

(2012) 01 CAL CK 0049

In the Calcutta High Court

Case No : G.A. No. 2298 of 2011 and Civil Suit No. 80 of 2011

Sustainable EMS LLC

APPELLANT

Vs

Lee Harris Pomeroy Architects PC (LHPA) and Others

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Constitution of India, 1950 — Article 9

Citation : AIR 2012 Cal 88 : (2012) 1 CALLT 700

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Ranjan Bachawat with Mr. S. Sengupta and Mr. Rakesh Dev, For the Defendant No. 1, for the Appellant; Joyak Gupta with Mr. P. Halder, for the Respondent

Final Decision : Allowed

Judgement

I.P. Mukerji, J.—This is an application by the first defendant. They are an American Company, having their head office in Broadway, New York. They want dismissal of the suit filed by the plaintiff, also an American Company, having their head office in Jersey City, New Jersey. Reliefs are claimed only against the first defendant. The second defendant did not appear at the hearing of this application. The third is a proforma defendant. The sum claimed in the plaint is Rs.1,69,75,485/- together with interest @ 18% per annum. Whether the interest claimed is simple or compound is not mentioned.

2. The first defendant wants dismissal of the suit mainly on the ground that it ought to have been filed in a Court in the United States of America. The most formidable point raised by the first defendant is the lack of jurisdiction of this Court on account of the forum selection clause in the agreement of 29th July, 2009 between the plaintiff and the first defendant. This agreement is a subcontract which the first defendant had awarded to the plaintiff. The main contract was between the first defendant and the second defendant Kolkata Metro Rail Corporation Ltd. The forum selection clause is Article 9, which I read

in full:

Article 9 Law Applicable

This Agreement has been entered into in the United States and shall in all respects be construed and interpreted in accordance with laws of the state of New York in the United States. The parties hereto submit to the exclusive jurisdiction of the federal and state courts located in the City of new York with respect to any disputes arising out of or Subcontract For Services Kolkata East West Metro Project - Sustainable EMS LLC related this Subcontract.

3. According to this sub contract only the federal and state Courts located in the city of New York in the United States of America have the jurisdiction to entertain the dispute.

4. Mr. Ranjan Bachawat for the first defendant submits that both the parties are American. It is submitted that the sub contract dated 29th July, 2009 was executed in the United States, bills were raised by the plaintiff in New York in the United States, referring to the invoice/bill dated 1st July, 2010 at page 82 of the application. Payments were also made in New York in the United States. More so, after institution of this suit the first defendant started proceedings against the plaintiff in U.S.A. in which the plaintiff has participated. The cause of action is similar to this case. These facts are uncontroverted.

5. A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, cited by Mr. Bachawat pronounced in para 21 of the judgment that when the parties had agreed to confer exclusive jurisdiction on a Court, the jurisdiction of any other Court was necessarily ousted. In my judgment, the same principle substantially applies if the agreement is between two foreign parties. More so, when, as stated above, a substantial part of the cause of action is shown to have arisen in the United States of America and the plaintiff has participated in an action filed by the first defendant against them in the U.S.A., on more or less the same cause of action. Our Appeal Court in Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others, pronounced the following dictum:

The Court acts upon the principle that in general the Court will compel the parties to abide by their contracts. Instead of driving the defendant to a separate suit to enforce the covenant, the Court may for the purpose of preventing multiplicity of litigation enforce the contract summarily on an application made to it in the suit instituted before it. The prima facie leaning of the Court is that the contract should be enforced and the parties should be kept to their bargain. Subject to this prima facie leaning, the discretion of the Court is guided by considerations of justice. The balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law which governs the contract, the connection of the dispute with the several countries and the facilities for obtaining even-handed justice from the foreign Tribunal are all material and relevant considerations. If on a consideration of all the

circumstances of the case the Court comes to the conclusion that it will be unjust or unfair to stay the suit, the Court may refuse to grant the stay asked for.

6. The decision *Laxman Prasad Vs. Prodigy Electronics Ltd. and Another*, cited by Mr. Joyak Gupta is to the effect that if part of the cause of action arises within the jurisdiction of a Court in India, that Court has jurisdiction. It does not matter if one party is foreign or the contract is to be governed by any foreign law. But in that decision there was no forum selection clause conferring jurisdiction on a foreign Court. In the absence of such a clause, the Supreme Court felt that there was no impediment to a Court in India in exercising jurisdiction. Unfortunately, that case does not apply to the facts of this case.

7. The other ground raised by Mr. Bachawat is that the suit was filed, without obtaining leave of this Court under Clause 12 of the Letters Patent, 1865. This was most probably on the footing that the first and second defendants were pleaded to be carrying on a part of their business within jurisdiction. Now, according to the learned Counsel the place of business of the first defendant is the office of an advocate of this Court, Mr. S.K. Bajoria of 6, Old Post Office Street, Kolkata-1. That could not be the place of business of the first defendant, it is submitted. That the first defendant does not have any office within the jurisdiction of this Court, it is also urged. Therefore, leave under Clause 12 of the Letters Patent ought to have been taken. Since no leave was taken before institution of the suit, the proceedings were defective and should be dismissed on that ground.

8. If a place of business is pleaded in the plaint that is taken to be correct. If such place of business is disputed by a party, he has to prove it. Till that proof comes, that address is taken to be correct. On the available evidence, i.e., affidavits the Court is not able to come to any conclusive finding that the address of the first defendant disclosed in the cause title is that of an advocate and further that, the defendant does not carry on business at that address. More evidence is required. Therefore, this point is rejected.

9. But acceptance or rejection of this point is not material for the outcome of this application.

10. Considering the forum selection clause in the contract between the parties, the presence of cause of action in the United States, and the institution of proceedings by the first defendant in the United States where the plaintiff has participated, I think the balance of convenience also points to this Court dismissing the suit by relinquishing jurisdiction. Furthermore when both parties are foreign, with part of the cause of action in a foreign country and a forum selection clause with that foreign place as the chosen forum, well settled principles of international law also require this Court to relinquish jurisdiction in favour of the chosen forum. (See *Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others*,

11. Therefore, the suit has to be dismissed. I pass an order in terms of prayer

(b) of the Notice of Motion. This will not preclude the plaintiff from filing a fresh suit or action on the selfsame cause of action.

12. This application is allowed. No order as to costs.

13. Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

Mr. Joyak Gupta, learned advocate for the plaintiff/respondent prays for stay of operation of this order. Considering the question of law involved, let there be stay of this judgment and order for a period of two weeks from date.

All parties concerned are to act on a signed photocopy of this order on the usual undertakings.