
(2011) 03 CAL CK 0036
In the Calcutta High Court
Case No : A.P.O. No. 56 of 2010

Magma Fincorp Ltd.

APPELLANT

Vs

AHK Earth Movers and Financial Services and Others

RESPONDENT

Date of Decision : 21-03-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 4, 9
Civil Procedure Code, 1908 (CPC) — Section 20

Citation : AIR 2011 Cal 152 : (2011) 3 CHN 28

Hon'ble Judges : Shukla Kabir (Sinha), J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Pratap Chatterjee, U. Bose, Samrat Sen, Mainak Bose, P. Sinha and K.K. Pandey, for the Appellant;

Final Decision : Allowed

Judgement

Pinaki Chandra Ghose, J.—The instant appeal has been directed against a judgment and/or order dated 22nd December 2009 when the Hon''ble Single Judge has refused to grant leave under Clause 12 of the Letters Patent, 1865 in connection with an application filed by the appellant under the provision of Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "said Act").

2. The only question involved in this appeal is whether in the facts and circumstances of this case pleaded in the petition filed by the appellant before the Hon''ble First Court, the appellant was entitled to grant of leave under Clause 12 of the Letters Patent?

3. From the facts it appears that at the time of presentation of an application u/s 9 of the said Act the Hon''ble single Judge was pleased to dismiss the application at the time of presentation of the said application when the appellant was seeking leave under Clause 12 of the Letters Patent. It is a fact which has been stated on behalf of the appellant that the averments made by the appellant in the application have not been controverted or refuted by the respondents by

filing an affidavit on the date of the presentation of the petition u/s 9 of the said Act.

4. It is pleaded in the said application that a part of the cause of action for institution of the proceeding had arisen within the Ordinary Original Civil Jurisdiction of this Hon''ble Court and accordingly the petitioner/ appellant herein is entitled to leave under Clause 12 of the Letters Patent.

5. For the sake of convenience, the pleadings contained in paragraphs 3, 4, 5, 11 and 13 of the petition on the basis of which the leave has been prayed by the appellant are reproduced below :-

3. The respondent No. 1 through its partner approached your petitioner at its registered office at 24, Park Street, Kolkata -700 016 within the jurisdiction of this Hon''ble Court for the purpose of taking on hire an EXCAVATOR/VOLVO EC-210 bearing Engine No. 10598422 and Chasis No. 23425 (hereinafter referred to as the "said equipment") for use in its business. The equipment is morefully and particularly described in the Schedule and annexed hereto and marked with the letter "B".

4. On or about 25th July, 2008 an agreement of Hire Purchase (hereinafter referred to as the "said agreement") was entered into by and between your petitioner (hereinafter referred to as the "Magma") of the First Part; the respondent Nos. 1 and 2 (hereinafter referred to as "the Hirer" and "Co-Hirer") respectively of the Second Part and the respondent No. 3 (hereinafter referred to as "the Guarantor") of the Third Part. The said agreement was accepted, signed and concluded at the office of your petitioner at 24. Park Street. Kolkata - 700 016 within the jurisdiction aforesaid. A copy of the said agreement is annexed hereto and marked with the letter "C".

5. By and under the said agreement the respondents agreed to make payment of the total hire purchase price of Rs. 64,18,675/- by way of 35 (thirty five) monthly instalments @ Rs. 1,83,391/- each except the last instalment of Rs. 1,83,381/- commencing on or about 01-08-2008 and becoming payable on or before the 1st day of every succeeding English Calendar month.

Such payment were to be made at the office of your petitioner within the said jurisdiction.

11. In the circumstances having no alternative by a Notice dated 16-04-2009 your petitioner terminated the said agreement and demanded payment of the sum of Rs 56,21,082/- then due as well as recovery of the said equipment. The said notice was issued by the petitioner from its office at 24. Park Street. Kolkata - 700 016. within the jurisdiction aforesaid by speed post with acknowledgment due. The respondents have notice and knowledge of the said notice. Subsequently the said notice was corrected by a letter dated July 6, 2009.

A copy of the said Notice dated April 16, 2009 and letter dated July 9, 2009 are correctively annexed hereto and marked with the letter "D".

13. The aforesaid sums are payable by the respondent Nos. 1 and 2 and/or the respondents and each of them at the registered office of your petitioner at 24, Park Street, Kolkata - 700 016 within the jurisdiction aforesaid.

(Emphasis added)

6. It is further stated in paragraph 54 of the said petition which is also reproduced hereunder: -

54. The said agreement was executed and concluded at the registered office of your petitioner at 24, Park Street, Calcutta - 700 016 within the aforesaid jurisdiction. The said agreement was to be performed by the respondents at the aforesaid office of your petitioner within the foresaid jurisdiction. The said agreement was terminated from within the said jurisdiction. Pursuant thereto the respondents become bound and obliged to comply with the requisition contained in the Notice of Termination. The respondents have failed and neglected to handover the possession from outside the said jurisdiction. The Agreement of Hire dated 25th July, 2008 between the parties also contains a Forum Selection clause whereunder Courts at Calcutta have exclusive jurisdiction to entertain the matters arising therefrom. The subject matter of reference is for in excess of Rs. 10 lakhs and the Hon"ble High Court at Calcutta has and the City Civil Court at Calcutta does not have jurisdiction to receive, try or determine this petition. This Hon"ble Court has jurisdiction to decide the question forming the subject matter of arbitration had the same been the subject matter of the suit. However as and by way of abundant precaution inasmuch as a part of the cause of action as pleaded by your petitioner in paragraphs 3,4,5,11 and 13 arose within the aforesaid jurisdiction of this Hon"ble Court and part pleaded in paragraphs 16, 19 and 20 outside the aforesaid jurisdiction, your petitioner prays for leave under Clause 12 of the Letters Patent to initiate this proceeding in this Hon"ble Court.

7. Mr. Pratap Chatterjee, Learned Senior Advocate, appearing on behalf of the appellant contended that the grant of leave under Clause 12 of the Letters Patent is imperative in view of the judgment of a Division Bench of this Hon"ble Court in Tobu Enterprises Pvt. Ltd. Vs. Camco Industries Ltd., . He also submitted that it is no longer res integra that where the respondent does not, at the time of commencement of the reference, dwell or carry on business or personally work for gain within the local limits of the Ordinary Original Civil Jurisdiction of this Hon"ble Court and the application under Part I of the said Act can be filed only after obtaining leave under Clause 12 of the Letters Patent.

8. He further contended that it is well settled that "cause of action" consists of bundle of facts which give cause to enforce the legal injury rights for redress in a court of law. The cause of action means every fact, which if traversed, would be necessary for the appellant to prove in order to support his right to an award. Even an infinitesimal fraction of a cause of action will be part of the cause of action and confer jurisdiction on the Court i.e. within the territorial jurisdiction of a Court. At this stage, the Court is not required to make inquiry as to the

correctness or otherwise of the facts pleaded by the appellant in the petition. In support of his submission he relied upon the following decisions :-

- i) Navinchandra N. Majithia Vs. State of Maharashtra and Others,
- ii) South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others,
- iii) A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,

9. From the aforesaid pleadings made by the appellant it is submitted that a substantial part of the appellant's cause of action, has arisen within the Ordinary Original Civil Jurisdiction of this Court.

10. He further submitted that for the purpose of considering whether leave under Clause 12 of the Letters Patent is to be granted, the assertions in the pleadings must be assumed to be true. The aforesaid proposition stands clearly established from the catena of judgments of the Supreme Court. In support of his submission he relied upon the following decisions:-

- i) Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others,
- ii) Indian Mineral and Chemicals Co. and Others Vs. Deutsche Bank,

11. He further submitted that the respondents despite having been represented at the time of hearing merely prayed for adjournment but did not seek to allege that the pleadings are incorrect or that this Hon''ble Court did not have jurisdiction.

12. He also pointed out that in paragraph 4 of the petition it has been stated that the agreement was accepted, signed and concluded at 24, Park Street, Kolkata-700 016 within the jurisdiction of this Hon''ble High Court. According to him, the execution of the agreement forms a very significant part of the appellant's cause of action in a matter relating to the non-performance and non-fulfillment by the respondents of their contractual obligations.

13. He further drew our attention to a decision in the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, where the Supreme Court held as follows:-

In the matter of a contract mere may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of, its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. 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. 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... Part of cause of action arises where money is expressly or impliedly payable under a contract... The above are some of the connecting factors.

14. He also drew our attention to the judgment of the Hon"ble single Judge and submitted that the Trial Court is proceeded to surmise that the use of expression "accepted" purportedly leads to a legitimate inference that "the agreement was executed somewhere else and thereafter that document came to Kolkata and something might have been done by the petitioner in its office at Kolkata, which is a mere clerical job, for the records of the petitioner which according to him amounted acceptance of the agreement".

15. According to him, this is nothing but mere speculation. Such speculation and conjecture are impermissible in considering whether Leave under Clause 12 of the Letters Patent may be granted, particularly when the averments in Paragraphs 4 and 54 are clear. Moreover, he submitted that this speculation de hors and is contrary to the pleadings. He further submitted that in A.B.C. Laminart Pvt. Ltd. (supra) the Hon"ble Supreme Court has made it clear that the acceptance of an offer and its intimation results in a contract and an action can be instituted in a Court within whose jurisdiction the acceptance is communicated.

16. He further pointed out that the said agreement dated 25th July, 2008 annexed to the said petition and has been made a part thereof. Inasmuch as the aforesaid document has been annexed to the pleadings as a part thereof, the same is deemed to be incorporated in the said pleadings as an integral part of the cause of action and such pleadings can be relied on for the purpose of considering the terms and conditions thereof. The agreement provides that the same has been made "at Kolkata". From the non-judicial stamps affixed to the agreement it is clear that the stamp duty too was paid in Kolkata.

17. The conclusions of the Hon"ble First Court with regard to the pleadings contained in paragraph 4 of the application are thus not sustainable.

18. He further contended that the pleadings contained in paragraph 5 of the application demonstrate that a part of the cause of action had arisen within the jurisdiction of this Hon"ble Court. In these circumstances, he submitted that the conclusion of the Hon"ble First Court is not sustainable in the eye of law. No inference can be drawn from paragraph 9 of the said petition as made by the Hon"ble single Judge.

19. He also contended that common law principle in that regard is that "debtor must seek his creditor" and payments must be made at the registered office of the appellant at 24, Park Street, Kolkata - 700 016 within the jurisdiction of this

Hon"ble Court. In support of his contention he relied upon the following decisions:-

- i) Mahaluxmi Bank Ltd. Vs. Chotanagpur Industrial and Commercial Association,
- ii) Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others,
- iii S.P. Consolidated Engineering Co. (P) Ltd. Vs. Union of India (UOI) and Another,

20. He further drew our attention to Section 4 of the said Act and submitted that notice of termination was issued within the jurisdiction of this Hon"ble Court.

21. He also drew our attention to "Clause 23" of the agreement i.e. "Jurisdiction" where it has been specifically stated that Courts in Kolkata alone shall have jurisdiction for the purpose of the Agreement. Therefore, the document shows that the appellant has no other alternative and is bound to institute the instant proceedings in this Hon"ble Court. In support of his submission he relied upon the following decisions:-

- i) Hakam Sing Vs. Gammon (India) Ltd.,
- ii) AIR 2002 2402 (SC)
- iii) M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another,
- iv) Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.,
- v) Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd., SCW 607.

22. He further submitted that The Hon"ble First Court, in the impugned judgment, has referred to the discretionary power of Court to grant or revoke leave under Clause 12 of the Letters Patent. It is respectfully submitted that no case has been made out and no grounds have been indicated in the impugned judgment as to why the discretion should be exercised against the appellant. The question of exercise of discretion would arise if the respondent applies for vacating at some stage the leave granted by the Court. Having regard to the question of the balance of convenience, the onus lies on the defendant i.e. the respondents in the instant case to make out a case. Reliance was placed on the judgment of State of Punjab Vs. A.K. Raha (Engineers) Ltd., . It is also well settled that an application seeking such revocation must be made at the earliest and if there is difficult question of law or facts are involved, then the matter can only be decided at the time of trial and not on a summary application. Reliance was placed on the judgment of The Secretary of State for India in Council v. Golabrai Paliram reported in (1931) 35 CWN 930 and Himmatsingka Timber Ltd. v. Narendranath reported in (1947) 50 CWN 624.

23. Mr. Chatterjee, submitted that grant of leave is normal and it is only in the most exceptional cases that grant of leave may be refused or leave already granted may be revoked. The question of balance of convenience might be a relevant issue, if at all, but that too would only to be considered if the

respondents seek revocation of leave under Clause 12 of the Letters Patent. However, at the threshold of the proceedings there is no reason to refuse leave under Clause 12 of the Letters Patent. Moreover, balance of convenience is not decisive. A plaintiff has the right to choose his forum as held in the judgment of *Ratan Kumar Bhar Pilia v. Laxmi Devi* reported in 1985(1) CHN 21.

24. Mr. Chatterjee further submitted that in the instant case, there can be no doubt whatsoever that it would be more efficacious for the Court proceedings to be in Kolkata rather than in any other city, since Clause 22 of the said agreement, (arbitration clause), expressly provides that the place of arbitration shall be at Kolkata. The parties have expressly agreed that the venue and/or sites of the sittings in connection with the arbitration shall be in Kolkata. Thus, the trial would be held before the agreed domestic forum in Kolkata. Therefore, there is substantial logic in vesting jurisdiction to Courts in Kolkata. The entire arbitral process would be conducted in Kolkata itself. Therefore, the balance of convenience lies in favour of the appellant to grant of leave under Clause 12 of the Letters Patent by this Hon"ble Court. The balance of convenience is overwhelmingly in favour of this Hon"ble Court exercising its jurisdiction in granting such leave.

25. The matter can also be looked into from the appellant's perspective. The plaintiff/appellant has the right to choose his forum. The appellant is "Dominus Litis". The carriage of the proceeding is with the plaintiff i.e. the appellant. In *Dhannalal Vs. Kalawatibai and Others*, the Hon"ble Supreme Court held as follows:

the plaintiff is dominus litis, that is, master of, or having dominion over, the case. He is the person who has carried and control of an action. In case of conflict of jurisdiction the choice ought lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law.

26. In these circumstances, he submitted that the impugned judgment and order dated 22nd December, 2009 may be set aside and leave should be granted by this Court and direction should be given that the matter may be placed before the Court for hearing.

27. After hearing the submissions on behalf of the appellant and after scrutinizing the pleadings made in the petition, in our considered opinion, the Court shall only decide the issue that whether Leave under Clause 12 should be granted or not at the time of presentation of the petition and/or a plaint. At that point of time, the Court would only proceed holding that the statements made in the plaint or petition are true and correct. In the given facts, it appears to us that the appellant has specifically submitted in the pleadings that part of the cause of actions have arisen within the jurisdiction of the Court. Therefore, in our considered opinion, the leave has been prayed for on the basis of the pleadings

made in paragraphs 3,4,5,11,13 and paragraph 54 of the petition.

28. We have noticed that in the case of Navinchandra N. Majithia Vs. State of Maharashtra and Others, where the Supreme Court held as follows:-

Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action wholly or in part arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the Courts. As per the section the suit could be instituted in a Court within the legal limits of whose jurisdiction the "cause of action wholly or in part arises". Judicial pronouncements have accorded almost a uniform interpretation to the said compendious expression even prior to the Fifteenth Amendment of the Constitution as to mean "the bundle of facts which it would be necessary for the" plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.

29. We have specifically scrutinized the averments made in the petition and from the pleadings it appears that contract was concluded between the parties at 24, Park Street, Kolkata, i.e. within the jurisdiction of this Court. Therefore, prima facie we hold that this Court should grant leave under Clause 12 of the Letters Patent.

30. After analyzing the decisions cited before us at the bar, we have to hold that the part of the cause of action arises within the jurisdiction of this Court. We have duly considered the judgment of the Division Bench of this Court in "Tobu Enterprises Pvt. Ltd. v. Cameo Industries Ltd. (supra)" and following the said decision we must come to the conclusion that an appeal against an order under Clause 12 of the Letters Patent refusing leave under Clause 12 to file an application is maintainable. The Court held that if the cause of action arises in part only within Ordinary Original Civil Jurisdiction of the High Court then an application under the Arbitration Act can be filed in the High Court after obtaining leave under Clause 12 of the Letters Patent. In other words, the Court held that leave under Clause 12 is imperative.

31. After considering the decisions and scrutinizing the same it appears to us that cause of action consists of bundle of facts which give right to enforce the legal injury for redress in a Court of law. The Cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove its fact in order to support his right to a judgment of the Court.

32. In the case of A.B.C. Laminart Pvt. Ltd. (Supra) the Court held that in a suit for damages a cause of action arises for breach of contract and the making of the contract is a part of the cause of action and a suit on such contract can, therefore, be filed at the place where it was made.

33. In the given facts, we are satisfied that part of the cause of action arises

within the jurisdiction of this Hon"ble Court and the Court has jurisdiction to entertain and try the application. Accordingly we hold that Hon"ble single Judge should have accepted the principle that at the time of institution of the suit or application the Court should accept that the statements made in the plaint/application are true, until such averment is questioned the Court will proceed on the basis of the averments. It appears to us that the said principle has escaped from the mind of His Lordship. It is also appeared that His Lordship also failed to consider that the contract was concluded at 24, Park Street, Kolkata, i.e. within the jurisdiction of this Court. The arbitration clause has specifically stated that the venue of the arbitration tribunal would be at Kolkata. Therefore, balance of convenience at this stage lies in favour of the appellant.

34. In these circumstances we find that the submissions made by Mr. Chatterjee have substance and we accept the reasoning given by him.

35. Accordingly, we grant leave under Clause 12 of the Letters Patent in favour of the appellant to institute this application. The appellant should be at liberty to take steps accordingly.

36. For the reasons stated hereinabove, we set aside the impugned order and allow this appeal.

37. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

Shukla Kabir Sinha, J.

38. I agree.