

(1999) 02 CAL CK 0037

In the Calcutta High Court

Case No : APOT No. 50 of 1999, G.A. No. 332 of 1999 and C.A. No. 522 of 1998 etc. etc.

Hindusthan Zinc Ltd.

APPELLANT

Vs

Gujarat NRE Coke Ltd.

RESPONDENT

Date of Decision : 05-02-1999

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : AIR 1999 Cal 179

Hon'ble Judges : Ruma Pal, J;M.H.S. Ansari, J

Bench : Division Bench

Advocate : S.B. Mookerjee, Addl. Solicitor General and R.K. Khanna, for the Appellant;Jishnu Saha and Tiwari, for the Respondent

Judgement

Ruma Pal, J.—This judgment disposes of the 2 stay applications in 2 appeals as well as the appeals themselves. There will be an order in terms of prayer (a) of the stay application.

2. The two appeals are APOT No. 50 of 1999 (Hindustan Zinc Ltd. v. Gujarat NRE Coke Ltd.) and APOT No. 65 of 1999 (Gujarat NRE Coke Ltd. v. Hindusthan Zinc Ltd.). Both the appeals are treated as on the day's list.

3. Both the appeals have been preferred from an order allowing an application of Hindusthan Zinc Ltd. (hereafter referred to as HZL) in which HZL had prayed for revocation of leave under Clause 12 of the Letters Patent and for rejection of the suit filed by Gujarat NRE Coke Ltd. (hereinafter referred to as "Gujarat NRE").

4. The facts as pleaded in the plaint are as follows :

Gujarat NRE has its registered office at No. 1 Clyde Row, Hastings, Calcutta-700022 within the jurisdiction of this Court. It manufactures metallurgical coke in Jamnagar, Gujarat. HZL manufactures Zinc in Rajasthan. HZL invited a global tender on 20th July, 1998 for purchasing 75,000 M.T. of Low Ash Metallurgical Coke for delivery to its Lead Zinc Smelter in Rajasthan. An

advertisement was published in the Telegraph in Calcutta which was "located" by Gujarat NRE at its Registered Office. The Tender Notice dated 22nd/27th July, 1998 was served on Gujarat NRE at its Registered Office. Gujarat NRE submitted a report of an analysis and also delivered 100 kgs. of Metallurgical Coke to HZL. Gujarat NRE issued its offer from its place of business at Calcutta to HZL. The tender was opened in Rajasthan. The tender was scrutinized in HZL's premises in Rajasthan. Gujarat NRE's offer was rejected by letter dated 5th/7th December, 1998. Gujarat NRE came to know that its offer was rejected because the sample was not according to the specifications. The rejection was unwarranted and made for no reason. The clause by which HZL had reserved its right to reject a tender in full or in part without assigning any reason was ultra vires and illegal and was liable to be cancelled or quashed as being against the principles of natural justice. HZL was acting in violation of the "statute" and against the principles of natural justice, and thus, should be restrained from acting contrary to the terms and conditions, contained in the tender notice dated 22nd July, 1998, and should not be allowed to give any effect to the impugned notice dated 5th/7th December, 1998 and should allow the Gujarat NRE to participate in the Part II offer i.e. price bidding. The part of the "cause of action" which had arisen within the jurisdiction of this Court were :

- 1) "location" of the advertisement by Gujarat NRE in Calcutta;
- 2) the receipt of tender notice in Calcutta; and
- 3) the issuance of the offer by Gujarat NRE pursuant to the tender from its office in Calcutta.

5. On the basis of these averments Gujarat NRE filed a suit against HZL with leave under Clause 12 of the Letters Patent praying for,

"(a) Declaration that the rejection of the offer submitted in terms of the tender notice without assigning any reason is unlawful and illegal;

(b) Direction upon the defendants to reconsider the offer submitted by the plaintiff in accordance with law;

(c) Declaration that the letter dated 5th/7th . December, 1998 is unlawful, illegal and should be declared null and void and cancelled;

(d) Declaration that the plaintiff is entitled to participate in Part II "Coke Price Offer," i.e., price bidding as mentioned in Clause 3.0 (b) of Annexure "A" of the Tender Notice dated 22nd July, 1998;

(e) Declaration that the Clause 7.2 of Annexure "A" to the said Tender Notice dated 22nd July, 1998 being No. HZL/HO/CONT/4(42) is unlawful, illegal and is liable to be cancelled;

(f) Injunction;

(g) Receiver;

(h) Costs;

(i) Other and/or further reliefs."

Gujarat NRE filed an interlocutory application in its suit and obtained an ex parte order of status quo with regard to the tender until further orders.

6. HZL filed an application for revoking the leave under Clause 12 of the Letters Patent. Revocation was prayed on the ground that no part of the cause of action had arisen within the jurisdiction of this Court. Secondly, it was submitted that there was a jurisdictional clause in the tender documents which gave exclusive jurisdiction to the Udaypur Court in the State of Rajasthan. Finally, it was submitted that the balance of convenience was wholly in favour of the matter being heard and tried in Rajasthan.

7. No affidavit-in-opposition was filed by Gujarat NRE and the parties agreed that both the revocation application, filed by HZL, and the interlocutory application, filed by Gujarat NRE, should be disposed of on the basis of averments made therein. The learned single Judge accepted HZL's submissions that this Court did not have the jurisdiction to entertain the suit. He noted that the letter of rejection was addressed to Gujarat NRE at its Jamnagar office outside the jurisdiction of the Court. The Court also found that the balance of convenience was not at all in favour of the action being tried in Calcutta. The prayer of Gujarat NRE to file an affidavit-in-opposition to bring on record the facts showing that it would be more convenient for this Court to try the action was not allowed as the Court was of the view that no part of the cause of action had arisen within the jurisdiction of this Court. Having accepted the fact that this Court did not have the jurisdiction to entertain the suit, the learned single Judge dismissed the suit and vacated the interim order. But, in doing so, the following observation was made :--

"However, since the defendant is a State or other authority within the meaning of Art. 12 of the Constitution of India and also having regard to the fact that the plaintiff has been a supplier of Metallurgical Coke to the defendant, it is only fair and proper that an opportunity be given to the plaintiff to resubmit its sample. It is, therefore, desirable that the defendant should reconsider its decision rejecting the offer of the plaintiff and, if possible, allow the plaintiff to participate in the tender in the tender bidding process."

8. According to HZL, this "statement" or observation should not have been made by the learned single Judge at all after he had come to the conclusion that the Court did not have the jurisdiction to entertain the suit and after having dismissed the suit. It is further stated that on the basis of this "statement" Gujarat NRE had written to HZL for reconsideration of the rejection of its offer and for being allowed to participate in the tender bidding process.

9. According to Gujarat NRE, the learned single Judge erred in revoking the leave under Clause 12 of the Letters Patent. It is pointed out that as far as the

jurisdictional clause is concerned, no finding was arrived at by the learned single Judge on this question. In any event, it is submitted that the clause is contained in the contract which was yet to be executed between the parties. On the question of balance of convenience, it is stated that no opportunity was given to Gujarat NRE to file any affidavit-in-opposition. Had such opportunity been given, it is claimed, evidence could have been brought on record to show that the balance of convenience was in favour of the matter being tried in Calcutta. On the last question it is submitted that the learned single Judge erred in holding that the facts as pleaded for the purpose of attracting jurisdiction to this Court did not form part of the cause of action. It is said that having regard to the nature of the relief claimed, the facts as pleaded formed an integral part of the cause of action.

10. We are of the view that the learned single Judge's finding on the question of jurisdiction cannot be interfered with. We have already noted the basis upon which Gujarat NRE had sought to attract the jurisdiction of this Court. The facts of this case are on all fours with the facts of the case in *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others*, In that case also tenders had been issued from Gujarat for supply of Kerosene at Gujarat, bids were to be scrutinized in Delhi and the rejection took place in Delhi. It was held that the Calcutta High Court had no jurisdiction to entertain the writ application merely on the basis that the petitioner had read the advertisement inviting tenders at Calcutta, submitted its offer from Calcutta, made representation from Calcutta or sent FAX messages from Calcutta or received a reply thereto at Calcutta. It was held that none of these facts constituted an integral part of the cause of action where the grievance was that the offer of the petitioner had been wrongly rejected.

11. We do not find any distinguishing feature between the instant case and the case of *Oil and Natural Gas Commission (AIR 1994 SCW 3287)* (supra) and, accordingly, hold that no part of the cause of action had arisen within the jurisdiction of this Court and that the learned single Judge correctly revoked the leave under Clause 12 of the Letters Patent and dismissed the suit.

12. It is also clear even from a bare scrutiny of the allegations contained in the plaint that the balance of convenience is overwhelmingly in favour of the matter being tried in Rajasthan. Tenders were scrutinized in Rajasthan, rejection took place in Rajasthan and was communicated to Gujarat NRE in Gujarat; the contract was to be performed in Rajasthan; the samples were received in Rajasthan; the samples were to be tested in Rajasthan and the earnest money was sent by a Bank in Gujarat to Rajasthan. In these circumstances, whether the samples were in keeping with the specification or not would have to be proved by witness in Rajasthan. In any event, it certainly cannot be contended that any witness from Calcutta would be necessary for the purpose of proving the plaintiff's case that the rejection was wrong. The sample was supplied, tested and rejected outside the jurisdiction of this Court. There is, therefore, no reason for

this Court to entertain this suit where the balance of convenience is squarely in favour of the matter being tried in *Rekhab Chand Jain Vs. Paras Das Bhartiya*, and *Ultra Engineering Industries P. Ltd. Vs. Spintex Industries Pvt. Ltd.*,

13. The submission of Gujarat NRE that the jurisdiction clause is contained in the contract and there was no contract entered into by and between Gujarat NRE and HZL is self-defeating. If that is so, it is doubtful whether Gujarat NRE has any cause of action at all against HZL.

14. In any event, it is not necessary for us to express any opinion on this aspect as we are of the view that the order under appeal must be sustained as far as dismissed of the suit filed by Gujarat NRE, is concerned.

15. This brings us to the grievance of HZL regarding the observation of the learned single Judge. We are of the view that the learned single Judge erred in making such observation while dismissing the suit on the ground of lack of jurisdiction. As the learned single Judge was of the view that this Court had no jurisdiction to entertain the suit in the first place, this Court had no jurisdiction to make any observation on the merit of the suit at all.

16. Having regard to the aforesaid conclusion, we feel that no useful purpose would be served in keeping the appeals pending. We, accordingly, dispose of both the stay applications and the appeals filed by HZL and Gujarat NRE by,

i) " allowing the appeal, filed by HZL and deleting the observation of the learned single Judge;

ii) dismissing the appeal, filed by Gujarat NRE, and

iii) directing Gujarat NRE to pay costs of its appeal to HZL assessed at Rs. 5,000/-.

17. Let copies of this judgment and order, duly signed by the Assistant Registrar of this Court, be made available to the parties upon their undertaking to apply for and obtain certified copies thereof on payment of usual charges.

M.H.S. Andari, J.

18. I agree.