

FAO 14/2006

BEFORE

HON'BLE MR.JUSTICE AFTAB H.SAIKIA

HON'BLE MR. JUSTICE P K MUSAHARY

JUDGEMENT & ORDER (ORAL)

Saikia,J/

Heard Mr. N.Dutta, learned Sr. Counsel assisted by Mr. J. Roy, learned counsel appearing for the appellant. Also heard Mr. A.K.Goswami, learned Sr. Counsel assisted by Mr. R.Chakraborty and Ms. B.Sarma, learned Counsel appearing on behalf of the Respondent.

2 This First Appeal from Order has been directed against the Order dated 17.3.2006 passed by the learned Civil Judge (Senior Division), Jorhat in Title Suit No. 58 of 2005 whereby the learned Judge while allowing the application so filed by the defendant /respondent herein under Order VII Rule 10 read with Section 151 of the Code of Civil Procedure, returned the plaint so filed by the plaintiff/appellant holding that the instant case fell exclusively with the jurisdiction of Kolkata Court; meaning thereby the Jorhat Court had no jurisdiction to try the suit in question.

3. The cardinal issue raised in this appeal is as to whether the Jorhat Court has the jurisdiction to try Civil Suit being T.S.No. 58 of 2005 preferred by the appellant/plaintiff against the respondent/defendant seeking the following reliefs:

(a) A decree of Rs.3,18,01,240/- from the Defendant as stated in paragraph 32 and 33 the plaint.

(b) A decree directing adjudgement, delivery up and cancellation of confirmation of accounts being Annexure O collectively to the plain and five cheques being Annexure P to the plaint and four agreement dated March 5,2003, December 11,2003, March, 01,2004, January 08, 2005 being Annexure A and B collectively and declaration thereof as void.

(c) A Decree directing the Defendant to return the five cheques mentioned in paragraph 24 being Annexure P to the plaint.

(d) Permanent injunction restraining the Defendant through its agents/ servants/ assignees from using and or assigning and dealing in any manner whatsoever five cheques covered under Annexure P collectively to the plaint and balance confirmation of account being Annexure O collectively to the plaint.

(e) A decree directing delivery up, adjudgement and cancellation stipulation of interest under Annexure A and B collectively.

(f) Interest

(g) Compensation

(h) Receiver

(i) Attachment

(j) Cost

(k) Other relief

3. It is pleaded by the plaintiff/ appellant in its plaint that it, being the

he owner of a tea garden in the name and style of Boisahabi Tea Estate situated at Selenghat in the District of Jorhat, Assam within the jurisdiction of the Jorhat Court, was approached by the respondent -defendant, being a company carrying on business of auctioning and selling of tea having its Head Office at Kolkata to appoint itself as the tea auctioneer for sale of manufactured tea and accordingly in terms of the agreement, executed on 5.3.2003 between the parties an advance of Rs.50 lakh was provided towards dispatch of tea from the garden of the plaintiff at Jorhat. The agreement in question has also been annexed to the plaint and marked the same as Annexure A. Thereafter from time to time the appellant entered into another three agreements on 11.12.2003, 1.3.2004 and 8.1.2005 under which the defendant/respondent made an advance of Rs. 2 crores, 50 lakhs and 37 lakhs respectively. These agreements are also annexed to the plaint as Annexure B respectively.

4. In the process the plaintiff/ appellant delivered the required quantity of tea in terms of agreement from its own tea garden from Jorhat to the auction house nominated by the defendant for sale at Guwahati and Kolkata. The plaintiff/appellant again entered into a tripartite agreement on 1.6.04 and 15.3.2005 for getting further tea as required for their business and those tripartite agreements have also been annexed to the plaint and marked as Annexure E & F.

5. The basic grievance of the appellant has been narrated in paragraph 18 wherein they claim that the defendant /respondent undervalued the price of the tea sold in auction and they admitted such under valued sale and also undertook to replenish such amount. Paragraph-18 of the plaint is reproduced as under:

The plaintiff summoned the officers of the Defendant as its tea garden at Jorhat when Mr. Savindar Singh and Mr. Dipak Das attended the meeting and after they were confronted with actual sale of tea sold at Rs.90/- per kg by the aforesaid auction buyers whereas it were shown to have sold by them @ Rs.68.55/- per kg, they admitted undervalued sale by them and undertook to replenish undervalued sale which worked out to Rs.3,50,68.011/- taking into consideration 16,34,872.3 Kgs of tea dealt with by them @ 21.45/- per Kg. (average). A copy of the admission made by Mr. Dipak Das a representative of the defendant under which it agreed to replenish a sum of Rs.3,50,68,011/- to the Plaintiff on account of undervalued sale is annexed hereto and marked as Annexure NN.

6. To show the cause of action the plaintiff averred in paragraph 38 of the plaint as under.

Inasmuch as part cause of action has arisen within the jurisdiction of this Hon'ble Court at the office of the Plaintiff's tea garden situated at Selenghat, Jorhat where the Defendant was appointed as its auctioneer and from where manufactured tea were delivered from the garden of the Plaintiff to the Defendant within the jurisdiction of this Hon'ble Court and that tripartite agreement being Annexure E and F were entered into at the tea garden of the plaintiff's office at Selenghat, Jorhat this court has jurisdiction to entertain the suit.

6. Against the said pleadings filed by the plaintiff/appellant in its plaint as indicated above, the defendant preferred not to file any written statement rather it preferred an application under Order VII Rule 10 CPC read with Section 151 CPC seeking for return of the plaint on the ground of lack of jurisdiction. Along with the same, an application was also filed with the prayer for keeping the filing of the written statement in abeyance. However, those applications were rejected on 6.10.2005.

7. The Respondent moved this Court by filing petition being W.P(C)No.54 of 2006 and this Court by order dated 6.1.2006 disposed of the said application directing the trial Court to dispose of the application under Order VII Rule 10 CPC instituted by the respondent.

8. In compliance of the High Court's Order as indicated above, the trial Court after hearing the learned Counsel for the parties on the said application, passed the impugned order.

9. Mr. Dutta, the learned Sr. Counsel in support of the appeal and challenging the Judgment and order dated 17.3.06 has forcefully argued that the trial Court committed an error of law in holding that the Jorhat Court had no jurisdiction to try the present case was exclusively within the jurisdiction of the Kolkata Court. Relying on paragraphs 4,6,8 and 18 of the plaint vis- -vis the agreements so indicated above, the learned Sr. Counsel has submitted that it was the defendant who approached the plaintiff at Jorhat seeking their appointment as tea auctioneer of the manufactured tea and accordingly an agreement was executed and entered by and between the parties at Jorhat on 5.3.2003 . Since cause of action, therefore, arose at Jorhat, the Jorhat Court had the jurisdiction. Further submission of the learned Counsel is that the plaintiff

delivered the required quantity of tea in question from its tea garden from Jorhat to the auction house nominated by the defendant for sale of the same at Guwahati and Kolkata and as such since the goods were delivered to the plaintiff from Jorhat, the Jorhat Court had undoubtedly the jurisdiction. Referring basically to the agreements, it is submitted by Mr. Dutta that though it was mentioned in paragraph-9 of those agreements that any dispute between the parties would be within the jurisdiction of the Kolkata Court, such clause could not oust the jurisdiction of the Jorhat Court. According to him there has been no ouster clause so reflected in those agreements.

10. To drive home his this submission, Mr.Dutta has strongly relied upon a decision of the Apex Court rendered in the case of A.B.C.Laminart Pvt. Ltd and another -Vs- A.P. Agencies , Salem, report in AIR 1989 SC 1239 and another case from Andhra Pradesh High Court i.e. M/s. Sponge Iron India Ltd. v. M/S Andhra Steel Corporation Ltd reported in AIR 1989 Andhra Pradesh 206.

11. In A.B.C. Laminart's case (supra ) the Apex Court dealing with exactly of a similar matter of exclusion of jurisdiction of the other Courts excepts recorded Court in the agreement wherein Clause 11 of the agreement therein it was provided that an dispute arising out of this sale shall be subject to Kaira jurisdiction, held in paragraphs 21 and 22 as follows:

21. From the foregoing decisions it can be reasonably deduced that where such an outer 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 outer clause when words like 'alone', 'only', 'exclusive', and the like have been used there may be no difficulty. Even without such workers in appropriate cases the maxim expression unius est exclusion alterius'-expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the faces 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 case be inferred. It has therefore to be properly construed.

22. Coming to Clause 11 we already found that this clause was included in the general terms and conditions of sale and the order of confirmation no.68/59 dated 2.10.1974 with the general terms and conditions was sent from Udyognagar, Mahmdabad, Gujrat to the respondent's addresses at 12 Suramangalam Road Salem, Tamil Nadu. The statement made in the Special Leave Petition that Udyognagar, Mahmdabad, Gujrat is within the jurisdiction of the civil Court of Kaira has not been

controverted. We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus Kaira Court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for Court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by Cause 11 it would not absolutely oust the jurisdiction of the Court, and therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of the Court at Salem. In the clause 'any dispute arising out of this sale shall be subject to Kaira jurisdiction' ex facie we do not find

Exclusive words like 'exclusive', 'along', 'only', and the like. Can the maxim 'expression of unius est exclusio alterius' be applied under the facts and circumstances of the case? The order of confirmation is of no assistance the other general terms and conditions are also not indicative of exclusion of other jurisdiction. Under the fact and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which Court otherwise had jurisdiction under law through connecting factor of delivery of goods threat was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court.

12. It is stated at the bar that in the case in hand, the clause which appears in the agreement herein which provides the jurisdiction of such dispute will be within the civil jurisdiction of the Kolkata Court has not been qualified by the word like 'along', 'only' or 'exclusive', . And as such according to him, the jurisdiction of the other Court except the Kolkata Court has not been ousted.

13. The Division Bench of Andhra Pradesh High Court in M/s Sponge Iron India's case (supra) under the similar circumstances held that the absence of any word like 'alone', 'only' 'exclusive', did not have the effect of ousting of any other Court's jurisdiction.

14. Per contra, Mr. Goswami, learned Sr. Counsel has supported vehemently the finding of the trial Court to the extent of holding that the Kolkata Court had only jurisdiction to try this suit while assailing the other finding of the trial Court that both the Kolkata Court and Jorhat Court had the jurisdiction for which he has preferred separately Memo of Cross Objection challenging the said finding. His basic thrust is that the facts and circumstances so projected in the plaint itself would exclusively indicate that there was no cause of action to initiate any proceeding of such nature against the defendant at Jorhat and Jorhat court had, therefore, no jurisdiction. According to him, paragraphs 6,8,18 and 38 of the plaint would clearly say that the entire case was structured on incorrect facts. Referring to the statements in paragraph-4 of the plaint it is strongly stated that in the said paragraph it was categorically stated that it was the defendant who approached the plaintiff for their appointment as tea auctioneer, the agreement entered upon between the parties on 5.3.05 vide Annexure-A, would stand as proof of the extent of falsification so made by the plaintiff. Drawing our attention to the agreement Annexure-A, he has pointed out that in the agreement itself all the parties had shown their registered office at Kolkata and accordingly in Clause-9 of the agreement it was incorporated that the dispute between the parties would be within the jurisdiction of Kolkata Court. From the recital of the above, it would expressly indicate that it was the plaintiff who approached the defendant and not to defendant as claimant in paragraph-4. According to him, the statement made in paragraph-4 is ex-facie false and incorrect on the basis of which relief sought for by the plaintiff cannot be granted.

15. Referring to paragraph 38 of the plaint where cause of action was shown to be arisen within the jurisdiction of the Jorhat Court, it is stated by the learned counsel that plaintiff garden was situated at Selenghat where the defendant was never appointed as its auctioneer as claimed by the plaintiff in paragraph 4 as the same was belied by the agreement dated 5.3.2003 itself. It is contended that even an ordinary reading of paragraph 38 would manifestly exhibit that there no cause of action has ever arisen at any time within the jurisdiction of the Jorhat Court.

16. Distinguishing A.B.C Laminart's case (supra) so cited on behalf of the appellant, it is contended by the learned counsel representing the respondent that in paragraph 12 it was stated as under:

12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessarily for the plaintiff to prove to enable him to obtain a decree. Every thing which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the charter of the relief prayed for by the plaintiff.

17. According to him, to get a cause of action, it must include some act at least done by the defendant since in the absence of any such act no cause of action can possibly accrue. In the instant case, states the learned counsel, the plaintiff failed to show any such action done by the defendant to attract the jurisdiction of the Court at Jorhat.

18. Reliance has been placed on behalf of the respondent on the following decisions:

1. AIR 1995 SC 1766 equivalent to (1995) 4 SCC 153 (Angile Insulations-Vs-Davy Ashmore India Ltd and another)
2. AIR 2004 SC 2432 equivalent to (2004) 4 SCC 671 (Hanil Era Textiles Ltd. -Vs- Puromatic Filters(P) Ltd.)
3. (2004) 7 SCC 447 (Man Roland Druckmaschinen AG-Vs- Multicolour Offset Ltd. and another).

19. In Angile Insulations's case (supra), the Apex Court relying on ABC Laminart's case (supra) in paragraph-5 held as under:

5. So, normally that court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties, clause (21) reads thus:

This work order is issued subject to jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only.

A reading of this clause would clearly indicated that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in A.B.C Laminart (P) Ltd. V. A.P. Agencies. Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when the

ere is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the court will be unlawful and void being against the public policy under Section 23 of the Contract Act. We do not find any such invalidity of clause (21) of the contract pleaded in this case. On the other hand, this Court laid that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements.

20. In Hanil Era Textiles Ltd's case (supra) the Supreme Court in paragraph-9 held as follows:

9. Clause 17 says- any legal proceedings arising out of the order shall be subject to the jurisdiction of the courts in Mumbai. This clause is no doubt not qualified by the words like alone, only or exclusively. Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other courts except courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay, the said order was accepted by the branch office of the plaintiff at Bombay, the advance payment was made by the defendant at Bombay, and as per the plaintiff's case the final payment was to be made at Bombay, there was a clear intention to confine the jurisdiction of the courts in Bombay to the exclusion of all other courts. The Court of Additional District Judge, Delhi had therefore, no territorial jurisdiction to try the suit.

21. We have given our thoughtful consideration to the extensive arguments so canvassed on behalf of the rival parties and also perused carefully the pleadings so placed on record with all the Annexures appended thereto. It is clearly seen from paragraph-9 of the agreement that any question in dispute will be within the jurisdiction of the Kolkata Court. On meticulous scanning of the contentions made in those paragraphs in the plaint so relied upon by the parties, we are of the considered view that in paragraph-4 the correct factual position has not been stated and the same has been totally belied by in the agreement dated 5.3.2003 itself. On the other hand, in paragraphs 38 there is no disclosure of any cause of action wholly or partly in terms of Section 20(c) CPC. Even statement made in paragraph 18 did not indicate any such fact or sets of facts to constitute any cause of action with the jurisdiction of Jorhat Court.

22. Paragraph 18 reads as under:

The plaintiff summoned the officers of the Defendant as its tea garden at Jorhat when Mr. Savindar Singh and Mr. Dipak Das attended the meeting and after they were confronted with actual sale of tea sold at Rs.90/- per kg by the aforesaid auction buyers whereas it were shown to have sold by them @ Rs.68.55/- per kg, they admitted undervalued sale by them and undertook to replenish undervalued sale which worked out to Rs.3,50,68.011/- taking into consideration 16,34,872.3 Kgs of tea dealt with by them @ 21.45/- per Kg. (average). A copy of the admission made by Mr. Dipak Das a representative of the defendant under which it agreed to replenish a sum of Rs.3,50,68,011/- to the Plaintiff on account of undervalued sale is annexed hereto and marked as Annexure NN.

23. In the case in hand it is found on scrupulous scrutiny of the materials available on record that both the parties are having their respective registered offices in Kolkata wherefrom they have been running their business and all transactions even the payment by cheques have also been performed in Kolkata. Accordingly the agreements were also executed in Kolkata within specific clause pertai

ning the jurisdiction of kolkata Court in case of any dispute between the parties. It is accepted that the parties are bound by the agreement unless the same is void or contrary to public policy and it is solemn duty of the Court to respect such agreement entered into by and between the parties. Every case is based on its own factual premise. Herein in consideration of the attending facts and circumstances of the case, it can be easily inferred that the parties of the agreement intended and agreed to decide their dispute within the jurisdiction of Kolkata Court. And as such absence of any qualifying word like 'alone' 'only' or exclusively in these column of the agreement jurisdiction of Kolkata Court can not be ousted.

24. That being so, having considered the factual premises in its entirety and also having regard to the judicial pronouncements so relied on by the parties particularly paragraph 9 of the Hanil Era Textiles Ltd's case (supra), we are of the considered view that no cause of action has arisen for trial of the issue against the defendant/respondents in the Court at Jorhat and accordingly Jorhat Court has no jurisdiction to try such suit.

25. Consequently, this appeal stands dismissed affirming the findings arrived at by the trial Court to the effect that the issue in question falls within the jurisdiction of the kolkata Court.

26. In the result, this appeal fails and stands dismissed. No costs.