

OD-3

APO No.26 of 2019
GA No.323 of 2019
In
CS No.31 of 2016

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

ORIGINAL SIDE

SHRIDHAR VYAPAAR PVT. LTD.
Versus
GAMMON INDIA LTD.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE SUVRA GHOSH

Date : 8th February, 2019.

Appearance:
Mr. Anuj Singh, Adv.

Mr. Swatarup Banerjee, Adv.

The Court : The appeal arises out of an order rejecting a plaint – or, more appropriately, revoking the leave granted under Clause 12 of the Letters Patent – primarily, on the ground that the bills raised by the appellant-plaintiff on the defendant provide for a forum selection clause.

The principal contention of the appellant is that since there was no specific agreement between the parties regarding any choice of forum, the mere fact that the printed form of the plaintiff's bills indicated the Courts at a particular city to be the chosen forum, would not be binding on the defendant. At any rate, it is contended on behalf of the appellant that such purported forum selection clause was never agreed to or accepted by the defendant, whether expressly or otherwise.

The trial court proceeded primarily on the basis that since the defendant had made part payments, as claimed in the plaint, pursuant to the receipt of the bills raised by the plaintiff containing the forum selection clauses and the plaintiff accepted such part payments, the agreement between the parties as to the exclusive forum clause was crystalised. It is also observed in the judgment and order impugned dated August 9, 2018 that it may not lie in the mouth of the plaintiff to disown its own forum selection clause when the defendant appeared to have accepted the same by its conduct and it was the defendant who had come to enforce the same. The trial court reasoned that the plaintiff did not exclude the forum selection clause from its bills, nor did it otherwise indicate to the defendant that the forum selection clause contained in its bills would not apply.

On behalf of the appellant, it is asserted that words in fine print contained in bills and the like have very little impact on the transaction or even the rights of the parties. For instance, the plaintiff contends, if a bill were to provide for interest at the rate of 36% per annum after a grace period, it would

not imply that such unilateral assertion in the bill would be binding on the recipient of the bill unless the recipient had expressly agreed thereto. It is also submitted on behalf of the plaintiff that the forum selection clause could not have been found to be binding on the defendant even in the present case if the defendant had instituted a suit in apparent derogation thereof against the plaintiff. The impact of the relevant sentence in fine print in the bills raised by the plaintiff on the defendant need not be gone into, nor any conclusive pronouncement be made thereon in the light of what is otherwise evident from the plaint on a plain reading thereof. The defendant had not only relied on the forum selection clause to suggest that the suit should not have been instituted in this Court, it was also the contention of the defendant that no part of the cause of action, as pleaded in the plaint, had arisen within the jurisdiction of this Court and nothing said in the plaint otherwise clothed this Court with the authority to entertain or try or determine the same.

To begin with, the plaint is inarticulate and does not carry the usual paragraph that indicates the paragraphs relevant for the purpose of considering whether leave ought to be granted under Clause 12 of the Letters Patent at the receiving stage. Ordinarily, there is a paragraph towards the end of a plaint that refers to the previous relevant paragraphs in the plaint to indicate which part of the plaintiff's cause of action may have arisen within the jurisdiction of this Court and which part may have arisen outside. Leave under Clause 12 of the Letters Patent is necessary only when a part of the cause of action arises within and a part outside and not when the entirety of the cause of action arises within.

Further, even if a part of the plaintiff's cause of action arises outside the jurisdiction or even the entirety of the cause of action arises outside the jurisdiction, if the defendant ordinarily resides or works for gain or carries on business within the territorial limits of this Court exercising its ordinary original civil jurisdiction at the time of the institution of the suit, leave is not necessary to be obtained under Clause 12 of the Letters Patent.

Even though the necessary paragraph is absent in the present plaint, it is not as if there is no pleading at all as to which part of the cause of action was perceived to have arisen within jurisdiction and which part outside. The initial paragraphs of the plaint refer to an oral agreement for sale and purchase of goods. It does not appear, on a meaningful reading of a plaint, that the oral agreement between the parties was entered into within jurisdiction. There is an averment to the effect that negotiations were held between the parties within jurisdiction, but there is no clear averment to say that the agreement that followed the negotiations was entered into between the parties within jurisdiction.

On a query from this Court as to which of the paragraphs in the plaint should be looked at to ascertain which part of the plaintiff's cause of action may have arisen within jurisdiction, it is submitted on behalf of the plaintiff that paragraphs 5, 6 and 12 of the plaint would be relevant for such purpose. So that nothing is detracted from the contents of paragraphs 5, 6 and 12 of the plaint, such paragraphs are set out:

“5. The defendant in partial discharge of its liabilities made part payment to the tune of Rs.8,31,816/- (Rupees Eight Lacs Thirty One Thousand Eight Hundred and Sixteen only), thereby leaving a balance outstanding of Rs. 78,72,676/- (Rupees Seventy eight Lacs Seventy Two Thousand Six Hundred And Seventy Six only) after giving credit to Rs.40,092/- (Forty Thousand And Ninety Two only) through Credit Notes issued by the plaintiff. In terms of the agreement between the plaintiff and the defendant, the part payment as aforesaid was made by the defendant directly through R.T.G.S. into the bank account of the plaintiff maintained at IDBI Bank, Park Street Branch, Kolkata 700 016, within the jurisdiction of this Hon’ble Court. Such credit notes were executed and delivered over to the representative of the defendant at the plaintiff’s office at “Stephen House”, 56E, Hemanta Basu Sarani, Room No.59C, 4th Floor, Kolkata 700 001, within the aforesaid jurisdiction.

“6. The defendant, thereafter, in acknowledgement and admission of its liability issued a statement of confirmation of accounts as on 29.03.2014, 10.04.2013, 09.12.2013 and 12.12.2014 in respect of the transaction carried on between the plaintiff and the defendant during the relevant period. Such confirmation of accounts were executed and delivered to the plaintiff after a meeting held between the parties for crystallization of dues of the defendant at the plaintiff’s office at “Stephen House”, 56E, Hemanta Basu Sarani, Room No. 59C, 4th Floor, Kolkata 700 001, within the jurisdiction aforesaid. Subsequently, the defendant also forwarded such confirmation of dues statements to the plaintiff by way of electronic mails which were received by the plaintiff at its aforesaid office at “Stephen House”, 56E, Hemanta Basu

Sarani, Room No.59C, 4th Floor, Kolkata 700 001, within the jurisdiction aforesaid.”

“12. The defendant had approached the plaintiff at its office situated at 209, A J C Bose Road, Room No. 101, 3rd floor, Room No 166, 4th floor Kolkata 700 017, within the jurisdiction of this Hon’ble Court and the oral agreement for supply of the said goods was entered into at the said office. The goods were delivered at various sites situated at Angul, Bangalore, Chattisgarh, Chennai, Guwahati, Nasik, Nellore, Nigrie, Shahjanpur, Silapatthar, Tamnar, Tuticorin and WSP site, outside the jurisdiction aforesaid. Such deliveries were affected after Delivery Orders were issued by the plaintiff from its aforesaid office at “Stephen House”, 56E, Hemanta Basu Sarani, Room No.59C, 4th Floor, Kolkata 700 001, within the jurisdiction aforesaid. Part payments of Rs.8,31,816/- were made by the defendant directly through R.T.G.S. into the bank account of the plaintiff maintained at IDBI Bank, Park Street Branch, Kolkata 700 016, within the jurisdiction of this Hon’ble Court. Further, Credit Notes were issued by the plaintiff from its office at “Stephen House”, 56E, Hemanta Basu Sarani, Room No.59C, 4th Floor, Kolkata 700 001, within the jurisdiction aforesaid. Inasmuch as part of cause of action arose within the jurisdiction aforesaid and part of cause of action arose outside, the plaintiff prays for leave under Clause 12 of the Letters Patent.”

In addition, it is also submitted by the plaintiff that the debtor-seeks-creditor principle has also been invoked as would be evident from paragraph 13

of the plaint and the fact that the plaintiff carries on business within the jurisdiction of this Court confers jurisdiction on this Court to receive the suit.

Paragraph 5 of the plaint refers to certain payments having been made by the defendant. Though it is asserted towards the middle of such paragraph that “In terms of the agreement” the part payments were made to an account of the plaintiff within jurisdiction, the oral agreement pleaded earlier does not refer to the payment at the relevant bank of the plaintiff to have been one of the agreed terms. It is elementary that the accidental or even the regular deposit of cheques or like instruments for encashment at a branch of the plaintiff’s choice cannot be made the basis for clothing the Court exercising territorial jurisdiction over such place of choice to entertain a claim.

The plaintiff, however, refers to a schedule which is appended to the plaint and shows that all the part payments as indicated in the schedule were received at the plaintiff’s relevant bank within jurisdiction. Again, nothing turns on such matter. The defendant made the payments through RTGS. All that the defendant did was to issue instructions to the defendant’s banker or bankers to ensure that the money was credited to a particular account of the plaintiff that had been supplied by the plaintiff to the defendant. Since the payment at the relevant branch was not an integral part of the agreement between the parties – at least, it is not pleaded to be – it would not follow that the location of the bank would be material in the context of the plaintiff’s cause of action. If the plaintiff instructed the defendant to make one payment at Kochi, another payment at Kapurthala and a third at Kohima, all three Courts at Kochi, Kapurthala and

Kohima would not have had the jurisdiction to entertain the plaintiff's claim on account of balance price of goods sold and delivered.

Paragraph 6 of the plaint refers to some post-contract discussions at the plaintiff's office within jurisdiction and the confirmation of dues which was forwarded by a mail to the plaintiff's office within jurisdiction. Though there is nothing in the plaint to indicate that what is pleaded in paragraph 6 of the plaint was a part of the plaintiff's cause of action that arose within jurisdiction for the purpose of obtaining leave under Clause 12 of the Letters Patent, even if the averments are read charitably, it may not be of any use to the plaintiff in the present context. It is only normal that a balance confirmation statement would be issued by a party to another to the other's office or to the other's representative or wherever the other may be. That such balance confirmation is issued to the other at a particular place may not be the basis for invoking the jurisdiction of the local court of such place to lodge a claim.

Paragraph 12 of the plaint merely asserts that a part of the plaintiff's cause of action arose within jurisdiction and a part outside without really indicating any further.

As to the debtor-seeks-creditor principle, a mere invocation of such principle may not be good enough to invoke the jurisdiction of the relevant court, particularly, when it does not appear from the rest of the plaint that any part of the cause of action of the plaintiff may have arisen within jurisdiction. If the plaintiff had been able to establish, merely on the basis of its assertion, that whatever had been pleaded in the plaint to have arisen within the jurisdiction of

this Court had all or substantially arisen within jurisdiction, the applicability of the debtor-seeks-creditor principle may have been relevant. In the absence of the plaintiff indicating any part of the cause of action to have arisen within jurisdiction, the principle would not apply.

The plaintiff has referred to a judgment reported at (1989)2 SCC 163 for the recognition thereof at paragraph 12 of the report as to what “cause of action” means. Apart from the usual reference to the bundle of facts, which has been coming down for over a century, there is a sentence in the passage relied upon by the plaintiff to the effect that the action of the defendant is relevant in such context.

The judgment, though, was once an authority on the principles governing a forum selection clause; but the dictum as enunciated in the judgment has since been diluted.

In the present case, no action of the defendant can be traced or linked to any place within the jurisdiction of this Court. The agreement between the parties, which would have involved the defendant, is not said to have been entered into within jurisdiction. The receipt of the goods by the defendant did not happen within jurisdiction. The payments were not released by the defendant from any place within jurisdiction but the part payments were released by RTGS by instructing the defendant’s bankers to reach the payment to a particular bank as indicated by the plaintiff. That such chosen bank of the plaintiff is within jurisdiction, would not be material for the purpose of assessing the situs of the cause of action as discussed earlier.

For the reasons aforesaid, the appeal fails and the order of rejection of the plaint is not interfered with. The primary ground covered by the order impugned is, however, left open.

APO No.26 of 2019 and GA No.323 of 2019 are dismissed.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)