

\ñITEM NO.1A
[For judgment]

COURT NO.4

SECTION XVI

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS.5430-5431 OF 2002

RAJASTHAN STATE ELECTRICITY BOARD

Appellant (s)

VERSUS

M/S. UNIVERSAL PETRO CHEMICALS LTD.

Respondent(s)

Date: 12/01/2009 These Appeals were called on for JUDGMENT today.

For Appellant(s) Mr. Sushil Kumar Jain, Adv.

For Respondent(s) Mr. Parijat Sinha, Adv.

Hon'ble Dr. Justice Mukundakam Sharma pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Tarun Chatterjee and His Lordship.

In view of the findings and conclusions recorded in the judgment holding that it is only the Court at Jaipur which will have jurisdiction to try and decide the arbitration proceedings between the parties and also entertain a petition of the aforesaid nature i.e. Section 20 of the Act, the judgment and order of the Division Bench of the Calcutta High Court is set aside and quashed. Both the appeals are allowed to the extent indicated in the signed reportable judgment.

The Registry of this Court is directed to send a copy of the order to the Registrar, Calcutta High Court and also to District Judge, Jaipur for necessary action.

(Subhash Chander)
A.R.-cum-P.S.

(Pushap Lata Bhardwaj)
Court Master

[Signed reportable Judgment is placed on the file]

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5430-5431 OF 2002

Rajasthan State Electricity Board

...Appellant

Versus

M/s. Universal Petrol Chemicals Ltd.

...Respondent

JUDGMENT

Dr. Mukundakam Sharma, J.

1. Being aggrieved by the common judgment and order dated 17.04.2001 passed by the

Division Bench of the High Court of Calcutta in Appeal Number 462 and 463 of 1992, allowing the appeals filed by the respondent against the judgment of a learned Single Judge, these civil appeals have been preferred where special leave was granted. Since both these appeals involve similar questions of law and facts and arise out of the same impugned order, we propose to dispose of both these appeals by this common judgment and order.

2. The appellant Board which is having its base and operation at Jaipur placed an order for supply of 50 kiloliter of transformer oil with the respondent Company which is having its registered office and manufacturing unit at Calcutta vide purchase order No. RSEB/SE/Proc.I/TN-1261/U/Petrochemical/937 dated 23.9.1985 for an amount of Rs. 6,09,144/-. In terms of clause 5 of the said purchase order, the respondent was required to deposit security in the form of bank guarantee for an amount equivalent to 2 per cent of the contract value. In addition, the respondent was also required to furnish a performance guarantee equivalent to 5 per cent of the contract value for satisfactory performance and due execution of the said contract. Subsequent to the aforesaid purchase order, an agreement was also entered into between the parties on 16.10.1985 at Jaipur.
3. Subsequently the appellant Board placed another purchase order vide No. RSEB/SE/Proc.I/TN-1312/202 dated 02.12.1987 for supply of 150 kiloliter of transformer oil for an amount of Rs. 19,50,000/-. Similar to the previous purchase order, in the present purchase order also the respondent was required to furnish the bank guarantee equivalent to 2 per cent of the contract value towards security deposit and equivalent to 5 per cent of the contract value towards performance guarantee. Accordingly an agreement was also entered into between the parties on 16.12.1987 at Jaipur.
4. In terms of the abovesaid two purchase orders and agreements thereon the respondent was required to furnish bank guarantee to the tune of Rs. 1,79,200/-. In compliance to the said condition with respect to the bank guarantee the respondent furnished four bank guarantees for amounts of Rs. 12200/-, Rs. 30500/-, Rs. 39000/- and Rs. 97500/-. These guarantees were executed by the Allahabad Bank at Jaipur Branch on behalf of their Main Branch at Calcutta.
5. Before we proceed further it would be appropriate for us to extract herein the relevant clauses with respect to adjudication of the disputes, if any, which were

common in both the agreements. Clause 30 of the General Conditions of the Contract inter alia stipulates as under:-

"30.....The contract shall for all purposes be construed according to the laws of India and subject to jurisdiction of only at Jaipur in Rajasthan Courts only....."

Clause 31 of the General Conditions of the Contract, which is an arbitration clause, reads as under:-

"31. ARBITRATION

- (a) If at any time any question, dispute or difference whatsoever which may arise between the Purchaser and the Supplier upon or in relation to Contract, either party may forthwith to the other a notice in writing of the existence of such question(s)/dispute(s) differences and the same shall be referred to the Chairman, RSEB, Jaipur or any person appointed by him for the purpose (herein referred to as the 'Arbitrator'). Such reference shall be deemed to be a submission to the arbitration within the meaning of the Indian Arbitration Act, 1940 and the statutory modifications made thereof.
- (b) The award of the Arbitrator shall be final and binding on both the parties.
- (c) Upon every or any such reference, the cost incidental to such reference and an award shall be in the discretion of the Arbitrator who may determine the amount thereof and direct the same to be borne and paid.
- (d) Work under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable by the Purchaser shall be withheld on account of such proceedings."

In the second purchase order which is dated 02.12.1987, in addition to the above mentioned clauses, a clause was also incorporated which is with respect to the jurisdiction of the Court in case of disputes:

"DISPUTES

All disputes, differences or questions whatever which may arise between the Purchaser and the Supplier upon or in relation with or in connection with the contract shall be deemed to have arisen at Jaipur (Rajasthan) and no Court other than the Court at Jaipur (Rajasthan) shall have jurisdiction to entertain or try the same."

A clause, namely, Clause 7 was also incorporated in the bank guarantee which is with respect to the jurisdiction of Courts for adjudication of disputes arising under the bank guarantee. The said clause reads as under:-

"All disputes arising in the said Bank Guarantee between the Bank and the Board or between the supplier or the Board pertaining to this guarantee shall be subject to the courts only at Jaipur in Rajasthan."

6. Somehow the disputes arose between the parties. The appellant alleged that the respondent has failed to perform his part of the contract inasmuch as the respondent has supplied defective transformer oil and as such on receipt of such supply, the same was rejected by the Board requiring the respondent to replace the same. Thereafter the appellant took steps for invocation of the bank guarantees in view of the fact that the respondent has failed to adhere to the aforesaid requirement and also neglected to replace the defective transformer oil.
7. The respondent being aggrieved by the actions taken by the appellant filed a petition under Section 20 of The Arbitration Act, 1940 (for short the "Act") in the nature of a suit in the High Court at Calcutta being Special Suit No. 70 of 1990. In the said suit, the respondent also moved an application under Section 41 of the Act seeking interim reliefs. The appellant herein contested the aforesaid suit. By an Order dated 06.03.1991, the learned Single Judge of the High Court dismissed the petition and also vacated the interim order which was passed earlier.
8. On appeal being filed by the respondent, the said order of 06.03.1991 passed by the learned Single Judge was set aside and the matter was remanded back for fresh consideration.
9. Consequent upon the aforesaid order of remand, the learned Single Judge again heard the suit and passed a similar order dismissing the petition filed by the appellant under Section 20 of the Act. Being aggrieved by the said final order passed by the learned Single Judge, two appeals were filed before the Division Bench which were heard together and the same were allowed by the Division Bench under the impugned order dated 17.04.2001.
10. The said impugned judgment and order is under challenge in both the appeals on which we heard the learned counsel appearing for the parties who had taken us through the relevant documents. By the impugned order, the Division Bench of the Calcutta High Court held that the forum selection clause as appearing in the agreements between the parties would not operate in view of the specific prohibition under Section 31(4) of the Act. It was also held that since the respondent had made an application before the Calcutta High Court having competent jurisdiction to try

and decide the proceedings, the said Calcutta Court would be entitled to exercise jurisdiction and that all subsequent applications would be made to that Court only as first application was made in that Court by the respondent. Consequently, the appeals were allowed and the judgment of the learned Single Judge was set aside. The matter was directed to be listed before the Single Judge for passing consequential orders in terms of the directions issued by the Division Bench.

11. Contentions that were raised on behalf of the appellant in the present appeals before us, revolves around the issue of territorial jurisdiction of the Calcutta High Court in entertaining the said petition under Section 20 of the Act.

12. According to the appellant, the Calcutta High Court would have no jurisdiction to entertain and decide the aforesaid petition under Section 20 of the Act and that it is only the Court at Jaipur which would have territorial jurisdiction to entertain and decide any such petition filed by any of the party, in view of the specific intention of the parties as disclosed from the stipulations in the purchase order and agreements entered into between the parties.

13. The learned counsel for the respondent, on the other hand submitted before us that the provision of Section 31 of the Act is clear and in terms thereof and in view of the specific prohibition therein any proceeding between the parties would have to be instituted within the jurisdiction of the Calcutta High Court and therefore the impugned judgment and order passed by the High Court of Calcutta is legal and valid.

14. In the light of the aforesaid submissions made by learned counsel for both the parties, we proceed to decide the issues as to whether or not the Calcutta High Court had territorial jurisdiction to entertain the petition filed by the respondent under Section 20 of the Act as also the application filed under Section 41 of the Act seeking interim orders and also as to whether it is the Jaipur Court only which will have territorial jurisdiction to entertain any such request. For proper appreciation of the points at issue, it would be appropriate to set out the abovementioned legislative provisions of the Act, which are as under:

20. Application to file in Court arbitration agreement. -(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any

of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

41. Procedure and powers of Court. - Subject to the provisions of this Act and of rules made there under-

(a) the provisions of - the Code of Civil Procedure, 1908, (5 of 1908.) shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

15. There is no dispute with regard to the fact that the parties entered into various agreements which are referred to above. The said agreements admittedly also contained forum selection clauses between the parties whereby and whereunder the parties agreed that the said contracts and agreements, in relation to any dispute or difference would be subject to the jurisdiction of courts at Jaipur in Rajasthan.

16. Therefore, the issues which we are required to address here is whether the ouster clause in the agreement between the parties will also be applicable in ascertaining the competent court for making an application for reference under section 20 of the Act. As per Section 41 (1) of the act the provisions of the Code of Civil Procedure, 1908, (for short "the Code") shall apply to all proceedings before the Court, and to all appeals, under the Act. Section 20 of the Code, which is with respect to the jurisdiction of courts for institution of suit, reads as under:

20. Other suits to be instituted where defendants reside or cause of action

arises.

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation.-A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

17. There are number of decisions of this Court wherein it was held that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise as between themselves, such agreement would be valid and binding. In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies* [(1989) 2 SCC 163], this Court stated thus;

"21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the 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. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

18. The said decision also referred to and relied upon an earlier decision of this Court in *Hakam Singh v. M/s. Gammon (India) Ltd.* [1971 (1) SCC 286]. The said decision was rendered in the light of facts of a similar contract where clause 12 of the tender provided for arbitration whereas clause 13 provided;

"Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this Contract shall be deemed to have been entered into by the parties concerned in the city of Bombay and the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereon."

The question which fell for consideration of this Court in the said case was

whether the Court at Bombay alone had jurisdiction over the dispute. In that context, it was held that the Code in its entirety applied to proceedings under the Arbitration Act by virtue of Section 41 of that Act and that the jurisdiction of the Court under the Act to entertain a proceeding for filing an Award was accordingly governed by the provisions of the Code. Reference was made to the provisions of Section 20 of the Code, with all the terms of Section 20(a) of the Code read with explanation thereto, the respondent Company which had its principal place of business at Bombay was liable to be sued at Bombay.

It was further held that where two or more courts have jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts was not contrary to public policy and that such an agreement did not contravene the provisions of Section 28 of the Contract Act.

19. Similar view was also reiterated in *Angile Insulations v. Davy Ashmore India Ltd. and Another* [(1995) 4 SCC 153].

20. In *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd.* [(2004) 4 SCC 671], it was held by this Court that where two or more courts have jurisdiction under the Code, it is permissible to have an agreement between the parties restricting the place of suing to any one of them and if such restriction is placed in the agreement, the same cannot be said to be contrary to public policy and does not contravene Section 28 of the Contract Act. It was however, made clear that such restriction cannot be made and the parties cannot by agreement confer jurisdiction on a court which otherwise it does not possess under the Code.

This Court also considered the scope of Section 20 of the Code in the said case and by referring to the said provision it was held that when ouster clause is clear, unambiguous and specific, accepted notions of contract would bind parties and unless absence of *ad idem* can be shown courts should avoid exercising jurisdiction. While arriving at the said finding this Court followed the ratio laid down in *A.B.C. Laminart (P) Ltd.* (*supra*).

21. The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to Arbitration Act is clear, unambiguous and explicit. The said position is binding on both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into

the aforesaid purchase order and agreements thereon which categorically provide that all disputes arising between the parties out of the agreements would be adjudicated upon and decided through the process of arbitration and that no court other than the court at Jaipur shall have jurisdiction to entertain or try the same. In both the agreements in clause 30 of General Conditions of the Contract it was specifically mentioned that the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction of only at Jaipur in Rajasthan Courts only and in addition in one of the purchase order the expression used was that the Court at Jaipur only would have jurisdiction to entertain or try the same.

22. In the light of the aforesaid facts of the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. There is indeed an ouster clause used in the aforesaid stipulations stating that the courts at Jaipur alone would have jurisdiction to try and decide the said proceedings which could be initiated for adjudication and deciding the disputes arising between the parties with or in relation to the aforesaid agreements through the process of arbitration. In other words, even though otherwise the Courts at Calcutta would have territorial jurisdiction to try and decide such disputes, but in view of the ouster clause it is only the courts at Jaipur which would have jurisdiction to entertain such proceeding.

23. The Division Bench of the Calcutta High Court was aware of the clauses and stipulations in the agreements and was also aware of the abovementioned decisions of this Court, but the Division Bench held that the said forum selection clause agreed to and entered into between the parties would not apply in view of the specific provision of Section 31(4) of the Act. The said provision as well as sub-Section (3) are extracted below:-

"31. Jurisdiction.

(1).....

(2).....

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court."

24. Having noticed the aforesaid provision of Section 31(4), the Division Bench held that since the aforesaid provision starts with a non-obstantive clause, the said provisions would only apply and would come into operation. The Division Bench finally held thus:

"The said argument cannot be sustained after a plain reading of Section 31(4) of the Act. It is clear from the language used therein that where in any application has been made in a court, competent to entertain, in that case that court alone shall have jurisdiction. The requirement is not that the application should be allowed. Since in the instant case admittedly an application under Section 20 has been made, which is an application in a reference, Calcutta High Court will have jurisdiction."

The said findings were rendered by the Division Bench upsetting the findings of the learned Single Judge who had held that the non-obstantive clause appearing in sub-Section (4) of Section 31 would not be attracted in the present case where the parties by an agreement had agreed to a particular forum having jurisdiction over the dispute between the parties for adjudication.

25. Section 20 of the Code will apply in respect of deciding the issue with regard to territorial jurisdiction of a court in respect of a matter relating to arbitration also, for

in *Hakam Singh* (supra), it was held that the jurisdiction of the court under the Act to entertain the proceeding for filing an Award was governed by the provisions of the Code. We also at this stage may appropriately refer to the definition of the word "Court" as appearing in Section 2(c) of the Act wherein the expression "Court" is defined to mean "a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit, but does not except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."

26. Sub-section (3) precedes sub-Section (4) of Section 31 of the Act. The said sub-

Section provides that all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the Award has been or may be filed and to no other court. Sub-Section (4) on the other hand states that where in any reference any application under the Arbitration Act has been made in a Court competent to entertain, then that Court alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising from that matter and arbitration proceedings shall be made in

that court and in no other court.

27. An analytical look at the provisions of sub-Sections (3) and (4) will make it explicitly clear that any application in any reference, meaning thereby even an application under Section 20 of the Act could or should be filed in a court competent to entertain such proceeding and having jurisdiction to decide the subject of the reference. Such jurisdiction would or could be restricted by the agreements entered into by and between the parties. The parties have clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements, and therefore, it is the Civil Court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the court which is competent to entertain such proceedings. The said court being competent to entertain such proceedings, the said Court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other court.

28. In our considered opinion, the learned Division Bench of the Calcutta High Court misread and misinterpreted the provisions of sub-Sections (3) and (4) of Section 31 of the Act and thereby arrived at a wrong finding to the effect that by virtue of the aforesaid provision of Section 31(4) the Calcutta High Court would have jurisdiction in the matter.

29. In view of the aforesaid findings and conclusions arrived at by us holding that it is only the Court at Jaipur which will have jurisdiction to try and decide the arbitration proceedings between the parties and also entertain a petition of the aforesaid nature i.e. Section 20 of the Act, we set aside and quash the judgment and order of the Division Bench of the Calcutta High Court. Both the appeals are allowed to the aforesaid extent. The Registry of the Calcutta High Court is directed to transfer the petition filed by the respondent under Section 20 of the Act alongwith all the records to the District Judge, Jaipur, as expeditiously as possible but not later than four weeks from the date of receipt of this order. The District Judge, Jaipur on receipt of the said petition alongwith the transmitted records shall allocate it to the competent and appropriate Court, which would thereafter issue Notice to both the parties. The concerned Court shall thereafter deal with the matter in accordance with law.

30. The registry of this Court is directed to send a copy of this order to the Registrar,
Calcutta High Court and also to District Judge, Jaipur for necessary action.

.J.

.....

(Tarun Chatterjee)

.....J.
(Dr. Mukundakam Sharma)

New Delhi,
January 12, 2009