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Skipper Limited Vs. Sewerage and Infrastructure Development Corporation Ltd.

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Court : Kolkata

Decided On : Jul-11-2016

Judge : Sanjib Banerjee

Appellant : Skipper Limited

Respondent : Sewerage and Infrastructure Development Corporation Ltd.

Judgement :

ORDER

OD-19 GA No.3218 of 2015 CS No.343 of 2012 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction SKIPPER LIMITED Versus SEWERAGE & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD.BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE Date : July 11, 2016.

Appearance: Mr.Satadeep Bhattacharya, Advocate Mr.Jayanta Palit, Advocate...for the defendant.

Mr.Abhrajit Mitra, Advocate Mr.Kamal Kumar Sharma, Advocate Mr.Jishnu Chowdhury, Advocate Ms.Rajshree Kajaria, Advocate Mr.Soumabha Ghose, Advocate...for the plaintiff.

The suit is of the year 2012 and it is the admitted position that the defendant, a public body controlled by the Government of Goa, has filed its written statement.

The prayers in the present petition are for the rejection of the plaint pertaining to the suit or the return thereof in view of the forum selection clause cited.

In the alternative, the suit is asked to be dismissed.

The fiRs.ground taken to resist this petition is that there is no prayer for revocation of the leave granted under Clause 12 of the Letters Patent.

Such puerile objection deserves immediate consideration.

Since the defendant wants the suit to be dismissed or the plaint to be rejected or returned to the plaintiff to be filed before the appropriate forum, implicit therein is a prayer for revocation of the leave granted under Clause 12 of the Letters Patent and it does not make a difference whether a prayer in the traditional form, as is the practice on the Original Side of this Court, has been made or not.

The ground urged by the defendant is that in view of the following exclusive forum selection clause, the suit could not have been carried to this Court:25.

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, hereinafter designs, mentioned drawings and as and for the instructions quality of workmanship or materials used on the work as to any other question, claim, right, matter or things whatsoever in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions, orders or other conditions or otherwise concerning the work, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be settled through a Civil Suit to be filed in a Court of competent jurisdiction within the state of Goa, within thirty days from the date of rejection Department. of any of their claims by the The plaint plaintiff that within Goa.

no contends part of the that there plaintiffs is an cause averment of in action the arose Indeed, such a sentence appears prominently in the middle of paragraph 23

of the plaint.

However, it is accepted on behalf of the plaintiff that the work in terms of the contract between the parties was substantially executed in Goa.

The general rule is that the allegations contained in the plaint have to be accepted as true and correct for the purpose of deciding an application in the nature of demurrer.

However, the modern exception to the classical rule is that if a statement in the plaint is patently absurd or demonstrably veracity of such statement may be gone into.

erroneous, the In view of the plaintiffs acceptance that a part of the work under the relevant contract was executed in Goa, it is evident that the averment at paragraph 23 of the plaint, to the effect that no part of the plaintiffs cause of action arose in Goa, is patently incorrect.

The fact that the defendant has filed a written statement where an objection has been taken on the ground of the forum selection clause does not preclude the defendant from carrying this subsequent petition for, in effect, dismissal of this suit in this Court or for a direction on the plaintiff to carry the claim to the appropriate forum.

with the claim on Ordinarily, once a defendant has dealt merits, an objection as to territorial jurisdiction is not permitted to be canvassed since an objection as to territorial jurisdiction is capable of being waived.

However, when the objection as to territorial jurisdiction has been squarely taken in the written statement before the merits of the claim have been addressed, it cannot be said that the adjudication on the issue of jurisdiction has to await the trial whereat, by virtue of the present Order XIV of the Code of Civil Procedure, 1908, all other issues ought also to be decided.

Such an argument makes a mockery of the provisions and leads to an abuse plaintiff of the appears derogation of process to the have forum of court.

carried As the selection in suit this to clause case, this Court contained in the in the agreement or the tender documents which governed the parties.

A forum selection clause, like an arbitration agreement, is just another clause agreed to between parties and is as much capable of being waived by the parties thereto as the other ordinary clauses in an agreement.

selection thereto, clause an But and once the adjudication a party other becomes party is to in breach the necessary as of contract to a forum objects whether the action would be continued in the forum that has been approached in apparent breach of the agreement.

It cannot be said that merely because such objection has been taken in the written statement and not by way of an independent application prior to the written statement being filed, such objection would be decided at the trial where all other issues in the suit would also be decided.

That would defeat the forum selection clause altogether.

The amended provisions of the Code fix a time limit within which the written statement should be filed.

That the defendant in this case has adhered to the time limit must not be held against the defendant.

In any event, in filing the written statement and carrying this subsequent petition, the defendant has not caused any prejudice to the plaintiff nor can it be said that the defendant unequivocally submitted to the jurisdiction of this Court to the extent of being denied the right to pursue the forum selection clause contained in the agreement.

The further ground urged in defence by the plaintiff is that the clause is vague in it merely specifying courts in Goa without identifying a particular court.

unreported order of this In support of such argument, an Court passed on December 9, 2009 (Pidilite Industries PVT.LTD.versus Sanjib Paul) has been cited for the observation therein in connection with a forum selection clause that

provided, inter alia, that in case of legal dispute the forum shall always be Mumbai.

It will be evident from paragraph 7 of the unreported order that one of the considerations that weighed with the Court was that sufficiently identify the relevant court.

the clause did not However, the decision did not rest on such aspect of the matter.

There were several other considerations that weighed with the Court and it cannot be said that merely because the appropriate court in Mumbai was not sufficiently identified, the defendants application in that case stood rejected.

The plaintiff claims that the exclusivity of courts in the State of Goa, as apparently contained in the forum selection clause, has to be read in conjunction with the clause that follows it: within thirty days from the date of rejection of any of their claims by the Department. In other words, it is the plaintiffs contention that the forum selection clause is restricted to the period of thirty days from the date of rejection of the contractors claim by the department.

Such argument has to be rejected out of hand.

The appropriate interpretation of the clause would be that it imposes an obligation on the claiming contractor to lodge a claim within a specified period of time which may be at variance with the time permitted by the Limitation Act, 1963 for a claim of such nature to be carried to a court of law.

To the extent the clause abridges the time which is recognised by the said Act of 1963, the same may be void.

However, the strained interpretation sought to be closing given to unacceptable.

the words of the relevant provision is It is clear, on a plain reading of the entirety of Clause 25 of the contract, that it stipulates a civil suit to be filed in a court of competent jurisdiction within the State of Goa and it also stipulates that such action be filed within thirty days of the date of rejection of the relevant claim.

The second limb may be illegal or may not be enforceable, but that would not impact the first limb: the agreement between the parties that a claim in respect of the contract may only be filed in a court of competent jurisdiction within the State of Goa.

Since it is the admitted position that, notwithstanding the relevant sentence in paragraph 23 of the plaint, that the work under the relevant contract was substantially discharged in Goa, the forum selection clause cited by the defendant would stand attracted.

As a consequence, the plaintiff should not have filed this suit in this Court and the present action is found to be in derogation of the said forum selection clause.

In a sense, it cannot be said that a suit in derogation of a forum selection clause is not maintainable.

However, when a suit is filed in contravention of the forum selection clause and the other party to the contract objects thereto within reasonable time, the court is left with no choice but to hold the parties to their bargain.

GA No.3218 of 2015 is allowed by revoking the leave granted under Clause 12 of the Letters Patent and by permitting the plaintiff to carry the substance of the claim to an appropriate court in the State of Goa.

The plaintiff seeks exclusion of the time spent in this Court for the purpose of Section 14 of the Act of 1963.

The defendant has agreed not to urge the ground of limitation if a suit in respect of the same cause of action is filed before the appropriate court in Goa within three months from today.

CS No.343 of 2012 stands disposed of as above.

There will be no order as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(SANJIB BANERJEE, J.

) S.

Kumar

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