

(2011) 06 MAD CK 0423
In the Madras High Court
Case No : A.S. No. 989 of 2007

Sri Durga Lodge Pvt. Ltd.

APPELLANT

Vs

Federal Lloyd Corporation Ltd.

RESPONDENT

Date of Decision : 17-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 20, 96
Contract Act, 1872 — Section 28

Citation : (2011) 06 MAD CK 0423

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : T. Dhanasekaran, for the Appellant; Srinath Sridevan, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—This appeal is filed u/s 96 of the CPC against the judgment and decree dated 28.09.2005 and made in O.S. No. 4866 of 1999 on the file of the Learned Additional District and Sessions Judge (FTCIV), Chennai.

2. The suit was filed by the Respondent/Plaintiff against the Appellant/Defendant for the recovery of a sum of Rs. 6,41,151/- with interest at 24% per annum on Rs. 5,43,350/- from the date of plaint till the date of realization. The Appellant/Respondent had contested the suit on various grounds. However, the suit was decreed as prayed for. Challenging the judgment, the Defendant has approached this Court by way of this appeal.

3. The fact which giving rise to this appeal may be summarised as under.

4. The Plaintiff is carrying on business in manufacturing and installing Air-Conditioners and Cooling systems. The Defendant is a company registered under the Indian Company's Act carrying on business at No. 120, Ma.PO Si.Salai, Thiruttani. The Defendant had approached the Plaintiff at Madras for the supply of 28 Nos. 1-Ton and 12 Nos. 1.5 Tons window Air-Conditioners for his lodge at

Tiruttani. The Plaintiff had supplied the Air-Conditioners and partially installed them at the Defendants premises and raised invoice for a total value of Rs. 11,31,980/-. The Defendant had effected payment of Rs. 5,88,630/- through the Tamil Nadu Industrial Investment Corporation Ltd., and for the remaining balance he had issued two cheques drawn on Indian Overseas Bank, Tiruttani for Rs. 2,96,370.40. When the cheques were presented for encashment they were bounced back. Despite repeated demands, the Defendant had been giving evasive answers and did not come forward to pay the balance of Rs. 5,43,350/-. Hence this suit.

5. The Defendant has admitted that he had approached the Plaintiff to supply window Air-Conditioners 40 in Nos. as per the specification detailed in the plaint. He would contend in his written statement that the Plaintiff wanted to get all the amount payable to them as agreed upon. But the Plaintiff's company had not taken care and caution in installation of the same.

6. The Plaintiff was bound to perform the contract and keep the Air-Conditioners in working condition within the warranty period. Personal talks and representation through workers and phone messages about the defective conditions of the window Air-Conditioners ended in futile. The Plaintiff never cared to look into the difficulties of the Defendant with regard to defects at the time of installation followed by working conditions at later stage. Therefore this Defendant is entitled for compensation. The Plaintiff never sent an engineer to inspect the Air-Conditioners at any stage. The following are the particulars with regard to the supply of window Air-Conditioners.

Particulars

Amount

1.5 Tones A/C (12 Nos.) 12x25,000/-

1 Tonne A/C (28 Nos.) 28x20,000/-

Total Sale Price

Paid by TIIC

Rs. 3,00,000/-

Rs. 5,60,000/-

Rs. 8,60,000/-

Rs. 5,88,000/-

Rs. 2,88,000/-

7. Now the Plaintiff has claimed a sum of Rs. 6,41,153/- in the plaint which is absolutely not correct.

Particulars

Amount

7 Numbers 1.5 Tonnes A/C

13 Numbers 1 Tonnes A/C

Rs. 1,75,000/-

Rs. 2,60,000/-

Rs. 4,35,000/-

Rs. 65,000/-

Rs. 5,00,000/-

8. The Plaintiff has to replace the defective Air5 Conditioners at their costs and entitled only for the amount valued at the time of installation on the date originally fixed, if not, the Plaintiff is entitled to get back the defective machineries and to pay the balance amount with compensation.

9. In the additional written statement the Defendant has contended that the entire cause of action for the suit arose out side the jurisdiction of the City Civil Court at Chennai. The Defendants company carrying on the business at Tiruttani, Tiruvallur District and the Air-Conditioners have admittedly been supplied and installed by the Plaintiff through their staff at the Defendant's premises and therefore, No. part of cause of action has arisen within the jurisdiction of the City Civil Court, Chennai and hence, the suit is liable to be rejected on this ground.

10. In the reply statement, the Plaintiff has contended that the Defendant having purchased the Air-Conditioners from the Plaintiff's Company, is only dealing in the matter of payment which is legitimately due to the Plaintiff. The entire cause of action in the suit arose only at Chennai within the jurisdiction of the City Civil Court, Chennai. The Defendant had placed orders with the Plaintiff at Chennai for the supply of Air Conditioners for their lodge at Tiruttani. In fact the Defendant also had an office at Chennai. Therefore the invoices drawn on M/S. Tamil Nadu Industrial Investment Corporation Ltd., at Madras on account of Durga Lodge, Tiruttani. All payments had also been made at Chennai within the jurisdiction of the trial Court. The Defendant had also made payments to M/S. Tamil Nadu Industrial Investment Corporation Ltd., on his and further issued several cheques to the Plaintiff for payment though they were returned dis-honoured. Therefore, the entire cause of action for the suit has arisen within the jurisdiction of the trial court and it is not correct to state that No. part of cause of action has arisen within the jurisdiction of the trial Court.

11. Based on the pleadings of the suit the trial Court has formulated the following three issues for the better adjudication of the suit.

1. Whether the Plaintiff is entitled to the suit claim ?

2. Whether the Defendant has installed the Air Conditioners in the Defendants

premises as alleged?

3. To what relief the Plaintiff is entitled ?

12. Then the trial Court after receiving the additional written statement as well as the reply statement from the parties to the suit has framed the following two additional issues.

1. Whether the cause of action for this suit was not arisen within the territorial jurisdiction of this Court ?

2. Whether the Air Conditioners supplied by the Plaintiff were defective and for which the Plaintiff is liable?

13. In order to find the answer for the issues as well as the additional issues both the Plaintiff and the Defendant went for trial.

14. In order to substantiate their respective cases one P.K. Eappan, who is the Accounts Manager and Power of Attorney holder of the Plaintiff's company was examined as PW 1. During the course of his examination Ex.A1 to A10 were marked. On the other hand neither oral nor any documentary evidence was let in on behalf of the Defendant.

On evaluating the evidences both oral and documentary, the trial Court had ultimately decreed the suit with the cost of the Plaintiff as detailed below;

The Defendant was directed to pay a sum of Rs. 5,43,350/- to the Plaintiff with interest at the rate of 18% per annum from the date of plaint till the date of payment.

Being aggrieved by the judgment and decree of the trial Court dated 28.09.2005, the Defendant stands before this Court with this appeal.

15. Mr. T. Dhanasekaran, the learned Counsel for the Appellant/Defendant has based his arguments only on the sole ground of territorial jurisdiction of the trial Court.

He would contend that the orders for supply of 40 numbers of Air-Conditioners were obtained out side the jurisdiction of the trial Court and all the Air Conditioners were delivered at Tiruttani as per the invoice (Ex.A9) prepared by the Plaintiff's factory at Gujarat and they were transported from Gujarat and delivered at Tiruttani and as such the trial Court ought to have held that it had No. jurisdiction to entertain the suit. He would submit further that part payment was made by the Defendant by cheque drawn on Tamil Nadu Industrial Investment Corporation Ltd., under the finance assistance arranged by the office of the said corporation situated at Ambatur and this had also taken place out side the jurisdiction of the trial Court. He has also added that there is a clause in Ex.A9, on which the suit claim is made that;

All disputes shall be tried within the jurisdiction of Gujarat Courts and this very stipulation excludes the territorial jurisdiction of the trial Court.

16. On the other hand the learned Counsel for the Respondent/Plaintiff while advancing his arguments has drawn the attention of this Court to the plaint averments. In para 3 of the plaint, the Plaintiff has specifically stated that;

The Plaintiff was approached by the Defendant at Madras to supply 28 numbers 1 Tonne and 12 numbers 1.5 Tonne of window Air Conditioners for the Defendant's lodge at Tiruttani. At paragraph No. 4 viz., the cause of action paragraph, the Plaintiff has stated that the cause of action arose at Chennai where the Defendant had approached the Plaintiff to supply the Air Conditioners, on 05.05.1998, when orders were placed and on 11.07.1998 the supplies were made and when the Defendant made payments to the Plaintiff under various cheques, and subsequently when the Defendant evaded to pay the amount due to the Plaintiff.

17. The learned Counsel for the Respondent/Plaintiff has also drawn the attention of this Court to the averments of the written statement filed by the Appellant/Defendant.

In paragraph No. 5 the Respondent/Defendant has stated as follows;

In fact this Defendant requested the Tamil Nadu Industrial Investment Corporation Ltd., not to make any payment with a view to comply the defective nature in the various air cooler. The Defendant further submits that the Plaintiff receives the payment from the Tamil Nadu Industrial Investment Corporation Ltd., even after the objection raised by the Defendant.

18. Even in the plaint also the Respondent/Plaintiff has stated that "the Defendant had availed financial assistance from Tamil Nadu Industrial Investment Corporation and that the Defendant had effected payment of Rs. 5,88,630/- from the Tamil Nadu Industrial Investment Corporation Ltd., and for the remaining balance he had issued two cheques on Indian Overseas Bank, Tiruttani....."

19. In the proof affidavit PW 1 has stated that the contentions raised in the additional written statement that this Court(trial Court) has No. territorial jurisdiction to tri this suit is untenable. PW 1 has also stated that the order for the supply of Air Condition units were placed by the Defendant and accepted by the Plaintiff at Madras and part payment were also made at Madras through the Tamil Nadu Industrial Investment Corporation Ltd., and hence, the trial Court has territorial jurisdiction to entertain the suit.

20. As per the contention of the learned Counsel for the Appellant/Defendant part of cause of action was arisen at Tiruttani and other part of cause of action was arisen at Chennai. This fact has also been specifically stated in paragraph No. 3 of the reply statement filed by the Respondent/Plaintiff to the additional written statement filed by the Appellant/Defendant that the entire cause of action for the suit was arisen within the jurisdiction of the trial court and that it was not correct to state that No. part of cause of action was arisen within the jurisdiction of the trial court.

21. On a cursory perusal of the judgment of the trial court this Court is of the view that the issue with regard to the territorial jurisdiction has not been properly considered and dealt with. Simply the trial Court after placing reliance upon the decision in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, has observed that the suit could be filed before the court within whose jurisdiction the cause of action was arisen.

22. The proviso to Section 20 of the CPC reads as follows;

Section 20: Other suits to be instituted where Defendants reside or cause of action arises:

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

(a) the Defendant, or each of the Defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the Defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the Defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

23. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, in paragraph No. 13 it has been held by the apex court as follows;

Under Section 20(c) of the CPC subject to the limitation stated there before, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as under:

"Explanation III--In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:

(1)the place where the contract was made;

(2)the place where the contract was to be performed or performance thereof completed;

(3)the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

24. In paragraph No. 14 the Apex Court has held that, the above Explanation III has not been omitted but nevertheless it may serve a guide. There must be a connecting factor.

25. The learned Counsel for the Respondent/Plaintiff has also placed reliance upon the decision reported in Arunachalam chettiar and Anr. v. Murugappa Chettiar and Anr. reported in 1969 L.W. 577. In this case it is held that;

If a note is executed at one place and delivered at another or is made payable at another place, part of the cause of action arises at each one of those places and the suit may be filed at any place at the opinion of the Plaintiff. There is abundant authority both Indian and English for the above proposition. We are therefore, of opinion that the lower court has jurisdiction to entertain the suit.

26. In M/s. Harbans Singh Tuli and Sons Builders Pvt. Ltd. Vs. Union of India, , at paragraph No. 10 it is held that;

On the question of territorial jurisdiction, since a part of cause of action had arisen within the territory of Chandigarh, namely the payment by cheque at Chandigarh, there was No. lack of territorial jurisdiction. For this argument reliance is placed on A.B.C. Laminart Pvt. Ltd., and Anr. v. A.P. Agencies, Salem.

27. Countering this argument the learned Counsel for the Appellant/Defendant has reiterated his earlier submission that in Ex.A9 (Invoice) it was specifically submitted that all disputes subject to Gujarat jurisdiction. In this connection he would submit that as stipulated in Es.A9, if all the disputes were subject to Gujarat jurisdiction the trial court would not derive territorial jurisdiction to entertain this suit.

28. In support of his contentions he has also placed reliance upon the following two decisions;

1. New Moga Transport Company, through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and Others, .

2. Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd., .

29. In the first case while writing the judgment on behalf of the Division Bench His Lordship Hon"ble Dr. Justice Arijit Pasayat has held that;

Normally, under Clauses (a) to (c) Plaintiff had a choice of forum and cannot be compelled to go to the place of residence or business of the Defendant and can file a suit at a place where the cause of action arises. If the Defendant desires to be protected from being dragged into a litigation at some place merely because the cause of action arises there it can save itself from such a situation by an exclusion clause. Where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in No. way contravenes Section 28 of the Indian Contract Act, 1872.

30. In the above cited case the only question that was raised before the Supreme Court was, whether the High Courts conclusion that the Civil Court at Barnala had jurisdiction to try the suit filed by Respondent No. 1-United India Insurance Company Ltd. (hereinafter referred to as "Plaintiff No. 1") and Malwa Cotton

Spinning Mills Ltd. (hereinafter referred to as "Plaintiff No. 2") is correct or not. While the trial Court held that the Barnala Court had jurisdiction, the first Appellate Court held otherwise. Accepting the revision filed u/s 115 of the Code of Civil Procedure, 1908 (in short the "Code of Code of Civil Procedure") the High Court by the impugned judgment held that the trial Court's view was correct. In the suit a specific plea inter alia was taken by the present Appellant that the Court at Barnala had No. jurisdiction to deal with the suit. With reference to the consignment note, it was submitted that the Court at Udaipur alone had jurisdiction to deal with the matter. In the consignment note it was indicated that the Court having jurisdiction was the one situated at Udaipur.

31. Under this circumstances after hearing both sides his Lordship Hon"ble Dr. Justice Arijit Pasayat had spoken to in the judgement that;

Had it only been indicated in the consignment note that the Court at Head Office city had jurisdiction then in the absence of a precise indication of the place what would have the consequence, we are not presently concerned, more particularly, when the consignment note itself had indicated that Court at Udaipur alone had jurisdiction.

32. His Lordship has also observed in paragraph No. 19 of the judgment that;

The intention of the parties can be culled out from use of the expressions "only", "alone", "exclusive" and the like with reference to a particular Court. But the intention to exclude a Court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such case only the accepted notions of contract would bind the parties. The first Appellate Court was justified in holding that it is only the Court at Udaipur which had jurisdiction to try the suit. The High Court did not keep the relevant aspects in view while reversing the judgment of the trial Court. Accordingly, we set aside the judgment of the High Court and restored that of the first Appellant court.

33. In the second case viz., Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd., the Appellant had placed a purchase order for supply of 136 numbers Coarse Filters and 136 numbers Fine FilteRs. In the said purchase order in condition No. 17 under the caption of jurisdiction it is stated as under "Any legal proceedings arisen out of the order shall be subject to the jurisdiction of the Courts in Mumbai".

34. In this connection the apex court has held in paragraph No. 7 that;

7. The effect of Clause 17 of the Purchase Order which mentions any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai, has to be examined in the aforesaid background. Under Sub-sections (a) and (b) of Section 20, the place of residence of the Defendant or where he carries on business or works for gain is determinative of the local limits of jurisdiction of the Court in which the suit is to be instituted. Sub-section (c) of Section 20 provides that the suit shall be instituted in a Court within the local

limits of whose jurisdiction the cause of action, wholly or in part, accrues. As shown above, in the present case, a part of cause of action had accrued in both the places, viz., Delhi and Bombay. In *Hakam Sing Vs. Gammon (India) Ltd.*, it was held that it is not open to the parties to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two Courts or more have under the CPC jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. It was also held that such an agreement does not contravene Section 28 of the Contract Act.

35. In this case their Lordships have also referred the decision reported in *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, (head note D). Ultimately their Lordships have held that;

Having regard to the fact that the order was placed by the Defendant at Bombay, the said order was accepted by the branch office of the Plaintiff at Bombay, the advance payment was made by the Defendant at Bombay, and as per the Plaintiffs' case the final payment was to be made at Bombay, there was a clear intention to confine the jurisdiction of the Courts in Bombay to the exclusion of all other Courts. The Court of Additional District Judge, Delhi had, therefore, No. territorial jurisdiction to try the suit.

36. On coming to the instant case on hand in Ex.A9 (Invoice) No. 1723 dated 11.07.1998 in serial No. 3 it is stated in small letters that; "All disputes subject to Gujarat Jurisdiction".

37. This clause is No. doubt not qualified by the words like "alone", "only" or "exclusively". Under this circumstances what is to be decided in this case is as to whether in the fact and circumstances of the present case it can be inferred that the jurisdiction of all other courts except courts in Mumbai is excluded.

38. It is significant to note here that this invoice has been signed only by the manager/accountant on behalf of the Plaintiff and it does not have any reference to show that the Clause 3 has also been agreed or accepted by the Defendant and hence, it seems to be a unilateral one.

39. As decided in *M/s. Baldev Steel Ltd. Vs. M/s. The Empire Dyeing and Manufacturing Company Ltd.* and another, , merely because one of the standard printed terms of the invoice, mentioned, subject to "Gujarat Jurisdiction", it cannot exclude the "Chennai Jurisdiction" wherein part of the cause of action was arisen.

40. In *United India Ins. Co. Ltd. Vs. Associated Transport Corpn. Pvt. Ltd. and Another*, , the kerala High Court has referred an identical case decided in *Economic Transport Organisation v. United India Insurance Company Ltd.* reported in 1986 KLT 220. In that case also, a way bill or receipt contained a printed inscription of words "subject to Calcutta jurisdiction only". A question was arisen as to whether these printed words would constitute an agreement to oust,

the jurisdiction of all courts other than the Calcutta Court and whether the exclusion would be-valid.

41. After referring various decisions including the decision of the Hon''ble Supreme Court in Hakam Sing Vs. Gammon (India) Ltd., it is held that;

When there, is choice of forum, it is certainly open to the parties to agree on an exclusive forum for settlement of disputes. But such an agreement must be clearly spelled out either by express words or by necessary implication. Ouster of jurisdiction of courts cannot be lightly assumed or presumed. If there is such a concluded agreement it will certainly operate as estoppel against the parties to, the contract. If it is merely a unilateral affirmation or statement made by one of the parties, as long, as it is not shown that the statement has been accepted by the other party as a term or condition of the agreement, it cannot be held that there is an agreement to confer exclusive jurisdiction on any court. Particular caution is necessary in regard to such a clause contained in a printed form, as in this case. Where the printed form is signed by both the parties or where a form printed by one party is signed by the other party and forwarded by the latter to the former and the printed form contains clear words conferring exclusive jurisdiction on a Court at any particular place or ousting jurisdiction of the Court at any other place, it may not be difficult to hold that the parties have agreed on such a term. Even in such cases, courts must remember that people often sign order forms containing a good deal of printed matter without caring to read what is printed. It cannot always- be said that everything which is printed may be deemed to form part of the contract.

42. On coming to the present case on hand as already observed, the printed inscription in Clause 3 in Ex.A9 (Invoice) seems to be unilateral one and has not been agreed or signed by the Defendants and therefore it cannot be heard to say that there is an agreement to confer exclusive jurisdiction to Gujarat. As seen from the admission of both parties to the suit the Defendant had approached the Plaintiff to supply the Air-Conditioners on 05.05.1998. In pursuant to the orders the Air-Conditioners were supplied on 11.07.1998 under Ex.A9 Invoice No. 1728 dated 11.07.1998. All these facts would go to show that the Defendant has not signed in the invoice agreeing Clause No. 3 that all disputes are subject to Gujarat Jurisdiction. When there is No. reference to show that the Defendant had agreed for the Clause No. 3, it is not open for him to contend that the Chennai Court does not have jurisdiction to entertain the suit. As contemplated u/s 20(c) of the Code of Civil Procedure, part of cause of action has arisen within the territorial jurisdiction of City Civil Court, Chennai wherein the suit was instituted and decided.

43. Having regard to the facts narrated above this Court is of firm view that the decisions cited by the learned Counsel for the Appellant/Defendant are not lending helping hand to his case. Even on merits itself the Defendant is not having a good case to succeed and therefore, the appeal is liable to be dismissed.

In the result the appeal is dismissed.