
(2008) 04 DEL CK 0161
In the Delhi High Court
Case No : OMP. No. 12 of 2008

S.K. Contractor and Engineers	Vs	APPELLANT
Hindustan Petroleum Corporation Limited		RESPONDENT

Date of Decision : 30-04-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 34, 42

Citation : (2008) 2 ARBLR 263 : (2008) 150 DLT 584 : (2008) 103 DRJ 61 :
(2008) 9 ILR Delhi 79

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Anusuya Salwan, for the Appellant; Anil Kumar Mishra, for the Respondent

Final Decision : Disposed Off

Judgement

Badar Durrez Ahmed, J.—An objection with regard to the territorial jurisdiction of this Court to entertain the present petition filed u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") was raised at the outset by the learned Counsel appearing on behalf of the respondent. This order shall dispose of the said objection.

2. The petition is directed against the award dated 20.9.2007 made by the sole arbitrator. It is the contention of the learned Counsel for the respondent that no part of the cause of action arose in Delhi and, apart from this, Clause 14.10 of the Contract governing the parties clearly stipulated that:

The parties hereby submit to the exclusive jurisdiction of the Courts situated at Mumbai for all purposes. The Arbitration shall be held at Mumbai and conducted in English language.

On the strength of the aforesaid clause, the learned Counsel for the respondent submitted that even if it was to be assumed that part of the cause of action had arisen at Delhi, exclusive jurisdiction was vested in the Courts at Mumbai by

agreement between the parties. Referring to the decision in the case of Apparel Export Promotion Council v. Shri Prabhati Patni 2005 VIII AD (Delhi) 889, the learned Counsel for the respondent submitted that parties could by agreement restrict jurisdiction to the Courts at Mumbai provided the Courts at Mumbai otherwise had jurisdiction with regard to the subject matter of the contract. It was also submitted that though a contract to oust the jurisdiction of the Courts absolutely would be void, being against public policy, restricting jurisdiction to any one of the many courts which would otherwise have jurisdiction would not be opposed to public policy as held in the said decision in Apparel Export Promotion Council (supra).

3. The learned Counsel appearing on behalf of the petitioner submitted that this Court had jurisdiction because the letter of intent dated 12.2.2004 had been faxed by the respondents to the petitioner from Mumbai to the petitioner's fax machine installed at Delhi. She submitted that since the letter of intent was received by fax at Delhi, the contract was completed at Delhi and, Therefore, part of the cause of action arose within the territorial limits of this Court. She placed reliance on a decision of this Court in the case of Triveni Oil Field Services Ltd v. Oil & Natural Gas Commission 2006 III AD (Delhi) 19. She also stated that this Court would have jurisdiction to entertain the present petition u/s 34 of the said Act in view of the provisions of Section 42 of the said Act. This is because earlier the petitioner had filed OMP No. 388/2006 before this very Court u/s 12 and 13 of the said Act seeking the removal of the arbitrator. She submitted that the said OMP No. 388/2006 was disposed of by a detailed judgment on 23.1.2007 rejecting the petitioner's case on merits. She submitted that at that point of time the respondents had not raised any objection with regard to jurisdiction and this clearly implied that they have waived the condition stipulated in Clause 14.10 of the contract between the parties whereby the Courts at Mumbai had been given exclusive jurisdiction. Consequently, according to the learned Counsel for the plaintiff, because of the provisions of Section 42 of the said Act, this Court would have jurisdiction in entertaining the present petition.

4. In Triveni Oil Field Services Limited (supra), the issue of territorial jurisdiction in the backdrop of instantaneous communications had been considered threadbare. In that case everything had happened at Dehradun and the only point to be considered was the issuance of letter of intent which also had been issued from Dehradun but in the form of a telex message addressed to the petitioner at New Delhi. The said telex message indicating the acceptance of the respondent had been received by the petitioner at its telex machine at New Delhi. After considering the Supreme Court decisions in the case of Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others, and A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , this Court observed that the normal rule applicable to postal communications would not be applicable to communications which are instantaneous as in the case of a telephone conversation or a telex message. It further observed that the normal

rule for postal communications, as observed by the Supreme Court, is that the contract is completed the moment the acceptor posts his acceptance of the offer. It was further observed that had the communication been by post and had a letter been posted at Dehradun, under the normal rule, the contract could have been said to have been completed and concluded at Dehradun and no part of cause of action would have arisen at Delhi. However as the communication of the acceptance was by way of a telex message, the principles which would apply would be different. It was held that since the telex message was received at New Delhi, the contract was concluded at New Delhi, that is, the place where the acceptance was received. In the case before me, the letter of intent had admittedly been issued by the respondents from Mumbai by fax and the same had been received by the petitioner on its fax machine in Delhi. It is, Therefore, clear that, this being a case of instantaneous communication, the normal rule as applicable to postal communications would not apply and the contract would be deemed to have been concluded at the place where the acceptance was received, that is, New Delhi. Clearly, Therefore, part of the cause of action did arise within the territorial limits of this Court.

5. This takes me to the discussion of the jurisdiction clause contained in Clause 14.10 of the contract between the parties. As noted in *A.B.C. Laminart* (supra) as well as in the other two decisions cited by the learned Counsel for the parties, there can be a clause whereby jurisdiction is restricted to any one or more of the Courts which otherwise have jurisdiction in the matter. It is well settled that parties by agreement cannot confer jurisdiction on a court which otherwise does not have jurisdiction with regard to the subject matter. In the present case, there is no dispute that the courts at Mumbai do have jurisdiction with regard to the subject matter inasmuch as a substantial part of the cause of action had arisen at Mumbai. It is also clear that Clause 14.10 would be a clause whereby jurisdiction of courts other than the courts at Mumbai has been ousted. This is amply demonstrated by the use of the word "exclusive". In *ABC Laminart Pvt. Ltd* (supra), it has been observed:

...As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty.

This clearly shows that the intention of the parties was to exclude jurisdiction of other courts and restrict the same to the Courts situated at Mumbai. The said Clause 14.10, Therefore, clearly restricted the jurisdiction to the courts at Mumbai. However, this was by agreement between the parties. The case of the petitioner is that it is by agreement between the parties that this clause has been waived. This can be discerned from the fact that when the petitioner filed the earlier OMP No. 388/2006 u/s 12 and 13 of the said Act, the respondents raised no objection with regard to jurisdiction and, in fact, submitted arguments on merits. It is another matter that the said OMP No. 388/2006 was dismissed by this Court but, it was not dismissed on the question of jurisdiction. I am in agreement with the learned Counsel for the petitioner that by virtue of the fact

that the respondent did not raise any objection with regard to jurisdiction when the earlier petition under the said Act had been filed before this Court, the respondent would be deemed to have waived the condition with regard to exclusivity of jurisdiction of the Courts situated at Mumbai. As much as Clause 14.10 is contractual, so is waiver (See: AIR 1935 79 (Privy Council); Madamsetty Satyanarayana Vs. G. Yelloji Rao and Others, ; Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others, ; Krishna Bahadur Vs. Purna Theatre and Others,). That being the case, the provisions of Section 42 of the said Act would come into play. Since the first application had been filed before this Court, all subsequent applications under the said Act falling within the ambit of Section 42 would also have to be filed before this Court.

6. Consequently, I hold that this Court has jurisdiction to entertain the present petition. This petition has to be disposed of on merits. The learned Counsel for the respondent shall file his reply within four weeks. The rejoinder, if necessary, be filed within two weeks thereafter.

List the matter for disposal on 22nd October, 2008.