(2004) 09 DEL CK 0055

In the Delhi High Court

Case No : OMP 313 of 2004

Larsen and Toubro Limited APPELLANT

Vs

Abhishek Industries Limited RESPONDENT

Date of Decision : 24-09-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 151, 20
Contract Act, 1872 — Section 28

Citation : (2004) 3 ARBLR 213 : (2004) 114 DLT 436 : (2004) 77 DRJ 633 : (2005) 4 RCR(Civil) 110

Hon'ble Judges : Ramesh Chand Jain, J

Bench : Single Bench

Advocate : A.M. Singhvi and Rahul Srivastava, Suparna Srivastava and Pankaj Singh, for the Appellant; Parag P. Tripathi and Arjun Pant and Anamika Ghai, for the Respondent

Judgement

R.C. Jain, J.—This is an application u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called as ""The Act"") read with Section 151 CPC seeking the following reliefs:

""(i) restrain the respondent either itself or through its agents, representatives and employees, from utilizing in any manner whatsoever any or all the materials, plant and machinery, equipment and tools of the petitioner listed in Annexure ""P-4"" and annexure ""P-5"" of the petition and lying at the factory premises of the respondent at Dhaula, Barnala, Punjab and/or removing the same from the said premises or disposing off or alienating the same;

(ii) appoint a receiver to take possession and control of all the materials, plant and machinery, equipment and tools of the petitioner listed in Annexure ""P-4"" and Annexure ""P-5"" of the petition, as also the documents/records/software of the petitioner and lying at the factory premises of respondent at Dhaula, Barnala, Punjab with the help of the local police;

(iii) restrain the respondent either itself or through its agents, representatives and employees, from carrying on any works whatsoever on the factory premises of the respondent at Dhaula, Barnala, Punjab by engaging any other contractor or workers or otherwise, until measurements of the works done thereon by the petitioner under the Contract dated 14.11.2003 for settlement of accounts are taken in a time-bound manner;

(iv) restrain the respondent either itself or through its agents, representatives and employees, from disposing off, transferring, encumbering or alienating in any manner whatsoever, all the movable assets including stock-in-trade and immovable assets including the property whereon the works under the Contract dated 14.11.2003 were executed by the petitioner, and lying at the factory premises of the respondent at Dhaula, Barnala, Punjab;

(v) grant ex-parte ad interim reliefs in terms of prayers (i), (ii), (iii), (iv) and (v) above;

(vi) award costs of the present petition to the petitioner against respondent.''''

2. A work Contract dated 14.11.2003 was executed between the parties at Ludhiana. The petitioner''s case is that it had executed about 85% of the work for the respondent still the contract had been illegally and arbitrarily terminated. The respondent owes several crores of rupees to the petitioner under the said Contract but the respondent has invoked and encased the bank guarantee to the tune of more than Rupees three crores executed by the petitioner in favor of the respondent. It is further alleged that the respondent is indulging in various acts of high-handedness so much so that the valuable equipments and machinery of the petitioner worth crores of rupees, which it had installed at the construction site, is still lying there and the respondent is using the same through another contractor.

3. It is the case of the petitioner that the Contract dated 14.11.2003 contains an arbitration agreement for the settlement of the disputes/differences relating to the contract through arbitration, which is contained in clause 28, which is to the following effect:

''''28.0 ARBITRATION

28.1 All disputes relating to this contract shall be referred to arbitration to be conducted in accordance with the Arbitration and Conciliation Act, 1996. The arbitration shall be conducted within 3 (three) arbitrators, one arbitrator to be nominated by each party and the third being appointed by the mutual consent of the two arbitrators appointed by the parties. The venue of arbitration shall be Barnala. Each party to the arbitration shall bear its own costs and expenses.

28.2 Excepting any disputes, differences, claims, rights or liabilities as may have been referred to arbitration, the parties shall during the period of submission and pending its adjudication continue to avail rights and perform the rest of the obligations under this contract without prejudice to the final adjudication in accordance with the said award as may be issued by such arbitrator.''''

4. The petitioner vide various communications issued to the respondent in the month of July and August, 2004 called upon the respondent to permit the petitioner to remove the machineries and equipment but the respondent resorted to threatening and coercive attitude by filing certain FIRs in the local jurisdiction where the work was being executed.

5. Mr. Prag Tripathi, learned senior counsel appearing for the caveator/ respondent opposed the very maintainability of the present petition before this Court primarily on the ground that this Court has no territorial jurisdiction to entertain the petition.

In this connection, he has invited the attention of the Court to clause 29 of the contract dated 14.11.2003 in regard to the jurisdiction. The said clause is to the following effect:

''''29. It is expressly agreed that this contract shall be governed by the laws of India and any dispute, difference or claim which may arise between the AIL and the contract or in connection with the performance of this contract or the rights and obligations of the parties hereto shall be only under the jurisdiction of the law courts of the city of Barnala.''''

6. On the strength of the above clause of the contract, Mr.Tripathi contended that the parties have taken a conscious decision to confine the jurisdiction of any matter only to the law courts of the city of Barnala and, Therefore, that Court alone has the jurisdiction to entertain and try the present petition or any other legal proceedings. He also submitted that the respondent herein has already filed a civil suit, which is pending before a Civil Court of Barnala, wherein certain ad-interim orders have been passed relating to the subject matter of the present petition and for this reason also this Court would not like to proceed with the present petition.

7. Dr. Singhvi, learned senior counsel for the petitioner has not disputed the existence of this clause but his submission is that despite clause 29 of the contract, this Court can entertain the present petition; firstly, because the respondent has a sub-branch/sub-office in Delhi and part of cause of action has arisen in Delhi as most of the payments were received by the petitioner at Delhi and several meetings between the representatives of the petitioner and the respondent have taken place at Delhi. In this connection he has referred to the Explanation appearing below Section 20 CPC which states that ''''a corporation shall be deemed to carry on business at its sole or principal office in (India) or, in respect of any cause of action arising at any place here it has also a subordinate office, at such place.'''' Though the respondent has denied the existence of a subordinate office in Delhi, but assuming for the sake of argument that one such office exists, the question would be as to whether a cause of act on or part of cause of action can be said to have arisen in Delhi. In the opinion of this Court, having regard to the narration of facts and circumstances and the clause relating

to cause of action and jurisdiction contained in clause 29 of the contract it is not possible to hold that any part of cause of action in the present petition has arisen within the jurisdiction of this Court. As per the petitioner''s own showing, the respondent has indulged in various unlawful acts at the work site at Barnala.

Besides, a suit filed by the respondent touching the subject matter of this petition at an earlier point of time is pending at Barnala.

8. The next submission of Dr. Singhvi, learned senior counsel for the petitioner is that there exist special and extra ordinary circumstances in the present case which entitles the petitioner to file the present petition before this Court. According to him, the respondent is indulging in various overt and illegal acts of coercion and intimidation and has unlawfully withheld the machinery and equipment of the petitioner worth crores of rupees and they are putting the same into use unauthorizedly. It was contended that the petitioner, in the circumstances, is apprehensive of even going to Barnala to seek redressal of his grievance and pursuing his legal remedies. In support of his contention he sought support from the two decisions; one of Gujarat High Court in the case of M/s Snehalkumar Sarabhai Vs. M/s Economic Transport Organisation and others AIR 1975 72. In that case the said High Court on the face of the peculiar facts and circumstances of the case re-affirmed the settled legal position that white parties can lawfully enter into an agreement to restrict a dispute to a particular court having jurisdiction but held that the stipulation though valid, cannot take away the jurisdiction of the court which admittedly has jurisdiction. The Court further ruled out that such a stipulation may be legal and binding to the parties but that does not mean that it divests the Court of its jurisdiction. It also lays down that the plaintiff cannot insist that a Court, other than the stipulated Court, should try the suit. Reliance is also placed on a decision of the Orissa High Court in the case of Indian Rare Earths Ltd. and Others Vs. Unique Builders Ltd., . In this case it was held that where two or more courts have jurisdiction under the CPC to try a suit or proceedings, an agreement between the parties that the dispute between them shall be tried in one of such courts, is not contrary to public policy nor does it contravenes Section 28 of the Contract Act. Further that the choice of the forum made by the parties by an agreement shall ordinarily be respected. The Court went on to say that this, however, does not mean that the Courts other than the one chosen by the parties would have no jurisdiction to entertain he suit or the proceedings. This was based on the legal position that parties cannot by agreement conifer jurisdiction not inherently possessed by it just as the parties could not by such agreement take away the jurisdiction of the court which is otherwise vested in it. After surveying a large number of decisions, the court held that the acceptable principle is that though the parties are bound by the terms of the contract choosing one of the courts having jurisdiction to be the proper forum but the Court whose jurisdiction has been ousted by the terms of the agreement can still exercise jurisdiction, in the event the said Court after taking into consideration the entire facts and circumstances of the case is of the opinion that the said stipulation is unfair, unjust, inequitable or oppressive

ignoring the said stipulations and relieve the parties from the operation thereof.

9. Dr. Singhvi has vehemently urged that the present case is one which shows that the stipulation in regard to the restriction of jurisdiction in clause 29 is oppressive and is operating harshly against the petitioner because of the high-handed attitude of the respondent. This Court is not persuaded to accept this argument because it is impossible to come to such a conclusion that the stipulation is unfair, unjust, inequitable or oppressive and this Court should ignore the said stipulation for any of those reasons. In the case in hand, the parties have consciously chosen the forum of Barnala courts for the redressal of their grievances in relation to the contract in question. The Court set up at Barnala by the State must be functioning in accordance with law and are competent to redress the grievance of the parties and provide relief in accordance with law. Not only this, a civil suit filed by the respondent prior in time within the jurisdiction of competent court of Barnala is pending. On the face of this position, it would be wholly unjust and rather improper for this Court to entertain the present petition. Doing so will set-up an unhealthy precedent and practice.

10. In view of the foregoing discussion, this Court has no hesitation in holding that the present petition is not maintainable before this Court as this Court lacks the requisite territorial jurisdiction. The petition is, as such, dismissed. The petitioner may, however, pursue his remedy before the Court of competent jurisdiction, if so advised.

