

(1953) 09 MAD CK 0009

In the Madras High Court

Case No : O.S. Appeal No's. 56 and 58 of 1950

Hoosen Kasam Dada (India) Ltd.

APPELLANT

Vs

Motilal Padampat Sugar Mills Co. Ltd.

RESPONDENT

Date of Decision : 25-09-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Contract Act, 1872 — Section 23, 28

Citation : AIR 1954 Mad 845 : (1954) ILR (Mad) 855 : (1954) 67 LW 36 :
(1954) 1 MLJ 434

Hon'ble Judges : Rajamannar, C.J;Venkatarama Aiyar, J

Bench : Division Bench

Advocate : S. Azizuddin, for the Appellant; S. Maibrum Perumal, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—These are two appeals against the judgment of Rajagopalan J. disposing of two applications in two suits, C. S. Nos.

762 and 763 of 1948 on the original side of this court. The two applications Were heard together and disposed of by a common judgment. The

applications were made by the common defendant in the two suits to revoke the leave granted to the plaintiff in each of the two suits under Clause

12 of the Letters Patent.

The defendant is a limited company engaged in the business of manufacture of sugar at its mills at Majhauria in the Champaram District in Bihar

State. The registered office of the company happens to be at Kanpur. The plaintiffs are dealers in sugar carrying on business at Madras. They

placed orders with the defendant for certain bags of sugar. These orders were booked by one Purushotham Pai who is described in the concerned

contracts as the sugar agent of the defendant. The contract forms relating to the suit contracts purport to be offers made by the plaintiffs for the

purchase of sugar, and it is recited therein that the plaintiff would agree to sign formal contracts on receipt of the acceptance of the offers.

It is common ground that the offers were accepted by the defendant. The forms which were signed by the buyers were also signed by the agent

Pai and another for the mills and seller. The address of the mills is given as Majhaulia. In each of the two suits the plaintiff claimed damages for

breach of the respective contract in his favour. Before instituting the suit, each of the plaintiffs obtained an ex parte order granting leave to sue the

defendant (Appins. Nos. 3613 and 3614 of 19-18). The orders were obtained on the following allegations, viz., that the cause of action for the

suite entirely arose at Madras where the contracts were entered into and concluded, where the payment under the contracts was made and where

delivery was to be effected.

The defendant entered appearance in each of the two suits under Order 5, Rule 12 of the Original Side rules, i.e., it entered appearance under

protest. The defendants also applied and obtained extension of time to file the written statement but before filing the written statement took out two

applications out of which these appeals arise, praying "inter alia" that the leave granted to the plaintiff in each of the two suite be revoked and the

suits dismissed for want of jurisdiction and also for a stay of the suits u/s 34, Arbitration Act.

2. The applications were entirely founded on the terms of Clause 8 in each of the two offer forms which runs thus:

All disputes in respect of this contract shall be settled by arbitration failing which shall be settled in the court of the seller's jurisdiction where this

contract shall be deemed to have been entered into.

The learned Judge granted the first prayer and revoked the leave granted to the two plaintiffs. He did not therefore deal with the next prayer.

3. We entirely agree with the learned Judge that Clause 8 not only provided for a determination of the place of the contract, but it also provided

that a suit relating to the contract should be instituted in a particular court, viz., the Court of the seller's jurisdiction. It is obvious that under the

general law the Madras Court would also have jurisdiction to entertain the suits.

The parties must be deemed therefore to have had a choice of courts at the time when they entered into the contracts but they voluntarily agreed with each other that any suit relating to the contract shall be instituted only in the court of the seller's jurisdiction.

4. The main contention urged on behalf of the plaintiffs before Rajagopalan J. and before us was that Clause 8 was, illegal void and unenforceable because it fell within the scope of Section 28, Contract Act, which runs as follows :

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent.

5. There are two exceptions to the section which relate to agreements to refer disputes to arbitration. The contention is that Clause 8 in effect prevents the plaintiffs from instituting legal proceedings in a court which would have jurisdiction. Reliance was placed on the well known rule of law that parties cannot by agreement, oust the jurisdiction of any court; nor vest jurisdiction in a court otherwise not competent. There is an overwhelming preponderance of judicial opinion in this country on this point against the plaintiff's contention, though there are a few decisions sounding the other way.

Clauses similar to Clause 8 in the suit contracts have been held to be perfectly valid and not to come within the mischief of Section 28 of the

Contract Act. The principle that has now been practically accepted by most of the High Courts is that, where there are two competent courts

which can deal with the subject matter of the litigation, it is open to the parties to a contract to agree that disputes in respect thereof should be

adjudicated upon by one of the two competent courts and such an agreement is perfectly legal and not contrary to Section 28 of the Contract Act.

Vide -- "Shah Ramanlal v. Abdulla", 3 Dom. L. R. (Mys) 27. In -- Achratlal Kesavlal Mehta and Co., by Proprietor Achratlal and Kesavlal Vs.

Vijayam and Co., , Madhavan Nair J. observed thus: ""Where there are two courts both of which would normally have jurisdiction to try the suit, I

do not see why the parties should not be allowed to agree among themselves that a suit be brought in one of those courts and not in the other.

6. The learned Judge pointed out that such an agreement could not be contrary to the provisions of Section 28, Contract Act, because the party is

not thereby "restricted absolutely" from enforcing his rights under, or in respect of, the contract by the usual legal proceedings in the ordinary

Tribunals, as the restriction is only partial. The only other reported decision of this court is that of King J. in -- *Kondepu Raghavayya Vs. Elukooru*

Vasudevayya Chetty, , where the learned Judge followed the decision of *Madhavan Nair J.* The learned Judge adverted to the fact that that ruling

had been followed by other High Courts, for example, Calcutta, Bombay and Allahabad, and observed that he was not aware that it had ever

been dissented from.

7. In -- *Haji Abdulla Haji Cassum Vs. George Reginald Stamp*, , there was a clause in a policy of marine insurance which provided that all

disputes must be referred to in England for settlement and no legal proceedings should be taken to enforce any claim except in England where the

underwriters were alone domiciled and carried on business. The defendant in a suit on the policy took out an application under Arbitration Act of

1899 praying that all proceedings should be stayed.

It was held that there was a submission to arbitration and the suit was stayed. *Macleod C. J.*, made the following observations in construing the

clause,

The Question may arise whether the agreement in suit was an agreement whereby any party thereto was restricted absolutely from enforcing his

right under or in respect of the agreement by the usual legal proceedings in the ordinary tribunals. But I doubt very much whether an agreement of

this nature which merely contracts that one of the two courts, which would have jurisdiction to try any dispute arising under the agreement, should

try such dispute, would come within the meaning of Section 28, Contract Act.

The relevant clause in -- *The Khandesh Lakshmivilas Mills Co. Vs. Vinayak Atmaram Karpurkar*, , was,

If any dispute arises in respect of the aforesaid business between us under this agreement, the same shall be referred to the Bombay High Court or

in such courts in the Town and Island of Bombay as shall have jurisdiction in the matter.

8. It was held by *Eroomfield J.* that the clause was not contrary to Section 28,

Contract Act, because all that the parties had done was to select one of two competent Tribunals for the disposal of their disputes. The learned Judge followed the ruling in -- Achratlal Kesavlal Mehta and Co., by Proprietor Achratlal and Kesavlal Vs. Vijayam and Co., "

9. In the Allahabad High Court, Bajpai J., in -- Gopal Das Agarwala Vs. L. Hari Kishan Das, , followed the same principle. The Nagpur High

Court has taken the same view. Pollock J. in the -- AIR 1937 334 (Nagpur) , followed the two Madras rulings, the two Bombay rulings and the

Allahabad ruling above mentioned.

10. In Calcutta, too there has never been any rejection of this principle. On the other hand, the learned Judge accepted it as established beyond

doubt. In -- A. Milton and Co. Vs. Ojha Automobile Engineering Co., , without any discussion, Lord Williams J., was content to follow the

decision in -- Achratlal Kesavlal Mehta and Co., by Proprietor Achratlal and Kesavlal Vs. Vijayam and Co., ". In -- "Dhanmal Marwari v.

Jankidas Baijnath", 49 Cal W. N. 123(H), the question did not arise in the same form as it does here and as it did in the cases cited above. There

the effect of one of the terms of the contract was to oust the jurisdiction of the only competent court and confer it on another which had no

jurisdiction and it was held by a Division Bench (Eiswas and Latifur Rahman JJ.) that such a term could not be enforced.

Biswas J., though he thought it was unnecessary to express an opinion on the question, was clearly inclined to the view that where jurisdiction is

vested in either of two courts, parties may be allowed, by agreement, to provide that all suits should be brought in one of such courts and not in the

other. In his opinion such an agreement being only a partial restriction of the rights of the parties under the ordinary law may not be hit by Section

28, Contract Act. The other learned Judge expressed his definite agreement with the view taken in -- Achratlal Kesavlal Mehta and Co., by

Proprietor Achratlal and Kesavlal Vs. Vijayam and Co., "

11. A peculiar view of a clause like that in question was taken by Gentle J. as he then was in -- "Ramnickial v. Vivekanand Mills Co., Ltd.", 49

cal W. N. 58 (I). A clause in that contract provided that any dispute arising under the contract could only be decided in the court of Ahniedabad.

By the said contract A agreed to sell, and B to buy, certain textiles. On

11-5-1943, B instituted a suit in the High Court at Calcutta claiming damages for non-delivery. A in his written statement pleaded that the court had no jurisdiction because of the said clause. On 16-12-1943. A

instituted in his turn a suit in the court of the First Class subordinate Judge of Ahmedabad, claiming damages from B. On 11-3-1944, B filed an application in the Calcutta Court seeking an injunction restraining A from prosecuting the Ahmedabad suit until a final determination of the Calcutta suit. A, the defendant in the suit, raised an objection that the Calcutta court had no jurisdiction, but the learned Judge held that the Calcutta Court had jurisdiction to entertain the suit in spite of the clause in the contract.

At the same time he came to the conclusion that B's application to prevent A from prosecuting his suit in the Ahmedabad court must fail. The learned Judge threw out a suggestion that B could apply u/s 10. Civil P. C., to the Ahmedabad Court for a stay of A's suit. The learned Judge had no hesitation in overruling the contention raised on behalf of the plaintiff before him that the clause in the contract was contrary to Section 28, Contract Act. He said,

There is nothing contrary to law in an agreement that the disputes between the parties should be tried by one court rather than by the other and such agreement does not offend the section. In my opinion Clause 5 of the Contract is not void.

But the learned judge was of opinion that the effect of the Clause was a submission to arbitration under the Arbitration Act, the chosen Tribunal being the Ahmedabad Court and therefore when one of the two courts each having jurisdiction is the chosen tribunal, the jurisdiction of the other court is not ousted but it is subject to the exercise of the powers in Section 34, Arbitration Act.

In the case before him as there was no application for stay of proceedings under that section, it was dismissed. The learned Judge's opinion was based almost entirely on certain decisions of the courts in England and one decision of the High Court at Bombay to which reference has already been made, viz, -- Haji Abdulla Haji Cassum Vs. George Reginald Stamp, ". All these decisions related to contracts in which the parties have agreed upon foreign courts to decide disputes arising out of their contracts. Gentle J., assumed that there was no difference in principle, whether

the chosen court is a foreign court or both courts are of the same country. With great respect to him we do not agree. When the chosen forum is a foreign court, there is also the consequent implication that the rights under the contract would be determined by the rules of law prevailing in the foreign country.

In one of the cases referred to by Gentle J., viz., -- "Austrian Llyod Steamship Co. v. Gre-sham Life Assurance Society Ltd", (1903) 1 K. B. 249

(J), the contention of Haldane K. C. in respect of a clause which provided that for all disputes which may arise out of the contract of insurance all

the parties agreed to submit to the jurisdiction of the court of Budapest having jurisdiction in such matters, was that the object of that clause was

that the law of Hungary should govern the contract as presumably the Hungarian courts would only administer that law. This contention was accepted.

12. In Chitty on Contracts, 20th Edn. page 161 this decision is cited as an instance where parties provided in the contract itself for the law which is

to govern it. The learned Judge overlooked the fact that the judgment of a foreign court does not stand on the same footing as the judgment of one

of the courts in India. A decree will have to be again obtained in a court in India on the foreign judgment. If this is borne in mind, it becomes easy

to understand why the English decisions treat the term in a contract providing for reference of disputes to a foreign court as a submission to

arbitration. We therefore respectfully, dissent from the decision of Gentle J. in this respect.

13. A Full Bench of the Lahore High Court reviewed all the relevant decisions on this point in -- "Musarji Lukmanji v. Durgadas", AIR 1946 Lah

57 (K), and held that an agreement between the parties to a contract to the effect that a suit concerning disputes arising between them in respect of

the contract would be instituted in one of two competent courts is a valid and enforceable agreement and is not void under the provisions of

Section 28, Contract Act.

Mahajan J. who delivered the leading judgment pointed out that there was a considerable body of judicial opinion in support of the said view.

Earlier decisions of that court to the contrary were overruled. The following observations of Abdur Rahaman J. bring out clearly the "ratio

decidendi" of the decision.

But in agreeing not to bring suits in one out of the two courts, both of which were competent to try them, parties cannot be said to have

contracted out of the jurisdiction vested in that court or to be depriving it of the jurisdiction which it otherwise possessed (and would continue to

possess as long as it could entertain a suit of that kind in accordance with the law in force) but to have deprived themselves of the right of

proceeding in that court with a reservation that they would continue to have a right to proceed in others which have in law, jurisdiction to try. The

parties did not thus deprive any court of its inherent or even territorial jurisdiction but themselves of their right of exercising, it partially in one out of

the two or three courts. Jurisdiction is one thing, right to exercise it another.

The only two decisions which learned counsel for the appellant was able to cite in support of a contrary view are (1) a decision of the Judicial

Commissioner of Nagpur in -- "National Petroleum Co. v. Rebello", AIR 1935 Nag 48 (L) and (2) a decision of a single Judge, Henderson J. in -

-"Chittaranjan v. Panil Rani", AIR 1946 Cal 112 (M). In the former case the decision was based on a construction of a clause similar to that in

question as a clause ousting the jurisdiction of one of the courts--a construction which we cannot accept. In the latter case the learned Judge took

the view that the effect of such an agreement was to prevent the parties absolutely from filing a suit in one of the courts, and so it falls u/s 28,

Contract Act. With respect to the learned Judge, we think that this is a wrong interpretation of the language of Section 28, Contract Act. The

observations of Abdur Rahman J. extracted above completely answers this objection.

14. We have no hesitation in accepting the view taken in the two decisions of this court in -- Achratlal Kesavlal Mehta and Co., by Proprietor

Achratlal and Kesavlal Vs. Vijayam and Co., " and -- Kondepu Raghavayya Vs. Elukooru Vasudevayya Chetty, ", which has been accepted by

almost all the courts in this country. We hold that Clause 8 of the suit contract is not void as one falling within the mischief of Section 28, Contract

Act.

15. Learned counsel for the appellants next contended that the clause was void as being against public policy because it restricts the jurisdiction of

courts. No authority was cited by him in support of his contention except an observation in -- "AIR 1935 Nag 48 (L)", viz., ""It appears to me that

it would be against public policy if the parties by private agreement can oust the jurisdiction of the courts."" We can do no better than to quote

Mahajan J. -in -- "AIR 1946 Lah 57 (K)" to overrule the contention. At page 61 the learned Judge said :

It may be observed that there is nothing against public policy in an agreement arrived at between the parties that where several courts have

territorial jurisdiction to hear a case they may limit their choice to one of those courts. So long as the case is heard by a competent court which has

jurisdiction in every way to hear it, there is nothing in public policy which dictates that, because other courts can also hear the same and because

they cannot hear it in view of the agreement, that is a matter against public policy.

16. The next argument on behalf of the appellants was that the clause was void for uncertainty u/s 29, Contract Act. The uncertainty is supposed to

arise from the fact that the registered office of the defendant company is at Kanpur while the mills are in Majhauria. A glance at the contract will

show what was meant by the parties. The seller's address is given as Majhauria and the court of seller's jurisdiction must be held to be the court

which would have jurisdiction to decide dispute which arises at Majhauria. We hold that Clause 8 of the suit contracts is not void on this ground.

17. Mr. Azizuddin for the appellants also contended that the defendant must be deemed to have waived the objection to the jurisdiction of this

court. His contention is founded on the following facts, viz., that the defendant filed a vakalat and an application for extension of time to file the

written statement. There is no substance in this contention because, as already mentioned, the defendant entered appearance under protest and

filed the applications for revoking the leave before he filed any written statement pleading on the merits.

18. There is one other argument of Mr. Aziz-uddin which we are unable to follow, viz., that that part of Clause 8 which provides for institution of a

suit in the court of the seller's jurisdiction comes into force only on failure of arbitration and as there had been no attempt at arbitration that

provision cannot be relied upon. If the argument is that a suit cannot be instituted unless there has been an attempt at arbitration, then logically the

present suits must fail on that ground and we do not think Mr. Aziz-uddin intended to say this. There is nothing in this contention.

We entirely agree with the reasoning and conclusion of Rajagopalan J. and dismiss the appeals with costs.