

(2006) 01 CAL CK 0003
In the Calcutta High Court

Case No : G.A. No"s. 67 and 72 of 2006 and C.S. No. 293 of 2005

IMR Metallurgical Resources AG

APPELLANT

Vs

Hindusthan Newsprint Ltd. and Another

RESPONDENT

Date of Decision : 19-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 120, 16, 17, 20
Contract Act, 1872 — Section 28

Citation : (2006) 01 CAL CK 0003

Hon'ble Judges : Sengupta, J

Bench : Single Bench

Judgement

Sengupta, J.—Both these applications being GA No. 72 of 2006 and GA No. 67 of 2006 are taken up for hearing. The application being GA No. 72 of 2006 has been taken out by the defendant No. 1 for dismissal of the suit, alternatively the plaint in C. S. No. 293 of 2005 be taken off the file or in the alternative, the plaint in C. S. No. 293 of 2005 be forthwith returned for filing in the appropriate Court. Another application being GA No. 67 of 2006 has been taken out by the plaintiff for interlocutory reliefs, which are set out hereunder :

(a) The respondent be directed to nominate a surveyor mutually agreed by the plaintiff for the purpose of sampling and analysis of the cargo being the subject-matter of Purchase Order No. 990083, dated 26th July, 2005 presently lying at the factory premises of the respondent at Newsprint Nagar, Kottayam, Kerala.

(b) If necessary, a fit and proper person and/or agency be appointed as surveyor by this Hon'ble Court for the purpose of carrying out sampling and analysis of the cargo being the subject-matter of Purchase Order No. 990083, dated 26th July, 2005 presently lying at Newsprint Nagar, Kottayam:

(c) Injunction restraining the respondent, its servants and agents from utilising, removing, consuming and/or dealing with the entire balance quantity of goods being the subject-matter of Purchase Order No. 990083, dated 26th July, 2005 presently lying at the factory premises of respondent at Newsprint Nagar,

Kottayam, Kerala until completion of sampling and analysis in terms of prayers above;

(d) Ad-interim order in terms of prayers above;

(e) Cost of and incidental to this application be paid by the respondent;

(f) Such further order or orders be made and/or direction or directions be given as to this Hon''ble Court may seem fit and proper.

2. At the present moment the plaintiff wants ad, interim order in terms of prayer (c). Though the plaintiffs application has been taken out in earlier point of time but the subsequent application is important one, as the point of jurisdiction has been taken formally. It is settled position of the law that before the Court grants any order of injunction, the question of jurisdiction, if raised, has to be decided first. As such, I invited Mr. Chatterjee to advance argument on the question of jurisdiction first and then to oppose the interlocutory relief asked for by the plaintiff/petitioner.

3. The plea of jurisdiction as canvassed by Mr. Chatterjee is that in the agreement there has been a forum selection clause as the parties have agreed keeping their eyes open to accept competent Court at Kottayam/ Ernakulam. Mr. Chatterjee submits that when there has been an agreement, the plaintiff must go to that chosen forum and not to come to this Court, He submits the two places were chosen knowing fully well that the disputes if arise in future, the cause of action in relation to such future action might arise either in Ernakulam or in Kottayam because the defendants'' registered office is situated at Kottayam and the goods imported were unloaded at the port of Ernakulam. According to him, these two places are the natural forum, as such the agreement is not contrary to the provisions of Section 28 of the Contract Act.

4. That apart, he submits that the plaintiff has incorrectly stated in the cause title as if both the defendants are having their places of business within the jurisdiction of this Hon''ble Court. Such fact is not at all correct. No shred of evidence has been produced before this Court nor has been annexed to the plaint to show that defendant No, 1 at least is having place of business at 75, Park Street, Kolkata.

5. He further submits that now-a-days the trend of judicial pronouncement on the question of jurisdiction regarding accrual of cause of action vis-a-vis the place of business is somewhat different from old and traditional one. Mere statement in the cause title that the defendant is carrying on business would not do and it has to be stated with specific averment that the cause of action accrued, in fact, whether partially or wholly is having nexus or relation to the branch office, as has been pleaded in the plaint. He further submits that his client has nothing to do in relation to the transaction at the place mentioned in the cause title. He further submits that there is no specific averment in the plaint that the defendant No. 1 is having place of business within the jurisdiction of this

Hon"ble Court. According to him, the entire cause of action has arisen outside the territorial limit of this Court as the goods were unloaded at Kochi and it was loaded at the port in Indonesia and the bill of lading was issued at the port in Indonesia. It is amazing how the suit could be filed in this Court choosing as natural forum in any circumstances,

6. In support of his submission, he has relied on two decisions of this Court reported in AIR 1999 Cal 112 and Smt. Smriti Jaiswal and Another Vs. Romi Jaiswal and Another, and one decision of the Supreme Court reported in Food Corporation of India Vs. M/s. Evdomen Corporation,

7. Mr. Sudipta Sarkar, learned Senior Counsel appearing with Mr. Debal Banerjee and Mr. Tilak Bose, while countering the question of jurisdiction contends that at this stage the Court is to go by the statements made in the plaint and in particular, cause title. There is no separate pleading as to the place of business of the defendant is required to be made in the Original Side. He has also drawn my attention to the portion of the verification made by affidavit, of the demurer application wherefrom it will appear that the officer concerned, as mentioned, presently is camping at 75, Park Street, Kolkata. He contends the word "camping" has been carefully chosen as aforesaid premises is neither a hotel nor a guesthouse and it must be the place of business as mentioned in the cause title. So, the factum of existence of branch office and/or place of business at 75C, Park Street, Kolkata is, by necessary implication, admitted.

8. This suit is not based on accrual of cause of action. In order to decide the question of jurisdiction, this Court is to look into the provision of Clause 12 of the Letters Patent and the Letters Patent alone and the corresponding provisions of the Code of Civil Procedure, namely 16, 20 and 21 do not have any application in this matter.

9. Whether the defendants do have any place of business in the aforesaid place is a question of fact and cannot be gone into at this interim stage. Court has to assume the statements made in the plaint to be correct as far as the question of jurisdiction is concerned.

10. The decisions cited of the Supreme Court and the law laid down therein cannot be disputed because those were rendered in peculiar facts and circumstances of those particular cases.

11. The agreement of selection of forum is, according to him, absolutely vague. Both parties can choose one of the two natural forums. They cannot choose both. It is settled law that the choice has to be made amongst the natural forum where the suit ordinarily would have been filed by any of the parties, not the place of forum where by any stretch of imagination any suit could be filed can be chosen as a forum. He contends that, as both the defendants are carrying on business also in Calcutta, so going by the language of Clause 12 of the Letters Patent this Court has jurisdiction. Moreover, at this stage without asking for any affidavit, question of jurisdiction cannot be decided, since it has become mixed question of

fact and law.

12. While pressing the interlocutory relief he submits that in the suit the challenge is against the sampling and analysis report said to have been made by the defendant No. 2. The imported goods are lying in the custody of the defendant No. 1 and they are regularly consuming such goods. In the event pending interlocutory application succeeds as well as the suit and if no sample of the goods is preserved, further analysis cannot be carried out in terms of the agreement. Moreover, preservation of the sample of the imported goods by appointing Special Officer or by any other means will not prejudice or harm either of the parties.

13. Having regard to the contention raised by the learned Counsel for both the parties, I think question of jurisdiction has to be decided before I advent to other issues right now. First, I shall deal with the question of agreement relating to forum selection clause, I have read the clause and it is set out here-under.

All disputes relating to this order between the purchaser and vendor shall be subjected to and be referred to Courts of Law situated within the Kottayam/Ernakulam.

14. Having regard to the language mentioned in the aforesaid clause, I am of the view, of course, prima facie the aforesaid clause is vague. The parties can choose either one of the two or more than two forums for adjudication of the disputes. If there be two Courts then there is no question of selection. According to me, the aforesaid clause is not applicable, prima facie, but this observation is tentative and for this ad-interim stage. It will be decided at the time of hearing after completion of affidavits, if required to be filed.

15. Now coming to the other plea that the defendant No. 1 does not have any place of business here, it has been stated on oath in the demurer application that it has no place of business, whereas the plaintiff has stated in the cause title that the defendant No. 1 does have the place of business here. When it is denied onus lies upon the plaintiff to prove it either by furnishing documentary evidence or adducing oral evidence. As such unless chance is given to the plaintiff to prove the same, this Court is not in a position to decide it finally as to whether the defendant No. 1 has got any place of business here or not. While verifying the petition of the demurer action it appears that the deponent has described himself to have been camping at 75C, Park Street, Kolkata which is exactly the address given in the cause title of the plaint. Accordingly, presumption is now that the defendant No. 1 has place of business within jurisdiction, but this presumption is prima facie. At this ad-interim stage, I hold that this Court has got territorial jurisdiction in view of the statement made in the cause title.

16. Mr. Chatterjee has cited a decision of Supreme Court on the proposition that merely having a place of business in any place will not do unless it has got a nexus with the cause of action pleaded in the plaint. The decision of the Supreme Court reported in Food Corporation of India Vs. M/s. Evdomen Corporation, was

rendered, in my view, in the context of Arbitration Act, 1940. With great respect, I think, the Hon"ble Supreme Court has not decided anything new. Rather in paragraphs 6, 7 and 8 of the said judgment it has been observed that this provision of Sections 16, 17 and 20 of the CPC is not applicable in case of Chartered High Court by virtue of Section 120 of the Civil Procedure Code. The explanation given in Section 20 really helps the argument of Mr. Chatterjee, but, unfortunately such similar language and phraseology are missing in Clause 12 of the Letters Patent. Invocation of jurisdiction of this Court in ordinary original civil jurisdiction has to be guided by the provision of Clause 12 and Clause 12 alone, and nothing else unless the Special Act provides otherwise. Even in case of an arbitration proceeding the principal Civil Court of jurisdiction is determinable in the context of the provisions under Clause 12 of the Letters Patent, If such a proceeding is required to be instituted in this Court as a principal Civil Court of jurisdiction.

17. Therefore, the case cited by Mr. Chatterjee of the Supreme Court as quoted above does not help his case nor does it apply here. My observation and finding recorded herein is also supported by the Division Bench of this Court referred to in the case of Steel Authority of India Ltd. v. Dinesh Kumar Jaiswal reported in 2002 (1) CLJ 366. Exactly this question came up before their Lordships and their Lordships were of the view as it has been mentioned in paragraph 6, that only determinative factor regarding the question of jurisdiction either territorial or otherwise is clause 12 and none else. As I already observed that at the ad interim stage, both the defendants are carrying on business within the jurisdiction of this Court, therefore, for the time being I hold for entertaining the interlocutory application filed in the suit, that this Court has jurisdiction. However, it is not final, as such the other issues are to be decided finally and for this purpose I grant interim relief to the defendant No. 1 to the extent that the suit may not be placed in the undefended list until further order of this Court.

18. While deciding the question of interlocutory relief I am to take note of the objection of Mr. Chatterjee who says that identical prayer was made in the previous application and no such relief has been granted and such application is still pending. Therefore, no order need be passed on this application.

19. I have compared the prayers of the earlier application with the present one. I agree with the submission of Mr. Sarkar that at the earlier stage prayer (c) was not made. Considering the balance of convenience I think at least sample of the stocks shall be preserved and this shall be kept apart, if for any reason the application for that prayer succeeds or the suit succeeds then further test can be carried out. If the sample is preserved no body will be prejudiced and if not and in the event the plaintiff succeeds or the decree is passed then the entire exercise will be rendered infructuous. It would be open to Mr. Chatterjee's client to consume the stock. However, a reasonable quantity of sample of each lot as required for the purpose of further sampling and test shall be kept aside. Accordingly a very responsible officer of Mr. Chatterjee's client is appointed

Special Officer for this purpose and he shall keep aside a reasonable quantity of sample as indicated above in presence and upon notice to the official of the plaintiff and this sample shall be kept in a receptacle and/or container, if possible and to be sealed and signed by the special officer and both the parties. The aforesaid preservation shall be conducted preferably within a period of fortnight from the date of communication of this order.

20. Let affidavit-in-opposition be filed in both the matters within three weeks from date; reply, if any, be filed within two weeks thereafter. Matter to appear in the monthly list of April, 2006.

21. This order is passed without prejudice to the rights and contentions of the parties.

22. Mr. Chatterjee prays for stay of operation of the aforesaid interlocutory order.

23. Considering the facts and circumstances of the case the prayer for stay is refused.

24. All parties concerned including the Special Officer are to act on a xerox signed copy of this dictated order on the usual undertaking.