

(2009) 02 AP CK 0054
In the Andhra Pradesh High Court
Case No : A.A. No. 53 of 2008

TPR Marketing Pvt. Ltd.

APPELLANT

Vs

Kingsbury Personal Care Pvt. Ltd.

RESPONDENT

Date of Decision : 24-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(12), 11(5), 11(6), 2(1)
Contract Act, 1872 — Section 28

Citation : (2009) 4 ALD 481 : (2009) 4 ALT 16

Hon'ble Judges : Nooty Ramamohana Rao, J

Bench : Single Bench

Advocate : Domodar Mundra, for the Appellant; B. Nalin Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Nooty Ramamohana Rao, J.—This application has been taken out seeking appointment of an Arbitrator for resolving the disputes that have cropped up between the applicant company and the respondent company. The applicant company was carrying on marketing business at Hyderabad. The respondent is a company, having its registered office at Worli, Mumbai. A "consignee agreement" was entered into by and between the parties on 5.8.2004 at Mumbai. The applicant is the consignee agent who holds the marketing rights for the products supplied by the respondent company. The applicant as the consignee agent is the custodian of the company's goods and should deliver those goods at the required destination as instructed by the respondent company from time to time. The applicant was required to properly store the goods, insure them on behalf of the respondent company and shall dispatch the goods to any party upon receipt of written instructions of the respondent company in that regard. The applicant as a consignee agent was entitled to commission of a minimum of Rs. 5,000/- per month or 3% on the business value whichever is higher on the sale made to various distributors of the company and this agreement was specifically set out to be valid for a period of one year, liable to be renewed thereafter with mutual

consent. Clause 14 of the agreement which provides for the mechanism of dispute resolution, since will have a bearing upon the controversy, reads as thus:

14. That in case of disputes at any level, it shall be solved within the jurisdiction of Mumbai by arbitration only.

Since the contract has not been renewed, it had expired by 4th August, 2005. Certain disputes have cropped up between the parties and each made allegations against the other. The applicant has asserted that the account which has been struck correctly and properly by it reflected an outstanding liability of Rs. 5,89,603/- as payable by the respondent. Whereas the respondent has sent an email on 2.8.2006 setting out that it is liable to pay only a sum of Rs. 2,28,917/- towards full and final settlement. It is specifically alleged by the respondent that the goods and material of the company which are stored by the applicant inspite of being asked to be returned were not so returned and that the applicant has also not allowed repairs to be undertaken to the products supplied by the company and after great persuasion, the applicant had returned the goods of the company by which time they lost their saleable value and consequently the respondent company has suffered loss or damage on account of the applicant company. The applicant has issued a notice on 6.11.2006 to the respondent demanding payment of a sum of Rs. 5,89,605/-. In response, the respondent company has sent up a reply showing a liability of Rs. 1,10,577.01 only. The applicant did not accept the assertion of the respondent that it is liable to pay only a sum of Rs. 1,10,577.01 and hence through its notice dated 16.6.2007 has specifically demanded for payment of Rs. 5,89,603/- with interest at 24% and failing which payment, the applicant herein invoked Clause 14 of the Consignee Agreement and called upon the respondent company to appoint an Arbitrator within 15 days from the date of receipt of this notice. The respondent through its reply dated 15.7.2007 while denying the assertions of the applicant, it had in principle agreed to refer the disputes to arbitration. The last paragraph of the communication dated 15.7.2007 of the respondent reads as under:

As regards the last paragraph and requested by you, please note that we are in process of appointing Arbitrator and the same shall be intimated to you once the appointment becomes final.

Having waited for nearly six months period and realizing that the promise made by the respondent to appoint an Arbitrator having not fructified, instituted this arbitration application under Sub-section (6) of Section 11 of the Arbitration and Conciliation Act (for short "the Act").

2. The respondent has contested this application. It raised three objections:

(1) The consignee agreement dated 5.8.2004 which was executed at Mumbai has specifically provided for resolution of any disputes through arbitration subject to Mumbai jurisdiction only and hence the above application is not maintainable.

(2) This court lacks territorial jurisdiction to entertain the above application,.

(3) The respondent had not complied with the procedure spelt out under Sub-section 5 of Section 11 for securing the appointment of an Arbitrator.

3. Without prejudice to the above said contentions, it was pointed out in the counter affidavit that through their communication dated 20.6.2008, the respondent has already appointed Mr. Santosh Adukia, Advocate, Sri Sadashiv Cooperative Housing Society Ltd, III floor, M-Block, 6th Road, Santacruz (E), Mumbai - 400055 as the Arbitrator to adjudicate the disputes raised by the applicant and hence the present application has become infructuous.

4. I have heard Sri Damodar Mundra, learned Counsel for the applicant and Sri B. Nalin Kumar, learned Counsel for the respondent company.

5. Sri Damodar Mundra, learned Counsel would submit that the consignee agreement though is executed at Mumbai, but still it has got effective operation only within the State of Andhra Pradesh and in particular at Hyderabad and hence cause of action for seeking resolution of the disputes strictly in terms of the agreement has also arisen within the limits of State of Andhra Pradesh and hence this court has jurisdiction. Learned Counsel would also submit that where more than in one State, the cause of action arises, the parties are entitled to seek appropriate remedy from any of the competent courts where the cause of action has arisen and hence in terms of Section 11(12)(b), the Chief Justice of the High Court of Andhra Pradesh or his designate can as well be requested to make the necessary appointment. He submits that pursuant to the consignee agreement, the products supplied by the respondent company are to be marked within the area of Hyderabad in the State of Andhra Pradesh and the disputes have cropped up in the matter of such operations only and hence this court has jurisdiction. In support of the above plea, he places reliance upon the judgment of the Supreme Court in *Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others*, *Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited*, .

6. Per contra, Sri Nalin Kumar, learned Counsel submitted that since the consignee agreement has been executed at Mumbai and since the parties are conscious that the products of the respondent company are to be marked at Hyderabad, by consent and choice they have agreed to have the disputes resolved through the mechanism of arbitration subject to jurisdiction of Mumbai only and hence the jurisdiction of other courts irrespective of the cause of action arising therein, it is liable to be treated to have been excluded. The agreement arrived at between the parties therefore has got to be given full force. In that sense, this court has no jurisdiction to entertain this application.

7. Learned Counsel would also submit that the procedure contemplated by Sub-section (5) of Section 11 having not been followed by the applicant, this application deserves to be thrown out. He places reliance upon judgment of the Supreme Court in *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, and the judgment of the Gujarat High Court rendered in *State of Rajasthan Vs. Gujarat State Construction Corporation Ltd.*,

8. The 2nd objection raised by the learned Counsel for the respondent does not hold water, for, the respondent by its conduct has waived its right to raise this objection. It is no doubt true that Sub-section (5) of Section 11 of the Act unmistakably spells out that if a party fails to agree on the arbitrator or fails to respond to a request for reference of the disputes for resolution by arbitration, "within thirty days" from receipt of a request by the other party, then such a party can make a request to the Chief Justice or his designate to appoint the Arbitrator. The applicant herein through his notice dated 16.6.2007 has called upon the respondent to appoint an Arbitrator within 15 days. That per se is not an improper act. Upon receipt of such a notice, the opposite party has been granted a 30 days time limit for contemplation and for taking necessary action, by the statute. If it fails to act within that 30 days period provided, thereafter only the opposite party who made the initial demand for referring the disputes for resolution through arbitration, will have a right to approach the Chief Justice or his designate for making the appointment of an Arbitrator. The fact that one of the parties has given a shorter duration for contemplation by the opposite party will not hinder the exercise, as a right in that respect has been conferred and recognized by Sub-section (5) of Section 11, and the opposite party is entitled to take time up to 30 days for taking the required action. If a party rushes and seeks the Chief Justice or his designate even before the expiry of that 30 days period, for appointment of an arbitrator, then such an exercise can be objected to or faulted. This apart, the respondent through its notice dated 15.7.2007, has agreed in principle to refer the disputes for resolution through an arbitrator and in fact they have assured the petitioner to intimate the appointment of the Arbitrator as well. Therefore by this conduct of the respondent, it had waived the objection for being provided a shorter period for contemplation and hence it cannot now be allowed or permitted to raise any such objections and hence the objection in this regard is held as not sustainable. As is already noticed supra, the applicant having waited nearly for six months for the assured appointment of an arbitrator to fructify, moved this application.

9. However, the important question which falls for consideration is the effect that has got to be given to the terms of the contract entered into by the parties on their own agreeing for resolution of the disputes through the mechanism of arbitration subject to jurisdiction of Mumbai. When once the parties have agreed that they will subject themselves to jurisdiction of courts at Mumbai, the term in that regard being an integral part of the agreement, has got to be given effect fully. When the agreement has been entered into, both parties are conscious that that they are located in two different States i.e., Andhra Pradesh and Maharashtra respectively; whereas the marketing of the products supplied by the respondents from Mumbai has to be undertaken within the limits of Hyderabad falling in the State of Andhra Pradesh. Therefore, cause of action can legitimately arise in both the States, in the event of any dispute arising in working out such an agreement and hence consciously they have worked it out that they will resolve their disputes subject to Mumbai jurisdiction only. The Supreme Court in

ABC Laminart Pvt. Ltd.'s case (supra) after analyzing all the principles on the subject has concluded the issue as under:

(21) FROM the foregoing decisions it can be reasonably deduced that where such an, ouster Clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the Clause is clear unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster Clause when words like "alone", "only", "exclusive", and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio unius est exclusio alterius" - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

The Supreme Court in Shree Subhlaxmi Fabrics Pvt. Ltd. (supra 1) has approvingly reiterated the same principle as under:

17. .In Hakam Sing Vs. Gammon (India) Ltd., it has been 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 disputes between them shall be tried in one of such Courts is not contrary to public policy and that such an agreement does not contravene Section 28 of the Contract Act. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, a , it was held as under:

When the Court has to decide the question of jurisdiction pursuant to an ouster Clause it is necessary to construe the ousting expression or Clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Where an ouster Clause occurs, @page-SC2168 it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the Clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of ouster Clause when words like "alone", "only" "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio unius est exclusio alterius" - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly

construed.

18. This view has been reiterated in M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another,

10. In view of the material that was marshaled, it is clear that the parties have consciously agreed for resolution of their disputes through arbitration only and subject to Mumbai jurisdiction. Nothing has been brought out to discredit that consent of the applicant for this term of the contract was either missing or secured by any improper method by the respondent. In the absence thereof, it is fair to construe that both parties have purposefully and clearly agreed to have their disputes resolved subject to jurisdiction of courts at Mumbai only.

11. Sub-section 12 of Section 11 clearly points out that the Chief Justice is the one within whose jurisdiction, the civil court, as defined in Section 2(1)(e) of the Act, falls, which court can be approached by institution of a civil suit, should the subject matter of the dispute be the subject matter of a civil suit. Undoubtedly, if the contract has not excluded the jurisdiction of any other court, than those at Mumbai, the Andhra Pradesh High Court would have had jurisdiction to entertain the above arbitration application, as a part of cause of action has arisen within the limits of State of Andhra Pradesh and the civil courts at Hyderabad could have easily been approached by way of institution of a civil suit concerning the subject matter of dispute between the parties. Because of the conscious decision of the parties to exclude the jurisdiction of the other courts including the courts at Hyderabad, I consider it that only the Chief Justice of the Bombay High Court or his designate alone could have been approached by the applicant for appointment of an Arbitrator for the failure of the opposite parties to have appointed the Arbitrator, though assured to do so through his communication dated 15.7.2007.

12. Hence, I do not find this present application as maintainable in this court. In the circumstances, Arbitration Application is dismissed, only for that reason. No costs.