

(2008) 09 MAD CK 0181

In the Madras High Court

Case No : O.P. No"s. 704 and 711 of 2007

M/s. Kone Elevator India Pvt. Ltd.

APPELLANT

Vs

M/s. Indo Pacific Software and Entertainment Ltd.

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(11), 11(12)(b), 2, 2(1)(e)
Civil Procedure Code, 1908 (CPC) — Section 120, 16, 17, 20
Contract Act, 1872 — Section 28

Citation : (2008) 09 MAD CK 0181

Hon'ble Judges : A.K. Ganguly, C.J

Bench : Single Bench

Advocate : R. Murari, for the Appellant; Karthik Seshadri for M/s. Iyer and Thomas, for the Respondent

Judgement

A.K. Ganguly, C.J.—These two original petitions u/s 11 of the Arbitration and Conciliation Act, 1996 were filed by the petitioner in O.P. Nos. 704 and 711 of 2007 praying for the appointment of an arbitrator for resolving the disputes and differences between the petitioner and the respondent in respect of the two contracts entered into between them. O.P. No. 704 of 2007 was presented on 18.08.2007 and O.P. No. 711 of 2007 on 27.08.2007, and were heard together, as common issues of facts and law are involved.

2. The above two original petitions arose out of two contracts entered into between the petitioner and the respondent. The first contract is dated 19.12.2005 and it is in respect of supply, erection and installation of escalators. The arbitration clause in the said contract is as follows:-

"A-5) Arbitration: In the event of difference or dispute arising out of, under or in connection with this agreement, over the rights of obligation of parties hereto, the dispute or difference shall be referred to the Arbitration of a Sole Arbitrator to be appointed by KONE Elevator India Private Limited. The Venue of the Arbitrator shall be at Chennai and the Courts in the City of Chennai alone shall

have the jurisdiction in relation to the Arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall be applicable to such arbitration."

3. The other contract is for supply, erection and installation of elevators for goods-cum-passengers, and the arbitration clause therein, which is at page 17 of the typed set, is set out below:-

"A-5) Arbitration:

In the event of difference or dispute arising out of, under or in connection with this agreement, over the rights of obligation of parties hereto, the dispute or difference shall be referred to the Arbitration of a Sole Arbitrator to be appointed by KONE Elevator India Private Limited, The Venue of the Arbitrator shall be at Chennai and the Courts in the, City of Chennai alone shall have the jurisdiction in relation to the Arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall be applicable to such arbitration,"

4. Thereafter, two supplementary agreements were entered into in relation to the escalators, viz., first contract. But, there is no such agreement in respect of elevators, viz., second contract. The first supplementary agreement is dated 16.02.2006 and was made at Nagpur between the parties, and Clause -1 of the said supplementary agreement states that the said agreement will be read and constitute a part of the original agreement dated 19.12.2005. In the said supplementary agreement Clause -14 contains the provision relating to arbitration and the said provision is as follows:-

" 14. All disputes and differences of any kind whatever arising out of or in connection with this agreement shall be amicably settled at the first instance mutually by Indo Pacific Software & Entertainment Ltd. and Kone. If no such amicable solution at the first instance, then the dispute or differences shall be referred to the arbitration and will be dealt according to the provisions of Arbitration and Conciliation Act. 1996."

5. The second supplementary agreement was made at New Delhi on 16.02.2006, and in the said agreement also it was made clear that the same will be read and constitute a part of the agreement vide their offer letter KEI/0035/200512/20 which is mentioned in the first agreement dated 19.12.2005. In this agreement also there is an arbitration clause at Clause - 12 of the agreement, which runs as follows:-

"12. All disputes and differences of any kind whatever arising out of or in connection with this agreement shall be amicably settled at the first instance mutually by Indo Pacific Software and Entertainment Ltd. and Kone. If no such amicable solution at the first instance, then the dispute or differences shall be referred to the arbitration and will be dealt according to the provisions of Arbitration and Conciliation Act, 1996."

6. Thereafter, certain disputes developed between the parties. As such, a letter dated 30.10.2006 was written by the petitioner's counsel to the respondent

pointing out the nature of dispute and in paragraph - 12 of the said letter the following stand was taken.

"12. That by this Notice you Noticee are, therefore, called upon to make the payment of the balance amounts due to my client as agreed and also complete your part of the contract, failing which please note that my client shall be constrained to take suitable legal action for recovery of the above amount together with costs, interest, charges and demurrage, as may be deemed fit and proper in the circumstances of the case. In that even you Noticee shall alone be liable for the costs and consequences. Please also note that the cost of this Notice of Rs.5,000/- is to your account."

7. In answering the same, the respondent's counsel wrote back by a letter dated 14.11.2006 and in paragraph - 10 of the said letter criminal prosecution against the petitioner was threatened.

" 10. So please note, the matter is as urgent as can be. My client hopes that at least now you noticee wakes up from your slumber. However, if you noticee don't, my client will initiate necessary criminal prosecution against you noticee as it feels cheated and defrauded by you and also as there is breach of trust on your part."

8. After getting the said letter the petitioner's counsel again wrote another letter dated 21.11.2006, and in the said letter it was pointed out by the petitioner's counsel that the disputes and differences between the parties may be resolved through arbitration and not through threats of criminal prosecution, and the stand taken on behalf of the petitioner is as follows:-

"14. As to Para 10 of your Notice: My client is shocked at the threats of criminal prosecution for cheating, etc. being given by your client through your Notice. The reason for giving such threats appear to be to pressurize my client into meeting an illegal and unjust demand of your client without making payment of the amount due to my client. Your client is well aware that in case he wants to raise a dispute, then the matter can be resolved through arbitration and not through threats of criminal prosecution. Your client is being informed hereby that non-payment of dues of my client entitle him to refer the matter to arbitration. To avoid litigation, it is in the interest of your client to make the payment of the dues of my client and amicably accept the services for maintenance of the escalator and lifts."

9. A letter dated 23.04.2007 was thereafter sent by the petitioner's advocate under RPAD invoking the arbitration clause. In that letter the arbitration clause was quoted, and the name of the arbitrator was recommended, and the respondent was requested to give their concurrence within 15 days. In their turn, the respondent replied through their advocate by a letter dated 07.05.2007 refusing to give their consent and in that letter the respondent stated that they have huge money to recover from the petitioner towards damages, and they have also stated that the arbitration proceedings at Chennai would cause

harassment to them. In the subsequent communication dated 23.07.2007 written by the learned counsel for the respondent to the petitioner a statement was made that the arbitration clause for holding arbitration at Chennai has been modified by the subsequent agreement, and the respondent proposed the name of their arbitrator and ascertained whether the venue of the arbitration shall be at Nagpur as the cause of action relating to both the escalators and elevators arose at Nagpur, and the petitioner was requested to give their consent to the proposed appointment of arbitrator.

10. To that the petitioner replied through their counsel by letter dated 17.08.2007 denying that the arbitration agreement has not at all been modified as claimed by the respondents. It was also denied that the cause of action arose at Nagpur. Therefore, the petitioner declined consent to the appointment of arbitrator named in the respondent's letter, and it was made clear in the said letter that the petitioner is going to move the Chief Justice of the Madras High Court for appointment of arbitrator.

11. In the background of these facts, and the stand taken by the parties in their correspondences, the following questions fall for consideration before this Court u/s 11 of the said Act.

(1) Whether the cause of action in this case would enable the parties to hold arbitration at Chennai having regard to the provision of Section 2(1)(e) read with Section 11(12)(b) of the said Act.

(2) Whether the terms and conditions of the arbitration clause whereby the venue of arbitration is fixed at Chennai had been modified by subsequent agreement.

(3) Whether in view of the arbitration clause between the parties the filing of this petition u/s 11 of the said Act is competent inasmuch as the other options in the arbitration clause has not been worked out by the petitioner.

12. For the sake of convenience, all these questions are taken up together. The learned counsel for the petitioner submitted that before proceeding for arbitration an attempt should be made to amicably settle the disputes mutually between the parties and if no amicable settlement of the disputes takes place then the disputes and differences shall be referred to arbitration, according to the provisions of the said Act.

13. The learned counsel for the respondent submitted that in the facts and circumstances of this case no attempt was made by the petitioner to amicably settle the disputes. Therefore, this petition u/s 11 of the said Act is incompetent and in support of such submission, the learned counsel referred to a decision rendered by the Jharkhand High Court in the case of M/s. Indiana Engineering Works (Bombay)(Pvt.) Ltd. Vs. Chairman Coal India Ltd., AIR 2003 Jharkhand 15. In that judgment, the learned Judge quoted the arbitration agreement in the judgment itself. A perusal of the arbitration clause in the said judgment will make

it clear that the clause is vastly different from the arbitration clause on which the respondent is relying. The learned Judge in that case held that the petitioner did not set in motion the procedure for appointment of arbitrator inasmuch as they did not start any consultation process for arriving at a mutual consent between them for appointment of arbitrator. In that view of the matter, the learned Judge held that without adverting to the said procedure, the petitioner could not straight away rush to the court invoking sub Section (6) of Section 11 of the said Act.

14. In the instant case, arbitration clause in the subsequent agreement provides for an attempt at settling the disputes amicably. But, from the facts, which have been disclosed, it appears that the petitioner made a prayer for payment of the money, which according to them was due, and to that the respondent threatened them with criminal prosecution, so the question of amicable settlement has been given a go bye by the respondent at the very beginning. Apart from that from the letter written by the petitioner, it is clear that respondent was complaining of their inconvenience of holding arbitration at Chennai, and wanted that the arbitration should be held at Nagpur, and also appointed their arbitrator. Therefore, it was never the respondent's case that without invoking the arbitration procedure, the matter can be settled amicably, since the same was not the case of the respondent in their various correspondences with the petitioner. Rather the case was to the contrary. Therefore, it is not possible for this Court to apply the principle decided in *M/s.Indiana Engineering (supra)* to the present case. The third point is decided in favour of the petitioner.

15. Now die second question is whether the initial agreement of arbitration stands modified by the subsequent agreement.

16. Insofar as the agreement relating to Elevators is concerned, there is no supplementary agreement. But there are supplementary agreements relating to Escalators. In respect of both the supplementary agreements dated 16.2.2006, it is provided that the said agreements will form part of the original letter dated 19.12.2005. This is provided in Clause-1 of the agreements. That being the dominant position in the supplementary agreements, it cannot be said that the supplementary agreements supersedes the previous agreement. Learned counsel refers to Clause-9 of the first supplemental agreement (page-41 of the typed set) and CClause-7 of the second supplemental agreement (page-49 of the typed set) as superseding the previous agreement. The said clauses 9 & 7 have to be read in their context and not bereft of it. If they are so read and given their ordinary meaning, as would be understood by men of ordinary prudence, it cannot be said that those clauses supersede the dominant part of the agreement namely, clause-1. It is well settled that commercial agreements are to be read with a broad common sense approach and in a manner they are understood by ordinary men in the world of trade and commerce. They cannot be read as words of statute. Therefore, this Court holds that the stipulation in the arbitration clause in the original agreement must prevail and govern the relationship

between the parties.

17. Now, the only question, which remains for consideration, is whether the Chief Justice of Madras High Court has the jurisdiction on the basis of the principle of part of cause of action to appoint an arbitrator in this case. This is basically a question of fact. In a proceeding u/s 11 of the said Act, the Chief Justice has to be prima facie satisfied about his jurisdiction to pass an order u/s 11.

18. Reference in this connection may be made to the provision of Section 11 sub Section (12) (b) of the said Act. The said section namely, Section 11(12)(b) is set out below:-

"Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be constructed as a reference to the Chief Justice of the High Court within whose local limits the principal civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High court."

19. The aforesaid section refers to Section 2(1)(e) of the said Act is also set out herein below:

""Court" means the principal civil Court of original jurisdiction in a district, and 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, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes."

20. Here the Madras High Court has its ordinary original civil jurisdiction. Insofar as the original jurisdiction of a High Court is concerned the same is governed by the Letters Patent. Reference in this connection may be made to the decision of the Supreme Court in the case of Food Corporation of India Vs. Evdomen Corporation, (1999) 2 SCC 446. In that case, the Hon"ble Supreme Court noticed that u/s 120 of the Civil Procedure Code, Sections 16,17 and 20 of the CPC do not apply to a High Court in the exercise of its original civil jurisdiction. In that decision, it was held that the jurisdiction of the Bombay High Court to entertain a suit under its ordinary original civil jurisdiction is determined by Clause 12 of the Letters Patent of the Bombay High Court.

21. In the instant case, under Clause 12 of Letters Patent of the Madras High Court similar provisions exist. Therefore, Section 20 of the CPC will not apply for determination of jurisdiction of the Chief Justice of Madras High Court on the basis of a conjoint reading of Section 2(1)(e) and Section 11(12)(b) of the said Act along with Clause 12 of the Letters Patent of this High Court.

22. The principle in the case of Food Corporation of India (supra) was followed by the Madras High Court in the case of Pandy Chem Private Limited Vs. Gas Authority of India Limited, (2001) 3 MLJ 644.

23. It has also been held by the Hon'ble Supreme Court in the case of Jindal Vijaynagar Steel Ltd. Vs. Jindal Praxair Oxygen Co. Ltd., (2006) 11 SCC 521 = 2006-4-L.W.305 that the principle of Section 20 of the CPC is not applicable to Clause 12 of the Letters Patent since Section 120 of the CPC excludes the application of Section 20 of the Civil Procedure Code. (See paragraphs 51 and 54). The judgment of the Supreme Court in Food Corporation of India (supra) has been followed by the Supreme Court in Jindal Vijaynagar Steel case(supra).

24. Now the only question to be seen is whether a part of cause of action has arisen within the territorial limits of the original side jurisdiction of this High Court.

25. Learned counsel for the petitioner has urged that - Chennai office of the petitioner has confirmed the order placed by the respondent, which is at page - 1 of the additional typed set filed by the petitioner.

Pages 2 and 3 of the additional typed set would also show that from the Chennai office of the petitioner the order was placed on its corresponding office at China for supply of escalator. Order of confirmation for escalator was received from the Chennai office in which it was shown by the petitioner that the invoice address is also at Chennai office. (See pages 6 to 10 of the additional typed set filed by the petitioner)

Page 12 of the said additional typed set would show the bill of lading for transportation of the machinery from China to Chennai.

Pages 14 and 15 of the said additional typed set would show the supply of elevator and escalator parts from Chennai to Nagpur.

Relying on the above facts, the learned counsel for the petitioner urged that a part of cause action arose within the jurisdiction of this High Court.

26. As against that the learned counsel for the respondent pleaded that the agreements were executed at Nagpur, and goods were to be supplied and part of it were supplied at Nagpur. Even if these facts are true, from the facts which have been disclosed by the petitioner, it cannot be said prima facie that a part of cause of action did not arise within the territorial limits of this High Court. It is well settled that when two courts may have jurisdiction to try a suit or proceeding, an agreement between the parties that the disputes between them shall be tried in one of such Courts is not either contrary to public policy nor such an agreement contravenes Section 28 of the Contract Act (See the decision in Hakam Singh Vs. M/s.Gammon (India) Ltd., AIR 1971 SC 740).

27. Same principles have been reiterated in the case of A.B.C.Laminart Pvt. Ltd. v. A.P. Agencies reported in AIR 1989 SC 1239 = (1972) 85 L.W. 20 S.N.. In the aforesaid judgment, it has been held that if the parties to a contract agree to submit the dispute arising between them to a particular jurisdiction, which would not be otherwise improper, the agreement to that extent cannot be said to be void or against public policy. In paragraph-18 at page 1245 of the report, the

learned Judges held that Mercantile Law and practice permit such agreements. The learned Judges have further held in paragraph-21 when the clause is clear and unambiguous specific provisions of the contract would bind the parties, unless absence of ad idem is shown. The learned Judges observed that the presence of words "alone", "only" and "exclusively" in the clause, which confers jurisdiction on a particular court and ousts the jurisdiction of other courts, does not cause any difficulty in matters of constructions. In the instant case, in the arbitration clause the relevant words are "The Venue of the Arbitrator shall be at Chennai and the Courts in the City of Chennai alone shall have the jurisdiction in relation to the Arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall be applicable to such arbitration". Therefore, the jurisdiction has been very specifically fixed without leaving any scope for ambiguity.

28. In Jindal Vijaynagar Steel Ltd. (supra) the Hon"ble Supreme Court has held that where parties themselves have chosen Mumbai to be the situs of the arbitration proceeding that is a fact to be taken into account in determining the jurisdiction of Bombay High Court (See paragraph 65).

29. Therefore, I am of the opinion that in the facts of this case, I have the jurisdiction to appoint an arbitrator since petition u/s 11 was first filed in this High Court. On that petition notice was issued on 18.08.07 and thereafter, the respondent on 17.09.2007 sought to file a similar petition u/s 11 before the Nagpur Bench of the Bombay High Court. But u/s 11 (11) of the said Act, the Chief Justice to whom the request has been first made shall "alone" be competent to decide on the request. This Court, therefore, appoints Hon"ble Mr.Justice S.Jegadeesan, a retired Judge of this High Court the sole arbitrator. The Arbitrator shall enter upon reference, and issue notice to both the parties and upon adjudicating the dispute pass an award as early as possible, but preferably within six months from the date of entering upon reference. The fees of the Arbitrator and other incidental expenses may be fixed by the Arbitrator. The original petitions are disposed of accordingly. No costs.