

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS NO.1415 OF 2011
IN
SUIT NO.2263 OF 2010**

Traxpo Enterprises Pvt. Ltd.

....Plaintiff

V/s.

Kolmar Group AG

....Defendant

None for the plaintiff.

Mr. Darius J. Khambata, senior advocate a/w. Mr. Vikram Deshmukh and Ms. Akhita Buch and Mr. Bhavesh V. Panjwani i/b. Mulla & Mulla & C.B.C. for the defendant/applicant in CHS/1415/2011.

CORAM : K.R.SHRIRAM,J

DATE : 13th APRIL, 2016

P.C.:-

1 This chamber summons is taken out by the defendant to revoke the leave granted to the plaintiff under Clause 12 of the Letters Patent and in the alternative and without prejudice to reject the plaint under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

2 On or about 27th/28th August, 2007 the defendant agreed to buy and the plaintiff agreed to sell 15,000 metric tons Methanol +/- 5% at buyer's option at USD 255.00 per metric ton and optional 2000 - 3000 metric tons of cargo +/- 5% in buyer's option at USD 265.00 per metric ton and in each case FOB Kandla for shipment within September, 2007. The contract is evidenced by two faxes sent

on 28th August, 2007 from the defendant to the plaintiff. For the purpose of this chamber summons, clause 13 and clause 14 of the contract are relevant and the same read as under :-

“(13) – Governing Law :

This contract shall be governed and construed in accordance with the laws of England (without reference to any conflict of law rules). The United Nations Convention of on contracts for the International scale of goods shall not apply to this contract.

(14) – Jurisdiction :

Each party expressly submits to the jurisdiction of the High Court of London without recourse to Arbitration.”

3 Therefore, the contract expressly provided that it was subject to English Law and the parties had submitted expressly to the jurisdiction of the High Court of London.

4 The defendant filed a suit in the High Court of Justice Queen's Bench Division Commercial Court claiming damages for restitution, for short delivery, for demurrage paid to the vessel owners and shifting expenses. The plaintiff entered appearance and also filed their statement of defence. They also participated in pre-trial discussions but failed to serve any witness statement. The plaintiff did not participate in the trial. The English Court went ahead with the matter and passed a decree dated 1st February, 2010 by considering the matter on merits in favour of the plaintiff. The English Court was

pleased to award judgment in the sum of USD 2,235,737.27 in favour of the defendant. Though the plaintiff did not appear or participate at the hearing of the suit, the English Court considered the evidence filed by the plaintiff, the defence raised in the statement of defence and gave its judgment dated 1st February, 2010 on merits. It was an ex-parte decree but on merits.

5 On 20th July, 2010, after the English Court delivered its judgment against the plaintiff, the plaintiff filed a petition for leave under Clause 12 of Letters Patent and applied to this court for leave to file this suit. Paragraph 16 of the plaint reads as under :-

“16. The plaintiff states that the plaintiff is having its administrative office at Bombay. The entire contract was agreed and entered into at Bombay. The inspection for transshipment of the goods took place in Bombay. The goods were to be transshipped from Kandla to United States of America and therefore, part of the cause of action has arisen within the jurisdiction of this Hon'ble Court and therefore, upon grant of leave under Clause 12 of the Letters Patent this Hon'ble Court would have jurisdiction to entertain, try and dispose of the instant suit.”

Paragraph 4 of the Leave Petition reads as under :-

“4. The petitioner carried on its business in Mumbai. The order was placed upon the petitioners Mumbai. The respondents were supposed to make payment of the amounts in Mumbai. Therefore, the material part of the cause of action has arisen in Mumbai. However, the respondents carry on their business from Switzerland and the goods were delivered at Kandla. Thus a part of cause of action has arisen outside the jurisdiction of this Hon'ble Court. Hence, upon leave being granted, under Clause XII of the Letters Patent of this Hon'ble Court, therefore, this Hon'ble Court shall have jurisdiction to entertain and try and dispose of the present suit.”

6 In view of the averments made by the plaintiff as above, this court was pleased to grant leave under Clause 12 of the Letters Patent and assumed jurisdiction. The plaintiff thereafter lodged the plaint on 26th July, 2010.

 It is important to note that the plaintiff, though has annexed a copy of the contract, has not averred or highlighted anywhere in the plaint that the contract provided for English Law to apply to the contract and only English Court to have jurisdiction.

7 The defendant have, therefore, taken out this chamber summons for revoking the leave granted to the plaintiff in view of Clause 13 and Clause 14 and, in the alternative, the plaint is liable to be rejected under Order 7 Rule 11.

8 The Apex Court in *British India Steam Navigation Co. Ltd. vs. Shanmughavilas Cashew Industries & Ors.*¹ has held that whether a jurisdiction clause is exclusive or non-exclusive is a question of interpretation to be governed by the proper law of the contract. In other words, whether a clause is exclusive or non-exclusive jurisdiction clause is to be decided by applying the law of the contract.

1. (1990) 3 SCC 481

Paragraph 17 of the said judgment reads as under : -

“17. According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.”

It will also be useful to reproduce paragraph 11 of the said judgment which reads as under :-

“11. It is settled principle of Private International Law governing bills of lading that the consignee or an endorsee thereof derives the same rights and title in respect of the goods covered by the bill of lading as the shipper thereof had. For the purpose of jurisdiction the action of respondent 1 is an action in personam in Private International Law. An action in personam is an action brought against a person to compel him to do a particular thing. If clause 3 of the bills of lading is held to be binding on respondent 1 the choice of law by the parties would also be binding. English courts would perhaps use their own Private International Law to decide the dispute. In the event of the English court alone having the jurisdiction, the application of Indian statutes and the jurisdiction of the Indian courts would be, to that effect, inapplicable.”

9 Therefore, as clause 13 provides that the contract shall be governed and construed in accordance with the laws of England (without reference to any conflict of law rules), we will have to see whether under English Court jurisdiction Clause 14 would amount to

an exclusive jurisdiction clause.

10 The applicant have relied upon an affidavit of one Martin John Wisdom, a Practicing Solicitor of the Supreme Court of England and Wales and a partner in the firm of Arbis LLP having office in London to submit that Clause 14 will be construed as an exclusive jurisdiction clause by the English Court. It is also stated in the affidavit in support that the contents of the affidavit of Mr. Wisdom be treated as part of the affidavit in support and represents the pleading of fact and evidence as to what the English Law on the subject is. The plaintiff have not asked for cross-examination of Mr. Wisdom nor have they relied upon any evidence of an expert on English Law to the contrary. In the affidavit in rejoinder, the plaintiff has simply stated that the affidavit of Mr. Wisdom makes no difference as his opinion cannot decide the issue of revocation of leave of Clause 12 of the Letters Patent.

11 If one considers the affidavit in reply, the basic approach of the plaintiff has been that once leave has been granted the court should not revoke it. The plaintiff have also simply made a bald statement that they deny English Court has exclusive jurisdiction in the matter and have chosen not to deal with Clause 13 and Clause 14

as to what according to them these clauses mean. Even if we keep aside for the moment the affidavit of Mr. Wisdom, the applicant has placed on record the following judgments to submit that the English Court will have exclusive jurisdiction :-

(a) *Sohio Supply Company vs. Gatoil (USA) Inc.*²;

(b) *Continental Bank N.A. vs. Aeakos Compania Naviera S.A. & Ors.*³;

(c) *British Aerospace PLC vs. Dee Howard Co.*⁴;

(d) *Lugano Convention on jurisdiction and the Enforcement of Judgments in Civil Matters*;

(e) *Lafi Office and International Business S.L. vs. Mariden Animal Health Limited*⁵; and

(f) *I.P. Metal Ltd. vs. Ruote O.Z. S.P.A.*⁶

I have considered these authorities.

12 In *Sohio Supply* (supra) the parties had agreed to the term “this agreement shall be governed by the Laws of England” and “under the jurisdiction of the English Court without recourse to arbitration”. This clause is almost identical to the clause in the contract between

2. 1989 (1) LLR 588

3. 1994 (1) LLR 505

4. 1993 (1) LLR 368

5. 2000 (2) LLR 51

6. 1993 (2) LLR 60

the plaintiff and the defendant herein. The Court of Appeal came to a conclusion that the wording of such a clause was an exclusive jurisdiction clause. The relevant portion reads as under :-

“The question is one of the construction of this contract and nothing more. It is, I think, part of the matrix background, or surrounding circumstances, whichever term one chooses to use, that this was a contract made between sophisticated business men who specifically chose their words as to English jurisdiction for the purpose of this contract. It is not a consumer contract on a printed form, or anything like that. To my mind, it is manifest that these business men intended that clause to apply to all disputes that should arise between them. I can think of no reason at all why they should choose to go to the trouble of saying that the English Courts should have non-exclusive jurisdiction. I can think of every reason why they should choose that some court, in this case the English Court, should have exclusive jurisdiction. Then, both sides would know where all cases were to be tried. It may be that in some other types of case, such as a policy of insurance, there is a reason for providing for non-exclusive jurisdiction. I can see none here. I am not sure that I can detect what precisely the reason was for choosing England. The parties had chosen English law; it may be that they thought that the best place for English law to be applied was an English Court; it may be that they even thought that English Courts were a good thing in their own right – I do not know. It may be that they wanted to join the 28 per cent of cases in the Commercial Court where both sides came from overseas; or it may be that they just wanted to choose a neutral forum.”

13 In *Continental Bank* (supra) the court followed the ratio of the judgment in *Sohio Supply* (supra) and decided a similar jurisdiction clause which provided the irrevocable submission to the jurisdiction of the English Courts was an exclusive jurisdiction clause. The relevant portions are as under :-

“Does cl. 21.02 contain an exclusive jurisdiction clause?”

Clause 21.02 does not expressly make clear that the jurisdiction

agreement is an exclusive one. Dicey & Morris, the Conflict of Laws, 12thed., vol.1, at p.442, submit that the question is simply whether on its true construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word “exclusive” is used. In Sohio Supply Co. Ltd. vs. Gatoil (USA) Inc. (1989) 1 Lloyd's Rep. 508, at p.591, the Court of Appeal approved this submission as contained in the previous edition of Dicey & Morris. In our judgment it would be surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum.....

It is necessary to bear in mind that the proper construction of the jurisdiction agreements is governed by English law. And as the matter of English law the jurisdiction agreements apply to the subject-matter of the Greek proceedings, and are exclusive jurisdiction agreements. It follows that the English Courts have exclusive jurisdiction. And by virtue of art.17 the Greek Courts have been deprived of jurisdiction.”

14 In *British Aerospace PLC* (supra), which has also been referred in *Continental Bank N.A.* (supra), a clause which stated “parties here to agree that the court of law England shall have jurisdiction to entertain any action” was found to be an exclusive jurisdiction clause. The Queen's Bench held that if a contract provides English Law to apply then there would be no need to expressly agree that the English Courts should have jurisdiction but if the contract provides in addition to English Law, English Courts would have jurisdiction, it would mean that the parties by expressly agreeing to English jurisdiction must be seeking to add something more, i.e., England should have exclusive jurisdiction. The relevant portion reads as under : -

“There is only one matter that I would add in relation to the clause in the instant contract and it may be implicit in what Lord Justice Staughton said in Sohio. In the instant case the parties have expressly agreed English law and there would be no need to expressly agree that the English Court should have jurisdiction for the English Court to have non-exclusive jurisdiction. The English Court would in any event have such jurisdiction and by expressly agreeing to English jurisdiction they must be seeking to add something i.e., that England should have exclusive jurisdiction.”

15 In *I.P. Metal Ltd.* (supra) the Queen's Bench held that if one jurisdiction was chosen by the parties then in that case that jurisdiction should have exclusive jurisdiction. Even if we apply Indian Law, the Apex Court has held that there is no need to use the words only, alone or exclusively and the like because the parties would not have otherwise included the ouster clause were it not to carry any meaning at all. The very fact that Clause 14 is included in the contract between the parties conveys their clear intention to exclude the jurisdiction of courts other than those mentioned in the said clause. Infact in Clause 14 the parties have also stated that each party expressly submits to the jurisdiction of the High Court of London.

16 Paragraph 32, 55 and 57 of ***Swastik Gases Private Limited vs. Indian Oil Corporation Limited***⁷ decided by the Supreme Court of India reads as under :-

“32. For answer to the above question, we have to see the effect of

7. (2013) 9 SCC 32

the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts of Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement that 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 exclusio 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.”

.....

55. *It will be seen from the above decisions that except in A.B.C. Laminart where this Court declined to exclude the jurisdiction of the courts in Salem, in all other similar cases an inference was drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words “only”, “alone” or “exclusively” and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of courts other than those mentioned in the clause concerned. Conversely, if the parties had intended that all courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.*

56.

57. *For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause*

is an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties.”

17 In my view, Clause 14 confers exclusive jurisdiction to High Court of London. Therefore, the parties having expressly agreed to submit to the jurisdiction of the High Court of London, this Court cannot have jurisdiction and the plaint has to be returned to the plaintiff for presentation in the High Court of London.

18 In any event in Order 7 Rule 11 of Code of Civil Procedure it is provided that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. The plaintiff has chosen not to state anything in the body of the plaint about Clause 13 and Clause 14 but have annexed a copy of the contract. Clause 13 provides for English Law to apply and Clause 14 provides parties were expressly submitting to the jurisdiction of the High Court of London.

19 The plaintiff, in the suit filed by the defendant, had submitted to the jurisdiction of the High Court of London. Moreover, in view of Clause 14 of the contract, in view of what is stated above, the High Court of London has exclusive jurisdiction in the matter and this court does not have jurisdiction to entertain, try and dispose of

the present suit. That in my view would amount to the present suit being barred by law and the plaint is liable to be rejected under the provisions of Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908.

20 In the circumstances, the leave granted on 20th July, 2010 is revoked. The plaint be returned to the plaintiff for institution in the High Court of London in accordance with law.

21 The chamber summons accordingly stands disposed.

(K.R.SHRIRAM,J)