

Vijai Electricals Ltd. Vs. Mohan Exports (India) Pvt. Ltd.

Vijai Electricals Ltd. Vs. Mohan Exports (India) Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/428513

Court : Andhra Pradesh

Decided On : Feb-27-2007

Reported in : 2007(3)ALD583; 2008(2)ALT449

Judge : S. Ananda Reddy, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(6); Code of Civil Procedure (CPC) - Sections 16; [Companies Act, 1956](#)

Appeal No. : AA No. 99 of 2006

Appellant : Vijai Electricals Ltd.

Respondent : Mohan Exports (India) Pvt. Ltd.

Advocate for Def. : Philkhana Rama Rao, Adv.

Advocate for Pet/Ap. : C.S.N. Raju, Adv.

Disposition : Application allowed

Judgement :

ORDER

S. Ananda Reddy, J.

1. By this application under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to 'the Act'), the applicant seeks appointment of an

Arbitrator for adjudication of the dispute between the parties.

2. It is stated that the applicant is a Company registered under the [Companies Act, 1956](#) carrying on business of manufacturing of Power and Distribution Transformers in India. The respondent is also a company registered under the provisions of the [Companies Act, 1956](#) and carrying on business of trading by exporting the goods manufactured in India to outside the country. In the process of its business, the respondent entered into a purchase agreement with the applicant on 25-6-2003 for the supply of 2000 nos. distribution transformers in three lots along with other spare parts to Zarka Free Trade Zone, Zordan for a total contract price of Euros 3,283.308.00, which is equivalent to INR 17,06,49,933.00 (at a notional exchange rate of 1 Euro : Rs. 51.975). It is stated that the price stipulated under the terms of the purchase agreement is subject to the variation of the exchange rate between the Euros against the Indian Rupees as on the date of the supply. It is stated that the applicant had performed its part by delivering 2000 nos. of distribution transformers in three lots in the month of November 2003, and subsequent to the delivery of the transformers, the applicant became eligible for the realisation of the contractual amount. However, the respondent paid an amount of Rs. 18,73,46,594.72 paise as against the total and receivable amount of Rs. 19,09,85,615.905 by the applicant. It is stated that the said amount payable by the respondent to the applicant is evidenced by the certificate issued by the Banker, which is filed as Annexure-A2. According to the applicant, the difference or the balance amount payable as a result of the difference in exchange rate comes to Rs. 36,39,021/-with reference to which the applicant sent number of letters to the respondent, but the respondent did not even respond by giving any reply. Therefore, finally the applicant was constrained to issue the legal notice dated 8-5-2006 seeking consent of the respondent for appointment of an Arbitrator for resolving the dispute by naming one of the former Judges of this Court to act as an Arbitrator. Even for that also, according to the applicant, no reply was issued by the respondents. Hence, the present application.

3. The applicant also stated that as per the terms of the purchase agreement, though one of the clauses shows that the Delhi High Court has got jurisdiction, where the disputes have to be adjudicated, but in the light of the judgment of the

Supreme Court in A.B.C. Laminart Pvt. Limited v. Andhra Pradesh Agencies : [1989]2SCR1a , since there is no specific exclusion of this Court within whose jurisdiction the applicant Company has its manufacturing unit where it has manufactured the goods supplied to the respondent. Therefore, this Court has got jurisdiction as part of the cause of action had taken place within the jurisdiction of this Court. Hence, the present arbitration application seeking appointment of an Arbitrator for adjudication of the disputes.

4. A counter is filed on behalf of the respondent admitting that the parties had entered into a purchase agreement, which was stated to have been signed by the parties at New Delhi in the office of the respondent. Therefore, the present application is not maintainable before this Court, as this Court has no territorial jurisdiction to decide the issue. It is also stated that the respondent is having its office at New Delhi and has no place of business in Andhra Pradesh to come within the territorial jurisdiction of this Court. It is also stated that as per Clause 16 of the purchase agreement, dated 25-6-2003 it was stipulated that 'the present contract shall be subject to the jurisdiction of the Courts in Delhi/ New Delhi'. In view of the above fact, it is stated that the Courts at Delhi alone have got exclusive jurisdiction and this Court has no jurisdiction to entertain the present arbitration application. In Para-5 of the counter, the respondent has fairly conceded that the dispute whether the applicant is entitled for any amount as a result of the differential exchange rate depends upon the construction and interpretation of Clause-3 of the agreement and the same has to be decided by the Arbitrator appointed as per the agreement. The respondent also denied having not given any reply to the notice issued by the applicant and stated that a reply was issued to the notice of the applicant on 25-9-2006. Therefore, the respondent sought for dismissal of the application.

5. At the time of hearing, the learned Counsel for the Applicant while reiterating the facts and relying upon the judgment of the apex Court (supra), contended that there is no exclusion specifically the jurisdiction of any other Court other than the Courts at New Delhi. Further, part of the cause of action had taken place within the jurisdiction of this Court, since the applicant Company had its manufacturing unit within the jurisdiction of this Court, where the transformers were manufactured and

supplied to the respondent from Hyderabad. Therefore, this Court has jurisdiction as part of the cause of action falls within the jurisdiction of this Court. Therefore, the learned Counsel sought for appointment of an Arbitrator.

6. The learned Counsel for the respondent, on the other hand, has reiterated the contentions raised in the counter, and sought for dismissal of the arbitration application, as, according to the learned Counsel, the exclusive jurisdiction was conferred only on the Courts at New Delhi and therefore, the application is not maintainable. The learned Counsel relied upon a decision of the Supreme Court in *Harshad Chiman Lal Modi v. D.L. F. Universal Ltd.* : AIR 2005 AP464 .

7. Heard both the learned Counsel and considered the material on record.

8. The only dispute to be considered is whether this Court has got jurisdiction to entertain the application for appointment of an Arbitrator.

9. Admittedly, the parties have entered into an agreement, called the purchase agreement under which the respondent had agreed to purchase 2000 numbers of distribution transformers along with some spares specified therein for being exported to outside the country. The applicant had its industrial unit at Hyderabad, where it had manufactured the transformers and supplied from the said unit, which fact is not in dispute. It is also a fact that with reference to the supply of the entire 2000 transformers, the sale consideration was paid by the respondent. However, the dispute relates to the claim made by the applicant, since there is a variation in the exchange rate from Euros to Indian Rupees, and thus the applicant is entitled for an amount of Rs. 36,39,021/- over and above the amount already paid by the respondent. According to the applicant, it has made repeated demands for which there was no response from the respondent. Therefore, the applicant constrained to issue the legal notice proposing to refer the matter for arbitration and sought for the consent of the respondent by naming an Arbitrator, who is one of the former Judge of this Court. Even for that also, according to the applicant, there was no reply, but, the respondent stated that a reply was sent, a copy of which was not even enclosed along with the counter filed before this Court. However, the issue is only whether this Court has got jurisdiction to entertain the present application and appoint an Arbitrator, as according to the respondent, the exclusive jurisdiction

was confirmed on the Courts at New Delhi only.

10. In order to consider the said issue, it would be appropriate to refer to the relevant clause contained in the agreement. Clause 16 of the agreement deals with the jurisdiction and the same reads :

16. Jurisdiction: The present contract shall be subject to the jurisdiction of the Courts in Delhi/ New Delhi.

From the above, the contention of the respondent is that since the jurisdiction was confirmed specifically on the Courts at New Delhi, the Courts situated outside New Delhi are excluded to entertain any litigation. Even though the term exclusion was not specifically mentioned, but it is inferred that such exclusion exists in view of the terms of the said clause.

11. The learned Counsel for the applicant relies upon a judgment of the apex Court where almost identical issue was considered in A.B.C. Laminart Pvt. Ltd. v. Andhra Pradesh Agencies (supra). In that case, the appellant, a manufacturer and supplier of metallic yarn having its registered office at Udyognagar, Mohammadabad, Gujarat within the jurisdiction of Civil Court, Kaira, where a contract was entered into between the appellant and the respondent for supply of specific quantity of metallic yarn to the respondent. One of the clauses in the said agreement provides the jurisdiction, which reads, 'Any dispute arising out of this sale shall be subject to Kaira jurisdiction.' The order of confirmation with the general terms and conditions was sent from Udyognagar, Mohammadabad, Gujarat to the respondent's address at 12, Suramangalam Road, Salem, Tamil Nadu. Disputes having arisen out of the contract, the respondent filed a suit against the appellants in the Court of Subordinate Judge at Salem. The trial Court allowed the preliminary issue raised by the appellants and held that it had no jurisdiction to entertain the suit in view of the Clause-11 conferring the jurisdiction. The said matter was carried to the High Court, which allowed the appeal holding that the Court at Salem had jurisdiction, since a part of the cause of action arose within the jurisdiction of the Sale Court, as the supply of metallic yarn was effected at Salem to the respondent. Hence, the appeal filed before the apex Court. The contention was since the jurisdiction was specifically conferred on the Court at

Kaira, the Court at Salem was excluded. The apex Court dealing with the said issue held, as under:

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.. 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 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 exclusionary 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. We accordingly find no error or infirmity in the impugned

judgment of the High Court.

12. Coming to the decision relied upon by the learned Counsel for the respondent in *Harshad Chiman Lal Modi v. D.L.F. Universal Ltd.* (supra), in that case the appellant before the apex Court filed the suit for specific performance of an agreement of sale as well as for delivery of a piece of immovable property, which is a plot for residential purpose. It was the case of the plaintiff that he entered into an agreement relating to the said immoveable property at Delhi, though the property is situate at Gurgaon, Haryana. The Head Office of the defendant was situated in Delhi. Some of the installments were also made at Delhi. Therefore, when the agreement was cancelled by the 1st respondent/1st defendant, the suit was instituted. The said suit was originally filed before the Delhi High Court, but subsequently transferred to the District Court at Delhi. One of the objections raised by the defendants was as to the jurisdiction of the Delhi Court since the property with reference to which the suit was filed is situated at Gurgaon, Haryana. It was also the case of the defendants that the suit for recovery of immoveable property would only be instituted in the Court within the local limits of whose jurisdiction the property is situated in terms of Section 16 C.P.C. Therefore, a preliminary issue was framed and after hearing both sides, the Court decided in favour of the defendants and ordered return of the plaint for being presented to the proper Court. The said order was assailed in a civil revision petition before the Delhi High Court, which was upheld and therefore, further appeal to the apex Court. The apex Court while upholding the orders of the trial Court as well as the High Court held that the Delhi Court has no jurisdiction even though the agreement was entered into between the parties at Delhi and even the defendant had its Head Office at Delhi and even some of the installments are paid at Delhi, since the immovable property, which is the subject-matter of the suit is situated outside the jurisdiction of the Delhi Court. It was observed that,-

Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A Court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interest in such property. In other words, a Court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to

Section 16, no doubt, states that though the Court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rent still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim, 'equity acts in personam', recognized by Chancery Courts in England, Equity Courts had jurisdiction to entertain suits respecting immoveable properties situated abroad through personal obedience of the defendant. The principal on which the maxim was based was that Courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by personam, i.e., by arrest of defendant or by attachment of his property.

The apex Court also referred to its earlier decision in *Bahrein Petroleum Company v. Pappu* : (1966) IILLJ144SC , wherein the apex Court held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. It is well settled and needs no authority that 'where a Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing'. A decree passed by a Court having no jurisdiction is non-est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a Court without jurisdiction is a coram non judice. Observing so, the apex Court upheld the view of the trial Court as well as the Delhi High Court.

13. The above decision was rendered with reference to the Section 16 CPC, which specifically restricts the jurisdiction of the Court as to the location of the property, which is the subject-matter. Therefore, the decision rendered in this case is not at all relevant for the purpose of adjudication of the issue before this Court; while the decision in the case of *A.B.C. Laminart Pvt. Limited v. Andhra Pradesh Agencies* (supra), which is relevant and is almost identical to the facts of the present case.

14. If we examine and apply the facts of the present case with the ratio laid down in the case of *A.B.C. Laminart Pvt. Limited v. Andhra Pradesh Agencies* (supra), it is clear that the clause contained in the purchase agreement is also almost identically worded with the clause contained in the above case dealt with by the apex Court. In the present case also there were no words, like 'exclusive', 'alone',

'only' and the like. In the absence of it, it would be difficult to accept that the jurisdiction of this Court has been excluded. In fact, it was the case of the respondent that no part of the cause of action had arisen within the jurisdiction of this Court. The stand of the respondent is that the respondent had no place of business in Andhra Pradesh within the jurisdiction of this Court. Therefore, this Court has no jurisdiction to entertain the present arbitration application. It is not necessary that the respondent must also have its office within the jurisdiction of this Court. The agreement is between the applicant and the respondent. The applicant company, being the manufacturer, manufactured the goods in question within the jurisdiction of this Court, where the applicant had its manufacturing unit and supplied the goods from it to the respondent for being exported outside the country. Therefore this Court has got jurisdiction as part of the cause of action had arisen within the jurisdiction of this Court. Therefore, the contention of the respondent that this Court had no jurisdiction is clearly devoid of merit.

15. Under the above circumstances, the arbitration application is allowed. Sri Justice S. Dasaradharama Reddy, a former Judge of this Court is appointed as Arbitrator for adjudication of the disputes between the parties. The learned Arbitrator is at liberty to fix up his fee. However, initially the applicant is directed to deposit a sum of Rs. 40,000/- (Rupees forty thousand only) with the Arbitrator, which is to be adjusted towards the fee to be fixed by the learned Arbitrator. No costs.