

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

Arb.A.No. 43 of 2015 ()

(AGAINST THE ORDER DATED 8.6.2015 IN OP(ARBITRATION) NO.511 OF 2015 ON
THE FILE OF THE COURT OF THE DISTRICT JUDGE, ERNAKULAM.

APPELLANT/PETITIONER:

ZAYAN VISCOUS PRIVATE LIMITED
HAVING REGISTERED OFFICE AT F16, FIRST FLOOR
EMPIRE BUILDING, OLD RAILWAY STATION ROAD, ERNAKULAM
REPRESENTED BY ITS CHAIRMAN AND MANAGING DIRECTOR
SHIHABUDEEN NALAKATH WITH RPRESENT OFFICE AT V/484-B
MUPPATHADAM P.O., KALAMASSERY, ALUVA
ERNAKULAM DISTRICT - 683 110.

BY ADVS.SRI.K.M.SATHYANATHA MENON
SMT.KAVERY S THAMPI

RESPONDENT(S)/RESPONDENT:

VOYAGER DYNAMICS PRIVATE LIMITED
SURVEY NO.223, PLOT NO.2, NEAR JCB SHOWROOM SG HIGHWAY
SARKEJ, AHMADABAD
GUJARAT (REPRESENTED BY GEORGE MATTOM
VOYAGER DYAMICS PRIVATE LIMITED, 34/108 A3, 2ND FLOOR
RAINBOW BUILDINGS, NEAR MYLALATHU SIVA TEMPLE
NEAR NH 47, EDAPPALLY P.O., KOCHI - 682 024.)

BY SRI.K.P.SREEKUMAR

THIS ARBITRATION APPEALS HAVING BEEN FINALLY HEARD ON 27-07-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

Arb.A.No. 43 of 2015

- ANNEXURE A: TRUE COPY OF THE BILL OF LADING ISSUED FROM THE ADNOC DISTRIBUTION, ABU DHABI TO PORT AT COCHIN IN FAVOUR OF THE RESPONDENT.
- ANNEXURE B: TRUE COPY OF THE BILL OF LADING ISSUED FORM THE ADNOC DISTRIBUTION, ABU DHABI TO PORT AT COCHIN IN FAVOUR OF THE RESPONDENT.
- ANNEXURE C: TRUE COPY OF THE TAX INVOICE ISSUED BY THE RESPONDENT DATED 27.12.2014.
- ANNEXURE D: TRUE COPY OF THE TAX INVOICE ISSUED BY THE RESPONDENT DATED 7.1.2015.
- ANNEXURE E: TRUE COPY OF THE TAX INVOICE ISSUED BY THE RESPONDENT DATED 30.1.2015.
- ANNEXURE F; TRUE COPY OF THE TAX INVOICE ISSUED BY THE RESPONDENT DATED 4.2.2015.
- ANNEXURE G: TRUE COPY OF THE E.MAIL SENT BY THE RESPONDENT TO ALL THE CLIENTS INCLUDING THE ADDRESS PORTION ALONG WITH THE APPELLANT.

TRUE COPY

P.A.TO JUDGE

**P.N.RAVINDRAN &
ANU SIVARAMAN, JJ.**
= = = = =
Arbitration No.43 of 2015
= = = = =
Dated this the 27th day of July, 2015

JUDGMENT

Ravindran, J.

This appeal arises from the order passed by the Court of the District Judge of Ernakulam on 08.06.2015 in O.P.(Arbitration).No. 511 of 2015, a petition filed by the appellant herein under section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the Act" for short. By the impugned order, the Court of the District Judge of Ernakulam held that it has no jurisdiction to entertain the petition and that the application will have to be filed before the competent court at Ahmedabad. The brief facts of the case are as follows:-

2. The appellant was appointed as the distributor of petroleum products manufactured by ADNOC as per agreement dated 21.02.2014 entered into between the appellant on the one hand and the respondent on the other hand. By that agreement, the respondent, which had the right to sell and market ADNOC lubricants and greases in the territory of India, appointed the appellant as distributor in the State of Kerala to promote, distribute either directly or indirectly and sell ADNOC lubricants and greases in the State of Kerala. As per that

agreement the appellant had the right to appoint dealers in the State of Kerala. Articles 32 and 33 of the aforesaid agreement read as follows:-

**"Article 32:-
Arbitration**

Any and all claims, disputes, controversies or differences arising between the parties out of or in relation to or in connection with this Agreement or with a breach thereof, which cannot be satisfactorily settled by correspondence or mutual conference between the parties hereto shall be settled by Arbitration by a Sole Arbitrator to be appointed by '**VOYAGER DYNAMICS**' in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any amendments thereto only and that no parties shall directly approach any of the courts by passing the provisions of Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be Ahmedabad only and the language of arbitration shall be in English only. In the first instance, each party shall bear its own costs of Arbitration subject to ultimate determination of costs in the arbitration proceedings. (emphasis supplied)

Article 33

Governing Law and Jurisdiction

This agreement shall be governed by and construed with solely in accordance with the laws of India in every particular, including formation and interpretation. Any proceedings arising out of or in connection with this Agreement shall be brought only before the court of competent jurisdiction in Ahmedabad only." (emphasis supplied)

3. Disputes and differences arose between the appellant on the hand and the respondent on the other when the respondent sent an email to the dealers appointed by the appellant informing them that the respondent has decided to terminate its contract with the appellant. The dealers were also informed that they may place orders directly with the respondent and that goods will be delivered on first come first served basis. The appellant thereupon filed O.P.(Arb.).No. 511 of 2015 under section 9 of the Act before the Court of the District Judge of Ernakulam for the following reliefs:-

“a. Pass an order to preserve the agreement signed on 21.04.2014 for being proceeded against in execution of the award that is going to be passed by the arbitrator to be appointed to resolve the disputes between the petitioner and the respondents.

b) pass an order of Injunction restraining the respondent from terminating the contract.

c) pass an order of injunction restraining the respondents from entering into agreement with third parties.

d) pass an order of injunction restraining the respondents from the respondent to taking/placing orders directly from the customers, stockist and dealers.

e) Allow the petitioner to recover the full costs incurred for the institution and conduct of this petition from the respondent.”

4. The appellant had in paragraph 7 of the application filed under section 9 of the Act, inter alia, averred as follows:-

"7....Thus there is a dispute within the meaning of the agreement. As per clause 32 it is stipulated that in case of any dispute or litigation, parties shall submit to the jurisdiction of the courts in the city of Ahmadabad only and in no other court. The clause 32 of the agreement says that in the event of any dispute between the parties in relation to or in connection with the agreement or pertain to its breach, which cannot be satisfactorily settled by correspondence or mutual conference between the parties the said dispute has been settled by arbitration" (emphasis supplied)

5. The appellant had in paragraph 8 of the application filed under section 9 of the Act further averred as follows:-

"8. The respondent is aware that the petitioner is going to resort to arbitration proceedings. It is also within the knowledge of the respondent that in the arbitration proceedings, an award is going to be passed. Therefore, with a view to delay and defeat the execution of the award that is going to be passed, the respondent is making arrangements to take/place orders directly from the petitioner's customers, dealers and stockist and to appoint other Franchisees dealers. If, the respondent is allowed to be continue to take/place orders directly and to execute the agreement with other third parties the petitioner will have to bear huge financial loss. Hence, it has become necessary that an interim measure has to be taken. In the alternative an injunction restraining the respondent to take/place orders directly from the stockist and dealers and from entering into agreement with third parties has to be passed. Hence, this application is filed under section 9 of the Arbitration and Conciliation Act, 1996. The petitioner is

entitled to get such an order of interim measure passed in its favour."

6. The appellant had in paragraph 9 of the application filed under section 9 of the Act averred as follows:-

"9. The cause of action for this petition has arisen on 7th May 2015 when the petitioner came to know that respondent is trying to take/place orders directly from the stockist and dealers and trying to sign agreement with other third parties. When the petitioner came to know that the respondent has send a mail dated 7.5.2015 to all stockist and dealers with the subject of the mail, that the agreement with the petitioner was terminated and all the stockist and dealers has to place their order directly to the respondent, then only the fraudulent intention of respondent was known. As per clause 28.6 three months prior notice has to be given and same was not done and also this shows the intention of the respondent to enter into agreement with other third parties which was made evident through this action and the same was effected the business of the petitioner at Ernakulam District and the parties have agreed to settle their disputes through Arbitrator and both the parties have their offices in Ernakulam within the jurisdiction of this Honourable Court. Hence this Honourable Court is having jurisdiction to try this petition."(emphasis supplied)

7. Upon receipt of notice in the application filed under section 9 of the Act, the respondent entered appearance and filed a counter

affidavit dated 01.06.2015. In paragraph 3 thereof the respondent contended as follows:-

“3. It is respectfully submitted that this Hon'ble Court has no territorial jurisdiction to entertain the above Arbitration OP. As per the agreement entered into between the parties, the petitioner has specifically agreed that any proceeding arising out of or in connection with the agreement shall be brought before the court of competent jurisdiction in Ahmedabad only. Having agreed as per the agreement that the courts at Ahmedabad alone will have jurisdiction to entertain any legal proceedings between the parties, it is not permissible in law to revoke such agreement unilaterally or give a go by to the provision excluding the territorial jurisdiction of this Hon'ble Court. ”

8. In paragraph 4 thereof, the respondent had averred that “the agreement between the parties was entered into at the registered office of the respondent company at Survey No.223, Plot No.2, Near JCB Showroom, SG Highway, Sarkage, Ahmedabad, Gujarat.

9. The court below considered the issue regarding its jurisdiction as a preliminary issue and held that in view of Articles 32 and 33 of the agreement, it has no jurisdiction to entertain the application. It was held that the competent court at Ahmadabad alone has jurisdiction. The appellant has aggrieved thereby, filed this appeal.

10. We heard Sri.K.M.Sathyanatha Menon, learned counsel appearing for the appellant and Sri.K.P.Sreekumar, learned counsel

appearing for the respondent. Learned counsel appearing on either side also placed before us for our consideration, various decisions of the Apex Court including the decision in **M/s.Patel Roadways Ltd v. Prasad Trading Company** [(1991)4 SCC 270], **A.B.C. Laminart Pvt.Ltd and another v. A.P.Agencies, Salem** [(1989) (2) SCC 163] **Rajasthan State Electricity Board v. Universal Petrol Chemicals Ltd.**[(2009) (3) SCC 107] and **Swasthik Gases v. Indian Oil Corporation** [(2013) 9 SCC 32] . Learned counsel for the appellant also placed reliance on decision of a learned single Judge of the Delhi High Court in **Gujarat Insecticides v. Jainsons Minerals** [DLT-2007-140-465)] in support of his contention that the courts at Ahmedabad do not have jurisdiction to entertain the application. Shown of details, the attempt of the learned counsel for the appellant was to show that as the respondent has a branch office or a subordinate office at Ernakulam where a part of the cause of action has arisen, the reason being that the contract has to be performed at Ernakulam in the State of Kerala and as no part of the cause of action has arisen in the State of Gujarat, the court at Ernakulam alone has jurisdiction to entertain the application. The attempt of the learned counsel appearing for the respondent was to demonstrate that in a suit arising out of a contract, courts at the place where the contract was

entered into or at the place where it is to be performed have jurisdiction, that in the case on hand the contract was entered into at Ahmedabad and therefore, as the making of the contract is an integral part of the cause of action, the application under section 9 is not maintainable in the court at Ernakulam. Referring to paragraph 2 of the memorandum of appeal, learned counsel for the respondent submitted that the appellant itself has stated that the dispute between the parties is to be settled by arbitration and that it is taking steps to initiate arbitration proceedings at Ahmedabad and therefore, as the appellant does not challenge the provision in the contract regarding the venue of arbitration, the appellant cannot be heard to contend that the court at Ernakulam alone has jurisdiction to entertain the application. Learned counsel for the respondent contended, as the appellant concedes the fact that the arbitration can be held only at Ahmedabad, the appellant's contention that the court at Ernakulam can entertain an application under section 9 of the Act is untenable.

11. After considering the rival submissions made at the Bar and after going through the materials present on record, we are inclined to agree with the learned counsel for the respondent that the contention raised by the appellant is without any merit. The appellant has in paragraph 2 of the instant memorandum of appeal, averred as

follows:-

" As per clause 33 of the agreement the dispute and litigation are to be submitted to the jurisdiction of the court of Ahmadabad and since as per clause 32, the dispute are to be settled by Arbitration the appellant are taking steps for initiation of Arbitral proceedings at Ahmadabad. But in the meanwhile the respondents are taking hasty to take/place orders directly from the appellants customers so as to defeat the arbitral award which may be passed in favor of the appellant. Since the respondent took orders directly from the appellants customers the appellant will have to bear huge financial loss. Hence the appellant sought for an interim relief under section 9 of the Arbitration and conciliation Act. Along with the original petition the appellant had also moved I.A.No.3303/2015 for an order of injunction restraining the respondents from taking orders directly from the stockist, dealers and customers and not to enter into agreement with third parties till the disposal of the arbitration proceedings." (emphasis supplied)

12. It is evident from the averments extracted above, that the appellant does not dispute the fact that the arbitration proceedings can be held only at Ahmedabad. The appellant has also averred that it is taking steps to initiate arbitration proceedings at Ahmedabad. The appellant has not filed a replication and disputed the averment in paragraph 4 of the counter affidavit filed by the respondent in O.P. (Arb).No.511 of 2015 that the agreement between the parties was entered into at the registered office of the respondent at Ahmedabad.

It is only if a part of the cause of action, namely the making of the contract arose at Ahmedabad that the courts at Ahmedabad will have jurisdiction to decide the disputes arising out of the contract. The appellant has in paragraph 7 of O.P.(Arb.) No.511 of 2015 referred to clause 32 of the agreement and averred that clause 32 stipulates that the parties shall submit to the jurisdiction of the courts in the city of Ahmedabad. The appellant has not in O.P.(Arb) No.511 of 2015 raised a plea that no part of the cause of action has arisen within the jurisdiction of the courts at Ahmedabad. The appellant has also not pleaded or proved that the contract was entered into at Ernakulam. In such circumstances, as the courts at Ahmedabad and Ernakulam have jurisdiction, it was open to the parties to exclude the jurisdiction of the courts at Ernakulam.

We accordingly hold that there is no merit in the instant appeal. The appeal fails and it is dismissed. No costs.

P.N.Ravindran, Judge

Anu Sivaraman, Judge

sj