

(2009) 09 SC CK 0075

In the Supreme Court Of India

Case No : Transfer Petition (Civil) No. 78 of 2009

Balaji Coke Industry Pvt. Ltd.

APPELLANT

Vs

Maa Bhagwati Coke (Guj) Pvt. Ltd.

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 16, 20, 25
Constitution of India, 1950 — Article 139A(2)
Contract Act, 1872 — Section 28

Citation : (2009) 4 AWC 4091 Supp : (2010) 1 CompLJ 11 : (2009) 12 JT 250 : (2010) 2 MhLj 145 : (2009) 2 OLR 845 : (2009) 12 SCALE 343 : (2009) 9 SCC 403 : (2009) 14 SCR 241

Hon'ble Judges : Cyriac Joseph, J;Altamas kabir, J

Bench : Division Bench

Advocate : Gaurav Mitra, Vinay P. Tripathi and Abha Jain, for the Appellant; Jitendra Malkan, Syed Ahmad Saud, Shakil Ahmed Syed and Mohd. Moonis Abbasi, for the Respondent

Final Decision : Disposed Of

Judgement

Altamas Kabir, J.—This Transfer Petition under Article 139A(2) of the Constitution of India read with the relevant provisions of the Supreme Court Rules and Section 25 of the CPC has been filed by Balaji Coke Industries Pvt. Ltd. for transfer of Arbitration Application No. 1 of 2008, titled Maa Bhagwati Coke (Guj) Pvt. Ltd. v. Balaji Coke Industry Pvt. Ltd., pending in the Court of the Principal Senior Civil Judge at Bhavnagar (Gujarat) to the Calcutta High Court.

2. Briefly stated, the facts are that the Petitioner Company registered under the Companies Act and having its registered office at 12, Ho-Chi Minh Sarani, Flat 2B, Second Floor, Kolkata, is carrying on business in the trade of coking coal. The Respondent, which is engaged in the business of processing coking coal into hard coke, requires coking coal as raw material to be used in its processing unit for transformation into met coke (hard coke). On 29th April, 2005, the Petitioner

Company entered into an agreement with the Respondent Company to supply 15,000 Metric Tonnes of coking coal of Indonesian Origin. The agreement to sell provided that the cargo would be sold to the Respondent on High Seas basis. The said agreement was executed in Kolkata within the jurisdiction of the Calcutta High Court.

3. Clause 11 of the aforesaid agreement contains an Arbitration Clause which reads as under:

In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences in disputes shall be referred to an arbitrator in Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall be Kolkata.

[Emphasis supplied]

Pursuant to the aforesaid agreement dated 29th April, 2005, the parties entered into a specific High Seas Sale Agreement on 7th May, 2005, wherein it was specified that the contracted coal would be supplied to the Respondent from a vessel named MV Gulf Ranger. The total sale consideration for the consignment was mentioned as Rs. 8,11,80,000/-. Clause 14 of the said High Seas Sale Agreement provided that the sale contract would be subject to Kolkata jurisdiction.

4. Disputes having arisen between the parties, the Respondent herein by its letter dated 20th December, 2008, invoked the arbitration clause and requested the Petitioner Company to confirm the appointment of a retired Judge of the Gujarat High Court, Hon'ble Mr. Justice K.M. Mehta, to be the Sole Arbitrator. In the said letter, the Respondent alleged that the Petitioner was in possession of Rs. 3,43,73,485/- which belonged to the Respondent and was being enjoyed by the Petitioner instead of handing over the same to the Respondent. It was also alleged that the Respondent was entitled to receive 6,793 Metric Tonnes of material from the Petitioner on the basis of the aforesaid sum lying with the Petitioner. It was alleged that the Petitioner was not issuing delivery orders in favour of the Respondent for release of the said material and that the same was currently lying in a plot owned by the Respondent, but under the control and supervision of the Petitioner in Gujarat within the jurisdiction of the Bhavnagar Civil Courts.

5. The petitioner wrote back to the Respondent on 9th January, 2009, denying all the allegations and in particular denying the fact that it had received any sum of money from the Respondent or that the Respondent was entitled to receive any material, as alleged. A preliminary objection was also raised by the Petitioner to

the appointment of Mr. Justice K.M. Mehta as the Sole Arbitrator in terms of Clause 11 of the Agreement dated 29th April, 2005, particularly when the said clause stipulates that the disputes shall be referred to an Arbitrator in Kolkata, West Bengal, India, and Mr. Justice K.M. Mehta was based in Ahmedabad. It was expressly stated by the Petitioner that the appointment of the learned Judge as Sole Arbitrator would be wholly contrary to the express terms of the arbitration clause.

6. According to the Petitioner, it was surprised to receive summons issued by the Principal Senior Civil Judge, Bhavnagar (Gujarat) to appear before the said Court on 17th January, 2009, in Arbitration Application No. 1 of 2008 purported to have been filed by the Respondent-Company u/s 9 of the Arbitration and Conciliation Act, 1996, praying for an injunction to restrain the Petitioner, his servants and agents from disposing, selling, diverting or alienating the material in question or any part thereof and for the issuance of a direction to the Petitioner to issue delivery orders for 6,793 MT of coking coal in favour of the Respondent.

7. Appearing in support of the Transfer Petition, Mr. Gaurav Mitra, learned Advocate, submitted that the invocation of the jurisdiction of the Principal Senior Civil Judge at Bhavnagar, Gujarat, was contrary to the express terms of the High Seas Sale Agreement dated 7th May, 2005, wherein it had been expressly stated that the sale contract would be subject to Kolkata jurisdiction. Mr. Mitra submitted that the Respondent had deliberately, with mala fide intention, failed to disclose the specific High Seas Sale Agreement dated 7th May, 2005, in the application u/s 9 of the aforesaid Act, since it contained the specific jurisdiction clause by which all disputes arising out of or relating to the arbitration agreement were to be filed within the jurisdiction of the Courts at Kolkata. What was disclosed was merely the agreement to sell dated 29th April, 2005.

8. Mr. Mitra further submitted that when the venue for arbitration had been expressly agreed to between the parties to be Kolkata, West Bengal, and also having regard to the fact that the Arbitrator to be appointed was to be a person based in Kolkata, it is only the Courts at Kolkata which had both pecuniary and territorial jurisdiction to entertain all applications in connection with the High Seas Sale Agreement.

9. Mr. Mitra submitted that the learned Principal Senior Civil Judge at Bhavnagar (Gujarat), neither has the territorial nor pecuniary jurisdiction to entertain or determine any dispute between the parties arising out of the agreement referred to hereinabove and the jurisdiction of the Gujarat Court has been invoked with mala fide motive, in violation of the terms of the agreement agreed to between the parties.

10. In support of his aforesaid submissions, Mr. Mitra referred to and relied upon the judgment of a learned Single Judge of the Delhi High Court in the case of Geo. Miller and Co. Ltd. Vs. United Bank of India, , where since the parties had agreed to the jurisdiction of a particular Court to entertain disputes arising out of

an arbitration agreement between the parties, it was held that where two or more Courts have jurisdiction under the CPC to try a suit or proceeding, an agreement between the parties that the disputes between them shall be tried in one of such Courts is not contrary to public policy nor does it contravene the provisions of Section 28 of the Indian Contract Act, 1872. It was also observed that the choice of Forum agreed to and accepted by the parties should normally be respected. Mr. Mitra also pointed out that in the aforesaid decision, the learned Judge had relied upon two decisions of this Court in (i) A.B.C. Laminart (P) Ltd. v. A.P. Agencies 1989 (2) SCC 173; and (ii) Hakam Sing Vs. Gammon (India) Ltd., wherein it was held that where there might be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agreed to vest jurisdiction in one of such Courts to try any dispute which might arise between themselves, the agreement would be valid. It was also urged that if the purport of the agreement was to completely oust the jurisdiction of the Court, such a condition would be unlawful and void being against public policy and would, therefore, be hit by Section 28 of the Contract Act. However, if it was found that the jurisdiction agreed to would also be an appropriate jurisdiction in the matter of the contract, it could not be said that it ousted the jurisdiction of the Court.

11. In addition to the above, Mr. Mitra submitted that even if the provisions of Section 20 of the CPC were to be applied, no part of the cause of action had arisen within the jurisdiction of the Bhavnagar Court in Gujarat so as to enable it to assume jurisdiction in respect of the transaction arrived at in Kolkata and the parties had agreed under Clause 14 of the agreement that the sale contract would be subject to Kolkata jurisdiction. Mr. Mitra urged that it was in such circumstances and also having regard to Clause 11 of the aforesaid agreement, which provided for the place of arbitration to be Kolkata, that the petitioner was impelled to file the transfer petition for transfer of the pending case in the Bhavnagar Court to the Calcutta High Court.

12. Responding to Mr. Mitra's submissions, Mr. Jitendra Malkan, learned Advocate, urged that since the cause of action for the Section 9 application had arisen within the jurisdiction of the Bhavnagar Court in Gujarat, having regard to even the decisions cited by Mr. Mitra, the Bhavnagar Court had jurisdiction to entertain the said application. Mr. Malkan submitted that after discharge of the goods at port Pipavav in Gujarat, the same were stored in the godown of the Petitioner-Company at its own premises within the jurisdiction of the Bhavnagar Court and since the relief prayed for by the Respondent-Company was for release of 6,793 MT of coking coal from the said consignment, the application u/s 9 of the Arbitration and Conciliation Act, 1996 had been rightly filed before the learned Single Judge at Bhavnagar.

13. Mr. Malkan submitted that having regard to the provisions of Sections 16 and 20 of the Code of Civil Procedure, the suit had been rightly filed before the Bhavnagar Court, inasmuch as, it related to the coal which was lying within the

jurisdiction of the Bhavnagar Court. Mr. Malkan submitted that even taking into consideration the decisions of this Court in *A.B.C. Laminart (P) Ltd. (supra)* and *Hakam Singh (supra)*, it could not be contended that the jurisdiction of the Bhavnagar Court stood ousted by either Clause 11 or Clause 14 of the High Seas Sale Agreement, which had provided that the sale contract would be subject to Kolkata jurisdiction. Mr. Malkan urged that there was, therefore, no ground to allow the Petitioner's prayer for transfer of the Arbitration Application No. 1 of 2008, pending in the Court of Principal Civil Judge (Senior Division) at Bhavnagar to the Calcutta High Court.

14. Mr. Malkan also submitted that neither Clause 11 nor Clause 14 conferred exclusive jurisdiction on the Courts in Kolkata. Since the agreement did not use expressions such as "alone", "only" and "exclusive", which could be construed to have completely ousted the jurisdiction of the Courts in Gujarat, it could not be contended that the jurisdiction of the Court in Bhavnagar stood ousted from entertaining the respondent's application u/s 9 of the Arbitration and Conciliation Act, 1996.

15. The only question which falls for our consideration is whether, notwithstanding the mutual agreement to make the High Seas Sale Agreement subject to Kolkata jurisdiction, it would be open to the Respondent-Company to contend that since a part of the cause of action purportedly arose within the jurisdiction of the Bhavnagar Court, the application filed u/s 9 of the Arbitration and Conciliation Act, 1996, before the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat), would still be maintainable. The aforesaid question has often troubled the courts with one view being that since the parties to the agreement had agreed to a particular forum, they could no longer resile from the said position and claim that other courts, where a part of the cause of action may have arisen, would also have jurisdiction to entertain a suit or other proceeding. The other view has been that if by the said agreement the rightful jurisdiction of a court was sought to be ousted and a court was vested with the jurisdiction to entertain a suit, which it did not have, the same would be contrary to the provisions of Section 28 of the Indian Contract Act, 1872, being contrary to public policy.

16. One of the earlier judgments on this dichotomy of views is that of this Court in *Hakam Singh (supra)*. Faced with the question as to whether an agreement arrived at between two parties that one of two courts having jurisdiction, would decide all disputes relating to such agreement, was hit by the provisions of Section 28 of the Indian Contract Act, 1872, this Court held that where two courts or more have jurisdiction to try a suit or proceeding under the provisions of the Code of Civil Procedure, an agreement between the parties that one of such courts would have jurisdiction to decide the disputes arising between the parties from such agreement would not be contrary to public policy and would not, therefore, be contrary to the provisions of Section 28 of the Indian Contract Act, 1872.

17. The said question once again arose in the case of A.B.C. Laminart (P) Ltd. (supra), wherein following the decision in Hakam Singh (supra), but relying on the maxim *ex dolo malo non oritur actio*, this Court held that by an agreement which absolutely ousted the jurisdiction of a court having jurisdiction to decide the matter, would be unlawful and void, being contrary to public policy u/s 28 of the Indian Contract Act. But 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 could not be said that the parties had by their contract ousted the jurisdiction of the court. This Court went on to observe 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 there within, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise between them, the agreement would be valid. The question also arose in R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd., , where an endorsement "Subject to Anand (Gujarat) jurisdiction", was relied upon to contend that only Courts in Anand would have jurisdiction to entertain any dispute relating to such jurisdiction and the suit filed in Bombay on the ground that the cause of action arose in Bombay was not maintainable. In the said case, this Court held that since apart from the endorsement on the deposit receipt, there was no formal agreement between the parties, the said endorsement would not divest the courts in Bombay of their jurisdiction to entertain the suit. As will be evident from the facts of the suit, the same stood on a different footing and does not advance the case of the respondent in any way.

18. In the instant case, the parties had knowingly and voluntarily agreed that the contract arising out of the High Seas Sale Agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided in Kolkata by an Arbitrator in Kolkata, West Bengal, was valid and the Respondent- Company had wrongly chosen to file its application u/s 9 of the Arbitration and Conciliation Act before the Bhavnagar Court (Gujarat) in violation of such agreement. The decisions of this Court in A.B.C. Laminart (P) Ltd. (supra) as also Hakam Singh (supra) are very clear on the point.

19. Having regard to the above, we are inclined to accept the submissions made on behalf of the petitioner and we are of the view that the transfer petition should be allowed. We, accordingly, do so and direct that Arbitration Application No. 1 of 2008 titled Maa Bhagwati Coke (Guj) Pvt. Ltd. v. Balaji Coke Industry Pvt. Ltd., pending in the Court of Principal Civil Judge (Senior Division), Bhavnagar (Gujarat), be transferred to the Calcutta High Court.

20. There will, however, be no order as to costs.