

(1996) 09 MAD CK 0012

In the Madras High Court

Case No : O.S.A. No's. 212 to 218 of 1996 and C.M.P. No's. 11933 to 11935 of 1996

Larson and Toubro Ltd., ECC Construction Group, P. O. Box
No. 979, Manapakkam, Madras 600 089

APPELLANT

Vs

Kerala State Co-operative Hospital Complex and Centre for
Advanced Medical Services Limited, Bank of Baroda, State
Bank of India and Citibank

RESPONDENT

Date of Decision : 18-09-1996

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 2(e), 8, 8(1), 9, 9(ii)(d)

Civil Procedure Code, 1908 (CPC) — Section 120, 20

Citation : (1996) 09 MAD CK 0012

Hon'ble Judges : P. Sathasivam, J; Abdul Hadi, J

Bench : Division Bench

Advocate : K. Ravi for Mrs. Malini Ganesh, for the Appellant; C. Rajan for 1st respondent and Mr. S. Vijayakumar for 3rd respondent, for the Respondent

Final Decision : Dismissed

Judgement

Abdul Hadi, J.—The common applicant in O.A. Nos. 452 to 457 of 1996 and 50 of 1996 has preferred these Original Side Appeals

against the common order dated 26-8-1996 in the said Original Applications, whereby, interim orders granted on 19-7-1996 have been vacated

on the ground that this Court has no jurisdiction to try the said Original Application filed u/s 9 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as "the Act"), which (Act) repealed the earlier Arbitration Act, 1940 (Central Act 10 of 1940) and came into force on 25-

1-1996. As per Section 9(ii)(d) and (e) of the Act, under which clauses alone these Original Applications are said to have been filed, a party may

even ""before"" arbitral proceedings, apply to a ""Court"" for interim injunction or such other interim measure of protection as may appear to the Court

to be just and convenient. The term ""Court"" referred to in the said Section 9, as per Section 2(e) of the Act inter alia, includes ""the High Court in

exercise of its Ordinary Original Civil Jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the

same had been the subject-matter of a suit....."". Further, as per clause 12 of the Letters Patent (which may be relied on, alone would apply in the

present case and not Section 20, C.P.C. in view of Sec. 120 C.P.C., even if a part of the cause of action for a suit has arisen within the Original

Jurisdiction of this Court, the said suit, if leave of this Court is obtained, can be filed in this court.

2. The impugned order, apart from vacating the injunction as stated above, directs return of the above said Original Applications to the applicant

on the ground that this Court has no jurisdiction to try them. The impugned order has further directed the applicant to pay a sum of Rs. 15,000/- as

exemplary costs to the respondents.

3. So, the only question to be gone into in these Original Side Appeals is whether the decision of the learned trial Judge that this Court has no

jurisdiction to try those applications, is correct.

4. The appellant is a party to a contract with the 1st respondent-Hospital in Periyaram in Kannur District, Kerala State, under which it has to put

up certain buildings in the said Kannur District, Kerala. The value of the contract is said to be 58.86 crores. Though the formal contract was

entered into between the said parties on 21-12-1994, it is not in dispute that the said contract was concluded earlier by correspondence between

the parties, and that the letter of acceptance by the 1st respondent, addressed to the appellant, accepting the offer made by the appellant for

putting up the said construction was posted from the above said Kannur District to the appellant at Manapakkam, Madras 600 089. It appears

that the contract was to have been completed in 16 months, but that the contractor (appellant) has also been given 8 months extension of time for

completing the work and that the work is still incomplete. It also appears that according to the contractor, there have been delays on the part of the

1st respondent in paying the bills, supplying steel and cement, etc. It also

appears that the contractor has removed most of its materials from the site and sought to withdraw from the contract. The 1st respondent has subsequently on 28-6-1996 issued a notice to the contractor to show cause why the contract should not be terminated on the ground that the contractor had failed to complete the work and committed breach of contract.

The bank guarantees furnished by the contractor for a total sum of Rs. 6.14 crores were also sought to be invoked by the 1st respondent. At that stage, these Original Applications came to be filed, as the contract between the parties contains an arbitration clause.

5. The 2nd respondent-bank, of Madras 600 089-branch, has furnished four of the above said bank guarantees, one dated 10-12-1994 for Rs.

1,22,15,200/- another dated 28-12-1995 for Rs. 75 lakhs, another dated 20-12-1994 for Rs. 75 lakhs and yet another dated 20-12-1994 for

Rs. 69,30,400/-, subsequently reduced to Rs. 47,76,935/-. The branch at Guindy, Madras 600 032 of the 3rd respondent-bank has furnished the

bank guarantee dated 28-12-1995 for Rs. 85 lakhs. The Bombay branch of the 4th respondent-bank has furnished bank guarantee dated

22.3.1996 for Rs. 2,09,78,068/-.

6. Now, it is also not in dispute that the above said formal contract was signed at Tiruvananthapuram, Kerala State, though, learned counsel for the

appellant before the learned trial judge, initially maintained that the said contract was signed at Madras and later only admitted that it was executed

at Tiruvananthapuram.

7. The reasoning of the learned trial Judge may be gathered from the following passages in the impugned order:-

Learned counsel contended..... that even if a part of cause of action arises within the Ordinary Original Jurisdiction of this Court, a party to an

arbitration agreement can invoke the jurisdiction of this Court..... This Judgment (A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies,

Salem, sets out the law in the most unambiguous terms that the place where the contract is made, and the place of performance are the places at

which the suit or other action is to be brought when the suit is on the contract..... Even according the applicant, the letter of acceptance was

posted as Kerala before the formal agreement was signed and thereafter, a formal contract was signed.... On the facts of this case, it is clear that

no part of cause of action has arisen at Madras and the applicant has wrongly invoked the jurisdiction of this Court..... While directing the return of the application, I must record my strong disapproval of the manner in which the applicant invoked that jurisdiction of this Court by wrongly stating that the contract has been executed at Madras even when he had not been (so executed). Counsel for the applicant at the time of seeking an ex parte order of injunction as also throughout the final hearing on the application and till the respondent produced the copy of the brochures issued by the applicant. Relevant parties which has been extracted in para 1 above maintained that the execution was at Madras even when the applicant and presumably its counsel know full well that it was not so. These applications would have been rejected at the threshold had the fact of execution at contract at Tiruvananthapuram been stated at the outset. The applicant has misled the Court to obtain an ex parte order which has had the effect of denying the respondent for over a month, Rs. 6.14 crore Applicant which is said to be multinational company and has executed large number of contracts of high value, should have shown a much higher degree of responsibility when approaching the High Court in its original jurisdiction. I consider it appropriate to direct the applicant to pay a sum of Rs. 15,000/- (Rs. Fifteen thousand) as exemplary costs to the respondent.

8. Learned counsel for the appellant initially submits that since the above said acceptance letter by the 1st respondent to the applicant was received at Madras, this Court will have jurisdiction to try the above said applications. But, this contention cannot be accepted for various reasons. The contract is concluded by the above said letter as against the applicant-offered, once the said letter is posted by the 1st respondent at the above said Kerala address of the 1st respondent. The law is, the contract by correspondence is made at the place where the letter of acceptance is posted so far as the offered is concerned. (Vide *Manilal and Others Vs. M.P. Venkatachalapathi Iyer (deceased) and Others*, and *G. Venkatesha Bhat and Others Vs. Kamalapat Motilal and Others*, The following observation in *G. Venkatesha Bhat and Others Vs. Kamalapat Motilal and Others*,) is significant:-

A contract by correspondence is made at the place where the letter of

acceptance is posted; and it is repudiated at the place where the letter is received. The communication of the acceptance of the proposal only affects the coming into force of the contract and not the place of making the contract

(Emphasis supplied)

So, in the present case, the contract is concluded only in Kerala, outside the jurisdiction of this Court. No doubt, learned counsel for the appellant

relies on the following observation in the above referred to A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,

Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated.

But, it must be noted that the above said expression ""the acceptance was communicated"" would only mean, in the case of contract by correspondence, ""acceptance was posted or sent"".

8A. That apart, it must also be noted that the above said acceptance letter was received by the applicant only at its above said office at

Manapakkam, Madras 600 089, which is obviously outside the Original Side Jurisdiction of this Court.

8B. Further, the succeeding observation of the Supreme Court in the above said decision itself runs as follows:-

The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract

should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the

contract is. to be filed there and nowhere else.

In the present case, the contract has to be performed only in Kerala. Further, in Baroda Oil Cakes Traders Vs. Parshottam Narayandas Bagulia

and Another, Gajendragadkar J., (as he then was) and Vyas, J., held that a contract is complete when it is accepted and the, communication

thereof is not part of the cause of action.

9. We may also point out here that though Clause 12 of the Letters Patent, on its terms, would only apply to ""suits"", the principles therein may be

applied to the present Original Applications also.

10. Learned counsel for the appellant also relies on Order 7, Rule 10A(1), C.P.C., which runs as follows:-

Where in any suit, after the defendant has appeared, the Court is opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

According to the said learned counsel, even before giving such intimation, the impugned order has been passed. But, this contention has no merit

since, first of all, the said Rule will apply only to suits and not to such application u/s 9 of the Act. That apart, Order 7, Rule 10 , C.P.C., which is

subject to the above said Rule 10A, is stated to be not applicable to this Court in the exercise of its Ordinary Original Jurisdiction, as per Order

49, Rule 3, C.P.C. On that footing it was also argued by the learned counsel for the 1st respondent that Order 49, Rule 3, would cover even

Order 7, Rule 10A, C.P.C. In our view, since both Rule 10 and Rule 10A are to be read together it is clear to us that 10A, C.P.C. will not apply

to the Original Side of this Court.

11. Learned counsel for the appellant also argues that these applications only relate to said bank guarantees, since they in essence seek to prevent

the encashment of the above said bank guarantees. According to him, one of those bank guarantees, viz., the bank guarantee furnished by the 3rd

respondent-bank (Guindy branch) was furnished at Madras (i.e. Guindy) and so this Court will have jurisdiction. This contention also, according to

us, has no merit. First of all, the fundamental or material cause of action for filing the above said applications in July, 1996 is that the 1st respondent

issued the above said show cause notice dated 28-6-1996 asking the applicant to show cause why the above said contract should not be

terminated. (We also understand from both the counsel that the 1st respondent has also subsequently terminated the contract). If according to the

applicant, the above said show cause notice is not proper on the ground that the 1st respondent alone has committed breach of contract and not

the applicant, a suit by the applicant regarding the same could not be tried on the Original Side of this Court since the show cause notice was

issued in Kerala State and received by the applicant at the abovesaid Manapakkam, which is also outside the Original Side Jurisdiction of this

Court. Looking at the above said Section 2(e) of the Act, where the expression,

""having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit"" has been used, we are of the view that the above said applications u/s 9 of the Act also, cannot be filed in this Court. Further, even as per the supporting affidavit to these applications the applicant says that these applications are not in the nature of a suit and that hence the leave required under clause 12 of the Letters Patent, is not required.

12. That apart, admittedly all the above referred to bank guarantees other than the above said bank guarantee furnished by the Guindy branch of the 3rd respondent, have been furnished only by the relevant branches of banks, which are situated outside the jurisdiction of this Court. Further, it is not in dispute that the bank guarantee furnished by the 3rd respondent bank (Guindy branch) had already been encased and so the Original Applications in relation to that bank guarantee, would have become infructuous; and hence there is no case for our interference at this appellate stage.

13. Learned counsel for the appellant also argues that the above said applications have been filed inter alia, on the ground that the said bank guarantees have not been sought to be enforced as per the very terms of the bank guaranteed since the alleged loss of the 1st respondent due to the alleged breach of contract committed by the applicant has not been quantified at all. The contention also has no merit since no such specific plea has been taken in the affidavit support of the Original Applications (and also in the present grounds to these Original Side Appeals). What learned counsel points out that paragraphs 14 and 16 of the said affidavit does not bring out this aspect specifically and in the manner in which it is put before us now.

14. Learned counsel for the appellant also sought to submit that Section 8 of the Act would come to appellant's rescue, on the ground that the appellant had already filed Application (O.A. No. 3226 of 1996) for referring the above said dispute for arbitration. No doubt Section 8(1) says thus:-

A judicial authority before which an action brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer

the parties that arbitration.

(Emphasis supplied)

Learned counsel for the appellant points out that Section 8(1) does not speak of "Courts but only a judicial authority. But, it is clear to be that this

Section 8. which is somewhat similar to Section 34 of the old Act (Arbitration Act, 1940) would not at all support the above said contention.

Further, in our opinion, the expression, ""before which an action is brought used in Section 8(1) should normally be read only as ""before which an

action is validly brought That apart, it is clear to us that the above said O.A. No. 3226 of 1996 which itself is said to pray for reference to

arbitration would not come under the term ""action"" spoken to in Section 8(1) It must also be stated that no such ground has been taken in the

Memorandum of Grounds of these appeals.

15. Finally, learned counsel for the appellants submits that the learned trial Judge has erred in granting exemplary costs of Rs. 15,000/-. But, we

find that the reasons given by the learned trial judge which we have extracted in Paragraph 8 above for awarding such exemplary costs are sound

and there is no case for any interference, in this regard also. In the result, all the Original Side Appeals are not admitted, but dismissed. No costs.

Consequently C.M.P. Nos. 11933 to 11935 of 1996 are dismissed.