit and both parties, adduced their irrespective evidence before it.

9. Ex.P5 purchase order of defendants contains the printed terms and conditions of the suit transaction. Clause 14 therein relates to jurisdiction, the relevant portion of which reads thus:

'14. Jurisdiction: XXX XXXXXX XXX XXX XXX XXXIt is agreed that any suit to enforce the right of either party under this order can be instituted and tried to connect with Indian Law and it shall be subject to jurisdiction of the Courts at Rajpura.'

10. On the top of front page of Ex.P5 is also printed this term as under :

'Subject to Rajpura jurisdiction.'

11. In Ex.P8 plaintiff's despatch memo it is stated that Ex.P5 purchase order of defendant was accepted by the plaintiff without prejudice.

12. On consideration of the aforesaid material facts and the relevant clause contained in Ex.P5 pertaining to the jurisdiction of Court, the learned trial Judge arrived at his conclusion that the cause of action for the suit transaction arose within the jurisdiction of the Civil Court of Rajpura and also that the said clause in Ex.P5 excluded the jurisdiction ,of the Civil Court at Bangalore to entertain the suit and try the dispute between the parties. Reliance was placed by him on a decision of this Court reported in Republic Medico Surgical Co. v. Union of India (1979 (2) Kant LJ 410). The learned trial Judge was also of the opinion that the plaintiff should be notified as per O. 7, R. 10-A of C.P.C. Accordingly, intimation to plaintiff was ordered and the date of hearing was set on 16-7-90.

13. The order sheet of the trial Court discloses that from 16-7-90 the case was adjourned to 23-7-90 on which date the plaintiff's learned counsel made a submission before it that he will prefer an appeal against its said order. This submission of the plaintiffs counsel as recorded by the learned trial Judge in the Order sheet on 23-7-90 is as under :--

'Counsel for plaintiff states that the plaintiff will prepare an appeal against the order of this Court on issue No. 4. No application is filed ' under O.7, R. 10-A, C.P.C.

Hence the office to return the plaint and close the file.'

14. Thereafter, the plaintiff presented this appeal under O.43, R. 1(a), C.P.C. The Registry of this Court raised an objection regarding maintainability of the appeal in view of the provision contained under O. 43, R. 1(a), C.P.C., barring the right of appeal where the procedure specified in R. 10-A of O. 7 is followed by the plaintiff. This office objection was considered by this Court on 19-2-91. In view of the plaintiff's said submission made before the trial Court, this Court was of the view that since the procedure laid down in O. 7, R. 10-A, C.P.C. was not followed

by him, the impugned order is the appealable one under O. 43, R. 1(a), C.P.C. Thus the office objection was overruled and the appeal came up for admission on 5-4-95 on which date it was admitted and notice to respondent/defendant was ordered. On 16-2-1996 the learned counsel for defendants Sri. S.S. Shetty put in his appearance for respondents.

15. I have heard the arguments of the learned counsel on both the sides.

16. Sri. S. Shekar Shetty, learned counsel appearing for defendants vehemently contended that the defendants are entitled to be heard on the point of maintainability of the appeal since the said earlier order made on 19-2-91 was before issue of notice to them. Hence, both sides were granted opportunity to address their arguments on maintainability of the appeal.

17. Sri. S. Shekar Shetty argued that in view of the intimation given by the trial Court to the plaintiff under O. 7, R. 10-A, C.P.C., the appeal by the plaintiff is patently incompetent by virtue of the bar contained in O. 43, R. 1(a), C.P.C., and therefore, the same has to be dismissed on this ground.

18. Sri. S. P. Sastry, learned counsel for plaintiff on the other hand submitted that the combined reading of O. 7, R. 10-A and O. 43 and R. 1(a), C.P.C. make it very clear that plaintiff has not lost his right to appeal under O. 43, R. 1(a), C.P.C., since he has not chosen to follow the procedure laid down in O. 7, R. 10-A, C.P.C.

19. To find if the appeal is maintainable or not it is necessary to examine the legal import of the aforesaid material provisions.

Order 43, Rule 1(a) of C.P.C. reads:

'1. An appeal shall lie from the following orders under the provisions of Section 104, namely:--

(a) an order under R. 10 of O. 7 returning a plaint to be presented to the proper Court (except where the procedure specified in R. 10-A of O. 7 has been followed;'

Order 7, Rule 10-A of C.P.C. runs :

'10-A. (1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court -

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, --

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3), --

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.'

20. A plain reading of the above provisions, in particular R. 10-A(5) of O. 7, C.P.C. leaves no room to doubt that plaintiff would lose his right to appeal under O. 43, R. 1(a), C.P.C., from an order of trial Court passed under O. 7, R. 10, C.P.C. only when he avails of the alternative procedure stipulated under O. 7, R. 10-A, C.P.C. towards taking necessary steps to re-present the plaint in proper Court. In the case on hand, indisputably the plaintiff did not choose that procedural remedy but he opted to exercise the right of appeal available to him under O. 43, R. 1(a), C.P.C. by expressly so submitting before the trial Court. Therefore it cannot be held that plaintiff's right to appeal from the impugned order under O. 43, R. 1(a), C.P.C. is taken away or extinguished by reason of mere intimation envisaged under O. 7, R. 10-A(1), C.P.C. given to him by the trial Court. So, there is sufficient legal force in the argument of appellant's learned counsel and I find the objection of Sri. S. Shekar Shetty raised on maintainability of the appeal devoid of legal substance.

21. Adverting to merit of the appeal, Sri. S. V. Sastry, appearing for appellant-plaintiff argued that undisputedly in execution of defendant's purchase order at Ex.P5, plaintiff despatched the goods stated therein to defendants from Bangalore together with the connected railway documents and the bank papers enabling them to honour the delivery and make payment therefor. He maintained that these facts had given rise to part of cause of action at Bangalore and, therefore, the Court below had jurisdiction to entertain and try the plaintiff's suit. He further contended that clause No. 14 contained in Ex.P5 order does not expressly oust the jurisdiction of the competent City Civil Court at Bangalore and, therefore, the Court below has erred in law in holding that it has no jurisdiction to try the suit. In support of this contention reliance was placed by him on a decision of Supreme Court in *Mithilesh Kumari v. Prem Behari Khare* : [1989]177ITR97(SC) . He also relied on a decision of this Court in *National Insurance Company Ltd. v. A. B. C. India Ltd.* reported in ILR (1991) Kant 410, for the proposition that wherever there is a printed jurisdiction clause in an agreement or contract between the parties they are bound by the same only when there is convincing evidence of their meeting of minds on such a term of the contract.

22. Sri. Shekar Shetty argued otherwise and submitted that the condition 'subject to Rajpura jurisdiction' printed at the top of Ex.P5 defendant's purchase order and the same condition in clause 14 therein was accepted by the plaintiff when he despatched the goods to defendants. Sri. Shekar Shetty maintained that it, therefore, necessarily follows that plaintiff agreed to the exclusive jurisdiction of the Civil Court at Rajpura, and, as such, (he jurisdiction of the Civil Court at Bangalore stands excluded. So arguing he sought to uphold validity of the impugned order of the trial Court. He relied on a decision of the Supreme Court in *Hakam Singh v. Gammon (India) Ltd.* reported in : [1971]3SCR314 , for the legal proposition that 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 S. 28 of the Contract Act. There is no dispute about this position of law which is re-affirmed by the Supreme Court in its later decision in *A.B.C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem* : [1989]2SCR1a .

23. Therefore, what has to be seen in the instant case is that whether the cause of action, full or in part, arose within the jurisdiction of the Civil Court at Bangalore in respect of the suit transaction; and, if so, whether by virtue of clause No. 14 in Ex.P5 purchase order of defendant, the Civil Court at Rajpura alone is competent to try the suit, exclusively, and that the jurisdiction of the Civil Court at Bangalore stood excluded.

24. It is not in dispute that in response to plaintiff's quotation Ex.P2, defendants placed purchased order Ex.P5 dated 25-7-80 with the former for supply of the goods slated therein to them at Rajpura in Punjab State. In execution of Ex.P5 purchase order of defendants the plaintiff promptly despatched the goods to defendants through railway under its despatch memo Ex.P8 dated August 5, 1980 together with the connected railway receipts and the bill for payment of the value thereof. It is in the evidence of DW1 Manager of defendant that the consignment despatched by plaintiff under Ex.P8 though reached Rajpura it was not honoured by the defendants on the ground that 1st consignment was defective. Thus the material fact remains proved that the consignment in question which was

despatched by the plaintiff from Bangalore did reach the defendants at Rajpura through normal course of its transit. It is also an admitted fact that plaintiff's bill for the value of the said consignment sent to the concerned bank at Rajpura was not honoured by the defendants. Hence, the plaintiff's suit for recovery thereof.

25. The moot point for consideration, therefore, is whether the aforesaid steps taken by the plaintiff towards performance of his part of the contract at Bangalore constituted sufficient cause of action at Bangalore for the plaintiff's suit. In this regard the pertinent observations of the Supreme Court made in case of *A. B. C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem.* : [1989]2SCR1a (supra) may be usefully referred to. At para 11 of its judgment the Supreme Court has said that (the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. The material portion of its observation made on cause of action at para 12 of its judgment is as under :

'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 the 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.'

26. At para 13, the Supreme Court has further observed :

'13. Under S. 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 S. 7 of Act 7 of 1888 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 in performance of the contract any money to which the suit relates was expressly or impliedly payable.'

27. At para 14 of its judgment, the Supreme Court has pointed out that the above quoted Explanation III has now been omitted but nevertheless it may serve a guide.

28. In the light of the above guidelines laid down by the Supreme Court I find that the aforementioned steps taken by the appellant-plaintiff at Bangalore in manufacturing of the goods stated in Ex.P5 purchase order of defendants, despatch thereof to defendants from Bangalore through railway, and also the despatch of the bill for payment of the value thereof indicate that plaintiff substantially performed his part of the contract at Bangalore and it was now for the defendant to discharge his obligation thereunder at Rajpura. The said acts done at Bangalore by the plaintiff in discharge of his obligation under the said contract are the material connecting factors which sufficiently constitute the cause of action at Bangalore enabling him to file his suit in the Civil Court here. Therefore, it can be safely stated that sufficient cause of action had arisen at Bangalore for the plaintiff to institute his suit in the Court below, though there was cause of action at Rajpura also, in that the contract for supply of goods by plaintiff to the defendant came into existence there. It thus becomes clear that the competent Civil Courts at both places, i.e., Bangalore and Rajpura, had jurisdiction to entertain the plaintiff's suit. Hence the contention of Sri. S. S. Setty, learned counsel for the defendants that no cause of action had arisen at Bangalore is without force and untenable.

29. Now advertent to the said clause 14 incorporated in Ex.P5 purchase order of defendants, the interpretation of the similar clause came up for consideration before the Supreme Court in A. B. C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem : [1989]2SCR1a (supra). In that case the plaintiff at Salem had instituted a suit in the Salem Civil Court against the defendant who was resident of and carrying on his business at Udyog Nagar, Mohammadabad, Gujarat, within the jurisdiction of

the v. Civil Court at Kaira in Gujarat State. That case was filed by the plaintiff therein for recovery of certain amount from defendants on the alleged breach of similar contract between the parties. There was an agreement in that contract between the parties relating to the jurisdiction of Court for settlement of dispute arising between them, which was as follows:--

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

30. Discussing the ambit and purport of such a clause the Supreme Court has said at para 22 of its judgment :--

'22. The question then is whether it can be construed 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 exclusive words like 'exclusive', 'alone', 'only', and the like. Can the maxim 'expressio unius est exclusio alterius' be applied under the facts 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 factors 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 under law through connecting factor of delivery of goods thereat was expressly excluded, infirmity in the impugned judgment of the High Court'.

31. The relevant Clause 14 of Ex. P5 purchase order herein is in para materia with the said clause which was the subject of consideration of the Supreme Court in A.B.C. Laminart Pvt. Ltd. v. A. P. Agencies, Salen, : [1989]2SCR1a . It has been laid down by the Supreme Court that such a clause which does not find the exclusive words like 'exclusive', 'alone', 'only' and the like does not oust the jurisdiction of any other competent Civil Courts so entertain the suit and try the dispute between the parties. Therefore, it was to be concluded in the instance case also that the condition in clause 14 in Ex. P5 does not take away the jurisdiction of the Civil Court at Bangalore to entertain and try the plaintiff's suit.

32. The proposition that the cause of action for a suit on a contract cannot arise at the place where the offer was made, is enunciated by this Court in its decision in Republic Medico Surgica! Co. v. Union of India, 1979-2 Kar LJ 410 (supra) on which reliance was placed by the trial Court. It is not the case herein that the plaintiff has based his cause of action merely on his Ex. P2 quotation dated 3-7-1980 which was an offer to the defendant. As has been stated above the plaintiff's suit was brought after complete contract between the parties came into existence at Rajpura and after the plaintiff performed his part of the contract at Bangalore. As such the conclusion of the learned Trial Judge that cause of action for the plainiiff's suit has not arisen at Bagalore and that it has no jurisdiction to entertain the suit is unsustainable and the same is liable to be set aside.

33. Therefore, I find that the impugned order of the Court below is liable to be reversed and the appeal is entitled to succeed.

For the foregoing reasons, the appeal is allowed. The impugned order dated July 9, 1990 of the Court below is set aside. The trial Court is directed to take the plaint on its file and proceed further to decide the other issues in the suit i.e., O.S. No. 2738/1981, on their merit and dispose of the case in accordance with law. The parties to bear their own costs.

34. Appeal allowed.