

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 9th December, 2009

Date of Order: January 19, 2010

CS(OS) No. 2335/2009

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19.01.2010

M/s JSL Limited

... Plaintiff

Through: Mr. A.K.Ganguli, Sr. Advocate with
Mr. Rishi Maheshwari, Ms. Shally B. Maheshwari,
Ms. Megha Mukherjee & Ms. Priyanka, Advocates

Versus

Xstrata Coal Queensland Pty. Ltd.

... Defendant

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

ORDER

This suit has been filed by the plaintiff after declaration and permanent injunction with following prayers:

- (a) declare that Clause 12 of the contract dated 6th June, 2008 is invalid as it was vitiated by fraud and misrepresentation of the fact by the defendant that consequently is not binding on the plaintiff;
- (b) declare that as a consequence, LCIA does not have jurisdiction to deal with any dispute or difference whatsoever arising out of or in relation to the contract dated 6th June, 2008 between the parties;
- (c) declare that as a consequence, the courts in England do not have any jurisdiction to deal with an/or adjudicate any dispute or difference whatsoever arising out of or in relation to the contract dated 6th June, 2008 between the parties;

- (d) declare that as a consequence, the contract dated 6th June, 2008 cannot be interpreted, construed or governed by the laws of England;
- (e) declare that as a consequence, the nomination and appointment of the sole arbitrator by LCIA is also invalid;
- (f) declare that as a consequence, any action taken by the sole arbitrator appointed by LCIA is also invalid;
- (g) declare that there is no concluded contract between the parties in so far as the balance quantity of 50,000 MT hard coking coal is concerned as the events which were conditions precedent did not occur;
- (h) pass a permanent injunction restraining the Defendant from initiating or taking any action in terms of the contract dated 6th June, 2008;
- (i) pass a decree of permanent injunction restraining the Defendant and its agents, from continuing with or taking any further action to the arbitration initiated by the Defendant under the LCIA

2. After perusal of the agreement relied upon by the plaintiff this Court had doubt about the maintainability of the suit in India and heard arguments on the issues of jurisdiction and maintainability.

3. It is submitted by the Counsel for the petitioner that Article 12 of the contract entered into between the parties on 6th June, 2008 (date at the end of the agreement is 8.7.2008) was vitiated by fraud since the respondent had not disclosed about its interest in England. England was chosen as a neutral country by both the parties on the assurance given by the respondent that it had no business interest in England. However, later on it was revealed that respondent had business interests in England and therefore Article 12 of the Agreement was vitiated by fraud and this Court will have jurisdiction.

4. Article 12 of the Agreement reads as under:

ARTICLE 12

DISPUTE AND ARBITRATION

12.1 This agreement shall be interpreted, construed and governed by the Laws of England. Any suit or proceedings arising out of this Agreement shall be instituted in law courts in England.

12.2 Except as otherwise provided in this Agreement, if any dispute or difference of any kind whatsoever (a "Dispute") shall arise between Buyer and Seller in connection with or arising out of or relating to this agreement or the breach, termination or validity hereof Buyer and Seller shall attempt in good faith for a period of thirty (30) days after the receipt by one Party of a notice from the either Party of the existence of the Dispute, to settle such Dispute in the first instance by mutual discussions between the Parties.

12.3 If the Dispute cannot be settled within thirty (30) days by mutual discussion the Dispute shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration which Rules are deemed to be incorporated by reference to this article. The number of arbitrator shall be one to be mutually selected by both parties. The seat or legal place of arbitration shall be London. The is to be used in the arbitration shall be English.

12.4 Continuation of Obligations. During the pendency of any arbitration the Parties shall continue to perform their respective obligations hereunder.

5. The above Article makes it abundantly clear that only the Courts in England would have jurisdiction and Laws of England would apply to the contract and any suit or proceedings arising out of the agreement are to be instituted in the Courts in England. The plea taken by the plaintiff about the assurance given by respondent in respect of neutral venue is not tenable. One, the plaintiff has failed to place on record any written assurance which was given by the defendant to the plaintiff regarding England being a neutral country and second because of Article 19 of the agreement which reads as under:

ARTICLE 19

ENTIRE AGREEMENT

19.01 This Agreement contains the entire Agreement and understanding between the Parties as to the subject matter of the

Agreement and merges and supersedes all prior Agreements, commitments, representations, writing and discussions between them. Neither of the Parties will be bound by any other prior obligations, conditions, warranties, of representations with respect to the subject matter of this Agreement.

6. The plaintiff with open eyes signed this agreement which contained the above Articles 12&19 and Article 19 makes it clear that all previous understandings between the parties as to the subject matter of agreement shall have no effect and the agreement contained the entire understanding between the parties. Thus, there was no scope of playing fraud upon the plaintiff regarding Article 12. The suit is not maintainable in this Court and is liable to be dismissed and is hereby dismissed.

January 19, 2010
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SHIV NARAYAN DHINGRA, J.