
(2011) 05 CAL CK 0091
In the Calcutta High Court
Case No : A.P. No. 171 of 2001

Bhuwalka and Sons

APPELLANT

Vs

Baljit Securities Ltd. and Sykes and Ray Equities (Mumbai)
Pvt. Ltd.

RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 4, 7, 7(4), 9
Limitation Act, 1963 — Section 14

Citation : (2011) 5 CHN 516

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Ratnanko Banerjee, Lopita Banerjee, Varun Garg, for the Appellant; Samrat Sen, Amitesh Banerjee, R.L. Mitra, P. Dhar, for the Respondent

Final Decision : Dismissed

Judgement

I.P. Mukerji, J.

Background

1. This is an application to set aside an award made under the Arbitration and Conciliation Act, 1996. It was made in Mumbai on 28th May, 2001 by the Arbitral Tribunal comprising of three arbitrators. It was constituted under the Rules, By-laws and Regulations of the Mumbai Stock Exchange. Although, an arbitral award is under challenge, this Court cannot straight away go into the merits of the award. The jurisdiction of this Court to try this application is challenged. The point has to be decided. This arbitration took place without the intervention of the Court. An execution application was taken out by the respondent-award holder in this Court, but subsequently withdrawn. At the date of consideration of this application, there is no other application pending in this Court.

2. If one goes by the framing of the parties and the cause of action, on the face of it, this Court appears to have jurisdiction to entertain this application. This is

so because the respondent is within jurisdiction. But, the respondent relies on Regulation 226C of the Rules, By-laws and Regulations of Mumbai Stock Exchange. It is in the following terms:

In case of all claims (whether admitted or not), differences and disputes arising out of or in relation to all contracts referred to in sub-clause (a) the parties concerned shall be deemed to have agreed and acknowledged that such contracts have been entered into and are to be performed within the city of Bombay, that they are subject to arbitration in accordance with the provisions relating to arbitration other than between members contained in these Bye-Laws and Regulations and that they are subject to the jurisdiction of the Courts in Bombay.

Regulation 248, being the arbitration clause is also relevant and is in the following terms:

248. (a) All claims (whether admitted or not) difference and disputes between a member and a non-member or non-members (the terms "non-member" and "nonmembers" shall include a remisier, authorised clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights obligations and liabilities of remisiers, authorised clerks, sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

(b).....

(c) If any claim (whether admitted or not), difference or dispute arises between a sub-broker who is registered with SEBI as affiliated with a member and his constituent arising out of or in relation to dealings, transactions and contracts between the constituent and the sub-broker made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction fulfillment or validity or in relation to the rights, obligations and liabilities of the constituent, the sub-broker or the member in connection therewith, then such claim, difference or dispute shall be brought to the notice of the member by the constituent in writing within six months from the date of the claim, difference or dispute arising and the same shall as far as possible be settled with the help of the member failing which it shall be brought to the notice of the Exchange for resolution. If a claim, dispute or difference persists, the same shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations.

3. The preliminary submission of the learned Counsel for the petitioner is that

although they entered into a contract for sale and purchase of shares with the respondent, they did not agree with them to be bound by the regulations of the Mumbai Stock Exchange. Consequently, neither the arbitration clause nor the forum selection clause applies.

4. Moreover, it is alternatively submitted on their behalf that a third person by the name of Sant Kumar Kasera was intrinsically connected with the transaction and that no adjudication could have been made by the arbitral tribunal, without him. He was a necessary party, but was not a party to the arbitration agreement. Therefore, the disputes arising out of the transaction could only have been resolved in a civil forum.

5. On the other hand, learned Counsel for the respondent argues that the petitioner had submitted themselves to the jurisdiction of the arbitral tribunal by participating in the proceedings. They had filed their statement of defence. No proceeding challenging the jurisdiction of the learned arbitrators u/s 16 of the said Act had been taken out.

Gist Of The Dispute

6. Before I proceed further with this judgment a few words have to be said about the dispute between the parties.

7. Sant Kumar Kasera was a major shareholder of the respondent. He had one lakh shares. He was also its whole time director. The petitioner is a stock broker and a registered member of the Calcutta Stock Exchange. They also act for various registered members of the Mumbai and National Stock Exchanges. According to the petitioner this gentleman Sant Kumar Kasera was the alter ego of the respondent. On 3rd March, 2000 he wrote to the petitioner to sell 4,500 equity shares of Epic Enzyme Pharma Industries and 11,000 equity shares of Lanyard Food Ltd. held by the respondent.

8. He also did independent dealings in shares with the petitioner as a result of which Rs. 14,30,000/- was payable by him to them. In that letter he asked the petitioner to adjust the sale proceeds of the above shares against his above dues. The shares were accordingly sold and the price adjusted.

9. According to the respondent Kasera resigned on 1st March, 2000 from the Directorship of the Company. However, form 32 which is required to be filed with the Registrar of Companies is dated 15th March, 2000.

10. The respondent denied the authority of Kasera. They said that the shares sold by the petitioner belonged to them and the price ought to have been paid to them alone and not adjusted against the dues of Kasera. The dispute went to arbitration.

11. I am not discussing the details of the dispute because there are bound to be many twists and turns in this tale. However, the Arbitral Tribunal of the Bombay Stock Exchange held inter alia that the petitioner ought to have paid the price of

the shares that is Rs. 13,03,350/-, to the respondent.

Applications of Arbitration and Forum Selection Clauses:

12. The first point urged by the petitioner as I have already said is that they are not a party to the standard arbitration agreement or are subject to the Rules, By-laws and Regulations of the Mumbai Stock Exchange because they are neither a member nor a non-member of that Stock Exchange. Secondly, they submit that even if it is held that by their conduct they submitted to arbitration and had thereby impliedly acknowledged the arbitration clause, it cannot be said that they accepted the forum selection clause. Section 7 of the Arbitration and Conciliation Act, 1996 defines an arbitration agreement and also specifies situations when such arbitration agreement is to be inferred. As far as this case is concerned, the provision in section 7(4)(c) is crucial. Sub-section 4(c) of section 7 is in the following terms:

Section 7.....(4) An arbitration agreement is in writing if it is contained in --

(a).....

(b).....

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

13. Section 4 of the Act is about waiver. In this case the relevant subsection appears to be 4(b). For the sake of convenience section 4 is inserted below:

4. Waiver of right to object. - A party who knows that --

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

14. In my judgment, the arbitral tribunal of three arbitrators always proceeded on the basis that it was arbitrating under the Rules, By-laws and Regulations of the Stock Exchange Mumbai. This appears at the head of the award. The statements of claim and defence were delivered to this arbitral tribunal. The reply to the rejoinder described as Sur rejoinder was filed by the petitioner before this tribunal. It was stated at the head of such Sur rejoinder that it was being filed before the learned arbitrators of the Stock Exchange of Mumbai; Arbitration Reference No. 112 of 2000. No application challenging the authority of the arbitrators, u/s 16 or under any other provision of the said Act was filed. The parties proceeded before this forum as if it was a properly constituted tribunal under the Rules, By-laws and Regulations of the Mumbai Stock Exchange. It is in this context that section 7(4)(c) of the said Act comes into

play. If the statement of claim and counter statement did not mention an arbitration agreement but it could be inferred from the attending circumstances that such statements had been prepared and filed pursuant to an arbitration agreement between the parties, which was later disputed before the Court, the Court could safely conclude the existence of the arbitration agreement.

15. In this particular case the parties have so proceeded before the tribunal and hence I draw the above inference.

16. The arbitral tribunal as I have said earlier proceeded as if it was acting under the Rules, By-laws and Regulations of the Stock Exchange Mumbai. The petitioner can also be said to have waived any "requirement" u/s 4(b) of the Act, for a more formal incorporation of these rules, regulations and by-laws [see Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, and Vimal G. Jain vs. Vertex Financial Services Pvt. Ltd. & Anr., reported in 2007(4) Arb. LR 18, cited by the learned Counsel for the respondent.

17. If the arbitration clause applied, the forum selection clause also applied because the regulations are collective and inseparable and I have not come across any intention of the parties by which it can be said that only the arbitration clause was to apply and not the forum selection clause. In fact the records of the arbitral proceedings tell us that the entire body of rules, bylaws and regulations of the Mumbai Stock Exchange were applied. Therefore the forum selection clause squarely applied to the agreement.

Forum Selection Clause:

18. Now, the effect of the forum selection clause has to be examined.

19. Now, the ouster clause in Regulation 226C is like this "subject to the jurisdiction of the Courts in Bombay". Very illuminating submissions were made from the bar regarding construction of this ouster clause. The submission of the learned Counsel for the petitioner was that since the words "only" or "alone" had not been used to qualify the jurisdiction of the Bombay Court, it could not be said that only the Courts of Bombay had jurisdiction to entertain this application.

20. Now, let me take a look at the law on the subject. The leading case on the subject is Hakam Singh Vs. Gammon (India) Ltd., The Hon'ble Supreme Court in this case noted that the parties could by agreement confer jurisdiction on a Court which under the law had jurisdiction to try a dispute. It also noted that the Bombay High Court had such jurisdiction and that the parties could not by agreement confer a Court with jurisdiction which it did not have, in law. It held that the Court at Varanasi had no jurisdiction in law to try the case. The next case was A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, also cited on behalf of the respondent. In that case the Supreme Court said that in cases where the word "alone" or "only" was not used it was a matter of construction for the Court. The Court was to see on a proper construction of the

clause whether mention of a particular Court necessarily excluded other Courts, by implication. This is what the Hon"ble Supreme Court pronounced in paragraph 21 of the judgment:

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 "expression 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.

It added: "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.

21. R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd., cited by the learned Counsel for the petitioner is a three judges" bench decision of the Hon"ble Supreme Court. The jurisdiction of the Court was sought to be founded on a deposit receipt containing an endorsement to the effect "subject to Anand jurisdiction". The Hon"ble Supreme Court held that this endorsement was made unilaterally by the defendant in that action. On that basis it opined the following in paragraph 9 of the report:

9. We may also consider the effect of the endorsement "Subject to Anand jurisdiction" made on the deposit receipt issued by the defendant. In the facts and circumstances of this case it cannot be disputed that the cause of action had arisen at Bombay as the amount of Rs. 10,00,000 itself was paid through a cheque of the bank at Bombay and the same was deposited in the bank account of the defendant in the Bank of Baroda at Nariman Point, Bombay. The five post-dated cheques were also issued by the defendant being payable to the plaintiff at Bombay. The endorsement "Subject to Anand jurisdiction" has been made unilaterally by the defendant while issuing the deposit receipt. The endorsement "Subject to Anand jurisdiction" does not contain the ouster clause using the words like "alone", "only", "exclusive" and the like. Thus the maxim "expression unius est exclusio alterius" cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contained the endorsement "Subject to Anand jurisdiction" it excluded the jurisdiction of all other courts who were otherwise competent to entertain the suit. The view taken by us finds support from a decision of this Court in A.B.C. Laminart Put. Ltd. vs. A.P. Agencies, Salem.

22. Such observations are to be strictly construed. As evident from the findings there was no contract between the parties as the endorsement was unilateral. Therefore, there could not be ouster of jurisdiction on that document. This point once again arose in the case of *Balaji Coke Industry Pvt. Ltd. Vs. Maa Bhagwati Coke (Guj) Pvt. Ltd.*, , cited on behalf of the respondent where the Hon''ble Supreme Court was concerned with a clause in a contract stipulating that Courts in Kolkata would have jurisdiction. The clause did not use the word "alone" or "only".

23. The Hon''ble Supreme Court discussed all the earlier cases on this point in paragraphs 26, 27, 28 and 29 of the report and came to the following conclusion in paragraph 30:

30. 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 the 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.* as also *Hakani Singh* are very clear on the point.

Similar was the view of the Hon''ble Supreme Court in the case of AIR 2002 2402 (SC) also cited by the respondent''s learned Counsel decided earlier.

24. Suppose the law was that even if the Courts did not have jurisdiction to try a case, jurisdiction could be conferred on it by agreement of the parties, one could have attached some importance to the incorporation of a clause in a contract that Courts in a particular place (without qualifying the phrase with the word "only" or "alone") would have jurisdiction over the case. In that event, a construction would have been permissible that along with all other places having natural jurisdiction over the case, the place specified in the agreement would have jurisdiction. But our law is that if a particular Court does not have jurisdiction, jurisdiction cannot be conferred on that Court by agreement (See the case of *Hakam Singh vs. M/s. Gammon (India) Ltd.* (supra)).

25. Now, if a place has jurisdiction, amongst other places, also having jurisdiction, I think, it would be entirely without sense for a draftsman to specify in a contract one such place for institution of proceedings, unless that place is meant to be chosen, to the exclusion of all other places. I do not think it is even necessary to qualify the choice with "only" or "alone" as the draftsman of documents, like the draftsman of a statute is presumed not to use superfluous words and phrases.

26. As far as Regulation 226C is concerned the clause provides that the parties are subject to the jurisdiction of the Courts in Mumbai. It is true that the word "exclusive" or "alone" has not been used. But on the analogy made by me above

there can be no doubt that the parties meant and intended Bombay to be the exclusive place for institution of proceedings. Particularly so, when the preceding part of the clause states in very plain words that it is to be presumed that the contract was executed and to be performed in the city of Bombay. These phrases will not confer jurisdiction on a Bombay Court if it does not have jurisdiction but they can be interpreted to bring out the meaning and intention of the clause that Mumbai was to be the exclusive place.

27. Such intention of the parties may be ascertained considering the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, followed by M/s. Shriram City Union Finance Corporation Ltd. vs. Rama Mishra, reported in AIR 2002 SCC 2402 and Balaji Coke Industry Pvt. Ltd. Vs. Maa Bhagwati Coke (Guj) Pvt. Ltd.,

28. However, it is nobody's case that no part of the cause of action arose in Bombay. It is admitted that part of the cause of action had arisen in Bombay. Therefore, for the reasons above Bombay Courts have exclusive jurisdiction to try this application.

29. There are other points urged by the learned Counsel for the petitioner that the award is devoid of reasons and that there can be no arbitration between the parties when fraud is alleged and in such event the parties must be relegated to a civil Suit. Since I have specifically held that this Court has no jurisdiction, I cannot go into these controversies.

30. For this reason this application is dismissed. I make it clear that I have not gone into the merits of the dispute save and except to the extent necessary for determination of the issues above. I grant leave to the petitioner to file an application on the self-same facts before a court in Mumbai. The period of pendency of this application may be excluded u/s 14 of the Limitation Act, 1963. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.