

ODC-1

CS/93/2020

IA NO. GA/2/2021

IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

COMMERCIAL DIVISION

CHANDRAMUKHI IMPEX LIMITED

Vs.

VISHAL MEGA MART PRIVATE LIMITED

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On: 06.01.2023

Order On: 13.01.2023

Appearance:

Mr. Nilay Sengupta, Adv.
...for the plaintiff

Mr. Siddhartha Lahiri, Adv.
Mr. Debraj Dutta, Adv.
...for the defendant

ORDER

The defendant has filed the instant application for return of plaint. The plaintiff filed this suit on 08.07.2020 praying for decree for a sum of Rs.

14,20,47,08/- against the defendant towards dues along with interest @ 18 % per annum from 20.07.2020.

The defendant's case is that no part of the cause of action has arisen within the jurisdiction of this Court.

Mr. Siddhartha Lahiri, Learned Advocate representing the defendant submits that the defendant had started dealing with the plaintiff sometimes in the year 2013 for supply of various kinds of readymade garments of different sizes and qualities in consideration of agreed price as mentioned in the purchase orders placed by the defendant from its office and warehouse at Gurgaon and the plaintiffs were to supply such goods in terms of the purchase orders being placed by the defendants.

Mr. Siddhartha Lahiri submits that the said purchase orders were issued from Gurgaon and upon receipt of the purchase orders, the plaintiffs were procured such goods either by manufacturing them or importing them and allow the defendant to inspect such goods as and when the same became ready.

Mr. Siddhartha Lahiri submits that after inspection of the goods as to the quality and quantity, the defendant would issue an Advance Shipment Notification (ASN) to the plaintiff, whereafter the plaintiff were to supply the goods to the defendant.

Mr. Siddhartha Lahiri submits that as per the purchase order issued by the defendant, it is mentioned that “All disputes between the parties will be governed by the laws of India and subject to jurisdiction of Gurgaon Court”.

Mr. Siddhartha Lahiri submits that as per the terms and conditions of the purchase order, this Court has no jurisdiction to entertain the suit. He further submits that the Advance Shipment Notification (ASN) was also issued at the address at Gurgaon which is outside jurisdiction of this Court. Mr. Siddhartha Lahiri further submits that the bills at the e-way bill generated for transaction for delivery of goods were also mentioned at Gurgaon.

Mr. Siddhartha Lahiri further submits that the payments of those invoices were also made from the defendant’s bank being HDFC Bank, DLF Cyber city Branch at Gurgaon by NEFT in terms of the purchase order.

Mr. Siddhartha Lahiri submits that inspite of having forum selection clause in the purchase order which both the parties have agreed upon and both the parties have acted upon the said purchase order having the knowledge that the Court of Gurgaon is having the jurisdiction inspite of the same, the plaintiff has filed the suit before this Court though this Court has no jurisdiction. Accordingly, the defendant prays for return of the plaint to the plaintiff.

Mr. Siddhartha Lahiri relied upon the Judgment reported in **(2013) 9 SCC 32 (Swastik Gases P. Ltd. -vs- Indian Oil Corporation Ltd.)** and submits that *the very existence of the execution of jurisdiction clause in the*

agreement would be rendered meaningless were it is not given its natural and plain meaning. The use of word like “only”, “exclusively”, “alone” and so on are not necessary to convey the intention of the parties in a cause of action of jurisdiction clause of an agreement.

Mr. Siddhartha Lahiri relied upon the Judgment reported in **(2020) 12 SCC 667 (EXL Careers & Ors. -vs- Frankfinn Aviation Services Private Limited)** and submits that *presentation of the plaint in a Court contrary to the exclusion Clause would not be said to be proper presentation before the Court having jurisdiction in the matter.*

Mr. Siddhartha Lahiri relied upon the Judgment reported in **(2015) 12 SCC (B.E. Simoes Von Staraburg Niedenthal vs. Chhattisgarh Investment Ltd.)** and submits that *having regard to the Clause mentioned in the purchase order, the jurisdiction of this Court is ouster and, therefore, this Court cannot be said to have any jurisdiction in dealing with the matter and the only competent court of jurisdiction is at Gurgaon.*

Mr. Siddhartha Lahiri further relied upon the Judgment reported in **(2020) 5 SCC 462 (Brahmani River Pellets Limited vs. Kamachi Industries Limited)** and submits that *where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts.*

Mr. Siddhartha Lahiri further relied upon the Judgment reported in **(1989) 2 SCC 163 (A.B.C. Laminart Pvt. Ltd. & Ors. -vs- A.P. Agencies,**

Salem) and submits that *where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of the other Courts. When a clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction, As regards construction of the ouster clause when words like ‘alone’, ‘only’, ‘exclusive’ and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim ‘expressio unius est exclusio alterius’ expression of one is the exclusion of another may be applied.*

Per contra, Learned Counsel for the plaintiff submits that part of cause of action of the present suit arose at Kolkata at “Chatterjee International Centre”, 33A, Jawahar Lal Nehru Road, 12th Floor, Suite No. 7, Kolkata -700071 as stated in paragraph 57 of the plaint. Learned Counsel for the plaintiff submits that inspite of having knowledge of the pendency of the present suit before this Court on 16.03.2021 and 23.03.2021, the defendant had paid a sum of Rs. 5,86,63,000/- and Rs. 7,11,354/- out of the total claim made by the plaintiff.

Learned Counsel for the plaintiff submits that only for the purpose of delaying the proceeding, the defendant has filed the instant application as the defendant had the knowledge that the defendant has no defense against the claim of the plaintiff.

Learned Counsel for the plaintiff submits that mere reference any Clause of the purchase order restricting the jurisdiction for resolving the dispute

cannot be the sole criteria for consideration of forum selection clause. Learned Counsel for the plaintiff submits that the said Clause is general in nature and is not having exclusive binding upon the parties.

Learned Counsel for the plaintiff relied upon the Judgment reported in **(1993) 2 SCC 130 (R.S.D.V Finance Co. Pvt. Ltd. –vs- Shree Vallabh Glass Works Ltd.)** and submits that *the maxim “expressio unius est exclusio alterius” cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the purchase order contained the endorsement, the jurisdiction of the Court at Gurgaon.*

Learned Counsel for the plaintiff relied upon the Judgment of **Madras High Court (Prakash Roadlines Pvt. Ltd. –vs- P. Muthuswamy Gounder and Co. by its Partner P. Muthuswamy Gounder)** and submits that *it is not open to the parties by agreement to confer jurisdiction on a Court which does not possess such a jurisdiction under the provisions of the Code of Civil Procedure, but that where two Courts or more have jurisdiction to try a suit or proceeding, an agreement between the parties to have such disputes tried in one of such courts is not contrary to Public Policy.*

Learned Counsel for the plaintiff relied upon the Judgment reported in **(1982) SCC OnLine Cal (Periwal Packing Industries Pvt. Ltd. –vs- The Fertilizer and Chemicals Travancore Ltd.)** and submits that *the clause in the agreement provides that litigation under the contract would be taken up in a Court at Kerala. The clause does not indicate that only the Courts of law in*

Kerala would have exclusive jurisdiction or that no other court will have jurisdiction to entertain such litigation or that the parties would not be entitled to resort to any other court.

Learned Counsel for the plaintiff relied upon the Judgment reported in **(1984) SCC OnLine Gau 4 (All Bengal Transport Agency and Ors. –vs- Hare Krishna Banik)** and submits that *".....the settled legal position is entirely to the effect that such a contract, by which the parties selected one of the two competent forums, does not amount to ouster of the jurisdiction of the ordinary Court. Therefore, such a contractual stipulation, in favour of which court would have prima facie a great leaning for upholding the solemnity of the contract so as to bind the parties to their own bargains, could never operate as an absolute bar to the jurisdiction of the competent court".*

Learned Counsel for the plaintiff submits that there is no bar to file the suit before this Court and as such the application filed by the defendant is liable to be rejected.

Heard the Learned Counsel for the respective parties, considered the materials on record and the judgment relied by the parties.

The principle which emerges from the above decisions is that where the parties have agreed to confer exclusive jurisdiction to a Court located at a particular place, the intention of the parties to exclude all other courts must be given primacy. An exception to this would be where one of the parties to the agreement pleads ignorance of the clause or proves by conduct supported by

evidence, that the clause was a unilateral addition to the agreement by one party only and not affirmed by the others. The other exception would be where despite both the parties agreed to confer exclusive jurisdiction of certain courts, filing or continuing proceedings in the Court agreed upon would either be oppressive or cause insurmountable inconvenience to either of the parties. A third exception can also arise from sheer practicality and common sense; where the evidence forming the basis of the dispute and the witnesses who would bring that evidence to light are located in a jurisdiction other than that agreed upon by the parties. A fourth exception would be where parties have concurred to confer jurisdiction of a Court which is otherwise not competent to try the proceedings. The second and third exceptions are of course connected in that both would involve expenses of travel and avoidable hardship to either of the parties.

But what would really emerges as the fundamental basis in the gamut of decision cited, is that, a forum selection clause is almost always challenged by the parties who has filed a suit in derogation thereof. Hence, in such cases, it is the defendant who invokes the forum selection clause to denude the Court of its jurisdiction to try the suit. The decisions cited by the Learned Counsels will therefore, have to be seen in the light of who is asserting the clause to confer exclusive jurisdiction of the Court concerned.

From the facts and documents on record, there is no doubt in the purchase order was entirely contemplated to be performed outside the

jurisdiction of this Court. The purchase orders issued by the defendant are forum-neutral although they were issued from Gurgaon where by the defendant to the plaintiff and the plaintiff has received. In the purchase order, a specific selection clause is contemplated. The choice made by the defendant in inserting the clauses subject to the jurisdiction of Gurgaon Court indicates that the parties have agreed to be subjected only to Courts in this jurisdiction. Indeed, the forum selection clause was acted upon and given effect to all most immediately thereafter by the plaintiff supplying the goods to the defendant and the later in turn making part payment towards the supplies made. In pursuance to the purchase order, the plaintiff not only supplied the goods but proceeded to issue invoices to the office of defendant located at Gurgaon and have also received the payment from Gurgaon through RTGS.

The plaintiff admittedly instituted the suit in this Court by seeking and obtaining leave under clause 12 of the Letters Patent on the basis of the statement made in paragraph 57 wherein the plaintiff has averred that there was no agreement for exclusive forum selection clause but the plaintiff has not brought the notice of this Court with regard to the purchase order wherein specific clause is specified stating that “*all disputes between the parties will be governed by laws of India and subject to jurisdiction of Gurgaon Court.*” All the purchase orders have been issued from Gurgaon and the payment has also been made at Gurgaon Bank. What needs to be seen, therefore, is whether the condition in the purchase orders and the payments being credited to the plaintiff within the jurisdiction of this Court outweighs the forum selection

clause inserted by the defendant which determined the cause of action between the parties thereafter. The unambiguous word specifying the intention of the parties to confer exclusive jurisdiction at Gurgaon Court would be a clear indicator of what, the parties intended to be bound by.

Counsel for the plaintiff has urged there was no meeting of mind between the parties and hence the particular clause cannot give any weightage. If this is taken to be true, one may ask what further evidence can be called for to show that the parties were in perfect sync to be bound by the agreement including a choice of forum to seek redress in case dispute arose under the agreement? No case has also been made out by the plaintiff to show that approaching the Court at Gurgaon would be oppressive or that the evidence pertaining to the dispute is in Calcutta which would result in inconvenience to either of the parties if the suit is to be tried at Gurgaon. In any event, the plea of inconvenience should be taken by the party who is resisting a forum selection clause either on the ground of expenses for travel or for the reason that all material evidence is lying elsewhere and not at the place which the parties have selected. None of the above said two factors have been urged in this case.

In view of the reasons stated above, there is no basis to presume that the parties had given a go-by to the clause confirming exclusive jurisdiction Court at Gurgaon.

GA 2 of 2021 is accordingly allowed in terms of prayer (a) of the application. The plaint filed by the in Civil Suit No. 93 of 2020 is directed to be taken off the file of this Hon'ble Court.

GA 2 of 2021 is disposed of.

(KRISHNA RAO, J.)

p.d/