IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction
COMMERCIAL DIVISION
TITAGARH WAGONS LIMITED
Vs.
UNICAF AND ANR.

BEFORE: The Hon'ble JUSTICE KRISHNA RAO

IA No: GA/02/2020 In CS/258/2019
Heard On:17.11.2022, 25.11.2022 & 12.12.2022

Order On: 04.01.2023

Appearance: Mr. Jishnu Saha, Sr. Adv. Mr. Sayantan Bose, Adv. Ms. Madhurima Das, Adv. Ms. Ankita Chowdhury, Adv. ..... for the plaintiff.

Mr. Krishna Raj Thaker, Adv., Ms. Nandini Khaitan, Adv. Mr. Srinjoy Bhattacharyya, Adv. Mr. Joveria Sabbah, Adv. ..... for the petitioner.

Mr. Saunak Mitra, Adv. Ms. Shreya Singh, Adv. ..... for the respondents.

ORDER

The defendant no.1 has filed the instant application being G.A. No. 2 of 2020 in C.S. No. 258 of 2019 praying for revocation of Leave granted to the plaintiff under Clause 12 of the Letters Patent, 1865 and for return of plaint on the ground that this Court has no jurisdiction to entertain the suit filed by the plaintiff.

The plaintiff has filed the suit against the defendants praying for the following reliefs:

" 2. The plaintiff has filed the above suit seeking leave under Order II Rule 2 of the Code of Civil Procedure, 1908, and, under Clause 12 of the Letters Patent, 1865, and has claimed the following reliefs:

Decree against the defendant NO. 1 for a sum of Euro 35,26,864 equivalent as on date to Rs. 27,92,21,822.28 as pleaded in paragraph 25 above;

b) Decree for interest for a sum of Euro 11,63,865.12 equivalent to Rs. 9,21,43,201.55 as pleaded in paragraph 26 above;

c) Decree against the defendant NO. 1 for damages of Rs. 58,98,57,300/-as pleaded in paragraph 27 hereinabove;

d) Alternatively, an enquiry into the loss and damage suffered by the plaintiff consequent on the breaches and defaults committed by the defendant NO. 1 and a decree against the said defendant for such sum as may be found due and payable on such enquiry; "

On negotiation between the defendant NO. 1 and defendant NO. 2, on 21st September, 2016, defendant NO. 1 had issued a purchase order to the defendant NO. 2 for manufacture and supply of 100 flat wagons with metric track bodies destined for container transportation on the Railway network of SITARAIL, linking d'Ivoire with Burkina Faso in Africa.

On receipt of the purchase order, the defendant NO. 2 had issued a back to back purchase order dated 07.12.2016 to the plaintiff for manufacture and supply of 100 containers carrying wagons at a total consideration of 43,920.80 Euro per wagon, aggregating 43,92080 Euro, deliverable FOB, Kolkata by shipment after inspection at the workplace of the plaintiff.

The purchase order dated 21.09.2016 issued by the defendant NO. 1 was amended by a document dated 22.06.2017 wherein the delivery schedule was re-fixed and again on 23.10.2017 further amended by re-fixing the delivery schedule which are as follows:

"a. First batch of 30 wagons to be delivered FOB Calcutta by 31.10.2017, the reception Ex Words whereof to be before 23rd October, 2017;

b. Second batch of 30 wagons to be delivered FOB Calcutta by 31.10.2017, the reception Ex Works to be before 21st November, 2017;

C. Third batch of 40 wagons to be manufactured before 30.12.2017 and to be received by the defendant NO. 1 FOB Calcutta on a date to be intimated to the defendant NO. 2 60 days in advance and latest by 22.06.2019.

Copies of the said amendments dated 22nd June, 2017 and 23rd October, 2017 along with transaction thereof are annexed hereto and marked " C " and " D " respectively. "

The purchase order dated 07.12.2016 issued by the defendant NO. 2 to the plaintiff was also amended firstly on 06.02.2017 and subsequently on 17.11.2017 by extending the delivery schedule originally fixed in the purchase order dated 07.12.2016.

As per the purchase order, the plaintiff had completed the manufacture of wagons and duly notified to the defendant NO. 2. The defendant NO. 2 engaged one Bureau Veritas an internationally reputed inspecting agency for inspection of the wagons and accordingly the wagons were inspected at Hind Motor, District-Hooghly, West Bengal and on inspection, it was certified that the same has been manufactured in terms of the specification contained in the purchase order dated 07.12.2016.The plaintiff had raised invoices against the defendant NO. 2 after adjusting the advance of Euro 8784.16 received by the plaintiff from the defendant NO. 2. During the course of preparation of transportation of the wagons to the port, the defendant NO. 2 intimated the plaintiff that the defendant NO. 1 intends further checks to be carried out on the wagons. As there was no such provision for further checking and accordingly the plaintiff has objected the same but the defendant NO. 2 had suggested the plaintiff to allow

further checks by the defendant NO. 1 to avoid unnecessary delay or controversy with regard to quality of the wagons. All of a sudden on 18.01.2018, the defendant NO. 1 had informed the defendant NO. 2 with regard to some defects in the wagons and also informed that the defendant NO. 1 unable to accept the delivery of the same and had terminated the delivery procedure including chartering and loading of vessel. As the defendant had refused to take any further steps to either nominate or charter any vessel or to accept the delivery of the wagons manufactured by the plaintiff, the plaintiff unable to recover the balance 80% of the value of wagons being a sum of Euro 35,26,864 and accordingly the plaintiff had filed the instant suit.

Mr. Jishnu Saha, Learned Senior Advocate representing the plaintiff submits that the defendant NO. 2 was a wholly owned subsidiary of the plaintiff and in the month of August, 2016, the defendant NO. 2 commenced negotiation on behalf of the plaintiff with the defendant NO. 1 for manufacture and supply of 100 flat wagons with metric track bodies.

Mr. Saha further submits that the defendant NO. 1 had the knowledge that the defendant NO. 2 was not capable to undertake the manufacture of wagons and the defendant NO. 2 is wholly owned subsidiary of the plaintiff and was acting as agent of the plaintiff accordingly had placed the purchase order to the defendant NO. 2 and the defendant NO. 2 had placed the same to the plaintiff.

Mr. Saha further submits that in the purchase order, it is categorically mentioned that the defendant NO. 2 would supply 100 numbers of wagons at FOB, Kolkata at a fixed price of Euro 49,910 per wagon. He further submits that as per the condition 75% of payment will be paid on receipt of wagons FOB, Kolkata upon presentation of invoice. He further submits that the plaintiff would transport the wagons from its factory at Kolkata to the Port, FOB Kolkata at the expense and risk of the defendant NO. 2.

Mr. Saha submits that it is clear from Clauses 19 and 20 of the contract entered between the defendant NO. 1 and defendant NO. 2 that the " Court of Paris Commerce " in view of the " parties election of domicile " as both the parties having their offices at Paris but the said clause is not applicable to the plaintiff as the plaintiff is neither the domicile of Paris nor is having any office at Paris.

Mr. Saha submits that the factory of the plaintiff situated at Hind Motor, Hooghly and the office of the plaintiff is situated at Park Street, Kolkata and as such this Court has got jurisdiction to entertain the suit filed by the plaintiff.

Mr. Krishna Raj Thaker representing the defendant NO. 1 submits that the suit filed by the plaintiff is not maintainable as in the purchase order there is a clause of forum selection wherein it is mentioned that the Court of PARIS Commerce is having the jurisdiction to entertain the suit and not by this Hon'ble Court. Mr. Thaker had referred Article 19.3 of the Agreement entered between the defendant NO. 1 and the defendant NO. 2 wherein the forum selection is mentioned.

Mr. Thaker submits that the defendant NO. 1 and defendant NO. 2 have entered into a contract wherein a specific forum selection is provided and the plaintiff seeking to enforce the contract but the plaintiff is bound by the provisions thereof.

Mr. Thaker further submits that the defendant NO. 1 is a company incorporated under the appropriate law of Republic of France and having its registered office at 31-32, Quai de Dion Bouton, 92800 Puteaux, France outside the jurisdiction of this Court and the defendant NO. 1 does not have any office or establishment in India or at Kolkata.

Mr. Thaker further submits that the plaintiff has not claimed any relief against the defendant NO. 2 and as such the cause of action pleaded in the plaint is totally false, baseless and with the ulterior motive to harass the defendant NO. 1.

Mr. Thaker further submits that there is no pleading in the plaint to justify for grant of leave under clause 12 of the Letters Patent and no part of cause of action at all arose within the jurisdiction this Court. He further submits that the plaintiff is bound by the forum selection clause which specifically stipulates adjudication of disputes by Commercial Court at PARIS.

Heard the Learned Counsel for the respective parties and considered the documents available on record.

The sole question in the instant application whether the plaintiff is having any cause of action against the defendants within the jurisdiction of this Court.

To decide the said issue some of the Articles of the contracts entered between the defendant no.1 and defendant no.2 are to be looked into.

Article 19 of the contract reads as follows:

"19.1.This contract is subject to French Law.

19.2. The parties shall attempt to settle any disagreement arising from this contract amicably. Any conciliation must be recorded in a settlement signed by the parties.

19.3. If no amiable can be reached between the parties, a definitive ruling on the disagreement shall be given by judicial means before the Commercial Court of Paris. ""

Article 20: JURISDICTION

" For the fulfillment of this contract and subsequent documents, the parties choose the following address for service.

The Manufacturer seller at its head office designated above. The purchaser at its head office designated above. "

At paragraph 30 of the plaint, the plaintiff has described the cause of action which reads as follows:

"30. The plaintiff's cause of action in the suit has arisen, inter alia, as its erstwhile registered office at 113, Park Street, Kolkata within the jurisdiction of this Hon'ble Court and at its works at Hind Motor, Hooghly as also at the address of the defendant No. 1 in France, outside the aforesaid jurisdiction. As such, the plaintiff is entitled to seek and seeks leave under Clause 12 of the Letters Patent to institute this suit in this Hon'ble Court.in as much as no mechanism for pre-institution mediation and settlement is available in this Hon'ble Court-Chapter III A of the Commercial Courts Act has no application to the present suit."

The contract was entered between the defendant NO. 1 and defendant NO. 2 after discussion on 21st September, 2016 at Berlin wherein the defendant NO. 2 had agreed to supply 100 nos of Wagons to the defendant NO. 1.

In the contract, the defendant no.1 and defendant NO. 2 have agreed that the manufacture and sale of the wagons will be at FOB Kolkata and the defendant NO. 2 agreed that the same will be manufactured at Titagarh CARS AFR located at Calcutta, India.

The specific case of the plaintiff is that the defendant NO. 1 was well aware of the fact that the defendant NO. 2 was wholly owned subsidiary of the plaintiff and was acting as an agent of the plaintiff.

In the contract entered between the defendant no.1 and defendant NO. 2, nothing is mentioned that the defendant NO. 2 being the agent of the plaintiff entering into the contract with the defendant NO. 1. It is also not mentioned that the wagons will be manufactured by the plaintiff on behalf of the defendant NO. 2. In the contract it is simply mentioned that the manufacture and sale will be conducted at FOB Kolkata. In Clause 2.2 of the contract is mentioned that:

"2.2. The cars will be manufactured in our factories Titagarh CARS AFR LOCATED at Calcutta, India. "2

In the said clause also it is not mentioned that the plaintiff will manufacture the said Wagons at its factory at Titagarh, Kolkata.

On entering into contract between the defendant NO. 1 and defendant NO. 2, the defendant NO. 2 had issued back to back purchased order to the plaintiff on 7th December, 2016 for manufacture and supply of 100 containers carrying wagons but none of the correspondences between the plaintiff and the defendant NO. 2 was served to the defendant NO. 1. In one of the correspondence between the plaintiff and the defendant NO. 2 it is mentioned that " All invoices will be made in the name of TITAGARH WAGONS AFR and addressed to 140 RUE DU PARADIS 59500 DOUAI ".

Mr. Saha had relied upon the Sections 218, 226, 230 and 231 of the Indian Contract Act:

"218. Agent's duty to pay sums received for principal.- Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

226. Enforcement and consequences of agent's contracts. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

230. Agent cannot personally enforce, nor be bound by contracts on behalf of principal.-In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.- Such a contract shall be presumed to exist in the following cases

(1) Where the contract is made by an agent for the sale of purchase of goods for a merchant resident abroad;

(b) Where the agent does not disclose the name of his principal; (3) Where the principal, though disclosed, cannot be sued.

231. Right of parties to a contract made by agent not disclosed. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract. "

Mr. Saha submits that defendant NO. 2 acted as agent of the plaintiff in the transactions on the basis of back to back contract and thus the plaintiff is entitle to enforce its claims against the defendant NO. 1 for back of such contract in view of the above provisions of the Contract Act.

In the instant case the defendant NO. 1 who had entered into an agreement with the defendant NO. 2, there is no such condition that, the plaintiff is the agent of the defendant NO. 2 and the plaintiff will manufacture and supply the goods to the defendant NO. 1. There is no documents or any correspondence between the plaintiff and the defendant NO. 1 or in between the defendant No. 1 and defendant NO. 2 that the plaintiff is the agent of the defendant NO. 2 and the plaintiff will manufacture and supply the wagons thus the provisions referred by Mr. Saha is not applicable in the instant case.

Mr. Saha referred the judgment reported in (2003) SCC Online Cal 140 (Bellevue Clinic & Anr. -vs-State of West Bengal & Ors.) wherein the Coordinate Bench of this Court held that:

" 16. In the present case, the documents placed before this Court establish that this particular instrument has come from a foreign territory to the premises of the petitioner No. 1 at Kolkata

by virtue of the order placed by the petitioner No. 1 with the respondent No. 6. Therefore, the requisition of the petitioner No. 1 has brought the machine to Kolkata from a foreign country. At this juncture, we must not confuse this transaction with one where the respondent No. 6, itself has imported the machine and the petitioner No. 1 has subsequently purchased the same from the respondent No. 6 as if it has purchased the instrument from the shop of a dealer.

In the latter type of a transaction, petitioner No. 1 has the option of choosing this particular machine or any other one amongst those decorated in the show-room of the respondent No. 6. But in the present case, the foreign manufacturer has earmarked this particular machine for delivery to the premises of the petitioner No. 1 as would be reflected from the bill of lading itself. "

Mr. Thaker relied upon the judgment reported in (2013) 9 SCC 32 (Swastik Gases Private Limited -vs-Indian Oil Corporation Ltd.) wherein the Hon'ble Supreme Court held that:

"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11 (12) (b) and Section 2 (e) of the 1996 Act read with Section 20 (c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like " alone ", " only ", " exclusive " or " exclusive jurisdiction " have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties- by having Clause 18 in the agreement is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expression unius est exclusion alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts.

Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

34. In view of the above, we answer the question in the affirmative and hold that the impugned order [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., Civil Arbitration Application No. 49 of 2008, order dated 13-10-2011 (Raj)] does not suffer from any error of law. The civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court. "

In the present case, contract was entered between the defendant no.1 and defendant NO. 2. In the contract it is specifically mentioned that the contract is for manufacture and sale of 100 flat cars had bogies metric route (Wagons) and the same will be manufactured at Titagarh CARS AFR, located at Calcutta, India. Inspite of the facts, the defendant NO. 2 had agreed that " the contract is subject to French Law and if no amicable settlement can be reached between the parties, a definitive ruling on the disagreement shall be given by judicial means before the Commercial Court of Paris ".

As per the prayer in the plaint, the plaintiff has prayed for decree against the defendant no.1 and as per pleadings in the plaint there is no averments how the cause of action arose within the jurisdiction of this Court against the defendant NO. 1. In paragraph 30 of the plaint, the plaintiff has shown the cause of action as the registered office of the plaintiff is situated at 113, Park Street, Kolkata, but there is no justification how the cause of action can be treated to be arose at Park Street, Kolkata.

Due to defaults committed by the defendant NO. 2, the defendant NO. 1 had terminated the contract of the defendant NO. 2 and defendant NO. 2 had initiated a proceeding against the defendant NO. 1 before the Commercial Court at Paris against the said termination. It is also admitted by the plaintiff that the defendant NO. 2 is under liquidation at France.

In view of the above, this Court finds that as per the case made out by the plaintiff, the defendant NO. 1 and defendant NO. 2 are the companies incorporated in terms of the appropriate laws of France and the defendant NO. 2 while executing contract had agreed for forum selection clause and no cause of action arose within the jurisdiction of this Court.

Accordingly, leave granted by this Court to the plaintiff under Clause 12 of the Letters Patent, 1865 is revoked consequently the plaint filed by the plaintiff in connection with CS No. 258 of 2019 along with all documents are returned to the plaintiff.

G.A. 2 of 2020 is allowed.

(KRISHNA RAO, J.)