
(2012) 10 CAL CK 0110

In the Calcutta High Court

Case No : GA No. 488 of 2012 and AP No. 831 of 2010

HDFC Bank Limited

APPELLANT

Vs

Amit Roy Chowdhury and Another

RESPONDENT

Date of Decision : 04-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(e), 9
Civil Procedure Code, 1908 (CPC) — Section 21

Citation : (2013) 1 CALLT 29

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Moloy Ghosh, Ms. Puja Das Chowdhury, Mr. Joydeep Roy and Mr. I. Hassan, for the Appellant; Ranjit Kumar Jaiswal and Mr. Sekhar Pal, for the Respondent No. 1, for the Respondent

Judgement

Sanjib Banerjee, J.—The first respondent has seriously questioned the propriety of this court to receive the petition u/s 9 of the Arbitration and Conciliation Act, 1996 only at the very last stage of the final hearing. But it cannot be said that such ground was not indicated earlier. It is evident that the first respondent expressed his reservation on such aspect when he was represented for the first time in course of the proceedings. The ground is also squarely taken in the affidavit filed by the first respondent. However, the minor matter as to territorial jurisdiction was relegated to the back-burner upon a startling allegation being made by the first respondent against the receiver appointed in the matter and the objection appeared to have been given up till resurrected just at the end. The undisputed facts are that the petitioner financed the acquisition of two assets by the first respondent. The second respondent guaranteed due payment of the money due under the agreement. The first respondent defaulted in the payment of a few installments whereupon the petitioner sought to terminate the agreement and recalled the entire amount due there under. Upon AP No. 831 of 2010 being received, an initial order was passed on January 12, 2011. The petitioner sought and obtained the ex parte appointment of a receiver to be in

symbolic possession of the two assets financed and make an inventory thereof. The usual order of injunction was also passed. The first respondent was represented when the matter was next taken up on June 14, 2011. The ground of jurisdiction was urged and the forum selection clause in the agreement was cited. The court also noticed the following allegation of the first respondent:

... Counsel for the hirer submits that the equipment/equipments are not in the possession of his client as some agent of the petitioner has taken possession of them forcibly from the hirer.

2. The court observed in the order of June 14, 2011 that the receiver could not be directed to take physical possession of the asset before the issue as to the authority of this court to entertain the petition was resolved. Directions were given for filing affidavits. Affidavits were thereafter filed.

3. The matter was next taken up on November 17, 2011 when a direction was issued for a police investigation to be conducted "as to whether the excavator and rock-breaker claimed by the respondents to have been taken away from the respondents still remain with the respondents or persons known to the respondents." The order was modified on December 23, 2011 by requiring the Commissioner of Police, Asansol-Durgapur Police Commissionerate, to conduct the investigation. The report was directed to be filed when the matter was to appear next on January 19, 2012. The report was filed on the due date, copies of the report were directed to be obtained by the parties, the matter was adjourned for three weeks and the parties were left free to take appropriate steps in respect of the report. On March 14, 2012, when the matter next received attention, it was submitted by the petitioner that baseless and scurrilous allegations had been levelled against the receiver by the first respondent in his affidavit affirmed on July 6, 2011. The first respondent was directed to be examined as to the contents of his affidavit on April 12, 2012. The first respondent has been cross-examined on the contents of his affidavit on July 4 and July 6, 2012. The matter has, thereafter, been heard on several occasions. It is only on September 24, 2012 that the first respondent earnestly urged the objection as to the propriety of this court receiving or deciding the petition u/s 9 of the 1996 Act. The petitioner has also applied, by way of GA No. 488 of 2012, for taking steps against the first respondent for the alleged perjury committed by him.

4. Since a charge has been levelled against a receiver appointed by this court in course of the present proceedings, such aspect of the matter has to be conclusively dealt with herein even if the objection on the ground of territorial jurisdiction is upheld. But it is the objection as to the authority of this court to receive the petition, based on a forum selection clause contained in the agreement, which has first to be assessed.

5. The petitioning finance company has accepted the forum selection clause and its validity. The first respondent contends that in view of the clause, no matter pertaining to the agreement could have been carried to this court in exercise of

its original jurisdiction. It is, in such context, that the forum selection clause is of significance:

The parties hereto expressly agree that all disputes arising out of and/or relating to this Agreement including any Collateral Document shall be subject to the exclusive jurisdiction of a competent court in the city where the Lending office of the Bank is situate alone.

6. The first respondent founds his objection both on the basis of the forum selection clause and on the ground that this court otherwise did not have the authority to entertain the petition. The first respondent says that contrary to the averments in the petition, the agreement was executed in Durgapur and even the agreement records as such. The first respondent asserts that nothing pertaining to the agreement was required to be performed at any place within the territorial limits of this court exercising its jurisdiction on the original side. It is, however, unnecessary to go into such aspect of the matter if the forum selection clause that is asserted is found to be efficacious and the authority of this court to receive any petition relating to the agreement precluded to be invoked thereby.

7. Before referring to the forum selection clause there are some fundamental misconceptions evident in the first respondent's submission that need to be cleared. A jurisdiction clause or a forum selection clause does not operate as a bar on a court otherwise authorised to receive an action to entertain the same; it operates as a bar, just as any other contractual stipulation, on the parties to the agreement containing such clause and is enforceable only at the option of a party thereto. But once it is enforced, it operates from the inception of the action; save, may be, for the purpose of contempt. A court may not suo motu reject a matter upon noticing the forum selection clause governing the situs of an action under the relevant agreement; the ground has to be urged by a party to the forum selection agreement for the court to take cognizance thereof. The matter is not different from an arbitration agreement or an arbitration clause in an agreement which will not preclude a civil court from entertaining a suit in respect of disputes or differences covered by the arbitration agreement; but will require the civil court to stop in its tracks once a party to the arbitration agreement raises an objection based on the arbitration agreement. Just as it is open to the parties to a contract to waive clauses or substantial parts of the agreement, a party to an agreement governed by an arbitration clause or a forum selection clause may institute an action in breach thereof and the action may continue upon the other parties to the agreement not seeking the adherence to the arbitration agreement or the forum selection clause, and, in effect, accepting the breach thereof. There is a distinction in law between an action being maintainable and the continuation of an action being impermissible. If an action is not maintainable, the waiver of the objection on the ground of maintainability would not validate the action. If the continuation of an action becomes impermissible upon an assertion available a party thereto, the judicial authority

in seisin of the action cannot step in and arrest it if the objection is not canvassed by any party thereto.

8. The petitioner has asserted that the agreement between the parties was executed at the petitioner's office within jurisdiction. The first respondent has sought to discredit such statement by referring to the agreement recording Durgapur as the place of execution thereof. There are other statements in the petition, which the first respondent has denied, which would ordinarily entitle this court to receive the petition in exercise of its original jurisdiction. Though the court should look into a plaint or a petition to satisfy that its jurisdiction has been properly invoked, even if there is improper invocation on territorial or pecuniary grounds, the action would not be invalidated unless an objection is taken thereto at the earliest stage. Section 21 of the Code of Civil Procedure, 1908 embodies the general principle. The lack of authority of a court on pecuniary or territorial grounds is qualitatively different from inherent lack of jurisdiction for which there is no recognised exception.

9. It is, thus, that the first respondent's objection has to be scaled down in degrees and assessed not as an objection as to maintainability but as an objection as to institution or the continuation of the matter or the exercise of authority by this court over matters covered by the agreement; the bar operates in personam on the petitioner upon the first respondent urging it. Since the first respondent has not waived the forum selection clause and has asserted it, this court's authority to adjudicate any matter pertaining to the substance of the agreement would be dependent on the forum selection clause permitting it.

10. The forum selection clause in this case is unhappily worded. But the petitioner agrees that it confers exclusive jurisdiction to entertain any matter there under only to "a competent court in the city where the Lending office of the bank is situate ..." There is no dispute between the parties that the petitioner has a lending office in Durgapur. It is also the admitted position that the facility was obtained by the first respondent from such lending office of the petitioner in Durgapur. Once so much is evident, as to whether a part or the petitioner's cause of action arose within the territorial limits of this court exercising its original jurisdiction is utterly irrelevant. The petitioner makes some murmurs that for a forum selection clause to be effective and binding, a particular court having the authority to receive an action arising out of a matter governed by the forum selection clause should have been identified in the clause. The proposition is generally true but casts a wider net when worded in such manner which requires one particular court to be identified. It is possible for a forum selection clause to be effective and binding if a cluster of courts or if several possible courts are identified leaving the parties a choice. Ordinarily, a forum selection clause need not be as specific as indicating a particular court, though there is no harm if it does so. If the parties to an agreement agree that courts in Calcutta or Mumbai would have exclusive jurisdiction to entertain matters pertaining to the matrix contract, the clause does not lose its efficacy or binding value because a

particular court is not identified. Such a clause would give a limited choice to the parties to invoke the jurisdiction of any one of the possible courts covered by the forum selection clause. It would demonstrate the intention of the parties to confine their legal skirmish to Calcutta or Mumbai and not to be carried to other courts beyond the relevant cities which may otherwise have had the authority to receive an action in respect of the agreement. However, the authority of one or more courts indicated in the forum selection clause to entertain a matter pertaining to the relevant agreement is subject first to the caveat that such court should also have had authority to entertain the matter if there was no forum selection clause governing the agreement; and, second to the condition that exclusivity is conferred on one or more courts by the forum selection clause. The condition as to exclusivity has to be understood in its wider context and not as exclusivity denoting singularity. Since the question does not arise on the present facts, it is not necessary to consider whether a forum selection clause that empowers only courts in Calcutta and in Mumbai to entertain matters pertaining to an agreement to be regarded as effective in the context of exclusivity; but it would defy logic to not view such clause as binding and not warranting the institution of an action in courts otherwise authorised to receive the same except the courts in Calcutta and in Mumbai. In this case the clause permits an action relating to the agreement to be carried only to a competent court in Durgapur since the petitioner has a lending office in Durgapur. The exclusivity that is the sine qua non for an effective forum selection clause has to be gathered more from the word "alone" appearing at its end than from the word "exclusive" featuring therein. The clause implies that the parties intended the jurisdiction of only an appropriate court in Durgapur to be invoked in respect of matters pertaining to the agreement. It is possible that several courts in Durgapur would have authority to receive the action in adherence to the forum selection clause; the choice of one of them would be on the party to the agreement initiating the action.

11. The petitioner suggests that if the entirety of the petitioner's cause of action has arisen outside Durgapur, the forum selection clause would not come into play. Such an assertion would generally have required the facts relevant to the cause of action being assessed; but it is unnecessary so to do in the present case.

12. Since Section 2(1)(e) of the 1996 Act defines the authority of a court to receive a matter under Part I of the 1996 Act with reference to the same basis as in a civil suit, it must be discovered whether any court in Durgapur would have had authority to receive a petition u/s 9 of the 1996 Act relating to the subject agreement, if neither the arbitration clause nor the forum selection clause was contained therein. The power of a civil court to receive a suit on the ground of territorial jurisdiction would depend on the nature of the claim and civil actions can be divided into two basic classes: suits relating to immovable properties; and, other suits not relating to immovable properties. In a suit relating to an immovable property, subject to pecuniary considerations, only a court within whose territorial limits the whole or a part of the subject immovable property is

situate would have the authority to receive the action. In other suits, not concerning any immovable property, the jurisdiction of a court can be invoked either on the basis of the situs of the whole or a part of the cause of action or on the situs of all or one of the defendants at the time of the institution of the action. It would, then, be recognising half the legal proposition if it is accepted that a suit pertaining to an agreement not relating to an immovable property may only be instituted in a court within whose local limits a part or the entirety of the cause of action has arisen. Even if no part of the cause of action arises within the local limits of a court, but if the sole or any of the defendants actually and voluntarily reside or carry on business or work for gain within the local limits of such court, the action may be instituted in such court. Since the petitioner, in the cause-title to the petition, indicates that the respondents reside in Durgapur, irrespective of whether a part of the petitioner's cause of action has arisen within the local limits of any court in Durgapur, one or more courts in Durgapur would still have had authority to receive this petition based on the place of residence of either respondent at the time of the institution of the petition.

13. If a court in Durgapur, out of the many that there may be, had the authority to receive the present petition - as it must have had on the basis of both respondents residing at Durgapur - the forum selection clause when cited, would preclude the continuation of the proceedings in this court. Accordingly, it is held that the petitioner could not have carried the present petition u/s 9 of the 1996 Act to this court as the forum selection clause governing the agreement between the parties precluded the petitioner from so doing. AP No. 831 of 2010 is dismissed on such ground. For the petitioner having invoked the jurisdiction of this court in breach of the admitted forum selection clause, the petitioner will pay costs assessed at 1000 GM; but in view of the absence of the second respondent and the conduct of the first respondent as discussed hereinafter, such costs should be paid to the West Bengal State Legal Services Authority within three weeks from date.

14. The first respondent has alleged, inter alia, the following at paragraph 4 of the affidavit-in-opposition filed by him in AP No. 831 of 2010:

(c) On 28-01-2011 the Learned Receiver along with five or six persons went to the office of the Respondent No. 1 at F-1/7, Commercial Estate, City Centre at Durgapur and forced the Respondent No. 1 to sign on some blank papers, the said incident was reported to the Officer-in-Charge of the local Police Station and the Superintendent of Police Burdwan by registered post with A/D.

Photo copies of the letter of complaint and the postal receipts are annexed hereto and collectively marked with Letter - "B".

"(d) On 29th January, 2011 the Recovery Agent of the HDFC Bank Limited accompanied by armed musclemen illegally and without due process of law took the possession of the JCB JS 200 Excavator and Rock Breaker at Joladi near Puamki in the Rock Mine under the Jurisdiction Kalapathar Police Station Noadi,

Bokaro, Jharkhand while it was working. The said incident was reported to the Officer-in-Charge of the local Police Station and Superintendent of Police, District: Bokaro, Jharkhand by registered post with A/D.

Photo copies of the said letter of complaint and the postal receipts are annexed hereto and collectively marked with Letter - "C".

15. Pursuant to the order dated January 12, 2012, a report has been filed by the Commissioner of Police, Asansol-Durgapur. The Commissioner has referred to an enquiry conducted in the matter with officers-in-charge and other officials of several police stations being involved therein. According to the report, the officials of the Chasmufsil P.S. (Kalapathar) of District Bokaro, Jharkhand and the local persons of the mining area where the machines were reportedly lying were not aware of any incident of either an excavator or a rock-breaker being forcibly taken possession of on January 29, 2011. The report also speaks of no contemporaneous report in such regard having been made at any of the concerned police stations. The report has also discredited the first respondent's assertion that he had gone to the City Investigation Centre under the Durgapur P.S. on January 29, 2011 to complain of anything untoward. Copies of the reports of officials of the Chasmufsil P.S. are appended to the Commissioner's report.

16. The first respondent has been cross-examined on the contents of his affidavit affirmed on July 6, 2011. There are several anomalies that appear from his deposition. In his affidavit the first respondent has said that the "Receiver along with five or six persons ... forced the Respondent No. 1 to sign on some blank papers" on January 28, 2011 and such incident was reported to the officer-in-charge of the local police station and the Superintendent of Police of Burdwan District. The complaints to the officer-in-charge of City Centre P.S. Durgapur and Superintendent of Police, Burdwan were apparently made on March 16, 2011, though the incident is alleged to have taken place on January 28, 2011. To begin with, it is surprising that the first respondent has chosen not to complain in such regard within any reasonable time of the incident either to the police or to this court. Indeed, when the first respondent was represented in the present proceedings on June 14, 2011, no assertion was made on his behalf that the receiver had allegedly forced him to sign on some blank papers.

17. It defies reason that a person's signature is obtained on blank paper by a receiver and the aggrieved person does not complain to the court that had appointed the receiver within any reasonable time of the occurrence of the incident. It is even more difficult to accept that the receiver appointed by court had allegedly forced a party to sign on blank papers but the aggrieved person neither brought such fact to the notice of the court by filing an application nor did such person avail of the first opportunity when he was represented in court to inform the court of such an alarming incident. Clearly, the allegation against the receiver was by way of afterthought, not one or two weeks after the incident but several months thereafter.

18. The first respondent's deposition must be referred to on such aspect of the matter. He was asked to read paragraph 4(c) of his affidavit affirmed on July 6, 2011 and, upon his representation that he was not well conversant in English, the contents of paragraph 4(c) of his affidavit were explained to him by the court interpreter. He was asked whether he maintained that on January 28, 2011 the receiver along with some persons forced him "to sign on some blank papers." He answered such fifth question put to him in the affirmative. He was next asked whether something was written on the papers on which his signatures were forcibly obtained or whether the papers were completely blank. He confirmed that "the papers were absolutely blank and white." In response to the following question, he asserted that he had "signed on three or four such blank and white papers." He was then asked if he remembered whether he had signed the papers at the top or the bottom or on the side. His equivocal and evasive response to the eighth and ninth questions was telling.

19. In response to the fifteenth question put to him, the first respondent said that he had made written complaints prior to the one of March 16, 2011, "but since I failed to trace out the documents ... I made another written complaint on 16th March, 2011." The palpably dishonest testimony of the first respondent also referred to a complaint being made to the Kalapathar P.S. prior to March 16, 2011 and the copy of the complaint being lost. Apart from the fact that the report filed by the Commissioner of Police, Asansol-Durgapur, indicates that no complaint in respect of either alleged incident of January 28, 2011 or January 29, 2011 had been made by the first respondent, it is completely unacceptable that incidents of such magnitude occur and a person would lose the complaints made in such regard. Indeed, normal human conduct would have required multiple complaints to be made if a person was wrongfully dispossessed of any property and even the most careless and the negligent would have preserved the copies of the complaints. On the evidence available, it may be reasonably said on a preponderance of probabilities that the first respondent did not lodge any contemporaneous complaint of either alleged incident of January 28, 2011 or January 29, 2011. It can then be inferred that the incidents did not take place at all for no right-thinking individual, far less a person running a business, would overlook such incidents if they happened or would have nothing to show by way of contemporaneous complaints in respect thereof.

20. Even the letter of March 16, 2011 addressed to the City Centre P.S., Durgapur and the Superintendent of Police, Burdwan and the letter of March 16, 2011 addressed to the Kalapathar P.S. by the first respondent are not available in the records of the relevant officials. It must not be lost sight of that finance companies wield considerable influence and it is not unknown for a letter here or a complaint there going missing from all records, but it would be carrying the conspiracy theory to an absurd limit to assess on the evidence available that the three letters were issued but the Commissioner failed to trace any in the records. The first respondent has relied on the postal receipts evidencing apparent despatch of the postal articles, but in the absence of the letters said to have

been issued under the despatch receipts in the records, it cannot be accepted that those letters of March 16, 2011 were issued at all.

21. The petitioner has referred to the minutes of a meeting convened by the receiver on January 28, 2011 wherein the apparent signature of the first respondent appears bang in the middle of the page right next to where his presence is recorded, about a third from the top end of the page and equidistant from the left and right edges of the relevant paper. The minutes, over two pages, have been prepared in the hand of the receiver and reveal the usual speed and carelessness associated with such minutes and do not appear to have been contrived around the signature on the blank paper allegedly obtained from the first respondent. In any event, signatures are ordinarily not obtained on blank papers at the position where the first respondent's signature appears in the relevant sheet. The case run by the first respondent is unacceptable and it is disbelieved that he did not sign against his name in the relevant minutes.

22. The petitioner has also referred to the minutes of another meeting of July 13, 2011 where the first respondent was represented by advocate and where such advocate is said to have asserted that "my client shall not give the possession of the said vehicle." Though the copy of the minutes has been appended to the petitioner's affidavit-in-reply of July 18, 2011, no exception has been taken thereto on behalf of the first respondent.

23. The first respondent has referred to several judgments to assert that a person may not have photographic memory and his recollection several months after an incident may, naturally, not be completely accurate. The judgments relied upon and reported at *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, *The State of Punjab Vs. Hari Singh and Another*, and, *Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator)*, are inapposite in the present context not only because all the matters related to criminal proceedings, but also because the gaps in the first respondent's testimony are not minor inaccuracies but they are gaping holes which lead to the inevitable conclusion of a concocted story being made out with ulterior motive to gain undue advantage and cause undeserving prejudice not only to the petitioner but to a receiver appointed by court.

24. The affidavit of July 6, 2011 affirmed by the first respondent contains false statements, inter alia, in paragraphs 4(c) and 4(d) thereof. The first respondent has not been able to establish the case made out in such paragraphs in his testimony and it appears that false allegations were made by the first respondent knowing the same to be untrue. For such enterprise of the first respondent, he should be adequately rewarded. The Registrar, Original side, will cause an appropriate complaint to be lodged based on this order before the appropriate criminal forum for proceedings against the first respondent for perjury. The complaint is to be lodged within eight weeks from date and the appropriate criminal forum is requested to deal with the matter as expeditiously as the business of that forum would permit and by giving no unnecessary adjournment

to the first respondent. It is necessary and expedient in the interests of justice that an inquiry should be made for taking appropriate action against the first respondent for the first respondent having intentionally given false evidence and the first respondent having fabricated false evidence and used the same in course of the present proceedings.

25. GA No. 488 of 2012 stands disposed of.

26. The first respondent will pay costs assessed at 1200 GM to the receiver for levelling completely false charges against the receiver. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.