

(1977) 06 CAL CK 0010
In the Calcutta High Court

Case No : Appeal No. 425 of 1976 and Suit No. 189 of 1976

Shah Prabhudas Gulabchand and Another	APPELLANT
Vs	
Eurasian Equipments and Chemicals Ltd. and Another	RESPONDENT

Date of Decision : 02-06-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20

Citation : AIR 1977 Cal 449

Hon'ble Judges : Bimal Chandra Basak, J;A.N. Sen, J

Bench : Division Bench

Advocate : B.K. Chatterjee, H.K. Mitter and P. Chatterjee, for the Appellant;P.K. Roy, for the Respondent

Final Decision : Allowed

Judgement

A.N. Sen, J.—This appeal arises out an order passed by Ajay K. Basu, J. on the 22nd November, 1976 dismissing the application of the appellants who happened to be defendants Nos. 1 and 2 in the suit for stay of the suit filed by the plaintiff in this Court, for an injunction restraining the plaintiff from proceeding with the suit, for revoking leave under Clause 12 of the Letters Patent and for other reliefs.

2. The plaintiff instituted this suit in this Court on the 26th April, 1976. In the suit, the prayer of the plaintiff is for a decree for Rs. 7,58,322.48 p and in the alternative (i) a decree against the defendants Nos. 1 and 2 or alternatively against the defendant No. 3 for Rupees 1,77,106.44p. with interest thereon @ 12% per annum or at such other rate as may be prescribed from June 28, 1973 till the institution of the suit, (ii) an enquiry into the damages as pleaded in para. 11 of the plaint and decree for such sum as may be found due to the plaintiff, interest and other reliefs.

3. The plaintiff also prayed for leave under Clause 12 of the Letters Patent and under Order II, Rule 2 of the Civil P. C. The plaintiff entered into a contract with the defendant No. 2 who is the sole proprietor of the defendant No. 1. The said

contract was in writing and under the said contract the plaintiff agreed to buy and the defendants were to sell 10,000 Kgs. of Chloramphenicol Powder I. P. to be supplied during the months of April, May, June, July and August, 1973 @ 2,000 Kgs. each month at the agreed price of Rs. 340/- per Kg. F. O. B. Bombay. Under the terms of the said agreement between the parties the plaintiff was to open in favour of the defendant No. 1 a confirmed irrevocable revolving Letter of Credit for Rs. 34,00,000/- equivalent to the value of 10,000 Kgs. of the said merchandise. The said contract contains a clause to the following effect:

"This contract is subject to Bombay jurisdiction."

4. In this suit the plaintiff's cause of action against the defendants Nos. 1 and 2 is that the defendants instead of supplying Chloramphenicol Powder have supplied Talcum Powder in breach of the said contract between the parties and on the basis of such cause of action the plaintiff has asked for refund of the money paid in respect of the said supply and also for damages. The plaintiff in this suit has impleaded Dena Bank as a party defendant being defendant No 3. The cause of action of the plaintiff against Dena Bank is that in the event it be held that the defendants Nos, 1 and 2 had supplied proper materials then the said materials which went into the custody of Dena Bank must have been changed in the custody of the Dena Bank.

5. The defendants Nos, 1 and 2 thereafter made this application for stay of this suit and also for revocation of leave under Clause 12 of the Letters Patent. The said application of the defendant No. 2 was opposed by the plaintiff and also by the defendant No. 3. The learned trial Judge was pleased to dismiss the said application" of the defendants Nos. 1 and 2 by his order under appeal. It appears that the learned trial Judge did not deliver any judgment.

6. The principal contention of the appellants before us has been that in view of the specific provision in the contract between the plaintiff and the defendant No. 2 that the contract is subject to Bombay jurisdiction, this Court should not entertain this suit. Reliance has been placed on the decision of the Supreme Court in the case of Hakam Sing Vs. Gammon (India) Ltd., and also decision of the Division Bench of this Court in the case of Sri Rajendra Mills Ltd. Vs. H.V.M. Hazi Hasan Dada and Another, Reliance has also been made in this connection on two other decisions, one of which is reported in Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, and the other is a decision of the Andhra Pradesh High Court, reported in AIR 1962 Andh Pra 452,

7. Mr. Mitter, appearing on behalf of the appellants, has contended that in view of the specific covenant in the contract and in the light of the decisions in the above cases, the learned Trial Judge should have made an order staying the suit in this Court. He has further argued that the fact that Dena Bank has been impleaded as a party to this suit does not make any material difference and in support of this contention he has placed particular reliance on the decision of the Division Bench of this Court in Sri Rajendra Mills Ltd. Vs. H.V.M. Hazi Hasan Dada and

Another, and he has drawn our attention to the following observation at page 342:

"It appears, however, as we have already stated, that the instant suit could have been instituted either at Howrah or at Salem and the plaintiff, by reason of the above contract, had validly waived its thought to institute the suit except at Salem. In such circumstances, it is not open to the plaintiff to object to the order for return of the plaint for presentation to the Court at Salem. It is not also open to defendant No. 2 to object to the same course as the choice of forum in case of alternative forums, lies with the plaintiff and the plaintiff having debarred or precluded itself from going to any other Court except the Court at Salem which would be a proper Court as against defendant No. 2 also, it would not be just to allow the plaintiff, at the instance of any other party or under cover of its objection, to institute the suit except in the Court at Salem."

8. Mr. Mitter has also submitted that the balance of convenience in the facts and circumstances of this case is overwhelmingly in favour of the cause being tried in Bombay.

9. Mr. Roy, appearing on behalf of the plaintiff, does not dispute the pro-position that if the contract contains a specific provision or covenant as to any particular forum where suits or proceedings are to be instituted in respect of or arising out of the said contract, the said covenant should normally be enforced unless there is good ground for not enforcing the same. Mr. Roy has contended that in the instant case as Dena Bank is a party to the suit the plaintiff could not possibly file the suit at Bombay. It is his contention that the suit as framed cannot be instituted in Bombay, as Bombay Court has no jurisdiction to entertain the suit against Dena Bank. He has also argued that the balance of convenience is overwhelmingly in favour of this Court for the trial of the case in so far as the plaintiff and the defendant No. 3, Dena Bank are concerned. Mr-Roy has submitted that the plaintiff had transaction with the particular branch of Dena in Calcutta and the said branch constitutes a separate entity and the suit in relation to any transaction with the said branch should be filed in a Court within whose jurisdiction the said branch is situated. In support of this contention that each branch of a bank constitutes separate entity, Mr. Roy has relied on the decision of Privy Council in the case of *The King v. Irvine Lovitt*, reported in 1912 AC 212 and also on the decision of P. B. Mukharji, J in the case of *Hansraj Bajaj Vs. The Indian Overseas Bank Ltd.*, .

10. Mr. Chatterjee, appearing on behalf of the Dena Bank has submitted before us that so far as the bank is concerned the cause of action arises within the jurisdiction of this Court and the balance of convenience for trial of the cause of action in this case against the bank is overwhelmingly in favour of this Court.

11. In our opinion, in view of the specific provision in the contract making the contract subject to Bombay Jurisdiction the application of the defendants should succeed. The decisions relied on by Mr. Mitter clearly lends support to this view.

The mere fact that the Dena Bank has been impleaded as a Party to this suit does not entitle the plaintiff to file this suit in this Court in breach of the specific provision contained in the contract. It cannot be said in the instant case that the Bombay Court will have no jurisdiction to try this suit against Dena Bank. The head office of Dena Bank is at Bombay and it also appears on the basis of averments made in the plaint that Part of the cause of action against Dena Bank also arises in Bombay. The plaintiff and the said defendants entered into the said contract containing the said specific provision regarding their choice of forum. Apart from the said specific provision in the contract, it also appears from the facts and circumstances of this case that the balance of convenience for trial of the cause of action at least against the defendants Nos. 1 and 2 is entirely in favour of the Bombay Court. As the plaintiff who has the choice of forum is obliged to institute this suit in the Bombay Court in view of the specific covenant in the contract, the fact that Dena Bank who is not a Party to the contract is also made party to the suit does not authorise or entitle the plaintiff to file the suit in this Court on the basis of the said contract in breach of the specific provision contained therein. In view of the provision contained in the said contract, the choice of forum of the plaintiff is restricted, only to Bombay Court in respect of enforcement of any claim under the contract or on the basis of the contract containing this special provision regard-ins forum. The question of balance of convenience of the defendant No. 3 in the facts and circumstances of this case, loses a great deal or its importance and the question of balance of convenience of the defendant No. 3 has also to be considered in the background of the entire facts and circumstances of this case. It cannot be disputed in our opinion that the Bombay Court has jurisdiction to try and entertain the suit. Even, the decision of Hansraj Bajaj Vs. The Indian Overseas Bank Ltd., makes this position abundantly clear. We are further of the opinion that on a consideration of the entire facts and circumstances of this case, the balance of convenience for trial of the cause as a whole is overwhelmingly in favour of the Bombay Court.

12. In that view of the matter, the appeal succeeds. The order passed by the learned Trial Judge is set aside. There will be an order in terms of prayer (a) of the Notice of Motion and there will be an order staying the suit and all further proceedings thereon in this Court in terms of prayer (b).

13. In the facts and circumstances of this case we direct that each party will pay and bear its own costs.

Bimal Chandra Basak, J.

14. I agree.