
(2013) 10 DEL CK 0125

In the Delhi High Court

Case No : O.M.P. 963 of 2013 & O.M.P. 964 of 2013

Srei Equipment Finance Pvt. Ltd.

APPELLANT

Vs

Divij Infraprojects Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(12)(b), 2(e), 9
Civil Procedure Code, 1908 (CPC) — Section 20, 20(c)
Contract Act, 1872 — Section 23, 28

Citation : (2013) 10 DEL CK 0125

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Ajay Uppal, for the Appellant;

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, J.—This is a petition filed u/s 9 of the Arbitration & Conciliation Act, 1996 (in short the Act). This petition came up for hearing for the first time on 25.09.2013, when it was directed to be listed for directions today. The reason for doing so was that, during the course of hearing and perusal of documents, a query had arisen as to whether this court would have the jurisdiction to entertain and deal with the matter. Briefly, in the petition, following averments have been made:

1.1 The petitioner avers that a loan in the sum of Rs. 90,76,889/- was extended to respondent no. 1, i.e., the principal borrower in pursuance of a loan agreement dated 22.01.2013 (in short the agreement).

1.2 The loan was extended, it appears, to respondent no. 1 for purchasing assets/equipments of make/model Two HAMM Soil Compactors (Model-311), Apollo Drum Mix Plant (Model-DM-50) and Apollo Wet Mix Plant (Model-WM-100) (in short the equipments in issue).

1.3 It is further averred that as per the agreement, the said amount was

repayable by respondent no. 1 in 46 equated monthly instalments (EMIs) of Rs. 2,53,550/- each. Respondent nos. 2 to 4 are stated to be guarantors of the loan facility granted in favour of respondent no. 1.

1.4 The petitioner claims that the respondents have defaulted in repayment of the loan which led to its fore-closure. Accordingly, a notice was issued to the respondents, which is dated 17.09.2013 for recalling the loan.

1.5 As per the petitioner, total amount due and payable by the respondents, as on 17.09.2013, is Rs. 95,94,638.36/-.

2. It is in this background, the present petition was filed essentially seeking prayer for appointment of a receiver for taking possession of the equipments in issue, described above. The reason that this court raised a query with regard to territorial jurisdiction was on account of the fact that while there was an averment in paragraph 14 of the petition that the agreement in issue was signed at Delhi, the photocopy of the agreement demonstrated to the contrary. The agreement begins with the recital that the agreement has been made on 22.01.2013 at Olisa House, 7th Floor, 4 Govt. Place (North), Kolkata-700001.

2.1 I must also mention that in the very same paragraph 14 of the petition, there is also an averment to the effect that this court would have jurisdiction to entertain the petition as the petitioner's zonal office is in Delhi and respondents reside and carry on business at Delhi.

3. As indicated, it is in this background that the matter was put up for hearing today. A close scrutiny of the agreement disclosed that it contains a jurisdiction clause conferring "exclusive" jurisdiction on the courts and tribunals at Kolkata. Provision with regard to same is made in clause 9.10 of the agreement. Similarly, clause 9.11 of the agreement, which relates to arbitration, provides that the venue of the arbitration proceedings will be at Kolkata. The relevant clauses for the sake of convenience are extracted hereinbelow:

...9.10 Jurisdiction and Governing Law

The Parties hereto agree that the courts and tribunals at Kolkata shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement. All disputes arising out of this Agreement shall be decided in accordance with the laws of India.

9.11 Dispute Resolution

Arbitration

Any disputes or differences arising out of or in connection with the agreement during its subsistence or thereafter between the parties including any disputes and differences relating to the interpretation of the agreement or any clause thereof shall be adjudicated by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed there under and any amendment, modification, statutory enactment thereto from time to time and

shall be referred to the sole Arbitration of an Arbitrator appointed by Company on its own or upon request of the Customer and/or guarantors in writing, upon intimation to all parties to this agreement. It is made clear that the venue of Arbitration proceedings will be at Kolkata and no objection shall be entertained from any parties in this regard. The cost of the Arbitration proceedings shall be borne by the parties to this agreement.

The award of the arbitrator shall be final, conclusive and binding on all the parties.....

4. In the face of the aforesaid provisions Mr. Uppal, learned counsel for the petitioner, tried to contend that the provisions of Section 20 of the Code of Civil Procedure, 1908 (in short CPC), would have application. He submitted that since respondents reside in Delhi, this court would have jurisdiction. It was Mr. Uppal's contention that both courts, where the respondents reside and where venue for arbitration was indicated, would have jurisdiction in the matter. In this behalf, learned counsel for the petitioner relied upon paragraph 96 of the judgment of the Supreme Court in the case of Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., Mr. Uppal also relied upon the judgment of a Single Judge of this court in the case of GE Capital Transportation Financial Services Ltd. Vs. Raj Tours Private Limited, . Furthermore, learned counsel for the petitioner submitted that Section 20(c) of the CPC will also apply as the cause of action arose within the territorial jurisdiction of this court.

5. As to the last aspect, there is no averment made in paragraph 14 of the petition, as noticed by me hereinabove. The jurisdiction of this court is triggered solely on the ground that the respondents reside in Delhi and that the petitioner has its zonal office in Delhi. Though, there is reference to cause of action having arisen in Delhi, it is not articulated as to how the cause of action arose at Delhi. Even if, I were to assume that the cause of action was in Delhi the provisions of clause 9.10 of the agreement, as extracted above, would show that parties had agreed to oust the jurisdiction of all other courts except Kolkata. The principle of law is well settled that such an ouster clause is not contrary to public policy, and therefore does not offend Sections 23 and 28 of the Indian Contract Act, 1872 as it does not seek to completely oust jurisdiction of courts per se. The well accepted principle of law is: that parties cannot by agreement confer jurisdiction on a court, which does not have jurisdiction. It is when two or more courts have jurisdiction to try a suit or proceedings, and parties by agreement agree to have the dispute tried by one such court; such a provision in the contract, is not considered contrary to public policy.

6. Mr. Uppal tried to deal with this proposition of law by submitting that there was no ouster of jurisdiction of the courts in Delhi as the words "only" and "exclusive" do not find mention in the clause.

6.1 In my view, this submission may have been made by Mr. Uppal, oblivious of

the fact that clause 9.10, as a matter of fact, uses the expression "exclusive". Moreover, the mere absence of the words, such as, "alone", "only" or "exclusively" or its various variants, may not be decisive by itself.

6.2 This aspect has infact been put beyond doubt by the Supreme Court in a recent judgment in the case of Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd., wherein the court has held that in order to ascertain the intention of parties to exclude jurisdiction of all other courts except that which is mentioned in the jurisdiction clause, the absence of words such as "alone", "only", "exclusive" etc. may not by itself be decisive. The absence of such words, according to the Supreme Court, would not make a material difference if, otherwise the intention of the parties is clear. Speaking for the court Hon"ble Mr. Justice R.M. Lodha, made the following observations:

...31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator u/s 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties-by having clause 18 in the agreement-is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner....

(emphasis is mine)

6.3 Hon"ble Mr. Justice Madan B. Lokur in a concurring judgment has laid stress on this aspect of the matter with greater emphasis. The observations made in that regard are contained in paragraphs 26 to 28 of the judgment. For the sake of convenience the same are extracted hereinbelow:

...26. It will be seen from the above decisions that except in A.B.C. Laminart where this Court declined to exclude the jurisdiction of the Courts in Salem, in all other similar cases an inference was-drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words "only", "alone" or "exclusively" and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. Conversely, if the parties had intended that all Courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.

27. It is not necessary to refer to the decisions rendered by this Court in Harshad Chiman Lal Modi Vs. DLF Universal and Another, and Inter Globe Aviation Ltd. Vs. N. Satchidanand, since they deal with an issue that does not at all arise in this case. In this context it may only be mentioned that the appellant in the present case did not dispute-that a part of the cause of action arose in Kolkata, as observed by my learned Brother Justice Lodha.

Conclusion:

28. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the Courts in Kolkata had jurisdiction to entertain the disputes between the parties....."

(emphasis is mine)

7. Therefore, having regard to the fact that the agreement between the parties was executed at Kolkata, the exclusive jurisdiction clause 9.10 will be operable in the instant case, contrary to the stand of the petitioner.

8. Before I conclude, it must be said that in so far as the judgment of the Supreme Court in the case of Bharat Aluminium Co. is concerned, it did not deal with the issue articulated above. The court was not considering the matter from the angle as to what would be the consequences of parties making a provision

for exclusion of jurisdiction of all other courts except that which is mentioned in the contract obtaining between the parties. In so far as the judgment in the case of GE Capital Transportation Financial Services Ltd. is concerned, in my view, it is clearly distinguishable on facts as in that case the parties had, as a matter of fact, agreed that courts at Delhi would have sole and exclusive jurisdiction. Such is not the situation in the present matter. Thus, in view of the facts obtaining in the present case, the petition is disposed of with a direction that it be returned, for being filed in an appropriate court, in accordance with law. It is ordered accordingly.