

CASE NO.:  
Appeal (civil) 7244 of 1999

PETITIONER:  
Man Roland Druckmaschinen AG

RESPONDENT:  
Multicolour Offset Ltd. & Anr.

DATE OF JUDGMENT: 19/04/2004

BENCH:  
Ruma Pal & P.Venkatarama Reddi.

JUDGMENT:  
J U D G M E N T

RUMA PAL, J.

The appellant has challenged the order of the Commission set up under the Monopolies and Restrictive Trade Practices Act, 1969 (referred to as the Act) by which the Commission held it had the jurisdiction to entertain the respondent's claim for compensation under Section 12 B of the Act against the appellant and the respondent No.2.

The appellant carries on its business of manufacturing printing machines in Germany. It was incorporated under German Law and has its registered office at Offenbach, Main, Germany. The respondent No. 1 and the respondent No.2 have their registered offices at Mumbai. Pursuant to the agreement a printing machine was sold to the respondent No.1 by the appellant. The machine was shipped by the appellant from Germany to Mumbai on 16th June 1994. It was off-loaded at Mumbai on 5th August 1994 and cleared by the respondent No.1 from the customs warehouse on 22nd April 1997.

In November, 1997 the respondent No. 1 filed two applications before the Commission viz. Unfair Trade Practices Enquiry (UTPE) No. 388 of 1997 in effect complaining of unfair trade practices by the appellant and the respondent No.2 relating to the supply of the printing machine. Compensation Application (CA) No. 383 of 1997 was filed claiming over Rs. 13 crores towards the cost of the machine, customs duty paid by respondent No.1 on the machine interest on the cost and customs duty and damages. However, UTPE No. 388 of 1997 was withdrawn in August 1999.

The appellant had raised objections to the Commission's jurisdiction to entertain the respondent's application for compensation. The first ground was that the parties had agreed that the applicable law in the event of any dispute would be German Law. It was also agreed that disputes between the parties should be resolved either by proceedings brought in German Courts or alternatively through arbitration conducted in accordance with the International Chamber of Commerce Rules. The second ground on which the jurisdiction of the Commission was questioned by the appellant was that the appellant neither provided any service nor carried on any trade or trade practice in India for the purpose of the Act and even the machine in question had been sold to the respondent No. 1 outside India.

The Commission rejected both the submissions of the appellant. As far as the first ground was concerned, it was

held that the clause regarding the choice of forum was contrary to Section 28 and 23 of the Contract Act and was void.

The memorandum of understanding executed between the appellant and the respondent NO.1 on 21st December 1993 contained a clause to the following effect:

"13. Arbitration:

As claims and disputes arising out of the Contract shall be settled amicably between the parties as far as possible. But in case of failure all disputes arising in connection with this Contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules. The venue of such Arbitration shall be Paris (France) and the proceedings shall be conducted in English language."

Pursuant to this memorandum, a formal offer was sent by the appellant to respondent No. 1 on 24th January 1994 to sell the printing machine. This was accepted by the respondent No. 1's letter dated 2nd February 1994 to the appellant. On the same date, the appellant acknowledged receipt of the order and the fact of sale of the machine subject to, inter-alia, the following condition:

"XVI. Jurisdiction and Arbitration

1. The place of jurisdiction for all disputes arising out of the contract including actions on negotiable legal instruments and documents shall be the place of the Works supplying the goods concerned i.e. Augsburg or Offenbach MR may also bring an action at the place of the Purchaser's registered office.

2. In the event arbitration proceedings being agreed with a Purchaser having his registered office outside the Federal Republic of Germany any disputes arising out of the contract or in respect of its validity or the validity of the arbitration agreement shall be finally settled to the exclusion of legal proceedings under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris by a court of arbitration composed of three arbitrators appointed under such Rules. As long as no recourse to arbitration has been made the contracting parties shall be free to bring an action at the competent court of law at the place of the defendant's party's registered office."

Undoubtedly when the parties have agreed on a particular forum, the Courts will enforce such agreement. This is not because of a lack or ouster of its own jurisdiction by reason of consensual conferment of jurisdiction on another

Court, but because the Court will not be party to a breach of an agreement. Such an agreement is not contrary to public policy nor does it contravene Section 28 or Section 23 of the Contract Act. This has been held in Hakkam Singh V. M/s Gammon (India) Ltd. AIR 1971 SC 740; A.B.C Laminart Pvt. Ltd. V. A.P. Agencies 1989 (2) SCC 163 and Modi Entertainment Network V. W.S.G. Cricket Pte. Ltd. 2003 (4) SCC 341, 351. The decision of the Delhi High Court in Rajendra Sethia V. Punjab National Bank AIR 1991 Del. 285 relied on by the Commission which holds to the contrary is, therefore, clearly erroneous.

But although the Commission rejected the first submission of the appellant on an untenable ground, nevertheless the conclusion arrived at was correct. The principle which we have outlined in the previous paragraph is applicable to a situation where the Court is called upon to enforce rights arising under a contract which contains such a jurisdictional clause. The principle does not apply to proceedings under the Act which provides for statutory remedies in respect of statutorily defined offences. The remedies available under the Act are additional to the usual remedies available under the Contract Act to the parties. This is clear inter alia from Sections 4(1) and 12 B (1) of the Act, both of which indicate that the proceedings under the Act are additional to, and therefore distinct from, proceedings before a Civil Court. The powers invoked by the complainant under the Act are not exercisable otherwise than under the Act and it is certainly not exercisable by Courts in Germany. The jurisdictional clause in the contract would therefore not apply to proceedings before the Commission. This is so even assuming that the Commission is a "Court" as contended by the appellant on the basis of Canara Bank V. Nuclear Power Corporation of India Ltd. 1995 Supp (3) SCC 81 and P. Sarathy V. State Bank of India 2000 (5) SCC 355.

The question then arises whether the Commission can at all exercise jurisdiction in respect of the complaint of unfair trade practice made by the respondent No.1 before it? An 'unfair trade practice' has been defined in Section 36A as meaning "a trade practice which, for the purpose of promoting the sale, use or supply of any goods or the provision of any services, adopts any unfair method or unfair or deceptive practice" including any of the practice specified in that section. The respondent has in its complaint relied on the following provisions in Section 36B:.

(1) the practice of making any statement, whether orally or in writing or by visible representation which, -

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or mode;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, re-conditioned or old goods as new goods;

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(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that it is not based on an adequate proper test thereof:

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be \026

(I) a warranty or guarantee of a product or of any goods or services; or

(II) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result.

If such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;"

In the case of an unfair trade practice as invoked by the respondent No. 1 the object of inquiry is a statement which is a false representation of the kind specified in clauses (i),(ii) or (iii) of sub-section (1) of Section 36A or is an advertisement of the kind specified in clauses (vii) or (viii) thereof. The statement or advertisement is the trade practice. The further requirement under the section is that the trade practice complained of must be for the purpose of promoting the sale, use or supply of goods or for promoting the provision of any service. The sale, use or supply need not, for the purposes of the section, actually have taken place although it may be relied upon by the complainant to establish the falsity of the representation. The unfair trade practices alleged to have been committed by the appellant, according to the respondent No.1, were as follows:-

(a) Falsely representing that the machine in question was of a particular standard and model whereas in fact the machine supplied was a machine which was obsolete and out of production.

(b) Representing that the old goods were new and passing off the same as such to the respondent No.1.

(c) Giving guarantees and warranty in the purchase agreement regarding the performance, installation and commissioning of the machine but ensuring that the said clauses could not be invoked

(d) inspite of being obliged under the contract to repair the goods insists on the payment of an additional sum of Two lakhs as initial payment to the second respondent for carrying out repairs.

(e) and inspite of making the said payment not carrying out of any repairs.

The appellant's contention is that if the party alleged to have indulged in unfair trade practice does not reside in India the practices complained of must take place within India as the Act has no extra-territorial operation. As a proposition of law this is correct and follows from section 14 of the Act which deals with "Orders where party concerned does not carry on business in India" and says:

"Where any practice substantially falls within monopolistic, restrictive or unfair, trade practice, relating to the production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act with respect to that part of the practices which is carried on in India."

The subject matter of complaint of an unfair trade practice must be such that relief under Section 36D can be granted in respect of it. As the Commission can grant relief only in respect of practices within India, it necessarily follows that the practice complained of must have taken place in this country. This has also been held in *Haridas Exports vs. All India Float Glass Manufacturers Association & Others*: 2002 (6) SCC 600.

The appellant has relied on *Haridas Exports* also to contend that if the sale or supply in respect of which complaint is made had taken place outside India then the Commission would not have the jurisdiction to proceed with the complaint. In that case the complaint alleged was a restrictive trade practice and related to the sale and import of goods (float glass) into India at predatory prices. It was found that the sale by the foreign manufacturers of the goods had taken place outside India. It was in that context that the Court held:

"If the float glass was ready and available, then being ascertained goods the sale would be regarded as having taken place where the goods existed at the time of sale i.e. in Indonesia. If the glass had to be manufactured and was not readily identifiable, then the sale would take place outside India when the goods are appropriated to the contract by the foreign exporter. Here the appropriation would take place in Indonesia when the glass is earmarked and exported to India. In either case, the MRTP Commission would have no jurisdiction to stop that sale. If the said sale cannot be stopped and the import policy permits the Indian exporter to import on payment of duty then we fail to see what jurisdiction the MRTP Commission can possibly have till a restrictive trade practice takes place after the float glass is imported into India."

In the present case, the respondent No.1 has alleged that the appellant and the respondent No.2 have made statements which were false because the appellant had not only sold, but also the respondent No.2 had failed to repair, the machine which was not in keeping with such statements. We are not required to decide on the correctness of these allegations in this appeal.

An objection to jurisdiction can either be taken by way of

demurrer or raised as an issue in the proceeding. In the first case the objection will have to be decided on the basis of the allegations contained in the complaint, taking the statements contained therein to be correct. Otherwise an objection to the jurisdiction of a Court may be raised as a preliminary issue. In such event, the issue would have to be adjudicated upon after giving the parties an opportunity to lead evidence. The Commission proceeded on the basis that both the objections raised by the appellant, were by way of demurrer.

The appellant's first objection to the Commission's jurisdiction based on the clause in the agreement was in fact in the nature of a demurrer and could be decided as such. But in our opinion the second objection to the jurisdiction of the Commission was not. It would have to be determined on evidence.

The Commission held that it had the jurisdiction to entertain the complaint because (1) the appellant carried on its trade practice of supply of the printing machinery to the respondent No.1 in India through the respondent No.2 who "admittedly" was its Indian Agent (2) the contract between the appellant and the respondent No.1 was required to be performed in India and (3) the supply of the printing machinery pursuant to the sale transaction was within the definition of "trade practice" in Section 2(u) of the Act and the effect of such trade practice "would certainly be on the Indian soil as the printing machinery was to be supplied in India". The issue of passing of title was not gone into by the Commission, because the Commission felt it was not necessary to be considered at that stage.

The Commission erred in holding that the respondent No. 2 was 'admittedly' the Indian Agent of the appellant in view of the fact that the assertion of the respondent No.1 to that effect has been specifically controverted in the counter affidavit of the appellant. But then it certainly is not an issue which could be determined without taking evidence. The Commission would have to enquire into the question whether the respondent No.2 was in fact involved in the capacity of the appellant's agent as alleged by the respondent No.1. If it is so found the appellant may be said to carry on business in India thus giving the Commission the necessary jurisdiction to determine the respondent No. 1's complaint.

Even if it be found that the respondent No.2 was not the agent of the respondent No.1, the question would still remain to be determined on evidence as to whether the alleged representations were made and if so, whether the representations were falsified by the actions of the appellant. In this case there is also an allegation by the respondent No.1 relating to the carrying out of repairs to the machine. The appellant says that there was no obligation under the contract to repair the goods because the warranty period in the contract had expired long before the goods were cleared by the respondent No.1 and also because the goods had admittedly been damaged in the Customs Warehouse by fire. These are all questions of fact which require adjudication. Having regard to the nature of the allegations noted in clauses (a) and (b) of the complaint as noted earlier, the Commission's refusal to consider the question of passing of title in the machine as unnecessary to the question of jurisdiction was, particularly in the light of this Court's decision in Haridas Exports (supra), erroneous. According to the appellant, the sale was completed in Germany and the appellant was required to deliver the machine at Bombay Port C.I.F. It is contended that the property in the machine had passed from the appellant to the respondent No.1 before the goods were imported by the respondent No.1, It is not necessary to consider these



in India.

We therefore, dispose of the appeal by directing the Commission to deal with the second aspect of the preliminary objection on evidence which may be adduced by either party and in the light of the legal issues determined by us. It is clarified that in the event the Commission finds on the evidence that the appellant does not carry on business in India through the respondent No.2 and that the alleged unfair trade practice did not take place in India, the Commission will dismiss the respondent No.1's complaint without deciding the matter on merits. The appeal is accordingly disposed of without any order as to costs.

JUDIS