

Metal Distributors (Uk) Limited vs Emmsons International Limited And ... on 27 August, 2008

Author: A.K. Sikri

Bench: A.K.Sikri, Manmohan Singh

REPORTABLE
IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (OS) No.138/2005

Date of Hearing: 04.08.2008
Date of Decision: 27.08.2008

#METAL DISTRIBUTORS (UK) LIMITED
!

.....APPELLANT

Through: Mr.Atul Sharma with
Mr.Milanka Chaudhury

Versus

\$EMMSONS INTERNATIONAL LIMITED & ANOTHER

.....RESPONDENTS

Through Mr.Sanjeev Puri, Sr. Advocate
with Mr.Gyaltsen B.

CORAM :-

*THE HON'BLE MR.JUSTICE A.K.SIKRI
THE HON'BLE MR. JUSTICE MANMOHAN SINGH

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

:

1. The appellant herein is the defendant No.1 in the suit for recovery filed by the respondent No.1 herein/plaintiff. For the sake of clarity and to avoid confusion, we shall describe the appellant as the defendant No.1, respondent No.1 as the plaintiff and respondent No.2 as the defendant No.2 hereinafter. The plaintiff has filed suit for recovery on the original side of this Court. The plaintiff claims decree in the sum of Rs.30,61,145/- plus interest and cost on the ground that the defendant No.1 supplied defective copper wire bars to the plaintiff for which the plaintiff had placed orders with the defendant No.1 through their agents M/s. Benani Metals Limited, i.e., the defendant No.2.

2. The defendant No.1 filed the application under Order 7 Rule 11 of the Code of Civil Procedure on the ground that Delhi courts had no jurisdiction in view of Clause 13 contained in the contract dated 5.1.1996 entered into between the parties pursuant to which supplies were made by the defendant No.1 to the plaintiff. It is this application which has been dismissed by the learned Single Judge vide impugned order dated 7.1.2005 and that order is the subject-matter of the present appeal. The defendant No.1 is not satisfied with the said order and still maintains that Clause 13, which provides for dispute redressal mechanism through arbitration and since the contract is to be construed in accordance with and governed by English law, ousts the jurisdiction of the courts in Delhi, nay the Indian courts to entertain such a suit. According to the appellant, it is the competent court in England only which is foisted with requisite jurisdiction to adjudicate the disputes between the parties, if Clause 13 is given its fullest and proper implication.

3. We may note at the outset that the learned Single Judge in the impugned order has held that such a clause is opposed to public policy of India being an agreement in restraint of legal proceedings and is thus, void and unenforceable in view of the provisions of Section 28 of the Indian Contract Act, i.e., through the scope of the enquiry in this appeal.

4. We may now proceed to take note of Clause 13 of the agreement around which the entire controversy revolves. This clause reads as under:-

"GOVERNING LAW AND FORUM FOR RESOLUTION OF DISPUTES:

The contract shall be construed in accordance with and governed by English law. Sellers shall be entitled at their option, to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of London Metal Exchange or to institute proceedings against Buyers in any courts of competent jurisdiction."

5. According to learned counsel for the appellant, Clause 13 is in two parts. First part relates to the governing law, namely, in the event of dispute, as per that clause is the English law which will prevail while construing the contract. Second part of this clause provides the forum for resolution of disputes between the parties as per which, disputes arising under this contract can either be referred to the arbitration by London Metal Exchange or proceedings can be instituted against buyers in any courts of competent jurisdiction. It is the submission of the appellant that since the governing law is English law, the courts in India have no jurisdiction to entertain any dispute which arises between the parties. This submission proceeds on the premise that when the agreement is to be construed in accordance with and is governed by English law, it is only the English courts which are competent to interpret the terms and conditions of the contract. It is argued that for the purpose of jurisdiction it is only first part which is relevant. Second part of Clause 13, which provides for forum for resolution of disputes between the parties, was not even the subject-matter of the application. Learned counsel pointed out that, in fact, invoking second part of Clause 13 the defendant No.1 had already filed an

application under Section 8 of the Arbitration and Conciliation Act, 1996, in the suit which was yet to be decided. The grievance is that the learned Single Judge, though virtually agreed that the parties intended that contract is to be governed by English law, proceeded to interpret the validity of second part of Clause 13 and declared the entire Clause 13 as void on the ground that the second part of Clause 13 provides forum of arbitration/court proceedings only to the defendant No.1, namely, the seller and was, therefore, in the nature of a unilateral covenant depriving the plaintiff to enforce its rights under the contract. Mr.Atul Sharma, learned counsel for the defendant No.1, argued that it is here where the trial court fell into error.

6. Mr.Puri, learned senior counsel appearing for the plaintiff, on the other hand, refuted the aforesaid contention of Mr.Sharma. His submission was that the contract between the parties was signed at Delhi; the material was to be delivered at ICD, Delhi; part of the material was delivered at Delhi; that part of the material of which delivery was not taken because of the sub- standard quality was deliverable at Delhi; whatever payments were to be made by the plaintiff were paid at Delhi and the amount in question receivable by the plaintiff is also at Delhi. The defendants have breached the contract at Delhi; the losses have been incurred/suffered by the plaintiff at Delhi; the plaintiff works for gain at Delhi. Thus, the cause of action in favour of the defendant No.1 and the plaintiff has arisen at Delhi. The intention of the defendant No.1 is to defeat the claim of the plaintiff by delaying the proceedings and to cause undue hardship and prejudice to the plaintiff.

7. Mr.Puri agreed that Clause 13 is in two parts. However, his submission on the second part was that it conferred rights only on the defendant No.1, as the seller, to unilaterally refer the matter to arbitration or invoke the jurisdiction of a competent court. That part of the clause does not confer any right on the plaintiff as the buyer of the goods to take any legal action against the seller/defendant No.1 in case the buyer is aggrieved and wishes to take any legal action against the seller. On this basis it was contended that the plaintiff as the buyer was not bound by second part of the unilateral clause to invoke the arbitration etc. Therefore, in so far as the plaintiff, as buyer is concerned, it could file the suit at a place where the cause of action had arisen notwithstanding the fact that governing law is the English law. According to him, as the cause of action for filing the suit has arisen in India, the plaintiff had rightly filed the suit in Delhi.

8. From the aforesaid, it would be apparent that there is a unanimity in the approach of both the parties on the following two aspects:

I. Clause 13 is in two parts. First part deals with law which shall govern while interpreting the contract, in the event of disputes between the parties arising out of the contract and the parties had agreed that it is the English law which is the governing law;

II. Second part provides the forum for resolution of disputes between the parties by giving choice to the seller only. It stipulates that it would be the option of the seller to either refer the dispute arising under the contract to arbitration in accordance with the rules and regulations of London Metal Exchange or to institute proceedings against the buyer in any courts of competent jurisdiction. Thus, option is given only

to the seller under the contract when seller has a claim against the buyer. There is no provision for giving any such option to the buyer, i.e., the plaintiff.

In the instant case, admittedly, it is not the seller who has felt aggrieved. On the contrary, it is the buyer who has instituted the legal proceedings against the seller for recovery of money on the ground that seller has made supplies of defective goods.

9. The question, therefore, boils down to this: Whether the buyer (plaintiff) could maintain legal action against the seller in Indian court invoking the principles governing territorial jurisdiction as contained in Section 20 of the Code of Civil Procedure? Or the case has to be filed, even by the buyer only in a court of competent jurisdiction in England because of the reason that the contract is intended to be governed by English law?

10. We may initiate our discussion by clarifying the legal position. It is open to the parties to agree, in an international contract, to lay down the stipulation as to which Municipal Law would be applicable. The law on this aspect is beyond the pale of any controversy. The Apex Court has reiterated this principle time and again. In this behalf, it would be apt to note the following observations of the Supreme Court in the case of National Thermal Power Corporation v. Singer Company, AIR 1993 SC 998 where the question was as to what is the proper law of contract which could be applied to a commercial contract between the parties of two different countries:-

"24. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or impliedly.....on the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract."

11. Thus, it is not in dispute that parties could choose the applicability of English law for resolution of disputes between them. What is the fall out? If the governing law is the English law, whether the effect thereof would be to oust the jurisdiction of Indian courts? Whether it is the competent court in England which has exclusive jurisdiction to decide the disputes since the governing law is English law? This is the real bone of contention between the parties.

12. The defendant No.1 contends that once the parties have chosen the applicability of English law, the disputes are also to be determined by English courts. For this, reliance is placed on British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries and Others, (1990) 3 SCC 481. In that case the Court ruled that in case of international contracts it is common practice for the parties to agree that any dispute arising between them shall be settled by the courts of another country even though both the parties are not resident of that country. The principle enunciated was that in such a case having consented to the jurisdiction one cannot afterwards contest the binding effect of the

judgment. This can be found in the following portion extracted from this judgment:-

"28. Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English Law and disputes are to be determined according to English Law. Is the selection of law binding? In *Cheshire and North's Private International Law* (11th edn., page 495), while discussing about the interpretation of contract the authors say: 'When the stage has been reached where an obligation, formally and essentially valid and binding on the parties of full capacity, has been created, then in the further matters that may require the intervention of the Court, there is, speaking generally, no reason in principle why the parties should not be free to select the governing law.' The express choice of law made by the parties obviates need for interpretation.

29. In the absence of an express choice the question of proper law of contract would arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary."

13. Per contra, learned senior counsel for the plaintiff (respondent No.1) placed reliance on the case of *Laxman Prasad v. Prodigy Electronics Ltd. & Anr.*, (2008) 1 SCC 618 where the Supreme Court dealt with a similar issue. In the said case, the contract between the parties stated that it will be interpreted in accordance to the laws of Hong Kong. The contention for ousting the jurisdiction of Delhi court was noted in the following words:-

"It was also asserted that there was an agreement between the Plaintiff Company and the Defendant by which exclusive jurisdiction was granted to courts in Hong Kong and jurisdiction of all other courts had been ousted and on that ground also the Delhi court had no jurisdiction in the matter."

14. The Supreme Court in the said matter finally held that:

".....we have referred to the relevant clauses of the agreement. Clause 18 provides for applicability of law and it specifically declares that the terms and conditions of the agreement shall be interpreted in accordance with "the laws of Hong Kong Special Administrative Region." That, in our judgment, does not mean that a suit can be instituted only in Hong Kong and not in any other Country.

16. Territorial jurisdiction of a court, when the plaintiff intends to invoke jurisdiction of any court in India, has to be ascertained on the basis of the principals laid down in the Code of Civil Procedure. Since a part of "cause of action" has arisen within the local limits of Delhi as averred in the plaint by the Plaintiff Company, the question has to be considered on the basis of such averment."

It is contended that as per the ratio of the above judgment, applicability of law and the territorial jurisdiction of a Court based on cause of action, are two separate issues. The territorial jurisdiction

of a Court cannot be ousted merely because the law applicable is of a third country.

15. We have minutely gone through the aforesaid judgments cited by the defendant No.1 and the plaintiff respectively. Our opinion is that the case is squarely covered by the judgment of the Supreme Court in Laxman Prasad (supra). The entire thrust of the submission of the learned counsel for the defendant No.1 is that once the contract is governed by English law, it will be the English courts which will have exclusive jurisdiction to deal with the dispute and apply the substantive law, i.e., English law. This submission runs contrary to the law laid down by the Supreme Court in Laxman Prasad. In no uncertain terms the Supreme Court held in that case that applicability of law of a particular country would not mean that the case is also to be filed in that country alone. A clear and fine distinction was made by the Supreme Court between the "cause of action" and "applicability of law". It was held that if the parties had agreed upon the applicability of laws of a particular country that would not mean that there was also an agreement upon the territorial jurisdiction of court of that country as well. That was a case where contract was between the company of Hong Kong and its Indian ex- employee. Contract was executed in Hong Kong and it contained a stipulation to the effect that the terms and conditions of the contract would be interpreted in accordance to the Hong Kong law. The Hong Kong company was engaged in the business of trading electronic goods generally and Printed Circuit Board (PCB) particularly. According to this Hong Kong company, it had developed solid reputation in India under its trade name and trade mark in the field of the said goods. The appellant had joined the company in India as a representative for marketing PCB products of the company in India. Thereafter he was provided full time employment in Hong Kong as the 'International Business Development Manager'. In the contract of employment there was a clause regarding governing law. It was mentioned that the agreement "shall be interpreted in accordance to the laws of Hong Kong Special Administrative Region". The appellant tendered his resignation. Thereafter the Hong Kong company filed a suit in this Court against the appellant/defendant alleging that he misinformed its potential customers that he was representing the company and also submitted quotes for PCB products. He also participated in the trade fair in Delhi at Pragati Maidan where he used the goodwill and passed on the trade name of the company. He had also registered the domain name deceptively similar to that of the company while he was still in the employment of the company. On these averments the company had prayed for a decree of permanent and mandatory injunction and also for damages by ordering rendition of accounts. The appellant filed an application under Order 7 Rules 10 and 11 of the CPC for rejection of the plaint on the ground that Delhi courts had no jurisdiction. It was contended that since the employment agreement between the parties was governed by the Hong Kong law, it was only the competent court in Hong Kong which was vested with the jurisdiction to decide the matter. This Court rejected this contention of the appellant (defendant) and the matter went up to the Supreme Court. The Supreme Court upheld the decision of this Court holding that merely because the contract was governed by Hong Kong law would not mean that there was an agreement about the territorial jurisdiction of the courts in Hong Kong as well. The principles laid down by the Supreme Court in the said judgment can be summarized as under:-

- a) What was the agreed upon was not territorial jurisdiction of a court but applicability of laws. "Cause of action" and "applicability of law" are two distinct, different and independent things and one cannot be confused with the other. The

expression "cause of action" has not been defined in CPC. It is, however, settled law that every suit presupposes the existence of a cause of action. If there is no cause of action, the plaint has to be rejected [Rule 11(a) of Order 7]. Stated simply, "cause of action" means a right to sue. It consists of material facts which are imperative for the plaintiff to allege and prove to succeed in the suit.

b) Section 20(c) CPC leaves no room for doubt that a suit would lie in a court within the local limits of whose jurisdiction the cause of action has arisen, wholly or partly.

Section 20 has been designed to secure that justice might be brought as near as possible to every man's heartstone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself.

c) It is true that the suit could have been instituted in Hong Kong as well. That, however, does not take away the jurisdiction of the Delhi court where a part of cause of action had arisen. In the plaint, it was specifically alleged by the plaintiff Company that the defendant had committed breach of terms and conditions of agreement during the trade fair in Pragati Maidan, Delhi. It was, therefore, open to the plaintiff Company to institute a suit in a competent court within the jurisdiction of Delhi.

d) Territorial jurisdiction of a court, when the plaintiff intends to invoke jurisdiction of any court in India, has to be ascertained on the basis of the principles laid down in the Code of Civil Procedure. Since a part of "cause of action"

had arisen within the local limits of Delhi as averred in the plaint by the plaintiff Company, the question had to be considered on the basis of such averment. Since it was alleged that the appellant-defendant had committed breach of agreement by using trade mark/trade name in trade fair in Delhi, a part of cause of action had arisen in Delhi. The plaintiff Company, in the circumstances, could have filed a suit in Delhi.

e) So far as the applicability of law is concerned, obviously as and when the suit would come up for hearing, the Court will interpret the clause and take an appropriate decision in accordance with law. It has, however, nothing to do with the local limits of the jurisdiction of the Court.

16. In the present case, as conceded by the learned counsel for the defendant No.1 (appellant) himself, first part of Clause 13 deals with the governing law. It is on the basis of first part alone that the defendant No.1 wants to urge that it is the competent court in England which will have exclusive jurisdiction to deal with the matter. That submission has no legs to stand in view of ratio of Laxman Prasad's case (supra). Merely because the governing law is English law would not lead to the conclusion that English courts are conferred with the exclusive jurisdiction to decide the dispute. If more than one courts have the jurisdiction, it is the choice of the plaintiff to invoke the jurisdiction in any of those courts. There are specific averments made in the plaint on the basis whereof it is

pleaded by the plaintiff that jurisdiction is vested in Delhi Court as well. These are predicated on the provisions of Section 20 CPC which provision can be applied while determining the jurisdiction as per the principle of law laid down in Laxman Prasad (supra). Unless the jurisdiction of Delhi court or for that matter Indian courts is specifically excluded by agreement between the parties and exclusive jurisdiction is conferred upon the English courts, the appellant cannot succeed. The appellant has not even attempted to make out any such case.

17. Even as per the defendant No.1's own contention, second part of Clause 13 deals with choice of forum in case the defendant No.1 as seller had to institute the proceedings against the plaintiff/buyer. Admittedly, we are not dealing with such a situation as it is the buyer which has instituted legal proceedings against the seller and second part does not deal with that situation. We need not say more on this aspect as application of the appellant under Section 8 of the Arbitration and Conciliation Act, 1996, is pending in the suit and it would be for the learned Single Judge to take final view in the said matter after hearing the parties. What is emphasized is that it is the defendant No.1's own case that second part of Clause 13 is not relevant while deciding application of the defendant No.1 under Order 7 Rules 10 and 11 CPC.

18. The issue raised in British India Steam Navigation Co. Ltd. (supra), relied upon by the learned counsel for the appellant, was entirely different. The question before the Court was as to whether the parties can agree between them that the disputes would be settled by applying the law of a particular country even when both the parties are not resident of that country. It is this issue which was decided in affirmative. It would not follow therefrom that they even agreed to the territorial jurisdiction of the Court of that country, the law whereof was the governing law as far as the contract is concerned. Incidentally, British India Steam Navigation Co. Ltd. (supra) was specifically referred to and distinguished by the Supreme Court in Laxman Prasad (supra) in the following words:-

"40. Learned counsel for the appellant relied on a decision of this court in British India Steam Navigation Co. Limited v. Shanmughavilas Cashew Industries. In that case, the Plaintiff purchased from the Defendant Company raw cashew nuts which were shipped in a vessel chartered by a company incorporated in England. Clause 3 of the bill of lading dealt with jurisdiction of the court. The said clause read as under: (SCC pp. 488-89 page 8) "3. Jurisdiction-The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England or at the option of the carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the courts of any other country."

Though the above clause made it clear that the disputes should be determined in England, this Court held that the objection as to territorial jurisdiction had been waived by the Defendant. So far as the law is concerned, it was held that proper law to govern the contract was English Law.

41. The learned counsel for the appellant submitted that the ratio laid down in British India Steam Navigation Co. applies to the case on hand and the High Court of Delhi committed an error of law in not upholding the objection of the defendant that Indian Court had no jurisdiction to deal with the matter.

42. We are unable to agree. Clause 3, as extracted hereinabove, clearly provided that the contract would be governed by English Law. The High Court was, therefore, right in observing that the cause is not relevant so far as the question raised in the present matter is concerned."

19. Clause 3 in the said contract relating to jurisdiction clearly provided that not only the contract was governed by English law, even the disputes were to be "determined in England". Learned counsel for the appellant laid much emphasis on the expression used in para 42 extracted above wherein the Court distinguished the said case by observing that Clause 3 "clearly provided that the contract would be governed by English Law" and on that basis tried to argue that the Court was of the opinion that in case the contract is to be governed by English law, it is the English law which will have territorial jurisdiction also to determine the dispute. However, when the judgment is read in entirety, it is clear that the case of British India Steam Navigation Co. Ltd. (supra) was distinguished on the ground that Clause 3 itself provided the jurisdiction as well. The language is:

"3. Jurisdiction-The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England or at the option of the carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the courts of any other country."

20. We are, therefore, of the opinion that the submission of the learned counsel for the appellant runs contrary to the ratio of Laxman Prasad (supra) wherein it is clearly held, as pointed out above in principle (e) of the said case, that in so far as the applicability of the law is concerned, Delhi Court could interpret the clause and take appropriate decisions in accordance with law. Thus, it would be open to the appellant to argue, when the clauses of the contract dated 5.1.1996 come up for interpretation, that the same should be interpreted applying the English law. That exercise can be done by the Court in Delhi also and such a proposition has nothing to do with the territorial jurisdiction of the Court.

21. No doubt, the learned Single Judge should not have dwelled on second part of Clause 13 and decided as to whether that is contrary to the provisions of Section 28 of the Contract Act or not, that may be an issue which may arise when part II of Clause 13 comes up for discussion while deciding the application of the defendant No.1 under Section 8 of the Arbitration and Conciliation Act. For our purpose it is sufficient that when for the purpose of application under Order 7 Rules 10 and 11 of the Code, second part of Clause 13 is not relevant, the jurisdiction would be decided on the touchstone of Section 20 CPC. The approach of the learned Single Judge to that extent, while deciding the application under Order 7 Rule 11 CPC for which the only relevant provision was first II of Clause 13, was not correct. However, still the outcome remains the same. For the reasons given above, we are of the opinion that the application of the appellant/defendant No.1 filed under Order 7 Rule 11 CPC for rejection of the plaint is without any merit. Accordingly, this appeal is dismissed with costs.

(A.K. SIKRI)

JUDGE

August 27, 2008
hp.

(MANMOHAN SINGH)
JUDGE