

CASE NO.:
Appeal (civil) 7653 of 2004

PETITIONER:
Shree Subhlaxmi Fabrics Pvt. Ltd.

RESPONDENT:
Chand Mal Baradia and others

DATE OF JUDGMENT: 29/03/2005

BENCH:
D.M. Dharmadhikari & G.P. Mathur

JUDGMENT:
J U D G M E N T

G.P. MATHUR, J.

This appeal by special leave has been preferred against the judgment and order dated 21.5.2002 of Calcutta High Court by which the application moved by the first respondent under Order 39 Rule 1 and 2 and Section 151 CPC was allowed and Hindustan Chambers of Commerce, Mumbai (second respondent) was restrained from proceeding in Arbitration Case Nos. A/186 and A/187 subject to deposit of Rs.2 lakhs by the first respondent with the Registrar General within two days of receipt of the certified copy of the order.

The first respondent Chand Mal Baradia filed Title Suit No. 993 of 1999 in the City Civil Court at Calcutta for permanent injunction restraining the defendants from proceeding with the arbitration proceedings, which had been initiated by the appellant Shree Subhlaxmi Fabrics Pvt. Ltd. The case of the plaintiff (first respondent) in brief is that he was carrying on business under the name and style of M/s. Chand Mal Prakash Chand and Co. at Calcutta; that Shree Subhlaxmi Fabrics Pvt. Ltd., Mumbai (defendant No. 1), which is a company registered under the Companies Act and sells cloth through its agent M/s. Naresh Enterprises, which has its office at Calcutta, under the terms and conditions as dictated by defendant No. 1; that the plaintiff was getting supplies against the orders placed by him at Calcutta through the agent of defendant No. 1; that all such supplies were made by the agent to the plaintiff at Calcutta at his premises No. 160, Jamunalal Bajaj Street and all payments made by the plaintiff were collected by this agent on behalf of defendant No. 1 at Calcutta; that the plaintiff was taking delivery of goods at Calcutta on the basis of Railway Receipts/Lorry Receipts and consignment notes from the said agent M/s. Naresh Enterprises. The case of the plaintiff further is that there was no arbitration agreement between the plaintiff and defendant No. 1 at any point of time for referring their disputes to any arbitrator; that he was not a member of defendant No. 2 M/s. Hindustan Chambers of Commerce, having its office in Mumbai. As the plaintiff became seriously ill some time in early part of 1997, he could not look after his business and consequently there was some delay in making payments to defendant No. 1; that the plaintiff paid more than Rs. 4 lakhs to defendant No. 1 and the last payment was made on 27.2.1999; that in April, 1999 the plaintiff received two notices from defendant No. 2 intimating that the defendant No. 1 had initiated arbitration proceedings and the plaintiff was asked to nominate an arbitrator and send a sum of Rs.200/- as arbitration fee; that the defendant No. 2 had no jurisdiction or authority to act as an arbitrator and accordingly the plaintiff requested it not to proceed with the arbitration case. The case of the plaintiff further is that the defendant No. 1 initiated another arbitration proceeding bearing No. A/186 before defendant No. 2 claiming that

M/s. Chand Mal Prakash Chand and Co. was also the proprietor of Arihant Textiles; that the plaintiff informed by sending a letter to defendant No. 2 on 18.5.1999 that he had never placed any order in the name of Arihant Textiles at any point of time and, therefore, the case be dropped. The plaintiff filed an application under Order 39 Rule 1 and 2 and Section 151 CPC for restraining the defendants from proceeding with the arbitration cases.

The appellant Shree Subhlaxmi Fabrics Pvt. Ltd. (defendant No. 1) opposed the prayer for grant of injunction and also filed an application under Section 20 read with Section 151 CPC on the ground inter alia that the defendant No. 1 is a cloth merchant, which is carrying on business all over India; that M/s. Naresh Enterprises having its office at Calcutta had been engaged as a middleman by the appellant, who procured a buyer namely Chand Mal Prakash Chand & Co. represented by Chand Mal Baradia and others at Calcutta; that M/s. Naresh Enterprises contacted defendant No. 1 at Mumbai for supply of cloth upon which the defendant No. 1 sent their indents through the said middleman to the said M/s. Chand Mal Prakash Chand & Co. (plaintiff), which was duly accepted by them; that the defendant No. 1 supplied cloth valued at approximately Rs.20 lakhs in 1996-97 to the plaintiff; that in the indents (contracts) terms and conditions were mentioned and condition Nos. 6 and 7 read as under:-

"Clause \026 6 Dispute under this contract shall be decided by the Court of Bombay and no other courts.

Clause \026 7 If any dispute arises about the transaction the same shall have to be referred to the Hindustan Chamber of Commerce, Bombay, for decision under its Arbitration Rules."

It was further stated in the application filed by the appellant (defendant No. 1) that in the indent/offer letter, which was prepared and sent by the middleman M/s. Naresh Enterprises, to the office of defendant No. 1 a condition was mentioned regarding jurisdiction of courts, which reads as under: -

"UNDER JURISDICTION OF THE COURT
FROM WHERE THE GOODS HAVE BEEN
DESPATCHED".

In all the bills/invoices, which were sent to the plaintiff, it was specifically mentioned at the top "subject to Mumbai jurisdiction" and at the left hand side at the bottom the following was written: -

"In case of dispute arising out of the transaction between the vendors and the purchaser and the brokers or agent either for payment or any other dispute in relation to the transaction, the same shall be referred to the Hindustan Chamber of Commerce, Mumbai, for decision under its Arbitration Rules and the Award made thereunder shall be binding upon the parties."

Since dispute arose between the parties regarding payment of the goods sold and delivered, the appellant referred the matter to the Hindustan Chamber of Commerce, Mumbai, for arbitration and appointed Shri Shikhar Chand Jain as its arbitrator. The Hindustan Chamber of Commerce (defendant No. 2) had entered upon the reference and had served a notice upon the plaintiff by letter dated 31.3.1999 calling upon them to appoint one of their arbitrators from the panel/list sent by it and further to deposit Rs.200/- as arbitration fee. The said letter was duly replied by the plaintiff on 20.4.1999 along with a fee of Rs.200/-. A specific plea was thus raised by defendant No. 1 that the court at Calcutta had no territorial jurisdiction to try the suit and further that in view of the arbitration agreement contained in the indent (contract) and also the fact that the plaintiff

had already responded to the notice issued by the defendant No. 2, there was no ground for granting any injunction order in their favour.

The City Civil Court at Calcutta, after a detailed consideration of the matter, held that the said court had no jurisdiction to try the suit and further that the arbitration proceedings having already commenced, the civil court should not interfere with the functioning of the arbitrator (defendant No. 2). It was accordingly held that the plaintiff had no prima facie case to go for trial and the balance of convenience lies in favour of the defendants. It was further held that the plaintiff will not suffer any irreparable injury in the event of refusal of injunction. The application was accordingly dismissed by the order dated 22.2.2000.

Feeling aggrieved by the order of City Civil Court the plaintiff preferred an appeal before the Calcutta High Court under Order 43 Rule 1 (r) CPC. The High Court held that an objection as to the existence of the arbitration agreement can be taken either before the arbitrator or by way of a suit in a competent court, the initial choice being of the aggrieved party. If the court is approached, it is a matter of discretion of the court even at the final hearing, whether to decide the suit or to refer the matter to the arbitrator, allowing a decision by the arbitrator himself on the point. Regarding jurisdiction the High Court held that the plaintiff has no doubt an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the courts. It was further held that the plaintiff's plea that "from where the goods have been dispatched" is not sufficiently specific as to exclude a court's jurisdiction is no doubt an arguable case. On these findings the appeal was allowed and all further proceedings in arbitration cases A/186 and A/187, initiated by the defendant No. 1 before defendant No. 2, were stayed subject to the plaintiff's depositing Rs. 2 lakhs with the Registrar General within two days of the receipt of the certified copy of the order.

Shri M.N. Krishnamani and Shri Jaideep Gupta, learned senior advocates, who have appeared for the appellant Shree Subhlaxmi Fabrics Pvt. Ltd. (defendant No. 1) have assailed the order of the High Court on two grounds. The learned counsel have submitted that the indent (contract) contained a clause that in case any dispute arises about the transaction the same shall have to be referred to the Hindustan Chamber of Commerce, Mumbai, for decision under its Arbitration Rules and as such there was an arbitration agreement between the parties, which was invoked by the appellant by making a reference to defendant No. 2. The defendant No. 2 had sent a notice to the plaintiff asking it to nominate an arbitrator from the panel/list supplied to it and also to remit an amount of Rs.200/- towards the fee of arbitration. The plaintiff responded by sending a reply and also an amount of Rs.200/-. In such circumstances the plaintiff cannot contend that there is no arbitration agreement between the parties. That apart it is open to the plaintiff to raise such a plea before the arbitrator under Section 16 of The Arbitration and Conciliation Act, 1996 (hereinafter referred to "the Act"). The second ground urged is that there was an agreement between the parties that the disputes arising under the contract shall be decided by the courts at Bombay and by no other courts and consequently courts at Calcutta had no territorial jurisdiction to entertain the suit. The learned counsel have thus submitted that the High Court committed manifest error of law in granting an injunction order in favour of the plaintiff and in passing a restraint order staying further proceedings before the arbitrators.

Shri V.A. Mohta, learned senior counsel for the respondent No. 1 (plaintiff), on the other hand, submitted that there was no arbitration agreement between the parties as contemplated by Section 7 of the Act and, therefore, the reference made to the arbitrator by the appellant is wholly invalid and the defendant No. 2 has no jurisdiction to proceed with the arbitration. He has further submitted that a part of cause of action had accrued at Calcutta and the plaintiff had never consciously agreed to any condition that any dispute arising between the parties shall be decided by the courts at Bombay and by no other

courts and, therefore, the court at Calcutta had the jurisdiction to try the suit.

Before examining the contentions raised by the learned counsel for the parties it will be convenient to take note of certain provisions of the Act. Sections 4, 5, 7 and 16 of the Act read as under: -

"4. Waiver of right to object. \026 A party who knows that \026

(a) any provision of this part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

"5. Extent of judicial intervention. \026 Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part."

"7. Arbitration agreement. \026 (1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in \026

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

"16. Competence of arbitral tribunal to rule on its jurisdiction. \026 (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a

party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Sections 2 to 43), no judicial authority shall intervene except where so provided in the said part. This clearly indicates the legislative intent to minimize supervisory role of courts to ensure that the intervention of the court is minimal. Section 4 is a deeming provision, which lays down that where a party proceeds with the arbitration without stating his objection to non-compliance of any provision of Part I from which the parties may derogate or any requirement under arbitration agreement, it shall be deemed that he has waived his right to so object. Section 7 provides that the arbitration agreement shall be in writing and such an agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (4) of Section 7 provides the conditions under which a document or exchange of letter or exchange of statement of claim and defence may amount to an arbitration agreement. Section 16 of the Act is important and it provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or authority of the arbitration agreement.

Section 11 of the Act provides for appointment of arbitrators and sub-section (6) thereof empowers the Chief Justice of the High Court or any person or institution designated by him to make such an appointment on the happening of certain conditions enumerated in clauses (a), (b) or (c).

In *Konkan Railway Corpn. Ltd. vs. Mehul Construction Co.* 2000 (7) SCC 201, a three Judge Bench of this Court held that at the stage when a party has approached the Chief Justice for appointment of an arbitrator, the contentious issues should not be decided at that stage and the aggrieved party can raise all the objections including objection regarding non-existence of an arbitration clause before the arbitral tribunal. The Bench observed as under in para 4 of the report:-

"When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with

proper and the High Court erred in granting an injunction in favour of the plaintiff and staying the proceedings before defendant No. 2.

The other point, which needs consideration, is that the appellant had raised a specific plea by moving an application under Section 20 read with Section 151 CPC before the trial court that the court at Calcutta had no territorial jurisdiction to try the suit. According to the appellant the indent (contract) contained a clause that the dispute under the contract shall be decided by the court at Bombay and by no other court. That apart it was defendant No. 1, which had commenced arbitration proceedings before defendant No. 2 and both are situate in Bombay.

The plaintiff wants that the Hindustan Chamber of Commerce (defendant No. 2) may be restrained from proceeding with arbitration of the dispute, which has been raised by the appellant Shree Subhlaxmi Fabrics Pvt. Ltd. (defendant No. 1). Both defendant No. 1 and defendant No. 2 have their offices at Bombay. Insofar as commencement of proceedings before defendant No. 2 by defendant No. 1 is concerned, no part of cause of action has accrued in Calcutta.

In *Hakam Singh vs. Gammon (India) Ltd.* 1971 (1) SCC 286, 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 Code of Civil Procedure 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 (P) Ltd. vs. A.P. Agencies* 1989 (2) SCC 163, 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, 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 exclusion alterius' \026 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."

This view has been reiterated in *Angile Insulation vs. Davy Ashmore India Ltd.* 1995 (4) SCC 153.

In the case on hand the clause in the indent is very clear, viz., "court of Bombay and no other court". The trial court on consideration of material on record held that the court at Calcutta had no jurisdiction to try the suit.

The High Court in the earlier part of the judgment noted that

the invoice contained clause like "under jurisdiction of the court from where the goods have been dispatched" and in the indent (contract) a clause like "dispute under this contract shall be decided by the courts of Bombay and by no other courts". Further, while recording its findings on the plea raised by the appellant regarding jurisdiction it held as under: -

"In the facts and circumstances of this case, the plaintiff has no doubt an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the courts of its business. Its case that "from where the goods has been dispatched", is not sufficiently specific as to exclude a court's jurisdiction, is no doubt an arguable case."

In our opinion the approach of the High Court is not correct. The plea of the jurisdiction goes to the very root of the matter. The trial court having held that it had no territorial jurisdiction to try the suit, the High Court should have gone deeper into the matter and until a clear finding was recorded that the court had territorial jurisdiction to try the suit, no injunction could have been granted in favour of the plaintiff by making rather a general remark that the plaintiff has an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the court.

On overall consideration of the matter, we are clearly of the opinion that on the facts and circumstances of the case the view taken by the trial court was perfectly correct and the High Court has erred in reversing its order and granting an injunction in favour of the plaintiff.

The appeal is accordingly allowed with costs and the judgment and order dated 21.5.2002 of the High Court is set aside.