

(1999) 06 CAL CK 0022**Calcutta High Court****Case No:** Suit No. 578 of 1980

Bengal Bearing Private Ltd.

APPELLANT

Vs

Hindustan Machine Tools Ltd.
and Others

RESPONDENT

Date of Decision: June 25, 1999**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 21
- Contract Act, 1872 - Section 23, 28

Citation: 105 CWN 931**Hon'ble Judges:** Ronojit Kumar Mitra, J**Bench:** Single Bench**Advocate:** S.P. Sarkar, for the Appellant; T. Ghosh, S. Sen and D. Basak, for the Respondent

Judgement

Ronojit Kumar Mitra, J.

In this application the petitioner prayed for an order take the plaint off the file on the ground that the respondent had instituted this suit in this Court, though there was an agreement between the parties to the effect that in the event the parties should resort to litigation, the Court in Secunderabad alone would have jurisdiction to entertain and try the disputes. The suit had been filed in this Court on July 3, 1980. The petitioner who was impleaded as the defendant No.2 in the plaint had made this application on December 19, 1980. The application had been made returnable on June 5, 1981. Thereafter the petitioner had filed its written statement. By an order dated June 10, 1981 this Court had recorded that "this application should be heard first and thereafter if necessary the suit will be heard." The facts of the case in short were that the respondent no. 1 had manufactured a certain machine for the plaintiff and according to instructions of the plaintiff the respondent no. 1 had consigned the machine to the petitioner in Ajmer, to carry the machine by road from Ajmer in Rajasthan to Tiljala in West Bengal. It was alleged by the plaintiff that the machine had been carried by the petitioner's carrier, the

machine was handed over the plaintiff. In those circumstances, the plaintiff instituted this suit in this court on July 3, 1980 and claimed damages from the petitioner. The respondent no. 1 which was the manufacturer of the machine had been impleaded as the defendant no. 1 in the plaint. The petitioner which was the carrier had been impleaded in the plaint as the defendant no. 2. The plaintiff did not claim any relief against the defendant no. 1 in the suit. The machine had been insured by the plaintiff for safe carriage. The insurance company the respondent no. 3 had been impleaded in the plaint as the defendant no. 3 and made jointly and severally liable to pay the alleged damages suffered by the plaintiff.

2. It was submitted on behalf of the petitioner that in terms of Clause 5 of the "General Terms and Conditions of Carriers", the plaintiff could not institute this suit in any other Court but in the "Court in Secundrabad." It was argued by advocate for the petitioner, that the forum-clause contained at the back of the "Consignment Note" in clear and unambiguous terms, formed part of the "Terms and Conditions of Carriage". According to him, upon agreement for carriage being completed and before the process of carriage commenced, three copies of the "Consignment Note" was prepared according to practice in the trade, and one copy was made over to the lorry-driver, one copy was kept in the records of the carrier and one copy was forwarded to the consignor. He contended that the plaintiff was fully aware of and had agreed to the terms and conditions and that there could be no question of the plaintiff being unaware until the machine had reached its destination. He argued, that admittedly the suit could have been filed in Ajmer, Calcutta or Secundrabad, but in view of the agreement between the parties the suit could not be instituted in any other Court but in the Court in Secundrabad. According to him, the Courts have allowed parties the choice of forum by agreement in order to suit the convenience of the defendants. In support of his submissions he cited and relied on the decisions reported in Globe Transport Corporation Vs. Triveni Engineering Works and Another; (1970) AIR Cal. 342; (1989) AIR A.P. 206; (1971) AIR SC 740; (1989) AIR SC 1239; (1984) AIR CAL. 35.

3. Agreement between the parties had been completed and the "Consignment Note" was a subsequent document and not a contractual document, contending advocate for the plaintiff. The terms and conditions had been included in the document without any reference to the plaintiff, he submitted, and that the plaintiff had no opportunity to concur and was quite unaware, in that respect until the machine had arrived, in Tiljala in West Bengal and the plaintiff was shown the "Consignment Note" for the first time. According to him the liability of the defendants Nos. 2 and 3 were joint and several. He argued, that in terms of Section 21 of the CPC objection as regards the place of suing ought to be made at the earliest opportunity, but even though the petitioner had entered appearance as early as August 1, 1980. This application had not been moved until December 19, 1980. He submitted that all papers, documents and witnesses were in Calcutta and that it would be harassing and great hardship for the plaintiff if the suit was to be

prosecuted in Secundrabad. He argued that today it was a settled principle of law that a stipulation in the agreement between the parties as to the choice of forum could be ignored by the excluded court, having jurisdiction, if in its view it appeared to be oppressive on the plaintiff, with regard to the surrounding circumstances including the quantum of the claim. He submitted that the stipulation in any case was not applicable to the respondent No. 3 and since the respondents Nos. 2 and 3 were jointly and severally liable, the stipulation of choice of forum if allowed to be valid in the circumstances would be harsh and onerous on the respondent No. 3 and in that view the suit had been wrongly filed in this court. In support of his submissions he cited and relied on the decisions reported in A. (1985) ALL. 136, A. (1991) KER. 41. A. (1980) MAD. 28.

4. The question as to whether parties could lawfully by agreement choose a court, in case of alternative courts, all having jurisdiction, and debar or preclude themselves from going to any other court, had been decided as early as 1970 by a Bench decision of this court reported in A. (1970) CAL. 342. It had been held by their Lordships also that "the choice of forum in case of alternative forums, lies with the plaintiff and therefore it would be proper that the suit should be instituted in the court of the plaintiff's choice irrespective of the views of one of the defendants to whom the stipulation may not apply. In the case before this court however, the respondent No. 3 supported the petitioner. The Supreme Court in its decision reported in A. (1989) S.C. 1939 on the same issue deliberated that, where there were more than one court which could entertain a suit if the parties had agreed to vest jurisdiction in one such court, the agreement would be valid if the contract was clear, unambiguous, explicit and not vague and it would not be hit by Sections 23 or 28 of the Contract Act, nor would it be understood as parties contracting against the statute. The Bench decision of the Allahabad High Court reported in A. (1985) ALL, 136 was of the view that the "terms and conditions must be specifically and categorically brought to the notice of the consignor before he agrees to book the consignment." According to the Hon'ble Judges, "the contract is initially arrived at orally in pursuance of which the consignment note is issued," and that therefore the consignor could not be said to have agreed to the terms, more so, as the "Consignment Note" was not signed by the consignor. Kerala High Court in its decision reported in A. (1991) KER 41, was of the view that Since the "Consignment Note" had not been signed by the consignor, the terms and conditions contained in it were not binding on the parties. Madras High Court in its decision reported in A. (1980) MAD. 28, was of the view that unless the aggrieved party was able to show that entertaining the suit by a court other than the court specified in the agreement between the parties had caused failure of justice, the High Court would not interfere. The Hon'ble Judge in his decision had considered the stake involved, the distance between the two courts and that the claim in the suit was small, and was of the view that if the agreement between the parties was to be upheld it would amount to failure of justice.

5. Lawful and valid contracts have always been upheld by the law-courts. Legal Jurisprudence was averse to, and the law courts would never, interfere on what the parties had agreed provided there was nothing illegal or contrary to the interest of justice. A choice of forum to institute legal proceedings agreed to by parties, among several other forums where the proceedings could have been commenced in accordance with law, I should think was surely a fundamental right of a litigant other than the contractual right which the litigant enjoyed under the law.

6. The contention by advocate for the plaintiff, that the "Consignment Note" was not a contractual document was not sustainable, because the agreement which had been concluded between the parties relating to the carriage of the machine had merely been reduced into writing in the "Consignment Note", and a copy had been made over to the plaintiff. The document of the insurance policy, which had been issued by the defendant No. 3 in favour of the plaintiff with regard to the carriage of the machine, contained detailed particulars of the "Consignment Note". Such particulars were admittedly furnished by the plaintiff. The plaintiff could furnish such particulars because the plaintiff had full knowledge of the "Consignment Note" at that time. That there was an agreement between the parties for the carriage of the machine was not denied by the respondent. In other words even if, for the sake of argument, the contention of the plaintiff was accepted that the "Consignment Note" was not signed by the plaintiff and therefore it was not a contractual document, there could be little doubt from the course of conduct between the parties subsequent to the agreement that at the time of entering into the agreement which was admittedly oral, the plaintiff was made fully aware of the terms and conditions contained in the "Consignment Note" and that without being furnished with the "Consignment Note" it could not have been possible for the plaintiff to learn of the particulars and the plaintiff could not have taken out the insurance policy.

7. In the circumstances it was obvious that unless the plaintiff had agreed to the terms and conditions of the Consignment Note, it neither could nor would have furnished the particulars contained in it to the respondent no. 3 for the purpose of taking out the insurance policy for the safe carriage of the machine. Indeed the "Consignment Note" had not been signed by the plaintiff and the question would probably find place at the time of the hearing of the suit. At this stage I am *prima facie* satisfied that the plaintiff was quite aware of the terms and conditions contained in the "Consignment Note" and as was the practice in the trade the plaintiff had entered into the oral agreement on the basis of such terms and conditions.

8. The registered offices of both the respondents Nos. 1 and 2 were in Bangalore and Secundrabad respectively. The two cities were closer to each other than Calcutta. The machine had been carried from Ajmer which was perhaps closer to Secundrabad than Calcutta. The respondent no. 3 supported the petitioner in this

application. Finally, choice of forum in these circumstances was to suit the convenience of the respondent. There was nothing which could be said would be oppressive on the plaintiff if the prayer of the petitioner was allowed for after all the plaintiff of its own volition had entered into an agreement with the petitioner whose registered office was in Secundrabad. Balance of convenience sought to have been claimed by the plaintiff I am afraid does not favour its cause. The contention by counsel for the plaintiff that the suit had been pending in this court for a very long time and was now ready for hearing was not however supported with any material to substantiate that the plaintiff had been diligent and taken steps to have the suit heard. The suit had been allowed to remain with this application pending in this court for the last nineteen years or so.

9. For those reasons, this application is disposed of with the direction that the plaint be taken off the file. The department shall upon request by the plaintiff return the plaint to the plaintiff and/or its advocate on record duly authorised in that behalf and the plaintiff shall be at liberty to file the same plaint before the court in Secundrabad if the plaintiff was so advised. Costs of this applications shall be costs in the cause.

10. Parties and the department shall act on a xerox of the signed copy of the signed copy of the minutes of this dictated order and judgement. Prayer was made for stay of the order. Such prayer was rejected.