

(1978) 08 BOM CK 0039

In the Bombay High Court

Case No : O.C.J. Arbitration Suit No. 1082 of 1977

Standard Batteries Ltd.

APPELLANT

Vs

Casings (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 16-08-1978

Acts Referred:

Arbitration Act, 1940 — Section 2, 20
Civil Procedure Code, 1908 (CPC) — Section 20

Citation : (1980) 82 BOMLR 355

Hon'ble Judges : Bharucha, J

Bench : Single Bench

Judgement

Bharucha, J.—This is a suit u/s 20 of the Arbitration Act, 1940 (hereinafter called "the said Act") asking that the arbitration agreement between the parties be filed in Court and that the dispute between the parties be referred to an arbitrator to be appointed by the Court.

2. On August 28, 1973 an agreement was entered into between the parties which recited that the plaintiffs had offered to provide technical know-how and assistance to the defendants for the procurement of equipment and its installation and commission and to supply technical data and process details for the manufacture by the defendants of containers and covers for batteries. The said agreement provided that the entire production of containers and covers by the defendants would be purchased by the plaintiffs upon the terms and conditions therein contained. The agreement was, in the first instance, to remain in force for ten years. Clause 6 of the said agreement provided as under:

In the event of any dispute or difference of opinion between STANDARD AND CASINGS arising out of or in connection with this Agreement or with regard to the performance of any obligations hereunder by either party, such dispute shall be settled amicably by negotiations. Any dispute which will not be amicably settled by negotiation between the parties shall be referred to arbitration under the Indian Arbitration Act.

3. On June 11, 1977 the defendants wrote to the plaintiffs stating that their losses upto March 31, 1977 aggregated to the sum of Rs. 20,12,739.72 p. The letter listed various obligations which, according to the defendants were cast upon the plaintiffs under the terms of the said agreement. The letter stated that the defendants held the plaintiffs responsible and liable for the said loss. The said letter stated:

If the contractual commitments were honoured by SBL we would not have run into such heavy losses and on the contrary would have made a minimum profit of, 25%.

This is therefore to finally call upon you to pay the amounts due to us as indicated above within 15 days of the date of receipt of this notice failing which we will take it that you are refusing to pay and we will be instituting appropriate proceedings against you in accordance with the terms of the Agreement for recovery of the amounts due and payable to us, without further notice to you.

There was no reply to the letter. On July 9, 1977 the defendants wrote to the plaintiffs reiterating their grievances. The letter recorded thus: "This is therefore to notify you that we take it that you are refusing to pay the amounts due and payable to us which constitutes a dispute/difference between us". The letter said the disputes and differences were to be referred to arbitration under Clause 6 of the agreement and called upon the plaintiffs to agree to one of the four gentlemen whose names were set out to act as sole arbitrator. On July 28, 1977 the plaintiffs' advocate wrote to the defendants denying that the plaintiffs were liable for the said loss. The letter stated that the plaintiffs were not agreeable to any of the gentlemen suggested as sole arbitrators and that the plaintiffs had filed an arbitration petition in this Court for taking the said agreement on file and for appointment of an arbitrator. On July 28, 1977 this suit was filed and was accepted on August 2, 1977.

4. The defendants have filed a written-statement in which they contend: that the suit has been filed without proper notice, that the disputes between the parties were not crystallised when the suit was filed and that this Court has no jurisdiction to entertain the suit because it relates to a dispute about the performance at Ernakulam of the said agreement.

5. It may be mentioned that the plaintiffs had obtained leave to file the suit under Clause XII of the Letters Patent, that the defendants sought by chamber summons to revoke that leave and that, by my order dated July 17, 1978 Reported at (1978) 81 Bom. L.R. 331 Ed., I allowed that chamber summons.

6. Mr. Mehta, learned Counsel for the defendants, contended before me that no dispute had arisen between the parties when the suit was filed on July 28, 1977, it arose only upon the receipt by the defendants of the plaintiffs' advocate's letter dated July 27, 1977. The contention is easily disposed of. By the letter dated June 11, 1977 the plaintiffs were called upon by the defendants to make payment of their claim within fifteen, days of the receipt thereof. By their letter

dated July 9, 1977 the defendants notified the plaintiffs that the failure to pay constituted a dispute between the parties and proceeded to suggest the names of arbitrators to decide the dispute. As the defendants" recognised, the dispute arose upon the failure of the plaintiffs to pay to the defendants the amount claimed, that is, fifteen days after the receipt by the plaintiffs of the letter dated June 11, 1977. There is, therefore, no merit in this contention now raised on behalf of the defendants.

7. Mr. Mehta then contended that the disputes were not set out in the plaint and that it was not clear what it was that was sought to be referred to arbitration. The dispute sought to be referred to arbitration by the plaint is, quite unambiguously, the liability of the plaintiffs to make good the losses sustained by the defendants in the sum of Rs, 20,12,739.72 as claimed in the defendants" letter dated June 11, 1977. I reject this contention.

8. The next contention raised by Mr. Mehta, which is of some importance is that this Court has no jurisdiction to entertain the suit and that the only Court which can do so is the Court which exercises jurisdiction over the place where the said agreement was to be performed and wherein the defendants have now filed a suit u/s 20 of the said Act. Mr. Mehta relied upon the phraseology of Section 2(c) of the said Act in support of his argument that the jurisdiction of a Court to entertain an application under the said Act was not as wide as the jurisdiction conferred by Section 20 of the Code of Civil Procedure, 1908. He urged that the phrase "questions forming the subject-matter of the reference" in Section 2(c) of the said Act limited the Court"s jurisdiction.

9. Mr. Mehta submitted that in the instant case, the questions forming the subject-matter of the reference related only to the non-performance of the said agreement, that the said non-performance took place at Ernakulam and that, therefore, the Court at Ernakulam alone had jurisdiction to entertain the suit. Mr. Mehta relied upon a judgement of the Division Bench of the Madras High Court in the case of The Electrical Manufacturing Co. Ltd., Calcutta and Another Vs. The Crompton Engineering Co., (Madras) Ltd., Madras, wherein the Court held, in the circumstances of that case, which I shall set out presently, that the question forming the subject-matter of the reference related not to the execution of the agreement therein but to the misuse of goods to be supplied under that agreement and that the place where the goods were supplied and misused was material, and the place where that agreement was executed was not material, to decide jurisdiction.

10. The first question to be determined is: Is the provision regarding jurisdiction contained in Section 2(c) of the said Act more restricted than that contained in Section 20 of the Code. The phrase of import in Section 2(c) is "having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter, of a suit." Construing these words, it seems to me clear that if a Court has jurisdiction to entertain a suit upon a certain cause of action, that Court will have also jurisdiction in respect of all

matters under the said Act pertaining to questions that arise upon that certain cause of action, if that action has, under the terms of an agreement between the parties to be decided by arbitration. Section 2(c) of the said Act does not confer jurisdiction which is in any wise more limited than that conferred by Section 20 of the Code.

11. As a logical sequitur it follows that the place where an arbitration agreement was executed, the agreement being an essential part of the cause of action, is a factor to be taken into account in deciding which Court has jurisdiction under the said Act.

12. I am fortified in this view by a judgment of this Court in the case of *Cursetji Jamshedji Ardaseer Wadia Vs. Dr. R.d. Shiralee*, In this case the petition was to set aside an award. It was filed by the trustees of a trust which owned large tracts of land at Kurla, then outside this Court's jurisdiction on the Original Side. The respondent was a lessee of the trust of a plot of land at Kurla, Except for one trustee, who lived in England and came to Bombay at intervals of two to four years, the trustees resided in Bombay. The trust was managed from an office in Bombay. There was a dispute in respect of the plot of land between the parties and an arbitrator was appointed by the respondent under the terms of the lease. The trustees declined to appoint an arbitrator and the respondents' arbitrator acted as sole arbitrator and made an award. One of the contentions raised was that the whole cause of action arose at Kurla, and that as all the trustees did not reside in Bombay, this Court would have no jurisdiction in respect of the award. Referring to Section 2(c) of the Act, the Court stated as follows (p. 34):

... Reading the sub-section as worded, it is clear that any Court which would have jurisdiction to decide the question arising from the subject-matter of the reference, would be the proper Court in which the award may be filed. To give the Court jurisdiction it is not necessary that the whole cause of action should arise there. The Court has jurisdiction to determine the subject-matter of the dispute between the parties also when the parties reside within its jurisdiction or the land was within its jurisdiction. The provisions of Order 31, Rule 2, Civil P.C., 1908, are also material. It is provided by that rule that all trustees should normally be made party defendants. At the end of that rule there is a clear exception, viz., that if any of the trustees is outside British India, he need not be joined as a defendant. Therefore, if the respondent was to file a suit in respect of the subject-matter of the dispute and the suit was to be against the petitioners, it was open to the respondent not to make the second petitioner a party at all. Therefore, the Bombay High Court would have jurisdiction to accept this award on its file.

13. The Madras case to which Mr. Mehta referred me arose upon peculiar facts. The contract between the parties executed at Madras, required the petitioners to fabricate all the requirements of steel in respect of sub-station structures of the respondents. The steel and zinc required was to be provided by the respondents. The petitioners were not to use the steel or zinc entrusted to them for any

purpose except such fabrication. The contract contained an arbitration clause. The respondents' case was that the petitioners converted to their own use at Calcutta the steel supplied by the respondents. The respondents filed a petition u/s 20 of the said Act for taking the arbitration agreement on file and for reference of the dispute to arbitration after leave was obtained under Clause XII of the Letters Patent. The petitioners filed an application for revocation of the leave. At the hearing of that application it was contended by the petitioners that the questions which formed the subject-matter of the reference related to the conversion of steel which took place at Calcutta and that, therefore, the entire cause of action had arisen at Calcutta; It was also contended that the execution of the contract at Madras was not a question which formed the subject-matter of the reference and that the leave granted should be revoked. After considering various judgments the Court concluded that there was no direct authority on the question before them and they went on to state thus (p. 272):

...Having regard to the language of the definition of the word "court" u/s 2(c) of the Act and construing the words "with respect to subject-matter of the agreement" occurring in Section 20(1) of the Act and the circumstances that the factum of execution of the agreement at Madras not being in question, we are of opinion that the subject-matter of the agreement is not the execution of the agreement, but the place where the alleged misuse of the surplus steel supplied to the first defendant took place, viz., Sealdah, which is within the jurisdiction of the Calcutta High Court and that it is the Calcutta High Court that has jurisdiction to entertain the application u/s 20 and proceed to determine the application in accordance with Section 201 of the Act. Our conclusion is fortified by the plaint allegation in paragraphs 39 and 43 of the plaint already referred to by us above. The cause of action paragraph claiming the place of execution of the agreement as being the place where the entire cause of action had arisen does not set out the correct position. The aforesaid allegation in the cause of action paragraph has been made with a view to give jurisdiction to this Court. There being no controversy regarding the place of execution of the agreement that allegation cannot, in our opinion, confer jurisdiction to this Court to entertain the present application filed u/s 20 of the Act.

14. In my view, the execution of the arbitration agreement is very much a part of the cause of action particularly so if the arbitrator would have to take recourse to the contract embodying the arbitration agreement to decide the questions referred to him. That there is no controversy between the parties as to where the agreement was arrived at does not make any difference. The Court exercising jurisdiction over the place where the arbitration agreement was entered into has jurisdiction to take that agreement on file and to entertain all matters pertaining to that agreement which arise under the provisions of the said Act. I, therefore, with very great respect, decline to follow the Madras judgment.

15. I do, however, propose to examine Mr. Mehta's contention that the questions that form the subject-matter of the proposed reference in the instant case relate

only to the non-performance by the plaintiffs. The defendants claimed from the plaintiffs the totality of their losses for several years by their letter dated June 11, 1977. In that letter the defendants made this revealing statement:

If the contractual commitments were honoured by SBL (plaintiffs) we would not have run into such heavy losses and on the contrary would have made a minimum profit of 25%.

16. How the figure of losses is arrived at is not spelt out but a reading of the letter shows that the claim proceeds broadly on the basis that, under the terms of the agreement the plaintiffs were bound and liable to buy the entire production of the defendants; that under the terms of the agreement, moulds and jackets were to be supplied by the plaintiffs to the defendants free of charge; and that, under the terms of the agreement the plaintiffs were to procure for the defendants workable machinery but they failed to" do so. It will be seen that to determine the questions forming the subject-matter of the proposed reference, namely, whether the defendants are entitled to recover from the plaintiffs their claim, recourse by the arbitrator to the said agreement will be imperative.

17. In my view, therefore, the fact that the said agreement was executed at Bombay confers upon this Court jurisdiction to take the said agreement on file and refer the disputes between the parties thereto to an arbitrator.

18. Accordingly, I direct that the agreement between the parties dated August 27, 1973 be taken on the file of this Court and that the disputes between the parties arising upon the defendants' letter dated June 11, 1977 be referred to the sole arbitration of Mr. J.M. Shelat. The defendants shall pay to the plaintiffs the costs of this petition.

19. The arbitrator is free to decide where the arbitration proceedings should be held, in Bombay or Cochin or there about.