

(1992) 03 CAL CK 0031
In the Calcutta High Court
Case No : Matter No. 836 of 1990

G.M.B. Ceramics Ltd.

APPELLANT

Vs

Neiveli Ceramics and Refractories Ltd.

RESPONDENT

Date of Decision : 13-03-1992

Acts Referred:

Arbitration Act, 1940 — Section 14, 14(2), 2(c), 20, 31
Civil Procedure Code, 1908 (CPC) — Section 20

Citation : 96 CWN 1176

Hon'ble Judges : Prabir Kumar Majumdar, J

Bench : Single Bench

Advocate : B.K. Bachawat and Mr. Anil Gupta, for the Appellant; Bhaskar Gupta, A. Chatterjee and Mr. P. Mondol, for the Respondent

Judgement

Prabir Kumar Majumdar, J.—The petitioner has made this application u/s 41 of the Arbitration Act, 1940, inter alia, for an order restraining the respondent from claiming or obtaining or demanding 1,80,000 equity shares for Rs. 10/- each of the petitioner. This application has been moved in this Court after obtaining leave under Clause 12 of the Letters Patent as according to the petitioner, a part of cause of action has arisen within the territorial limits of this Court. This application u/s 41 of the Arbitration Act, 1940 has been made in a pending reference before Mr. Justice P. Rama Rao, a retired Judge of the High Court of Andhra Pradesh and Mr. O.P. Jhunjhunwalla an Advocate of this Court respectively nominated by the respondent and the petitioner. The Joint Arbitrators appointed Mr. Justice Y.B. Chandrachud, a former Chief Justice of India as Umpire.

2. The facts in the case in short are that a collaboration agreement was entered into by and between the parties whereby the respondent agreed to provide technical know-how and other services to the petitioner in connection with the setting up of Vitreous Sanitary ware manufacturing Unit in Orissa. This agreement has been entered into at Madras, and the agreement has to be

substantially performed at Orissa.

The disputes and differences arose between the parties and the same had been referred to the said Joint Arbitrators Mr. Justice P. Rama Rao (retired Judge) and Mr. O.P. Jhunjhunwalla.

3. In the instant application, the petitioner, inter alia, has alleged that the respondent has failed to perform its obligation under the said collaboration agreement and the petitioner has suffered loss and damages approximately Rs. 2 crores by reason of such alleged breach. It is also the contention of the petitioner that in view of such alleged breach of contract or part thereof, the respondent is not entitled to get allotment of shares to which it was entitled to under the said collaboration agreement.

4. When this present application is moved in this Court, Satyabrata Mitra J., as he then was) was pleased to pass ad-interim order of injunction as prayed for. This application was made returnable on 4th April, 1990 and the directions for affidavit were given. This application has now come up before me for final disposal.

5. The respondent has taken a point of objection by contending that in view of the forum selection clause contained in the said agreement entered into between the parties, this Court should not entertain this application and dispose of the same. It is also submitted on behalf of the respondent that on the ground of forum selection clause this Court should also vacate the ad-interim order of injunction already passed on this instant application.

6. With regard to the forum the parties agreed to. as follows :

The City Civil Court, Madras, shall be the only court which shall have jurisdiction to enforce the arbitration award obtained under this clause,

It is contended on behalf of the respondent that the award in the pending reference in terms of the said forum selection clause can only be filed in the City Civil Court, Madras, which shall have jurisdiction to enforce the arbitration award and as such, an application in the pending reference should also be filed in the City Civil Court, Madras and also be disposed of by the same Court.

7. The submissions of behalf of the respondent is that this Court has no jurisdiction as it is not a Court of competent jurisdiction u/s 31(4) of the Arbitration Act, inasmuch as :

a) No part of the cause of action has arisen within the jurisdiction of this Court and

b) By reason of forum selection clause only City Civil Court at Madras is the competent Court to entertain the instant application.

8. It has been submitted on behalf of the respondent that if the allegations made in the petition are taken as correct, even then it cannot be said that any part of

the cause of action alleged in the petition has arisen within the jurisdiction of this Court. Therefore, according to the respondent, apart from forum selection clause even taking the cause of action as alleged in the petition, this Court does not have any jurisdiction to entertain and dispose of the application.

9. It has been submitted on behalf of the respondent that so far as this Court is concerned, the jurisdiction of the Court is governed by the provisions of Clause 12 of the Letters Patent since Section 20 of the CPC has no application so far as this Court being a Chartered High Court is concerned. It is the submission of the respondent that jurisdiction of this court has, therefore, to be invoked either on the basis of place of dwelling or carrying on business or working for gain within the jurisdiction of this court or on the basis that the cause of action has arisen either partly or wholly within the jurisdiction of this court. If the cause of action has arisen in part this application can only be filed in this Court, as has been held by this Court, after obtaining leave under Clause 12 of the Letters Patent.

10. The respondent has submitted that the cause of action In a given case depend on the grievance of a person initiating the proceedings and the nature of relief claimed. It is also submitted on behalf of the respondent that the facts constituting the cause of action will depend upon which party is in breach and the relevant relief"s claimed in the proceedings. In a suit by an unpaid seller for the price of the goods sold and delivered, the payment would form a part of the cause of action and the cause of action can be said to arise at the place where the payment was due to be made. But in a suit where there is a claim for damages arising out of breach of the same contract, the payment of the price may not form a part of the cause of action if the damages do not include price element. The respondent submits that the payment or consideration or any part thereof as contemplated in the collaboration agreement cannot form a part of the cause of action inasmuch as the claim of the petitioner is for damages for breach of the contract and the petitioner has not made any grievance in the statement of claim filed before the Joint Arbitrators regarding the payment of price or technical know-how fee and has not demanded refund thereof. It Is also submitted on behalf of the respondent that in the instant case the Court has to take into consideration the cause of action as has been disclosed in the statement of claim filed before the Joint Arbitrator and not on the basis of the application u/s 41 of the Arbitration Act since the jurisdiction of court to entertain an application u/s 41 Of the Arbitration Act is determined on the same consequence on which the Jurisdiction of the court in which the award may be filed is determined.

11. In support of the aforesaid contention, the respondent has placed reliance on a Bench decision of this Court reported in Sreenivasa Pulvarising Industries Vs. Jai Glass and Chemicals Pvt. Ltd., According to the respondent, it has been laid down by the division Bench of this Court in the said case that a contract of the nature which was under consideration of the Bench, the cause of action would arise at three places. namely, (a) where the contract was made, (b) where the

contract" was to be performed or performance thereof completed, and (c) the place where in performance of contract any money to which the suit relates was expressly or impliedly payable. It is submitted on behalf of the respondent, that in the contract for consideration before the Division Bench, the performance of the contract consisted not only of the delivery of the goods but also of the payment of price and that, therefore, the cause of action for a suit on breach of such a contract would arise not only in place where the goods were to be delivered but also where the price would be payable on such delivery. According to the respondent, the Division Bench in the said case has laid some emphasis on the words "any money to which the suit relates was expressly or impliedly payable".

12. The petitioner in repelling the aforesaid contention as to whether a cause of action has arisen partly within the jurisdiction of this Court, has submitted that on the case as pleaded by the petitioner in the petition the following was within the jurisdiction of this Court:

i) In performance of the contract the petitioner paid Rs. 1 lakh as initial payment towards fees of the respondent;

II) The respondent paid to the petitioner Rs. 1 lakh and such payment was made by the adjustment as the price of 1,80,000 shares of the petitioner.

iii) The petitioner applied to the respondent to perform its obligations under the contract;

iv) The respondent promised and assured to fulfill its obligation under the contract and to complete and rectify the defects In the plant;

v) The respondent failed to perform some of its obligations and

vi) The petitioner suffered loss and damages :

13. It is submitted by the petitioner that all the aforesaid facts are essential to support the claim of the petitioner and these would necessarily constitute a part of cause of action.

14. It is the contention of the petitioner on the said Bench decision reported in AIR 1985, Calcutta 74 (supra) that the Division Bench of this Court held in the said case that in suits arising out of a contract a cause of action will arise where the contract is made, where it is performed or to be performed and where the money to which the suit relates is payable. It is submitted on behalf of the petitioner that on the said ratio of this judgment, in the instant case, the contract was to be performed in that the payment of Rs. 1 lakh was to be made as initial payment and such payment was to be made by adjustment against the price of 1.80.000 shares of the petitioner, all to take place within the jurisdiction of this court. This is to which the instant reference before the Joint Arbitrators relates. Therefore, according to the petitioner, this becomes a part of the cause of action arising within the jurisdiction of this Court and an application with leave under

Clause 12 of the Letters Patent has been filed in this Court. It is further submitted by the petitioner that even in the said decision of the Division Bench, it has been observed, inter alia, that in considering the evaluation of Section 20 of the Code of Civil Procedure, the explanation (iii) to Section 17 of the earlier code which provided, inter alia, that the cause of action arises at a place where the contract was performed or to be performed and the place where money was payable in performance of the contract to which the suit relates and although such explanation was omitted in the present code, the law continues to remain the same.

15. Considering the respective arguments of this aspect, I am inclined to accept the contentions of the petitioner that on the averments made in the petition, a part of the cause of action has arisen within the jurisdiction of this Court. It has been contended by the respondent that in considering the question whether a part of the cause of action arose within the jurisdiction of this Court, the cause of action as disclosed in the statement of claim before the Arbitrator is to be considered. This is the cause of action for consideration in arbitration matter, and the Court's Jurisdiction is determined in relation to the subject matter of the reference.

16. The cause of action as disclosed in the statement of claim has also been substantially disclosed In this application u/s 41 of the Arbitration Act. it appears that in consideration of the respondents imparting technical know-how the petitioner agreed to pay to the respondents a collaboration fee of Rs. 20 lakhs in terms of the said agreement in the manner as follows :

- i) Rs. 1 lakh at the time of execution of the agreement;
- ii) Rs. 6 lakhs within two months after the petitioner
- iii) Rs. 6 lakhs at the time of submission of details of the specification of equipment received along with the layout for the factory.
- iv) Rs. 6 lakhs as soon as the construction of the building, installation of the equipment and construction of the tunnel kiln was completed; and
- v) Rs. 1 lakh as soon as the factory achieved optimum production.

It was also agreed that the payment would be made by the transfer of funds to the respondent who will then immediately deposit the same with the petitioner as advance towards issue of shares. It is also alleged by the petitioner that pursuant to and in terms of the aforesaid contract, Rs. 1 lakh was paid by the petitioner to the respondent at Calcutta within the jurisdiction of this Court and further pursuant to and in terms of the contract, Rs. 18 lakhs as agreed was paid by the respondent towards price of 1,80,000 equity shares and the said payment was made by adjustment by crediting to the respondent and such adjustment was made at Calcutta within the jurisdiction of this Court.

17. In the instant application u/s 41 of the Arbitration Act, the petitioner has

invoked the jurisdiction of this court on the grounds, inter alia, that said sum of Rs. 1 lakhs was paid at Calcutta within the jurisdiction of this court and an adjustment was made at Calcutta within the jurisdiction of this court and further on the allegation that the respondent committed breach of certain obligation under the contract, namely, inter alia, that the respondent failed to complete the dry grinding plant and failed and neglected to assist to develop motors and working materials for the proposed manufacture, failed and neglected to depute and provide technical person and also failed and neglected to provide assistance in marketing, appoint dealers and retailers. According to the petitioner, as disclosed in the instant petition, some of such failures and neglects or breaches occurred partly within the jurisdiction of this court and partly outside. It has also been contended, as stated above, that the dues of the petitioner are payable at Calcutta within the jurisdiction of this court. Therefore, taking the averments as they are it can be said that a part of the cause of action arose within the jurisdiction and the court on that basis can entertain the application after granting leave under clause 12 of the Letters Patent.

18. Now I will deal with the objection as raised by the respondent as to jurisdiction. It has been contended by the respondent that by reason of the said forum selection clause only the City Civil Court at Madras is competent to entertain this application. It is contended on behalf of the respondent that the Court at Madras and the Court at Calcutta along with court of Orissa will have jurisdiction over the subject matter of the reference.

19. The contract has been executed at Madras it has to be performed partly in Orissa and partly at Calcutta and payments under the contract were also payable to the petitioner at Calcutta as can be inferred from the terms of the contract. Now it is the contention of the respondent that the parties have selected a particular forum at Madras having jurisdiction over the subject matter to go into the question arising out of the pending reference.

20. I have set-out above the forum selection clause, it will appear there from that the city Civil Court at Madras shall be the only Court which shall have jurisdiction to enforce the arbitration award obtained under this Clause. It is now settled proposition that if the parties have agreed to certain forum having jurisdiction over the subject matter, the court which is excluded should not entertain any application relating to the subject matter of the reference. The court should refuse to entertain the application not on the ground of lack of jurisdiction but on the ground that parties should be held to their bargain when they have made a lawful agreement with regard to the forum to go into the question relating to the subject matter of the reference. This proposition of law cannot be disputed and is not disputed.

21. The petitioner has, however, taken a stand that if any application has already been made in a court having jurisdiction over the subject matter of the reference, then under provisions of Section 31 (4) of the Arbitration Act, once an application is made in a Court competent to entertain it, the court in which such

application is made has to entertain notwithstanding the existence of any forum selection clause. It has been submitted on behalf of the petitioner that once an application has been filed in a Court having jurisdiction In the subject matter of the reference, the court is clothed with the jurisdiction to entertain that application and dispose of the same notwithstanding any forum selection clause agreed to by the parties, it is further contended on behalf of the petitioner that in view of non-obstante clause in sub-section 4 of Section 31 of the Arbitration Act, the forum selection clause loses all its relevance. In support of the aforesaid contention the petitioner has placed reliance on a -Supreme Court decision reported in AIR 1981 S.C. 1075 (Guru Nanak Foundation vs. Rattan Singh & Sons), the petitioner has also referred to a decision of the learned Single Judge of this Court in the case of Ramkripal Sharma vs. Union of Idia reported in AIR Cal. 80.

22. I find it difficult to accept this contention of the respondent relying on the provision of Section 31. to particular Sub-section 4 Section 31 of the Arbitration Act, 1940. Section 31(4) of the Arbitration Act is as follows :-

Notwithstanding anything contained elsewhere in this Act or in any other law. for the time being in force, where in any reference any application under this act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of, that reference, and the arbitration proceedings shall be made in that court and no other Courts.

23. The plain reading of Section 31 (4) suggests that only when an application has been entertained by a court considering the question as to merits including- the question of jurisdiction, then all subsequent application arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court. The every object of Section 31(4) is that if there are several courts having jurisdiction over the subject matter of the reference of the arbitration proceedings then the court where first application is made Should also decide that application and also entertain other subsequent application..

24. I am of the view that if there is any valid forum selection clause then the Court although having jurisdiction over the arbitration proceedings should not entertain the same and Section 31(4) is not a bar in this regard. If the Interpretation of Section 31 (4) as made on behalf of the petitioner is accepted, then the forum selection clause would become nugatory. I am also of the view that non-obstante clause in sub-section 4 of Section 31 of the Arbitration Act is not meant to exclude any lawful agreement as to selection of a forum having jurisdiction over the matter for adjudication of the disputes.

25. In the Supreme Court's decision relied upon by the petitioner, AIR 1989 S.C. 2075 , there was no forum selection clause in the contract before the Supreme Court. Further, the decision was concerned with an application u/s 14(2) of the Arbitration Act and Section 14(2) of the Arbitration Act contemplates a stage

where the reference has come to an end, whereas in the instant case, the application is in the pending reference. Similarly, the "Calcutta judgment was also on an application u/s 14 of the Arbitration Act. Further, it has also been held by a learned Single Judge of this Court in the said Case that Section 31(4) would not apply to an application u/s 20 and Section 41 of the Arbitration Act as those are not applications in a reference. Therefore, in my view those two decisions relied on by the petitioner do not assist the petitioner. The respondent has referred to a decision of a Division Bench of this Court relating to the forum selection clause which is reported in *Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others*, where the Bench of this Court has held after considering the provisions of Section 31 of the Arbitration Act that in view of the forum selection clause contained in the contract, it is not open to the parties to file any application in the Court excluded under the agreement. The respondent has also referred to another decision of a learned Single Judge of this Court reported in AIR 1985, Cal. 89 (*Kumud Agarwala vs. Fertilizer Corporation of India*) on the point.

26. I am, therefore, unable to accept the contention of the petitioner that in the context of Section 31(4) of the Arbitration Act, a forum selection clause would lose all its importance.

27. On the facts of this case, it appears that the respondent has filed an application for removal of one of the Arbitrators in the Madras High Court where the respondent had contended that the Madras High Court had exclusive jurisdiction in the matter. It has been submitted by the petitioner that the said application of the respondent before the Madras High Court was disposed of by a judgment and order dated 22nd March, 1991 where the Madras High Court has, inter alia, held that in view of the instant petition in the Calcutta High Court, the Calcutta High Court alone would be competent and will have exclusive jurisdiction to entertain the application. The respondent filed a SLP against the said judgment of Madras High Court before the Supreme Court, the said SLP is said to be still pending.

28. Be that as it may, it appears to me that forum selection clause is an agreement between the parties. Such selection as to forum may be waived by the party who was take benefit of such forum selection. According to the clause relating to forum, the City Civil Court, Madras shall be the only Court which shall have jurisdiction to enforce the arbitration award obtained under this Court. It has been pointed out on behalf of the petitioner and has not been disputed by the respondent that the respondent made two several applications before the High Court at Madras one for revocation of the authority of the Arbitrator and the other for an order of injunction restraining the arbitrators from proceeding with the reference. It also appears that the said application for revocation of the authority of the Arbitrator was made invoking the jurisdiction of the Madras High Court on the basis of Section 2(c) of the Arbitration Act, 1940. If the forum selection as agreed to the parties is adhered to, then the proper forum according

to the agreement of the parties should be City Civil Court, Madras and not the Madras High Court. It, therefore, appears to me that the respondent by instituting an application in the Madras High Court ignoring the forum selected by the parties had also waived such forum selection clause.

29. In view of such waiver, this Court can entertain the present application if the Court is otherwise satisfied that it has jurisdiction over the subject matter to which the reference relates. As stated above, the petitioner has invoked the jurisdiction of this Court after obtaining leave under Clause 12 of the Letters Patent as a part of the cause of action arose within the jurisdiction of this Court. I have also held, taking the averments in the petition as true and correct at this stage, that a part of the cause of action as alleged in the petition has arisen within the jurisdiction of this Court and this court is competent to entertain the same under the provisions of Section 31 (4) read with Section 2(c) of the Arbitration Act, 1940.

30. I, therefore, hold that this Court is competent and has jurisdiction to entertain the instant application and dispose of the same.

31. Apart from the objection as to jurisdiction, no submission on behalf of the respondent appears to have been made on the prayer of the petition for injunction restraining if from obtaining and demanding 1,80,000 equity shares of the petitioner. The disputes as to the respondent's entitlement to the shares is now the subject matter of the arbitration before the Joint Arbitrators in the pending reference. I hold that this Court is competent to entertain this application and has jurisdiction to dispose of this application. The ad-interim order made herein is made absolute.

There will be no order as to costs.