

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 3500 OF 2017

M/s. Anupam Rasayan India Ltd. ... Petitioner
Vs.
M/s. Liberty Exports Ltd. ... Respondent

Mr. Dhiraj Mirajakar a/w. Ms. Lopa Munim i/b. Rajesh Kothari & Co.,
Advocate for the petitioner.
Mr. Nikunj Mehta a/w. Mr. Jinesh Jani a/w. Ms. Rachana Kapasi i/b.
Pimenta Kapasi & Co., Advocate for the respondent.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 26th April, 2017.
PRONOUNCED ON : 5th May, 2017.

ORDER:

Rule. Rule made returnable forthwith. By consent, Writ
Petition is heard finally and disposed of at the stage of admission.

2. In this Writ Petition, the order dated 9th December, 2016 passed
by the learned Judge of the City Civil Court, Greater Mumbai
dismissing the Notice of Motion No. 4946 of 2016 in Suit No. 8506 of
1992 taken out by the petitioner/original defendant is challenged.

3. The petitioner/defendant has filed Suit No. 473 of 1991 on 19th
October, 1991 in the Court at Surat and the respondent/plaintiff has
filed Suit No. 8506 of 1992 for damages for breach of contract in

December 1991 in Mumbai. Admittedly the parties in both the suits are same and the issues involved in both the suits are directly and substantially one and the same. It is also admitted that the suit filed by the petitioner/defendant is filed first in time, therefore, the petitioner/defendant has filed the Notice of Motion before the said Court in Suit No. 8506 of 1992 under section 10 of Code of Civil Procedure for stay of the suit filed in Mumbai and the suit in Surat to proceed. The said application under section 10 of C.P.C. filed by the petitioner/defendant was dismissed by the learned trial Judge on 9th December, 2016. Hence, this Petition.

4. In the present case, there is no separate agreement which is executed by both the parties, however, admittedly Exhibit 8 is a purchase order and offer and Exhibit 9 is a letter given by the petitioner to the respondent is an acceptance and these two letters constitute contract between the parties. This position is not disputed.

5. The learned counsel for the petitioner has submitted that though all the facts are admitted, as the application for stay of the suit which is filed later, i.e., Mumbai suit should have been stayed as all the requisite factors of section 10 are fulfilled. He pointed out that

a footnote in Exhibit 8 that all disputes arising out of the contract will be tried or solved within the Court of Mumbai and addressed that this note does not oust the jurisdiction of the Surat Court when part of the contract is executed and performed in Surat. He further submitted that the learned Judge has wrongly relied on the ratio laid down in the case of **Ram Bahadur Thakur & Co., vs. Devidayal (Sales) Ltd., AIR 1954 Bom. 176**. He submitted that the learned trial Court Judge was wrong in holding that the preposition in the case of **Ram Bahadur Thakur and Co. (supra)** is perfectly applicable to the present case and erroneously held that the suit filed by the defendant at Surat is filed to forestall the plaintiff who filed subsequent suit in Mumbai. The observation made in **Ram Bahadur Thakur and Co. (supra)** are not accepted by the larger Bench of the Hon'ble Supreme Court in 1962 in the case of **Manohar Lal Chopra (supra)**. It means the intention of the parties to file the suit cannot be taken into account to decide the issue of stay under section. Thus, the order of not staying the suit under section 10 is to be set aside. In support of his submissions, the learned counsel relied on following decisions of the Hon'ble Supreme Court:

- (i) A.B.C. Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, Salem, reported in AIR 1989 SC 1239.

- (ii) R.S.D.V. Finance Co. Pvt. Ltd., vs. Shree Vallabh Glass Works Ltd., reported in AIR 1993 SC 2094.
- (iii) Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, reported in AIR 1962 SC 527.

6. The learned counsel Mr. Nikunj for the respondent has submitted that the Writ Petition is to be dismissed and the order passed by the learned Ad-hoc District Judge is fully justified. He relied on the letter, i.e., Exhibit 9 wherein letter dated 22nd March, 1999, i.e., Exhibit 8 given by the respondent to the petitioner is referred. He submitted that in the letter Exhibit 8 in a foot note specifically mentioned that any dispute arising out of the said contract is subject matter of Mumbai jurisdiction. The learned counsel submitted that the petitioners have accepted this proposal by letter dated 3rd May, 1991 and have acted upon it. Thus, there is specific clause of Mumbai jurisdiction and therefore, the suit filed by the respondent in Mumbai is a suit filed within appropriate jurisdiction and the suit filed by the petitioner at Surat though is prior to the suit in Mumbai, the suit in Mumbai cannot be stayed. He submitted that the judgment if the Full Bench of the Hon'ble Supreme Court in **Manohar Lal Chopra** (*supra*) is distinguishable on facts. He

submitted that the prayer to stay the suit was made, as the suit was vexatious, speculative and oppressive. He further submitted that the application made for exercise of the inherent jurisdiction before the trial Court was rejected. He submitted that in fact in the case of **Manohar Lal Chopra** (*supra*) the Full Bench restrained themselves from expressing any opinion on the question of jurisdiction. He further submitted that the stay was prayed that the other party be restrained from proceeding with any other suit and the Court held that said order cannot be made unless it is absolutely essential for the ends of justice. The learned counsel argued that the respondents have not made such application that suit in Surat be stayed. In support of his submissions, on the point of ouster of jurisdiction, as per the clause mentioned in the letter, he relied on the judgment of Full Bench of Hon'ble Supreme Court in the case of **Swastik Gases Pvt. Ltd. vs. Indian Oil Corporation Ltd., reported in (2013) 9 SCC 32.**

7. Perused the impugned order, the applications made by the parties, record placed before me and the cases laws. In the light of mandate of Section 10, the suit filed later is to be stayed to avoid the possibility of contradictory views expressed by two Courts and further

anomaly and complexity in respect of the execution of the respective decrees if both the suits are decreed. A short question involved in this case is Despite specific mention of place of jurisdiction in the contract, whether in absence of prefix words like “alone”, “only”, “exclusive” etc. can the jurisdiction of the Court be ousted. This issue is no more res integra in view of the judgment of **Swastik Gases Pvt. Ltd. (supra)**. Before considering the ratio laid in different cases, let me advert to the clause disclosing the jurisdiction and the manner in which it is worded. The letter dated 22nd March, 1991 (Exhibit 8) is admittedly an offer letter by the respondent given to the petitioner wherein the impugned clause is a foot note as it is “**ANY DISPUTE ARISING AGAINST THIS ORDER IS SUBJECT TO BOMBAY JURISDICTION**”. The said offer was accepted by the petitioner by writing letter dated 3rd May, 1991 Exhibit 9 to the respondent. In that letter, earlier letter of offer dated 22nd March, 1991 Exhibit 8 is referred to and thus it is clear that the petitioner has acted upon the said offer. This foot note in the offer is admitted by the petitioner. The petitioner tried to make out its case that mention of Bombay in this letter cannot oust the jurisdiction of Surat in the absence of specific words like “alone”, “only”, “exclusive”.

8. In the case of **A.B.C. Laminart Pvt. Ltd.** (*supra*), the suit was filed for the breach of contract. There was a clause in the agreement that a dispute arising out of sale shall be subject to kaira jurisdiction , however, the suits were filed in the Court at Kaira and also in the Court at Salem. The Hon'ble Supreme Court after considering the said clause has held that they did not find exclusive words like 'exclusive', 'alone, 'only' and the maxim 'expressio unius est exclusio alterius' is not applicable and the jurisdiction of other Court is not clearly and unambiguously and explicitly excluded. Therefore, as the goods were delivered, the Court at Salem cannot be ousted from the jurisdiction.

9. In the case of **R.S.D.V. Finance Co. Pvt. Ltd.** (*supra*), the Hon'ble Supreme Court has dealt with Section 20 of C.P.C. in respect of ouster of jurisdiction in a suit of recovery of loan. In the said case, 5 post dated cheques were issued by the defendants being payable to the plaintiff at Mumbai. The defendants had made unilaterally endorsement "Subject to Anand jurisdiction" and therefore, it was held that it cannot oust the jurisdiction of Mumbai. Thus the maxim 'expressio unius est exclusio alterius' cannot be applied.

10. In the case of **Manohar Lal Chopra** (*supra*), the parties have entered into partnership at Indore for working coal mines at Kajoragram (District Burdwan). The appellant filed the suit in the Court at Asansol and the respondent filed Regular Civil Suit at Indore and while dealing with the issue under section 10 of C.P.C., it was argued that the suit at Indore which was instituted later is to be stayed in view of Section 10 of C.P.C. The Hon'ble Supreme Court while dealing with the section has also considered the provisions of Section 35A of C.P.C. in respect of vexatious claims made in the suit and it held that "The provisions of Section 10 do not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract. It does not appear correct to say, as has been said in **Ram Bahadur Thakur and Co. vs. Devidayal (Sales) Ltd. ILR (1954) Bom 334: (AIR 1954 Bom 176)**, that the Legislature did not contemplate the provisions of Section 10 to apply when the previously instituted suit be held to be instituted in those circumstances. The provisions of Section 35A indicate that the Legislature was aware of false or vexatious claims or defences being made, in suits, and accordingly provided for compensatory costs. The Legislature could have, therefore, provided for the non-

application of the provisions of section 10 in those circumstances, but it did not.”

11. In the case of **Swastik Gases Pvt. Ltd.** (*supra*), the Full Bench of the Hon'ble Supreme Court has referred the case of **A.B.C. Laminart Pvt. Ltd.** (*supra*) and **R.S.D.V. Finance Co. Pvt. Ltd.** (*supra*) where the jurisdiction was not ousted in the absence of the words like “alone”, “only”, “exclusive” though there was specific mention of the place in the contract. In the said case of **Swastik Gases Pvt. Ltd.**, the parties have entered into the consignment agreement wherein it was mentioned that Calcutta High Court has jurisdiction in respect of Arbitration. The suit was filed in Jaipur and also in Calcutta. Thereafter the Full Bench of the Hon'ble Supreme Court referred the ratio laid down previously in other cases and held as follows:

“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.

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 in 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.”

12. The submissions made by the learned counsel for the respondent that the case of **Manohar Lal Chopra** (*supra*) on facts is distinguishable, is accepted. The respondents have filed the suit in Mumbai as mentioned in the Agreement, therefore, the suit in Mumbai though filed later cannot be stayed.

13. I am of the view that had this footnote been absent in the letter of offer, the suit filed by the respondent, which is later in time, ought to have been stayed under section 10 of the Code of Civil Procedure. The said footnote is an inseparable part of an agreement. Thus, mention of the foot note cannot be ignored but it requires a

meaningful expression. The maxim “expressio unius est exclusio alterius” which means expression of one is exclusion of another, is applicable, as there is nothing to indicate to the contrary. . In view of this, the order passed by the learned District Judge is upheld. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)