

(2011) 05 CAL CK 0042

In the Calcutta High Court

Case No : G.A. No. 430 of 2011, A.P.O.T. No. 72 of 2011, G.A. No. 262 of 2011
and C.S. No. 10 of 2011

Rotomac Electricals Private Limited

APPELLANT

Vs

National Railway Equipment Company

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 33

Citation : (2011) 05 CAL CK 0042

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Jayanta Mitra, Ranjan Bachawat, Ravi Kapur, S. Ginodia, P. Chowdhury, M. Tiwari and S.D. Majumdar, for the Appellant; Anindya Mitra, Abhrajit Mitra, Ajay Verma, Vinay Vaish, G.N. Jajodia, Gautam Dey and Ranajit Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal under Clause 15 of the Letters Patent is at the instance of a Plaintiff and is directed against an order dated January 31, 2011 passed by a learned Single Judge of this Court by which the said learned Judge has dismissed an application for injunction for restraining the Respondent from initiating or proceeding with any legal proceeding in any Court in Illinois or any other place in the United States of America or in any forum other than that of the learned Single Judge.

2. Being dissatisfied, the Plaintiff has come up with the present appeal.

3. The Appellant before us filed in the Original Side of this Court a Civil Suit being No. 10 of 2011 thereby praying for the following reliefs:

a) Decree for US\$ 12,22,125.00 against the Defendant as pleaded in paragraph 22 above;

b) In the alternative, an enquiry into the damages suffered by the Plaintiff

caused by the Defendant's breach and appropriate decree for such sum as may be deemed to be found due and payable upon such enquiry;

c) Perpetual injunction restraining the Defendant, its servants, agents and/or assigns from initiating and/or in any manner proceeding with any legal proceeding before any of the Courts in Illinois or in any other place in the United States of America or any forum other than this Hon''ble Court;

d) Receiver;

e) Injunction;

f) Attachment;

g) Costs and;

h) Such further and/or other relief or reliefs as this Hon''ble Court may deem fit and proper.

4. The case made out by the Plaintiff in the said suit may be summed up thus:

1) At all material times, the Plaintiff was and still is engaged, inter alia, in the manufacture, sale and repair of locomotive traction motors, spare parts and other ancillary commodities. The Plaintiff has its registered office at 105, Park Street, Kolkata - 700 016 within the jurisdiction of this Court and has its workshop and factory at No. 1, Oil Installation Road, Kolkata - 700 088 where it manufactures and repairs locomotive traction motors, spare parts, etc., as per the requirement of its customers.

2) The Defendant is a closely held company incorporated under the laws of the United States of America and is engaged, inter alia, in manufacture, reconditioning and sale of vertically integrated locomotive products. The Defendant has its place of business and carries on business in the State of Illinois in the United States of America outside the aforesaid jurisdiction.

3) In or about the month of April 2008, the Plaintiff was approached at its registered office at Kolkata within the aforesaid jurisdiction by one Mr. V. K. Pal, claiming to be the representative of the Defendant, along with one Mr. Will Burrows, Vice President, International Operation and Project, and some other officials of the Defendant with a view to purchase, inter alia, D-78 traction motors. In the course of discussions, the aforesaid representatives of the Defendant expressed their desire to inspect the Plaintiff's workshop and factory at No. 1, Oil Installation Road, Kolkata - 700 088, outside the aforesaid jurisdiction in order to assess the capacity and capability of the Plaintiff to manufacture those items. The Plaintiff's Deputy Managing Director, Mr. S. R. Acharyulu, accompanied the said representatives of the Defendant and took them around the workshop and the factory of the Plaintiff. On inspection of the said factory and workshop, the Defendant's said representatives expressed their satisfaction as to the Plaintiff's facilities and their intention to have business relationship with the Plaintiff.

4) After the Defendant was satisfied with the capability of the Plaintiff to supply the said required motors, in or about early part of the month of June 2008, the Plaintiff made its offer to sell and supply traction motors meant for locomotives as per the necessary general arrangement, drawings and technical specifications prepared by the Plaintiff for the said motors. The said offer was made to the Defendant through the said Mr. V.K. Pal at the Plaintiff's registered office within the aforesaid jurisdiction. The Defendant received the said offer, accepted the technical specifications supplied by the Plaintiff and never raised any objection with regard to the said drawings prepared and submitted by the Plaintiff.

5) Thereafter, between June 2008 and September 2008, protracted negotiations and discussions took place between the Plaintiff and the Defendant through the respective representatives of the parties, either at the workshop and factory of the Plaintiff or at the registered office of the Plaintiff. In all such discussions, the said Mr. V. K. Pal, represented the Defendant and the Managing Director and/or the Deputy Managing Director of the Plaintiff represented the Plaintiff.

6) In course of the aforesaid negotiations, there had been exchange of a series of e-mails between the Plaintiff and the Defendant through the said Mr. V. K. Pal during the period from April 2008 till the finalization of the said Agreement as stated herein below.

7) By an e-mail dated May 02, 2008, the Plaintiff forwarded to Mr. V. K. Pal the technical details of D78 traction motors, consisting of Technical Specifications, Outline Drawings, General Arrangement and Armature Coil Drawing. By an e-mail dated June 11, 2008, the Defendant through Mr. V. K. Pal sent to the Plaintiff an order for 50 Nos. of D78 motors and informed that the order for 8 Nos. of D87 motors will shortly be forwarded. The pricing basis for both, D78 and D87 motors, was also made known to the Plaintiff. By the said e-mail dated June 11, 2008, a purchase order without the detailed terms and conditions was forwarded by the Defendant and the Plaintiff was informed that the other documents attached to the purchased order would be forwarded later. The Defendant, subsequently, through Mr. V. K. Pal forwarded various other documents by e-mail dated June 11, 2008. The same included armature coil drawings, general arrangement drawings, technical specifications and general purchase order terms (standard purchase order terms).

8) On the same day, i.e., June 11, 2008 the Plaintiff communicated to Mr. V.K. Pal that the terms in the draft Purchase Order were not acceptable. By an e-mail dated July 04, 2008, Mr. V. K. Pal forwarded to the Plaintiff a modified Purchase Order No. VSA001 dated May 09, 2008 for 36 D78B traction motors. Again, Mr. V. K. Pal through an e-mail dated July 09, 2008 forwarded a further Purchase Order No. VSA300 dated May 09, 2008 for 14 numbers of D78B traction motors. Subsequently, Purchase Order No. VSA001 was again revised and was forwarded through an e-mail dated August 30, 2008 to the Plaintiff at its aforesaid registered office in Kolkata, within the aforesaid jurisdiction. It is stated that at no point in time, the terms and conditions of the draft Purchase Orders were

acceptable to the Plaintiff. In fact, the agreement ultimately concluded, as more fully stated herein, contained terms and conditions which were materially different from those contained in the draft purchase order and the standard purchase order terms initially forwarded by the Defendant were not even considered appropriate or applicable. In fact, various terms and/or conditions and/or stipulations therein were not considered and/or were specifically excluded in arriving at the agreement.

9) The terms and conditions which were ultimately finalized between the parties upon protracted negotiations are contained in an Agreement dated October 01, 2008 in writing made between the Plaintiff and the Defendant (hereinafter referred to as "the said Agreement").

10) The said Agreement dated October 01, 2008, was accepted, concluded and signed by the Plaintiff at the Plaintiff's registered office within the aforesaid jurisdiction. The said agreement, inter alia, stipulated as follows:

16.3 Entire Agreement. This Agreement constitutes the entire agreement and supersede all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter thereof.

Accordingly, all the prior agreements and understandings between the parties including the Standard Purchase Order Terms have been superseded, altered, rescinded and novated by the said Agreement.

11) In view of the urgency expressed by the Defendant, the Plaintiff had already commenced work on preparation of the said motors for type-testing and two motors were checked, inspected and their performance type-tested and approved by Mr. Will Burrows of the Defendant at the factory and works of the Plaintiff in Kolkata. The same were also found to be in conformity with the Plaintiff's drawings which were approved by the Defendant. The Defendant, through its representative Mr. Will Burrows, witnessed the type testing at the Plaintiff's said works and factory in Kolkata outside the aforesaid jurisdiction and was fully satisfied with regard to the merchantable quality and satisfactory performance of the said traction motors as also the manufacturing facility of the Plaintiff.

12) Only upon such approval being given by the Defendant, the Plaintiff undertook manufacture of the balance quantity of the said motors. The goods shipped by the Plaintiff, corresponded with the motors which had been tested and approved of by the Defendant and were free of defect.

13) Thereafter, in terms of the said agreement, the Plaintiff made the following shipments FOB Kolkata to the Defendant:

Sl.No.

Invoice No.

Bill of Lading/Air Way Bill No. & Date

Quantity of motors

1.

EXP-032/08-09 dt. 19/11/08

ARK/KOL/F/CHI/8115 dt. 11/12/08

6 Nos.

2.

EXP-034/08-09 dt. 23/12/08

ARK/KOL/F/MEM/8183 dt. 30/12/08

4 Nos.

3.

EXP-035/08-09 dt. 31/12/08

ARK/KOL/MEM/8239dt. 16/01/09

10 Nos.

4.

EXP-045/08-09 dt. 27/02/09

MAWB No. 36553 dt.13/03/09

10 Nos.

5.

EXP-047/08-09 dt. 20/03/09

MAWB No. 1608736571 dt. 27/03/09

10 Nos.

6.

REPL/EXP-11/09-10 dt. 15/5/09

MAWB No. 125-4380 4751 dt. 23/5/09

6 Nos.

7.

REPL/EXP-12A/09-10 dt.29/5/09

MAWB No. 125-4381 2742 dt.3/6/09

4 Nos.

50 Nos.

14) The Defendant made the following payments to the Plaintiff in respect of the above shipments:

Sl.No.

Invoice No.

Contractual Value in USD

Amount Received in USD

1.

EXP-032/08-09 dt. 19/11/08

171,000

171,000

2.

EXP-034/08-09 dt. 23/12/08

114,000

114,000

3.

EXP-035/08-09 dt. 31/12/08

285,000

285,000

4.

EXP-045/08-09 dt. 27/02/09

285,000

285,000

5.

EXP-047/08-09 dt. 20/03/09

285,000

285,000

6.

REPL/EXP-11/09-10 dt. 15/5/09

171,000

171,000

7.

REPL/EXP-12A/09-10 dt.29/5/09

1,14,000

60,000

1,425,000

1,371,000

The aforesaid payments were all received by the Plaintiff through its bankers, namely, the State Bank of India, Overseas Branch, Samriddhi Bhawan, 1, Strand Road, Kolkata- 700 001 situated within the aforesaid jurisdiction.

15) When the supply of the motors was substantially in progress, the Defendant raised a dispute with regard to the acceptability of the Axle Caps attached to the said motors. The said representative of the Defendant, Mr. V. K. Pal, alleged that the Axle Caps fitted to the motors having been found to be defective, the same were dismantled from the locomotives and that after removing the old Axle Caps, the locomotives were re-fixed with new locally sourced Axle Caps. It was further alleged that the Defendant got the new Axle Caps sourced from local vendors which were being fixed for the purpose of completing the locomotives. In doing so, the Defendant unconditionally accepted the said goods. Thereafter, correspondence ensued between the Plaintiff and the Defendant with regard to rebate/deduction that should be given by the Plaintiff to the Defendant in respect of the alleged defective Axle Caps.

16) Ultimately, towards the end of April 2009, it was, inter alia, agreed by and between the Plaintiff and the Defendant that as against the alleged cost of repair, renewal and replacement aggregating USD 2,30,000.00 the Defendant would absorb 25 per cent of such cost and that the Plaintiff would grant a deduction/ rebate of USD 54,000.00 in respect of the last of its invoices referred to hereinabove, namely, REPL/EXP-12A/09-10 dated May 29, 2009 and that a further sum of USD 25,000.00 would also be paid by the Plaintiff on behalf of the Defendant to Messrs Logistics Plus India Private Limited, the freight agent of the Defendant towards compensation for the alleged loss stated to have been suffered by the Defendant due to the allegedly defective Axle Caps. Additionally, a sum of USD 1,00,000.00 would be adjusted against future orders to be placed by the Defendant at the rate of 10 per cent of each order value. The Plaintiff accepted the said proposal from its registered office within the aforesaid jurisdiction and also implemented the same from its said place of business within the aforesaid jurisdiction.

17) In spite of the fact that the representative of the Defendant duly inspected the aforesaid goods prior to shipment, the Defendant wrongfully and illegally raised alleged disputes in respect of the Axle Caps and Axle Bore in respect of the goods supplied by the Plaintiff. However, in view of the fact that the said

Agreement was valid for a period of three years and that further orders were contemplated under the said Agreement, the Plaintiff in the honest and bona fide belief and with a view to keeping amicable business relations on a continuing basis was induced to giving credit for an approximate sum of USD 79,000.00 towards the alleged repairs and replacements carried out by the Defendant outside the jurisdiction aforesaid. The adjustment of USD 79,000.00 was unequivocally and unconditionally accepted by the Defendant without any objection and/or demur. In acting as aforesaid, the Defendant unequivocally agreed and accepted that no further claim would be made in respect of the said supplies made by the Plaintiff, save and except by way of the agreed adjustment against future orders to be placed by the Defendant. The Defendant had in any event waived its right to claim any compensation of any nature save and except by way of the agreed adjustment against future supplies to be made by the Plaintiff against future orders to be placed by the Defendant.

18) After having received the aforesaid payments and/or adjustments aggregating to approximately USD 79,000.00, the Defendant by letters dated August 25, 2009 and October 2, 2009 respectively sought to raise further disputes as an afterthought and attempted to reopen a closed chapter with a view to avoid its commitments for placing further orders. Various false and untenable allegations were made by the Defendant, inter alia, by contending that the Plaintiff was in breach of the said agreement. No such claim is tenable in view of the adjustment and/or credit afforded to the Defendant by the Plaintiff as mentioned hereinbefore. The said letters of the Defendant were replied to by the Plaintiff on October 12, 2009 denying the allegations made by the Defendant. The Defendant however continued with its false and untenable allegations by its letter dated December 10, 2009. In any event, the contents of the letters issued for and on behalf of the Defendant were false, frivolous and wholly motivated.

19) Though the Defendant was acting wrongfully and in violation of its commitments, the Plaintiff with a view to continuing the business relationship, sought to accommodate the Defendant and prolonged discussions were held between January, 2010 and June, 2010. However, such negotiations did not result in any mutually acceptable solution as the Defendant, inter alia, sought to change the very basis of the said Agreement by insisting on 100 per cent compliance with OEM D-78. Significantly, as will be evident from an e-mail dated March 18, 2010, the Defendant deliberately, intentionally and fraudulently denied the Plaintiff any access to the motors for the purposes of inspection.

20) By a notice dated October 28, 2010 issued for and on behalf of the Defendant, the Defendant wrongfully, illegally and fraudulently terminated the said Agreement dated October 15, 2008 and threatened the Plaintiff with legal action. The Plaintiff was compelled to accept the said breach and treat the said Agreement as repudiated. The claims made in the said letter dated October 28, 2010 including those on account of alleged defects and breach of warranty are wrongful, illegal, misconceived, fraudulent, null and void. In any event, the same

became voidable at the instance of the Plaintiff and the Plaintiff has duly avoided and/or hereby avoids the same.

21) By letters dated November 20, 2010 and December 21, 2010, the Plaintiff through its Advocates duly replied to the notice dated October 28, 2010 and refuted and categorically denied the allegations contained therein.

22) In acting as aforesaid, the Defendant in connivance with various other persons and/or its agents intentionally made misrepresentations to the Plaintiff and induced the Plaintiff to enter into the said Agreement and thereby acted wrongfully, illegally and fraudulently particulars whereof are set out herein below:

a) The Defendant at all material times was fully aware of the fact that the Plaintiff is not an Original Equipment Manufacturer ("OEM") and that the motors supplied by the Plaintiff were based on the drawings which had been duly examined, approved, concurred to and accepted by the Defendant. Accordingly, the subsequent demands by the Defendant for OEM compliance were not only contrary to the said Agreement but also ex facie, unlawful and illegal.

b) The Defendant having wrongfully induced the Plaintiff to agree to its proposal mentioned hereinbefore and to make payment of USD 79,000.00 approximately on account of rectification of alleged defaults was not entitled to turn around and make the same the basis of the termination, particularly when the motors had been admittedly opened and damaged by the Defendant itself in trying to bring the same to OEM/EMD standards which was never agreed upon between the parties herein. Significantly, the warranty obligations of the Plaintiff under the said Agreement had also lapsed in these circumstances.

c) The Defendant made suggestions that it would place further orders in excess of US 1 million dollars not believing the same to be true so as to induce the Plaintiff to enter into the contract more fully mentioned hereinabove.

d) The Defendant with the intent to deceive and/or defraud the Plaintiff made suggestions and/or representations which were not true and not believed by it to be true. In fact, it will be evident from the letter dated October 28, 2010 that the sole and mala fide intention of the Defendant was to defraud and deceive the Plaintiff.

e) The purposed letter of termination dated October 28, 2010 issued for and on behalf of the Defendant is in breach of the said Agreement and in violation of the terms thereof.

f) The purposed letter of termination dated October 28, 2010 is ex facie in breach of the said Agreement and in violation of the terms and conditions thereof. The Defendant wrongfully caused the said letter to be issued in order to conceal its acts of repudiation of the said Agreement, and in order to shift the burden of its obligations on the Plaintiff.

g) The purported letter of termination dated October 28, 2010 is fraudulent

inasmuch as it is silent on the fact of the Defendant having received USD 79,000.00 and/or having adjusted the same.

h) The Defendant has acted in breach of its obligations to the Plaintiff by misleading and/or prejudicing the rights of the Plaintiff.

i) The unlawful and illegal threats by the Defendant to initiate proceedings before the Courts at Illinois or any other Court in the USA as contained, inter alia, in the said letter dated October 28, 2010, is ex facie unlawful, mala fide and fraudulent, illegal, null and void.

j) The Defendant has committed diverse other acts fitted to deceive the Plaintiff and has otherwise acted fraudulently.

k) The Defendant actively concealed the fact that it had no intention of purchasing further motors from the Plaintiff.

l) The Defendant made promises of settling the matter on various adjustments being made without any intention of performing the same.

The Plaintiff is unable to give fuller and further particulars of fraud until full disclosure is made by the Respondent. All such wrongful acts have been perpetrated by the Defendant both within the outside the jurisdiction aforesaid. The aforesaid wrongful and fraudulent acts of the Defendant are actionable both under the laws of India as also that of Illinois.

23) In the light of the wrongful, illegal and fraudulent actions on the part of the Defendant as detailed hereinabove, the Plaintiff has suffered loss and damages at its registered office within the jurisdiction aforesaid, particulars whereof are given herein below:

Sl. No .

Particulars

Amount (USD)

Amount (USD)

(i)

Cost of preparation of drawings; developing special purpose equipment; manufacturing tools, inspection, Quality Assurance Programme, jigs and fixtures as per the following details :

Manufacturing information, component drawings, sub-assembly drawings and assembly drawings

38,325.00

Preparation of special purpose jigs, fixtures, gauges, etc.

1,11,500.00

Preparation of Technical Specifications

9,600.00

Preparation of Quality Assurance Programme

4,800.00

Preparation of Shop Floor Inspection

7,200.00

Special purpose equipment installed exclusively for D78/D87 project of the defendant.

2,00,000.00

Cost incurred because of the failure of the defendant to furnish technical information, drawing, sample, critical items dimension and drawings from different sources for which the plaintiff had to make payments.

5,200.00

Shop floor rearrangement done exclusively for the manufacture of D78/D87 project of the defendant.

75,500.00

4,52,125.00

(ii)

Compensation for failure of the defendant to place additional orders of D-78 and D-87B traction motors as contemplated and projected in the aforesaid Agreement.

4,90,000.00

(iii)

Compensation for failure to place orders for D31 traction motors.

2,10,000.00

(iv)

Loss of business opportunities relating to North and South America (excepting Argentina) arising out of the exclusivity clause in the said agreement.

70,000.00

Total

12,22,125.00

24) The Plaintiff has now come to learn that the said Mr. V. K. Pal who had at all

material times been acting as a representative of the Defendant, has recently been permanently employed by the Defendant. In any event, the Defendant has a significant presence in India which would be evidenced inter alia from the fact that the Defendant has an Indian subsidiary namely NREC Railway Equipment India Private Limited having its registered office and carrying on business in New Delhi, India. The Plaintiff has come to learn that the said Mr. V. K. Pal, who all throughout acted as the representative of the Defendant, has now been appointed as one of the directors of the said Indian subsidiary of the Defendant and is at present posted in India and is looking after the Defendant's business in India.

25) The Defendant is wrongfully and illegally threatening and intends to initiate proceedings against the Plaintiff before the appropriate Courts of Illinois, USA. Accordingly, there is every possibility of the Defendant indulging in multiplicity of proceedings and in abuse of process. The initiation of any such proceedings by the Defendant would be vexatious, harassing, oppressive, fraudulent and mala fide.

26) The Plaintiff has no office outside India and has no representation whatsoever in the United States of America. This fact is well known to the Defendant. The Defendant on the other hand is carrying on business both within the United States of America and in India. It is well known that this Hon'ble Court would be pleased to take judicial notice of the fact that it would be inequitable, extremely inconvenient and prohibitively expensive for the Plaintiff to conduct litigation in the United States of America particularly in the facts and circumstances of the case and also be a drain on the foreign exchange reserves of the country.

27) The Plaintiff apprehends that the sole and mala fide intention of the Defendant is to cause harassment and financial loss to the Plaintiff. Any proceeding initiated by the Defendant in the State or Federal Courts in USA or in the State of Illinois, USA or elsewhere in USA, would be highly vexatious and exorbitantly costly. In fact, counsel fees itself would be approximately USD 450.00 to 600.00 (approximately Rs. 20,000/- to Rs. 27,000/-) per hour. Apart from this, all the Plaintiff's witnesses and evidence are all situated in Kolkata within the jurisdiction of this Hon'ble Court and this Hon'ble Court is the natural forum to maintain the instant suit. The balance of convenience warrants adjudication of disputes between the parties in India. Both the Plaintiff and the Defendant can be represented before this Hon'ble Court. The dealings and transactions between the parties took place primarily at Kolkata at and from the registered office of the Plaintiff situated within the jurisdiction aforesaid as also from the Plaintiff's works and factory at 1, Oil Installation Road also at Kolkata outside the jurisdiction aforesaid. In the course of negotiations, discussions and transactions between the parties concerning the said Agreement, the representatives of the Defendant including the said Mr. V.K. Pal and Mr. Will Burrows had visited Kolkata, in particular the registered office and the works and

factory of the Plaintiff on numerous occasions. As against the aforesaid, none of the Plaintiff's employees and/or directors and/or agents had ever visited Illinois in connection with the contract during its formation or its implementation, except on one occasion for reconciliation attempts after these disputes had arisen. All correspondence relating to the said Agreement was by and between the Plaintiff and the Defendant at the Plaintiff's registered office at Kolkata situated within the aforesaid jurisdiction or its factory and works at Kolkata outside the jurisdiction aforesaid.

28) There is no clause in the said Agreement by which the parties conferred exclusive or non-exclusive jurisdiction on Courts in any particular country, whether in India or Illinois in the USA. Significantly, the clause with regard to the choice of forum mentioned in the standard terms and conditions initially forwarded by the Defendant purporting to confer jurisdiction on Courts in Illinois to hear, mediate or litigate the disputes has been consciously and expressly excluded from the said Agreement, wherein the parties have only agreed that the same shall be construed and interpreted in accordance with the laws of the State of Illinois. In any event, there would also be no issue with this Hon''ble Court applying the laws of Illinois in respect of the subject matter of the dispute.

29) This Court is the natural forum for deciding the disputes between the parties particularly because Kolkata, having more than substantial connection with the cause of action in this suit, it would be more convenient for this Hon''ble Court to adjudicate the instant suit. This Hon''ble Court is the convenient forum considering all relevant factors and the interest of the parties both under Indian law as well as the laws of Illinois.

30) The Defendant is invading and/or threatening to invade the valuable rights of the Plaintiff by initiating and/or threatening to initiate proceedings in the United States of America. The invasion is such that compensation in money will not afford adequate relief. Such invasion has in any event taken place at the Plaintiff's registered office within the aforesaid jurisdiction.

31) Inasmuch as a part of the cause of action has arisen within the jurisdiction of this Hon''ble Court and a part of the cause of action has arisen outside the jurisdiction of this Hon''ble Court, the Plaintiff is entitled to get leave under Clause 12 of the Letters Patent to entertain, try and determine the present suit.

5. After filing of the aforesaid suit, on the basis of the aforesaid allegations made in the plaint, the Plaintiff came up with an application for injunction praying for restraining the Defendant, its servants, agents and/or assigns from initiating and/or in any manner proceeding with any legal proceeding before any of the Courts in Illinois or in any other place in the United States of America or in any forum other than the learned Trial Judge.

6. The learned Single Judge, by the order impugned in this appeal, dismissed the said application even without issuing any notice upon the Respondent and thereby holding that 1) the primary requirement of obtaining an order of anti-

suit injunction has not been proved by the Plaintiff; 2) the parties having agreed to be governed by the laws of Illinois, even though there may not be any forum selection clause, having regard to the rule of comity, the court was not inclined to grant a blanket order of injunction for such an order would in effect "amount to interference under exercise of jurisdiction by a foreign court"; 3) when two parties to a contract belong to two different countries and proceedings are initiated in the country of origin of one of the parties to the contract, it could not be said the proceedings were initiated in a forum of non-convenience, if the forum is otherwise competent; 4) at any rate, anti-suit injunction should be granted in very rare and exceptional cases and not for the mere asking; 5) the refusal of injunction as prayed for would not defeat the ends of justice or perpetrate injustice; on the other hand, the grant of injunction would violate the rule comity.

7. The learned Single Judge, however, observed that the said order would not prevent the Plaintiff from filing an application in future should any suit be filed by the Defendant.

8. Being dissatisfied, the Plaintiff has come up with the present appeal.

9. Mr. Jayanta Mitra, the learned Senior Advocate appearing on behalf of the Appellant, has strongly contended before us that in dismissing the application for injunction filed by his client even without calling for any explanation from Defendant, the learned Single Judge has totally misconstrued the law relating to grant of anti-suit injunction as laid down by Supreme Court. According to Mr. Mitra, in view of the averments made by his client in the plaint, the learned Single Judge should have held that it would be an abuse of law if his client was required to contest any claim made by the Defendant in the United States of America. Mr. Mitra contends that if the Defendant has any counterclaim, it can raise such counter-claim in the present suit. As regards the balance of convenience and inconvenience, Mr. Mitra tried to impress upon us that as the Defendant has a representative in India and in course of negotiation for the contract, the Defendant's representative came to Kolkata and even having inspected the goods manufactured by his client, it was a fit case for injunction restraining the Defendant from initiating any proceeding in the United States of America and to compel the Defendant to initiate such proceeding in this Court. In support of his contention, Mr. Mitra relies upon the following decisions:

1. Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd.,
2. Oil and Natural Gas Commission Vs. Western Company of North America,

10. Mr. Anindya Mitra, the learned Senior Advocate appearing on behalf of the Respondent, however, opposed the aforesaid contention advanced by Mr. Jayanta Mitra and submitted without prejudice to his client's rights and contentions that this Court has no territorial jurisdiction to even entertain the present suit and the learned Single Judge on the facts and in the circumstances of the present case has rightly declined to grant any injunction against his client. Mr. Anindya Mitra

further submitted that even it is a fit case for revocation of leave under Clause 12 of the Letters Patent as no part of cause of action arises within the jurisdiction of this Court. Mr. Mitra, therefore, prays for dismissal of this appeal.

11. Therefore, the only question that arises for determination in this appeal is whether the learned Single Judge was justified in dismissing the application for injunction filed by the Appellant in the facts of the present case.

12. The law relating to grant of anti-suit injunction has been laid down by the Supreme Court in the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., in paragraph 23 of the said judgment which is quoted below:

From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the Court must be satisfied of the following aspects:

(a) the Defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the Court;

(b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the Court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;

(2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens;

(3) Where jurisdiction of a Court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or nonexclusive jurisdiction of the Court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the Court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) a Court of natural jurisdiction will not normally grant anti-suit injunction against a Defendant before it where parties have agreed to submit to the exclusive jurisdiction of a Court including a foreign Court, a forum of their choice in regard to the commencement or continuance of proceedings in the Court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the Court of choice because the

essence of the jurisdiction of the Court does not exist or because of a vis major or force majeure and the like;

(5) where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the Court of their choice which cannot be treated just an alternative forum;

(6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the Court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the Court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that Court cannot per se be treated as vexatious or oppressive nor can the Court be said to be forum non-conveniens; and

(7) the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

(Emphasis supplied by us).

13. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the suit is basically one for damages for breach of contract admittedly entered into by the parties and also for injunction restraining the Defendant from initiating or proceeding with any legal proceedings in any other forum than the present forum.

14. The agreement has been annexed to the plaint and it appears that according to the terms of the agreement goods are to be delivered in the States of Illinois and thus, the country of performance of the contract is undisputedly the United States of America. Term 16.6 of the agreement is important and is quoted below:

The agreement shall be construed and interpreted with the laws of the State of Illinois and may be amended only by a writing signed by the parties hereto. The parties agree to opt out of CISG and the UCC shall apply.

15. From the aforesaid admitted facts, we are of the opinion that if Clause 16.6 quoted above was not there, it could be reasonably argued that the cause of action for getting the relief claimed in the suit has arisen both in India and in the State of Illinois and thus, the suit can be filed at any of the competent courts having territorial and pecuniary jurisdiction either in India or in the State of Illinois.

16. However, the moment the parties to a contract agree that the same should

be construed and interpreted in accordance with the laws of the State of Illinois, it necessarily follows that the parties mutually agreed not to be governed by the Indian laws relating to contract. According to the Contract Act which is in force in India, an Indian court dealing with an agreement between the parties to which such Act applies must be guided by the same and there is no scope of dealing with any issue of a suit for breach of an agreement being guided by the law of contract prevailing in any other country.

17. In other words, the parties having mutually agreed to be guided by the law of Illinois in interpreting and construing the terms of the agreement, expressly decided not to be subject to the Indian Contract Act and consequently, not to be subject to the jurisdiction of the Indian Courts.

18. It is now a settled principle of the Private International law that the proper law of a contract will be the law of the country where it is made. But where a contract is made in one country and to be performed wholly or in part in another, the proper law may be presumed to be the law of the country where it is to be performed. (*Auckland Corporation v. Alliance Assurance Co.*(1937 AC 587). But these rules are only presumptive in nature and subject to the intention of the parties, whether expressly declared or inferred from the terms and nature of the contract and the circumstances of the case. The aforesaid principle has been approved by the Supreme Court in the case of *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*,

19. Thus, by mutual agreement, the parties inevitably agreed that out of the Courts of the two countries having jurisdiction, the Courts in India should be excluded. As pointed out by the Supreme Court in the case of *Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd.*, , where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, such agreement would be valid and binding.

20. We, therefore, find that prima facie, the learned Single Judge had no territorial jurisdiction to entertain the suit in view of the agreement between the parties and if by agreement, the jurisdiction of a Court is excluded, the grant of leave under Clause 12 of the Letters Patent on the face of the documents annexed to the plaint cannot confer jurisdiction.

21. We, accordingly, find that in view of the agreement between the parties, the Plaintiff has prima facie failed to prove that the Defendant which is a foreign company is amenable to the personal jurisdiction of this Court. If in a contract between the subjects of two different countries, the parties agree not to be governed by the laws of the one of them, it necessarily follows that in the matter of adjudication of the disputes relating to the breach of such contract, the parties are not amenable to the jurisdiction of the Court of that country. Thus, the very first condition for grant of an anti-suit injunction pointed out by the Supreme

Court in the case of Modi Entertainment Network and Anr. v. W.S.G. Cricket Pte. Ltd (supra) is not satisfied.

22. Further we find that although a vague allegation of fraud has been pleaded in the matter of execution of the said agreement, the circumstances mentioned therein in support of such fraud do not indicate that there was any fraud in the matter of arriving at the consensus that the parties would be governed by the law prevailing in the State of Illinois relating to the interpretation and construing the terms of the agreement. Thus, even no prima facie case of fraud as regards the exclusion of jurisdiction of this Court has been made out.

23. Moreover, we find from the averments made in the plaint itself that it was the Plaintiff who admitted its fault and promised to rectify its mistake but ultimately failed to convince the Defendant, which compelled the latter to terminate the agreement which has been accepted by the Plaintiff. Thus, no special case has even been made out to deviate from the agreed terms of exclusion of jurisdiction of this Court and restraining the Defendant from proceeding with or initiating the remedy available to it under the law. Thus, even the other conditions for grant of anti-suit injunction as pointed out in the case of Modi Entertainment Network and Anr. (supra) are absent as we fail to find any mala fide or vexatious claim of the Defendant even from the averments made in the plaint and the documents relied upon by it.

24. In the case of Oil and Natural Gas Commission (supra), strongly relied upon by Mr. Jayanta Mitra, the Appellant, ONGC, and the Respondent Western Company, had entered into a drilling contract. The contract provided for any differences arising out of the agreement being referred to arbitration. The arbitration proceedings were to be governed by the Indian Arbitration Act 1940 read with the relevant rules. A dispute had arisen between the parties. It was referred to two Arbitrators and an Umpire was also appointed. The Arbitrators entered on the reference in London which was the agreed venue for hearing as per the Arbitration Clause contained in the contract. On October 1, 1985 the Arbitrators informed the Umpire that they were unable to agree on the matters outstanding in the reference. Consequently, the Umpire entered upon the Arbitration, and straightway proceeded to declare his award (styled as interim award) on Oct. 17, 1985 without affording any hearing to the parties on the matters outstanding in the reference. The award rendered by the Umpire was lodged in the Bombay High court on November 22, 1985. Subsequently, on Nov. 28, 1985 the Umpire rendered a supplementary award relating to costs which has been termed as "final" award. About a month after the lodging of the award in the High Court of Bombay by the Umpire at the instance of the Respondent, Western Company, the latter lodged a plaint in the U. S. District Court, inter alia, seeking an order (1) confirming the two awards dated Oct. 17, 1985 and Nov. 28, 1985 rendered by the Umpire; (2) a judgment against the ONGC for the amount of \$ 256,815.45 by way of interest until the date of the judgment and costs etc. On Jan. 20, 1986, the Appellant ONGC on its part instituted an

Arbitration petition under Sections 30 and 33 of the Arbitration Act 1940 for setting aside the awards rendered by the Umpire. The Appellant, ONGC, also prayed for an interim order restraining the Western Company from proceeding further with the action instituted in the U.S. Court. The single Judge granted an ex parte interim restraint order on Jan. 20, 1986 but vacated the same after hearing the parties by his impugned order against which the matter went to the Supreme Court in an appeal by Special Leave.

25. In such a case, it was held that there was the possibility of the award rendered by the Umpire being set aside by the Indian Court and in that event, an extremely anomalous situation would arise inasmuch as the successful party (Western Company) might well have recovered the amount awarded as per the Award from the assets of the losing party in the USA after procuring a judgment in terms of the award from the USA Court. It would, according to the Apex Court, result in an irreversible damage being done to the losing party (ONGC) for the Court in USA would enforce a non-existent award under which nothing could have been recovered. It would result in the valuable Court time of the USA Court being invested in a non-issue and the said Court would have acted on and enforced an award which did not exist in the eye of law. The U. S.A. Court would do something which it would not have done if the Western Company had waited during the pendency of the proceedings in the Indian Court. The parties, according to the Supreme Court, would also be obliged to spend large amounts by way of costs incurred for engaging counsel and for incidental matters and the losing party, in that event, would be obliged to initiate fresh proceedings in the USA Court for restitution of the amount already recovered from it, pursuant to the judgment rendered by the USA Court in enforcing the award which is set aside by the Indian Court. Both the sides would have to incur huge expenditure in connection with the attendant legal proceedings for engaging counsel and for incidental matters once again.

26. Secondly, according to the Supreme Court, while as per the contract, parties are governed by the Indian Arbitration Act and the Indian Courts have exclusive jurisdiction to affirm or set aside the award under the said Act, the Western Company is seeking to violate the very arbitration clause on the basis of which the award has been obtained by seeking confirmation of the award in the New York Court under the American Law. It will amount to an improper use of the forum in America in violation of the stipulation to be governed by the Indian law which by necessary implication means a stipulation to exclude the USA Court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian Court. According to the Apex Court, if the restraint order was not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will secure an order enforcing the order from a foreign Court in violation of that very clause. Till an award is transformed into a judgment and decree u/s 17 of the Arbitration Act, the Supreme Court proceeded, it was altogether lifeless from the point of view of its enforceability and life is infused into the award in the sense of its

becoming enforceable only after it is made a rule of the Court upon the judgment and decree in terms of the award being passed. The American Court would therefore enforce an award which is a lifeless award in the country of its origin, and under the law of the country of its origin which law governs the award by choice and consent. We, thus, find that the facts of the said case is totally opposite the case before us and the case rather supports the view we have adopted in this case as regards the prima facie lack of jurisdiction of the Indian Court in view of the agreement between the parties as to applicability of the law of the State of Illinois. The aforesaid decision, therefore, does not support the Appellant in any way.

27. We, thus, although do not approve all the reasons assigned by the learned Single Judge in refusing the prayer of injunction, find that the ultimate conclusion was correct and as such, we approve the ultimate conclusion of the learned Single Judge that the application for injunction should be dismissed for the reasons discussed by us in this order.

28. The appeal is, thus, dismissed.

29. In the facts and circumstances, there will be, however, no order as to costs.

I agree.