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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: May 06, 2009
Date of Order: May 14, 2009

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14.05.2009

Max India Limited

...Petitioner

Through : Mr. Rajiv Nayar, and Mr. Sanjeev Puri, Senior Advocates with
Mr. Ruchir Midha and Mr. Thomas Phillippe, Advocates

Versus

General Binding Corporation

...Respondent

Through: Mr. A.S. Chandhiok, Sr. Adv. with Ms. Pallavi Shroff, Mr. Tejas
Karia and Ms. Neha Bhasin, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. The petitioner invoked jurisdiction of this Court seeking interim relief under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, "the Act") and prayed that the respondent should be restrained from implementing the terms of agreement entered into by it directly or through its holding company with Cosmo Films regarding sale of its commercial prints finishing business. The petitioner also prayed for other reliefs. The respondent after putting appearance filed reply raising objections regarding jurisdiction of the Court in entertaining an application under Section 9. This order proposes to dispose of the issue of jurisdiction.

2. The Governing Law and Dispute Resolution covenants as contained in the contract between the parties read as under:-

“19.1 This agreement shall be governed and construed in accordance with the laws of Singapore and, subject to Article 19.2, the courts of Singapore shall have jurisdiction to settle any disputes that may arise out of or in connection with this Agreement.

19.2 Any dispute between the Parties arising out of or in connection with this Agreement shall be referred to and finally resolved by arbitration under the Singapore International Arbitration Centre rules (“SIAC Rules”) as in force at the time of the dispute, which shall be conducted before one (1) arbitrator mutually appointed by the Parties, failing which Max India shall be entitled to appoint one (1) arbitrator and GBC shall be entitled to appoint one (1) arbitrator and the two (2) arbitrators so appointed shall jointly appoint a third arbitrator who shall preside as the chairman. Such arbitration shall be conducted in the English language. The venue of arbitration shall be at Singapore.”

3. In pursuance of this contract, the petitioner had invoked the arbitration clause and served a notice of arbitration upon the respondent on 20th March 2009. The notice of arbitration served by the petitioner on the respondent would show that the petitioner had invoked the arbitration before the Singapore International Arbitration Centre in terms of the arbitration clause.

4. It is submitted by counsel for petitioner that despite above clause 19 contained in the contract between the parties whereby the parties had agreed that the Court of Singapore shall have the jurisdiction to settle the disputes that may arise in connection with the contract, the petitioner had a right to invoke Section 9 of the Arbitration & Conciliation Act, 1996 in India.

He relied upon *Laxman Prasad v. Prodigy Electronics Ltd. & Anr.* AIR 2008 SC 685 and *Venture Global Engineering v. Satyam Computer Services Ltd & Anr.* AIR 2008 SC 1061. Respondent on the other hand, has placed reliance on *Bhatia International v. Bulk Trading S.A. & Anr.* (2002) 4 SCC 105 *National Thermal Power Corporation v. Singer Company & others* (1992) 3 SCC 551; *Tamil Nadu Electricity Board v. Videocon Power Limited* MANU/TN/0135/2009 (decided on 27th January 2009) and *Hardly Oil & Gas Limited v. Hindustan Oil Exploration Company Limited & 3 Ors.* (2006) 1 GLR 658.

5. The law regarding invocation of Part-I of the Arbitration & Conciliation Act, 1996, in respect of foreign awards was considered by the Supreme Court at great length in *Bhatia International (supra)* and it held that provisions of Part-I of the Arbitration & Conciliation Act, 1996 would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate only to the extent permitted by derogable provisions of Part-I. In case of an international commercial arbitration held out of India, provisions of Part-I would apply unless the parties by agreement express or implied exclude all or any of its provisions. In that case, the law and rules chosen by the parties would prevail. Thus, as per the decision in *Bhatia International (supra)* wherever parties choose to exclude the laws and rules of Part-I of Indian Arbitration & Conciliation Act, 1996, in those cases Part-I of Indian Arbitration & Conciliation Act, 1996 would not apply in cases of International Commercial Arbitration held out of India.

6. In *Laxman Prasad's case(supra)*, the agreement between the parties read as under:

"18. The terms & conditions as stipulated above shall be interpreted in accordance to the laws of the Hong Kong Special Administrative Region."

(emphasis added)

7. In view of the above clauses the Supreme Court held as under:

"31. In the case on hand, 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. 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' 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. Since it is alleged that the appellant-defendant had committed breach of agreement by using trade mark/ trade name in Trade Fair, 2005, in Delhi, a part of cause of action has arisen in Delhi. The plaintiff-Company, in the circumstances, could have filed a suit in Delhi. So far as applicability of law is concerned, obviously as and when the suit will 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. The High Court, in our opinion, was right in rejecting the application and in overruling preliminary objection. Since prima facie the plaint disclosed a cause of action as also territorial jurisdiction of the court, the High Court rightly rejected both the contentions and no error was committed

by it in not rejecting plaint, nor returning it for presentation to proper Court. 'Applicability committed by it in not rejecting plaint, nor returning it for presentation to property Court. 'Applicability of Hong Kong Law', 'entering into an agreement in Hong Kong' or 'defendant residing in Ghaziabad (Uttar Pradesh)' or any of them does not take away the jurisdiction of Delhi Court since a 'cause of action' at least in part, can be said to have arisen in Delhi. We, therefore, see no substance in the contention of the defendant- appellant."

(emphasis added)

8. In above case, Supreme Court was dealing with a clause entirely different from clause herein. Thus, this judgment is of no help to the petitioner.

9. In *Venture Global Engineering's* case (supra), the Supreme Court had reiterated that in respect of the arbitration which take place outside India even the non-derogable provisions of Part-I can be excluded by agreement between the parties. Such an agreement may be express or implied. Moreover, in *Venture Global Engineering (supra)*, the Arbitration Clause contained a non-obstantative clause which read as under:

"(c) Notwithstanding anything to the contrary in this Agreement, the Shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time."

And in view of the non-obstante clause, the Supreme Court observed:

"26. Finally, the overriding Section 11.5(c) of the SHA cannot be ignored lightly. As pointed out, the said section would exclude respondent No.1-Satyam Computer Services Ltd. approaching the US Courts in regard to the

enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties which is relevant has already been extracted in para 23.

The non-obstante clause would override the entirety of the agreement including Sub-section (b) which deals with settlement of the dispute by arbitration. Sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force in India at any time. Necessarily, enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement. Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Courts in the United States.”

The Apex Court found that Part-I of the Act was applicable to the award in question even though it was a foreign award.

10. I consider that the ratio of above three judgments relied upon by respondent does not help the respondent in invocation of jurisdiction of this Court, in view of the specific clause of the contract as entered into between the parties providing that the agreement between the parties was to be construed in accordance with laws of Singapore and was to be governed by laws of Singapore. It also provided that Courts at Singapore shall have the jurisdiction to sort out any differences in connection with the agreement. All disputes arising between the parties arising out of the contract are to be

referred to Singapore International Arbitration Centre and are to be resolved as per rules under Singapore International Arbitration Centre Rules (SIAC Rules). The agreement provided that the appointment of an arbitrator in accordance with the SIAC Rules and the place of arbitration was to be Singapore. It is clear that the parties knew very well at the time of entering into the agreement that the jurisdiction of Indian Courts and operation of Part-I of Indian Arbitration & Conciliation Act was excluded.

11. In *ABC Lombard Private Limited* 1989 2 SCC 163, the Supreme Court had specifically held that where parties to contract agreed to submit the disputes arising from the contract to a particular jurisdiction which would otherwise also be proper jurisdiction under the law, their agreement to that extent cannot be said to be void or against public policy. When the Court has to decide the question of jurisdiction pursuant to ouster clause, the ouster clause must be construed properly. It was not necessary that the ouster clause should contain words like 'alone', 'only', 'exclusive' and the like. Even without such words, in appropriate cases, the Court can infer that the parties had agreed to exclude the jurisdiction of a particular court and agreed to submit to the jurisdiction of another court. When the parties had agreed to mention the jurisdiction of one Court, it may imply exclusion of another.

12. In the present case, the arbitration and dispute resolving clause specifically provided the law which may be applicable, place where arbitration will be done and the Court which would adjudicate the disputes. Since parties had specifically agreed that in the event of disputes between the parties, the Courts at Singapore would have jurisdiction and the contract would be governed in terms of laws of Singapore, the arbitration would also

take place at Singapore, I consider the parties had specifically excluded the jurisdiction of this Court and they had also agreed to exclude the application of Part-I of the Arbitration & Conciliation Act.

13. In view of the foregoing facts, I consider that this petition under Section 9 of the Arbitration & Conciliation is not maintainable and is liable to be dismissed and is hereby dismissed. No orders as to costs.

May 14, 2009
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SHIV NARAYAN DHINGRA J.