

Emmsons International Ltd. vs Metal Distributors (Uk) And Anr. on 7 January, 2005

Equivalent citations: II(2005)BC465, 2005(1)CTLJ39(DEL), 116(2005)DLT559, 2005(80)DRJ256, AIR 2005 (NOC) 280 (DEL), 2005 A I H C 1190, (2005) 4 CIVLJ 623, (2005) 116 DLT 559, (2005) 2 BANKCAS 465

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Bench: R.C. Jain

JUDGMENT

R.C. Jain, J.

1. M/s Metal Distributors (UK) Limited-defendant No. 1 who is facing a suit filed by the plaintiff for the recovery of a sum of Rs. 30,61,145/- for the alleged defective supply of Co-operware bars has filed this application under Order VII Rule 11 read with Section 151 CPC praying for rejection of the plaint or for its return to the plaintiff for presentation in the Court of competent jurisdiction i.e. English Courts. It is alleged in the application that the suit of the plaintiff is based on a contract dated 5.11.1996 entered between defendant No. 1-applicant through their agents Binani Metal Ltd-defendant No. 2 for supply of continuous cast Electrolytic Copper Wire Rods at a price of USD 2194 per Metric Ton, CIF Bombay. The contract entered into between the parties is stated to be an international commercial contract containing Clause 13 which provides for the dispute redressal mechanism through arbitration and that the contract shall be construed in accordance with and governed by English Law. It is the case of defendant No. 1-applicant that the parties once having agreed that the contract shall be governed by a particular law, only that law will govern the contract and consequently only the Courts of that country which are competent to administer law of the said country and no other court would have the jurisdiction to entertain any disputes arising out of the said contract.

2. The plaintiff has opposed the application and filed a reply not disputing that the claim in the suit filed by the plaintiff is based on the contract entered into between the parties which contain a clause i.e. clause 13 "Governing Law and Forum for Resolution of disputes" but it is stated that reference to the said clause is wholly out of context; jurisdiction cannot be conferred or vested upon/ in a court of law merely by an agreement between the parties where the Court inherently lacks jurisdiction in the matter. It is also alleged that the plea of defendant No. 1 is not tenable because the defense of both the defendants has been struck off by the Court vide an order dated 21.

3. 2001 as they failed to file the written statement despite opportunities allowed for the purpose. It

is stated that this Court has the necessary territorial jurisdiction to entertain and try the present suit. The application is stated to be malafide, having been filed more than three years after the institution of the suit and suffers from delay and laches amounting to acquiescence. It is denied that either the plaint is liable to be rejected or returned to the plaintiff for presentation before the Competent Court.³ I have heard Mr. Atul Sharma, learned counsel representing defendant No. 1-applicant and Mr. V. K. Sharma, learned counsel representing the plaintiff-non-applicant and have given my thoughtful consideration to their respective submissions.

4. Clause 13 of the contract between the parties on the strength of which the defendant No. 1 has moved the present application and has raised the objection about the jurisdiction of this Court to entertain and try the suit of the plaintiff is a material one and is reproduced below for the facility of reference:

"Governing Law and Forum for Resolution of Disputes- This contract shall be construed in accordance with and governed by English Law. Sellers shall be entitled at their opinion, to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of the London Metal Exchange or to institute proceedings against buyers in any Courts of competent jurisdiction."

5. Mr. Atul Sharma, learned counsel representing defendant No. 1-applicant has vehemently argued that the parties with open eyes have agreed to the above clause which in unequivocal terms provide that it is the English Law which would govern the contract and its provisions shall be construed in accordance with English Law. Based on this, his next submission is that it is those Courts which are competent to administer English Law which would alone have the jurisdiction to entertain and try the present suit and since the Indian courts are not vested with such a jurisdiction, therefore, this court does not have the territorial jurisdiction to entertain and try the present suit. In support of his contention he has heavily relied upon a Supreme Court decision in the case of British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries . In that case, the Court considered the question of jurisdiction of Indian Courts in relation to a contract which was governed by the English Law. In that case there was a specific clause in relation to jurisdiction in the bill of lading which read as under:

"Jurisdiction: The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England or, at the option of the carrier, at the port of destination according to English law to the exclusion of the jurisdiction other courts of any other country."

6. On the basis of the said clause the Supreme Court ruled that a bare reading of the said clause, without anything more, would clearly show that the suit claim arising out of the contract of affreightment evidenced by the bills of lading will have to be determined in England or, at the option of the carrier, that is the appellant, at the port of destination, that is, Cochin, to the exclusion of the jurisdiction of the courts of any other country. The Court also considered a question "Was the respondent bound by the Clause of the Bill of lading. In part 11 of the said judgment the Supreme Court laid down as under:" 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 No. 1 is an action in personal in Private International Law. An action in personal 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 No. 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 extent, inapplicable.

7. The Supreme Court referring to Dicey and Morris in the conflict of Laws (11th edn.) quoted with approval the following Rule 28, Sub-rule 4 in regard to the general principle as to the jurisdiction in action in personal:

"Rule 28, Sub-rule 4: The Court may assume jurisdiction if, in the action begun by the writ, the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of contract, being (in either case) the contract which

(i) was made in England, or

(ii) was made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England, or

(iii) is by its terms or by implication governed by English law, or

(iv) contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract."

The Supreme Court also ruled that the question of jurisdiction in that case ought not to be determined by the High Court on the basis of the provisions of Section 28 of the Indian Contract Act, 1872, in the absence of a specific provision and making it applicable to transactions in international trade.

8. The Supreme Court also referred to "Cheshire" and "North's" Private International Law (11th edn.) on submission to jurisdiction.

"Despite the fundamental principle that the court cannot entertain an action against a defendant who is absent from England, it has long been recognised that an absent defendant may confer jurisdiction on the court by submitting to it. This may be done in a variety of ways, such as by the defendant acknowledging service before actual service of the writ, or instructing a solicitor to accept service on his behalf. Commencing an action as a plaintiff will give the court jurisdiction over a counter-claim. Although a defendant who appears and contests the case on its merits will be held to have submitted to the jurisdiction, an appearance merely to protest

that the court does not have jurisdiction will not constitute submission, even if the defendant also seeks a stay of proceedings pending the outcome of proceedings abroad."

9. On the basis of the above view, the Supreme Court ruled that in case of international contracts, it is a common practice for the parties, to agree that any dispute arising between them shall be settled by the courts of another country even though both the parties are not resident of that country. In such a case, having consented to the jurisdiction, one cannot afterwards contest the binding effect and judgment. Having done so, the Supreme Court concluded as under: " Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English law and disputes are to be determined according to English law. Is the selection of law binding? In *Cheshire and North's Private International Law* (11th edn., page 495), while discussing about the interpretation of contracts the authors say: " When the stage has been reached where an obligation, formally and essentially valid and binding on the parties of full capacity, has been created, then in the further matters that may require the intervention of the court, there is, speaking generally, no reason in principle why the parties should not be free to select the governing law." The express choice of law made by parties obviates need for interpretation.

10. In para 50 it further laid down that disputes could not have been decided partly according to the municipal law and partly according to English Law. Reliance has also been placed on another decision of the Supreme Court in the case of *National Thermal Power Corporation v. The Singer Company and others* AIR 1993 SCC 988 wherein the question was as to what was the proper law of contract which could be applied to a commercial contract between the parties of two different countries. The Court ruled that it is the intention of the parties which would decide that law of which country would govern the contract and which court would have the jurisdiction having regard to the provisions of Article 253 of the Constitution of India and Section 20 CPC. In the opinion of this Court, this authority is not relevant because here we have express term in regard to the jurisdiction and governing law.

11. On the other hand, Mr. V. K. Sharma, learned counsel for the plaintiff, has argued that the Clause 13 is not capable of enforcement because it is against the public policy and also hit by the provisions of Section 28 of the Contract Act inasmuch as it does not give any right or remedy to the plaintiff e.g. the buyer of the goods for the redressal of his grievance/for resolution of any disputes/claims raised by him in relation to the supplies made under the said contract. A reading of Clause 13 would clearly show that it is a unilateral clause because it gives all the right to the sellers i.e. defendants to refer any dispute arising under the Contract through the mechanism of Arbitration in accordance with the Rules and Regulation by instituting the proceedings against the buyers and it does not give any corresponding rights to the buyers i.e. plaintiff in the present case. Such a clause would be hit by Section 28 of the Indian Contract Act, 1872, and will not be enforceable as has been held by this Court in the case of *A. V. N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd.* 1992 (2) Arbitration Law Reporter, 8. In this case the Court considered the effect of a similar clause which was to the following effect:

"Without prejudice to the above Clause 17, of the Contract the Company, M/s AVN Tubes Limited, reserves its right to go in for arbitration, if any dispute so arisen is not

mutually settled within 3 months of such notice given by the Company to the Contractor. And, the award of the Arbitration, to be appointed by the Company, M/s. AVN Tubes Limited, shall be final and binding on both the Company and the Contractor."

12. The Court on a reading of the aforesaid arbitration clause held that M/s A. V. N. Tubes Ltd alone has been given the right to go in for arbitration. Not only this, the aforesaid clause has to be followed only at the instance of the company by giving three months notice if the dispute is not mutually settled between the parties; and thirdly, the right to appoint an arbitrator has been given only to M/s AVN Tubes Limited and the decision of the Arbitrator of M/s AVN Tubes Ltd. is to be considered final and binding on both the parties. The Court held that cumulative effect of all the three clauses was that it is unilateral agreement. In case, any one of the clauses alone had been there, that by itself may not have made the agreement unilateral. The Court finally ruled that the said agreement was clearly unilateral and not enforceable in a court of law.

13. Learned counsel for defendant No. 1-applicant has submitted that the above authority would not govern the facts of the present case inasmuch as the three clauses contained in Clause 13 "Governing Law and forum for resolution of dispute' contain three distinct conditions namely: (i) The contract shall be construed in accordance with and governed by English Law, (ii) Sellers shall be entitled at their option (should be option) to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of the London Metal Exchange; and (iii) to institute proceedings against buyers in any Courts of competent jurisdiction.

14. Learned counsel for defendant No. 1 further submits that these clauses are independent and separable from each other, therefore, cannot be termed as unilateral and on that basis unenforceable. On the face of the above position, the important question with which this Court is confronted is as to whether such a condition in the contract is a valid condition capable of enforcement in Indian Courts or the same is against the public policy of India and/or hit by Section 28 of the Indian Contract Act 192, Section 28 of the Indian Contract Act provides that agreements in restraint of legal proceedings will be void and reads as under:

28. Agreements in restraint of legal proceedings, void-(Every agreement)

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent."

15. The basis of the above legal provision is that no man can exclude himself from the protection of courts by contract. In other words, every citizen has the right to have his legal position determined

by the ordinary tribunals, except, subject to contract (a) when there is an arbitration clause which is valid and binding under the law; and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be discharged. The section renders void those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. As noticed above, Clause 13 of the agreement between the parties in the case in hand imposes an absolute bar on the buyer of the goodsie. the plaintiff from enforcing its rights under the contract before ordinary tribunals or through the Alternate Dispute Resolution mechanism. In the opinion of this Court, such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy. Had it been a case where the restriction imposed by the contract was against the enforcement of the rights of the buyer before the ordinary tribunals but the agreement had provided for section of one of several ordinary tribunals in which ordinarily a suit would lie, the defendant would have been within its right to enforce such an agreement.

16. Thus, having considered the matter from different angles and in depth this Court is of the considered view that Clause 13 being in the nature of a unilateral covenant depriving the plaintiff to enforce its right under the contract either through the ordinary tribunals set up by the State or through alternate dispute resolution mechanism is void and cannot be enforced in India. This Court has, therefore, no hesitation in holding that the present suit before this Court for enforcement of rights of the plaintiff under the contract is perfectly maintainable and is not hit by Clause 13 of the contract. The application has, therefore, no merits and is accordingly dismissed.