(1972) 08 CAL CK 0001

Calcutta High Court

Case No: Appeal No. 307 of 1971

Indian Oil Corporation Ltd.	APPELLANT
Vs	
Stewarts and Lloyds of India Ltd.	RESPONDENT

Date of Decision: Aug. 9, 1972

Acts Referred:

- Arbitration Act, 1940 - Section 2, 20, 20, 20(1), 31
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 10
- Contract Act, 1872 - Section 28
- Specific Relief Act, 1963 - Section 20(4)

Citation: (1973) 2 ILR (Cal) 485

Hon'ble Judges: S.C. Ghose, J; A.N. Sen, J

Bench: Division Bench

Advocate: S. Roy Chowdhury, for the Appellant; S. Chatterjee, for the Respondent

Final Decision: Allowed

Judgement

S.C. Ghose, J.

This appeal by the Appellant, Indian Oil Corporation Ltd., seeks to set aside the judgment and order dated November 29, 1971, passed by the Court of the first instance directing the filing of the Arbitration Agreement contained in the contract between the parties and referring the disputes between the parties mentioned in the letter dated September 7, 1969, a copy whereof is exhibited as annex. D to the petition filed herein to Mr. Anil Chandra Ganguli, the Arbitrator appointed by the Court, upon an application made by the Respondent u/s 20 of the Indian Arbitration Act.

The facts, of the instant case resulting in the said order are set out hereunder.

2. On or about July 17, 1964, fee Respondent No. 2 herein, the Oil and Natural Gas Commission the predecessor-in-title of the Appellant and the Respondent Stewarts

and Lloyds of India Ltd., an existing company within the meaning of the Companies'' Act. 1956, executed a contract whereby and whereunder the Respondent Stewarts and Lloyds was appointed a contractor for execution of the work mentioned in the said contract in connection with the construction of the Gujarat Refinery. The total stipulated, value of the said contract was Rs. 1,27,11,000. The said contract between the parties contained an Arbitration Agreement to the following effect to wit:

Arbitration;

G.R.P. (i.e. Gujarat Refinery Project) and S. and L. agree, that the arbitration clause in the tender, document for the purposes of the present contract will be superseded by one given as under:

Except where otherwise provided in the contract any question, dispute or difference that shall arise between the engineer-in-charge on the one hand and the contractor on the other hand as to the construction, intent meaning or effect of the contract documents, designs, drawings, specifications, estimates or any one of them or as to any further drawings to be prepared or as to the application of schedule rates to the measurements taken, or as to the materials or the quality thereof or as to the workmanship employed or the execution, or failure to execute the same whether arising during the progress of the work or within 12 months of completion or abandonment thereof or as to any other matter or thing whether of the nature aforesaid or-otherwise howsoever arising out of or in any way relating to or connected with the contract, then every such question, dispute or difference (except-where otherwise herein expressly provided) shall be referred to arbitration for decision and in order to ensure, the work being proceeded with continuity, the contractor shall (in case of any such question, dispute or difference) act upon and give effect to the orders of the engineer-in-charge pending the decision of the arbitration being given and in any case act upon and give effect forthwith to any and every decision of the engineer-in-charge.
Arbitration proceedings will be initiated on receipt of written notice from the contractor addressed to the engineer-incharge communicating the existence of any such matter wherein he intends to go in for arbitration. The arbitration proceedings will be in accordance with the Indian Arbitration Act (1940) and any statutory modifications thereof. The venue of the arbitration shall be the place at which the contract is signed or such other place as the Arbitrator at his entire discretion may determine.

3. For the purpose of deciding the issue involved in the instant appeal it will be necessary for us to consider and construe another clause of the contract which is set out hereunder:

The contract shall be and deemed to be an Indian contract and shall be governed by and construed according to the laws in force in India from time to time and Indian Courts shall have jurisdiction to hear and determine all actions and proceedings

arising out of the contract and the contractor hereby submits to the jurisdiction of Courts situated at Baroda for the purpose of any such action and proceedings.

4. The Appellant, Indian Oil Corporation Ltd., in or about September 1964, took over from its predecessor-in-title Oil and Natural Gas Commission, the management, control and administration of the said Gujarat Refinery Project including the construction thereof. The rights and liabilities thereupon in the said contract of the said Oil and Natural Gas Commission devolved upon the Appellant who treated to be substituted in the place and stead of Oil and Natural Gas Commission in regard to the said contract between the parties.

5. The Respondent Stewarts and Lloyds of India Ltd. carried out various further works not mentioned in the said contract or document relating to the contract. On or about December 20, 1966, the Respondent Stewarts and Lloyds of India Ltd. submitted to the Appellants a claim for a total sum of Rs. 35,97,190-58. The said letter appears at p. 42 of the brief and is headed as ''Claim for ex gratia payment''. By its letter dated September 27, 1969, the Respondent Stewarts and Lloyds of India Ltd. withdrew the words ''ex gratia'' from the aforesaid letter dated December 20, 1966; on the ground that it was a concession made in the said letter and was made by an unfounded assurance of their claim. Items of claims made in the said letter of December 20, 1966, as well as in the said letter dated September 27, 1969, appearing at p. 16 of the paper-book are identical. By another letter of the same day, i.e. September 27, 1969, addressed only to the engineer-in-charge, Gujarat Refinery Project, in the district of Baroda, in the state of Gujarat, the Respondent Stewarts and Lloyds of India Ltd. gave the particulars of the work included within each item or heads of work stated to be done in the aforesaid letters. The Respondent Stewarts and Lloyds of India Ltd. by the said letter dated September 27, 1969, in the last and penultimate paragraphs gave notice to the Appellant in the following terms:
Questions, disputes and differences having arisen as between us regarding the matters as set out above, we appoint Mr. Pritimoy Bhattacharjee of 26 Old Ballygunge Road, Calcutta-19, to be the Arbitrator.

Therefore, we require you to concur with us in the appointment of the Arbitrator for the settlement of the questions, disputes and or differences that have arisen between us arising out of and or relating to and or connected with the contract and agreed variations above-mentioned dated in (sic) August 1964 further, in default of your so doing within fifteen clear days after the service of this notice upon you we intend without further notice to apply to the Court to appoint an Arbitrator.

6. The Appellant by its letter dated October 17, 1969, denied the claim put forward by the Respondent Stewarts and Lloyds of India Ltd. in the aforesaid letters for the said sum of Rs. 35,97,190-58. They further asserted, that there was no dispute under the contract or the Arbitration Agreement contained therein to be referred. The

Appellant further informed the Stewarts and Lloyds of India Ltd. that it did not concur in the appointment of Mr. Bhattacharya, appointed by the Respondent as the ''Arbitrator, to decide the Said alleged disputes. It intimated, however, that it had no objection to discuss the matter with the representative of the Respondent Stewarts and Lloyds of India Ltd. The said letter dated October 17, 1969, appears at p. 27 of the paper-book. On November 1, 1969, the Appellant forwarded to the Respondent Stewarts and Lloyds of India Ltd. a cheque for Rs. 40,914-18 in full settlement of the final bill submitted by the Respondent Stewarts and Lloyds of India Ltd. for the work done by it in respect of the construction of the Gujarat Refinery. On November 12, 1969, the Respondent Stewarts and Lloyds'' forwarded a receipt to the Appellant stating that it had received the aforesaid cheque as ''on account payment''.

7. Thereafter on June 18, 1970, an application u/s 20 of the Indian Arbitration Act was filed in this Court whereon the order mentioned above was passed by the Court of the first instance. From the said judgment and order mentioned above this appeal has been preferred.

8. On behalf of the Appellant the counsel submitted that the trial Court should not have directed the filing of the Arbitration Agreement u/s 20 of the Arbitration Act nor should have referred the alleged dispute between the parties to Mr. Ganguli after having appointed him as the Arbitrator, in the instant case, in view of the fact that by virtue of the aforesaid condition of the contract whereby and whereunder it was stipulated that

The contractor hereby submits to the jurisdiction of Courts situated at Baroda for the purpose of any such actions and proceedings,

the parties agreed that all actions and proceedings arising out of the contract would be proceeded with by the parties or in any event by the contractor, i.e. the Respondent Stewarts and Lloyds at a Court of competent jurisdiction at Baroda. The work was to be performed by the contractor and was in fact performed at Baroda. Thus the Court at Baroda having territorial and pecuniary jurisdiction over the subject-matter of the claim of the contractor was the chosen forum of the parties and the contractor must be held bound by the bargain he had struck with the principal and the Court in its discretion should refuse to allow the Arbitration Agreement to be filed in this Court.

9. By and under the said clause of the contract, the contractor agreed that all disputes in regard to the contract would be decided by a Court of competent jurisdiction at Baroda. The clause although is couched in a positive form in substance implies and contains a negative covenant prohibiting any of the parties and in any event the contractor from instituting a proceeding in regard to the dispute arising under or in connection with the contract in a Court other than a Court of competent jurisdiction at Baroda. The counsel for the Appellant submitted that although no application had been made by the Appellant for the stay of the

petition filed by the Respondent Stewarts and Lloyds u/s 20 of the Indian Arbitration Act or for injunction restraining the said Respondent from proceeding with the said petition as generally is or might have been done, the Court should on the strength of ratio decidendi in Hakam Sing Vs. Gammon (India) Ltd., refuse to file the Arbitration Agreement. The counsel also relied on the case Motabhai Gulabdas and Co. v. Mahaluxmi Cotton Mills Co. Ltd. 91 C.L.J. 1 and pointed out that, although no application was made for stay of suit in the said case, defence as to jurisdiction on the basis of a similar clause ousting the jurisdiction of the Calcutta High Court was taken in the written statement filed in the suit. Issue No. 1 was raised in the suit involving the said question and was gone into by the Court. Although on the facts of the said case that issue was decided against the Defendant and in favour of the Plaintiff and continuance of the suit, the counsel relied on the said decision in support of his contention that defence as to jurisdiction may be taken even without filing an application for stay or for an injunction in the suit or in the very proceedings itself on the basis of similar clauses. The counsel also relied on the cases Continental Drug Co. Ltd., Bombay Vs. Chemoids and Industries Ltd., Calcutta, and Austrian Lloyds Steamship Co. v. Gresham Life Assurance Society Ltd (1903) 1 K.B. 249. It may be that the term imposes an obligation on the contractor only but that by itself will not absolve the contractor from the obligation of the term. The principal made this term a part of the bargain in express words. The contractor with eyes open and for valuable consideration entered, into the contract and accepted the burden imposed by the contract including this clause on him.

10. It should be noted that this term does not militate against the provision of Section 28, Indian Contract Act, which reads as follows:

28. Every agreement, 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, is void to that extent.

11. It seems that partial restriction with regard to the choice of a forum may be imposed upon a party to a contract or upon any of the parties to the contract. Therefore, this obligation albeit an onerous one cast upon the contractor by the contract is binding.

12. The counsel submitted that in case of Section 20(1) of the Act a party can only choose to have his disputes covered by an Arbitration Agreement decided by Arbitrators in terms of the agreement without the intervention of the Court under chap. II of the Act or he may have the disputes decided through the intervention of the Court under chap. Ill of the Act. The Respondent, Stewarts and Lloyds, having proceeded with the provision of having an Arbitrator appointed under chap. II of the Act by first appointing an Arbitrator and requesting the Appellant to concur in the said appointment in terms of Section 8 of the said Act could not turn round and then apply to the Court u/s 20 of the Act for filing an agreement for referring the disputes

covered by such agreement to an Arbitrator. The counsel relied on the cases Ravu Venkata Surya Rao Vs. Ravu Venkata Rao and Others, and Teamco Private Ltd. Vs. T.M.S. Mani, .

13. Lastly, the counsel for the Appellant submitted that there was no dispute to be referred in terms of the Arbitration Agreement between the parties. The claims mentioned in the second letter dated September 27, 1969, did not arise out of nor did it relate to nor was connected with the contract and thus any dispute in regard to the said work or claim in regard to them did not fall within the ambit of the arbitration clause and were not matters agreed to be referred. The counsel submitted that the letter dated October 17, 1969, in reply to the second letter dated September 27, 1969, merely shows that the Appellant requested Stewarts and Lloyds to come for ''discussion''. They did not deny the claim or refuse payment. The counsel relied on the case of Nandram Hanutram Vs. Raghunath and sons Ltd., .

14. The counsel further submitted that the alleged disputes were not set out in the petition as should have been done. Form of application u/s 20 of the Act as set out in the Original Side Rules of this Court (vol. II, p. 904) shows that such disputes should be stated or set out in the petition. Therefore, it cannot be found by the Court as to whether the alleged disputes between the parties are the subject-matter of the reference and so the application ought to have been rejected. In the alternative, the counsel submitted that the disputes, if any, that may be spelled out from the correspondence that passed between the parties would clearly show that the claims made by Stewarts and Lloyds do not relate to nor arise out of and are not connected with the contract. The learned Counsel relied on the case of Lawson v. Wallasey Local Board 11 Q.B.D. 229 where claim for damage for extension of the contract on-the ground of breach of implied term of the contract was held to be not connected with the contract.

15. The entire claim made in the said first letter dated September 27, 1969, showed clearly that the Respondent Stewarts and Lloyds never intended that legal consequences would flow out of the subject-matter of that letter. The claim was not a claim of right but an appeal to the kindness or mercy of the principal. On the basis of Nandram Hanuthmal''s case Supra it cannot be said to be a dispute. Thus the application for all the reasons urged above should have been rejected by the trial Judge, according to the counsel for the Appellant.

16. The counsel for the Respondent Stewarts and Lloyds, on the other hand submitted that the provisions providing for ouster of jurisdiction of Courts must be strictly construed. If there be any doubt as to the meaning of such clause, such doubt has to be resolved in favour of litigant and not ouster of jurisdiction of the Court.

17. The clause providing for the submission of the Respondent Stewarts and Lloyds to the Baroda Court formed part of a clause contained in the standard form of the

tender. The tender was a global tender inviting submission of tenders from all contractors throughout the world. In the instant case, the contractor is not a foreigner but an Indian company. Thus the first part of the clause providing for the applicability, of Indian law to the contract and for decisions of the disputes or claims under the contract by Indian Courts only cannot have any force. The last part of the said clause providing for submission of the contractor to a Court at Baroda formed integral part of the said clause and this part must also be inapplicable. The said clause including the latter part thereof is, therefore, meaningless. In the facts and circumstances of the instant case, where both the parties are Indian, the said clause must therefore be ignored.

18. Mr. Chatterjee relied on the case of Nicolene Ltd. v. Simmonds (1953) 1 All E.R. 822. The clause clearly shows that the Baroda Court was not the chosen Court for the parties for all purposes, but only when the principal choose to file suits or institute suits or proceedings in a Court at Baroda, the contractor would not be able to raise, any objection thereto. The said term lacks mutuality and thus no negative covenant or term can be implied as it is not applicable to both the parties. It is the discretion of the Judge either to direct or refuse filing of an Arbitration Agreement u/s 20 of the Act. The learned trial Judge, in the instant case, exercised his discretion in favour of the Petitioner. It cannot be said that such exercise was done perversely. So far as the Appellant is concerned, there is no obligation on its part to take recourse to any particular Court. The Appellant is at liberty to file a suit or institute proceedings in any Court within the jurisdiction wherein a part of the cause of action arose. This Court is certainly a competent Court inasmuch as the contract was signed by the contractor within the original jurisdiction of this Court. Thus this Court is a Court within the meaning of Section 2(c) of the Act. Now, that an application u/s 20 has been filed for the first time in this Court u/s 31(4) of the Act, this Court henceforth shall be the only Court in which the proceedings may be taken in regard to the Arbitration Agreement between the parties according to Section 31(4) of the Act. Section 31 is a complete code in regard to the arbitration on the question of jurisdiction of a Court. The non-obstante clause of the section makes it clear.

19. Lack of mutuality under the present Specific Relief Act must be an absolute bar, but even then this is one of the factors that should be taken into consideration by the Court in directing the ouster of jurisdiction of a particular Court. Motabhai Gulabdas and Co. v. Mahaluxmi Cotton Mills Co. Ltd. Supra (13) lays down clearly that enforcement of the proceedings amounts, to granting specific-performance. This can only be done when the clause is ambiguous. The counsel relied on the case of Britannia Building and Iron Co. v. Gobinda C. Bhattacharji 64 C.W.N. 324 (328).

20. Sub-section (4) to Section 31 of the Act overrides the contract between the parties including the law of contract and the Respondent Stewarts and Lloyds cannot now be sent to a Court of competent jurisdiction at Baroda. It is true that application under Sections 8 and 20 fall within the ambit of Section 31(4) of the Act.

But it is clear from the precedents as well as the authorities mentioned above including Union of India (UOI) Vs. Surjeet Singh Atwal, that all subsequent applications must be filed in that Court. In the instant case, we are not concerned with the subsequent application but with the first application filed under the Arbitration Act. Even where the parties agree to go to one particular Court out of several competent Courts, application filed in a Court other than the chosen forum of the party cannot be returned to be filed in the chosen forum of the party in view of Section 31(4A) of the Act.

21. Competency of a Court has to be decided with regard to Section 31 of the Act. In deciding the jurisdiction of the Court the provision of Section 31 read with Section 2(c) will alone be applicable and relevant irrespective of any other provision in any other law. In Hakam Singh v. Gammon (India) Ltd. Supra the only question that came to be considered by the Court was that whether suit can be filed in Bombay. The counsel for the Respondent relied on Continental Drug Co. Ltd., Bombay Vs. Chemoids and Industries Ltd., Calcutta, , H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , S. Sundarajan Vs. Union of India and Others, and 22 Halsbury (3rd ed., p. 796, Article 1682) and contended that the decision in Hakam Singh v. Gammon (India) Ltd. (1) is not binding inasmuch as the question of Section 31 of the Act was not considered in the said case.

22. In the instant case, only notice to concur was given. No consent was given and therefore, application u/s 20 was filed and allowed. The said notice cannot be taken to be a proceeding under chap. II of the Act. The counsel relied on the cases of East India Construction Co. (P) Ltd. Vs. Union of India (UOI), , Murlidhar Vs. State of U.P. and Others, , India Hosiery Works Vs. Bharat Woollen Mills Ltd., . The last mentioned case decided by the Division Bench of this Court, according to the counsel for the Respondent, applies on all fours to the present one. In the said case also notice to concur was given. There was no consent and the application u/s 20 of the Arbitration Act was allowed. The said case is binding on us according to the counsel. The counsel also relied on the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), . According to the counsel, the words "before proceeding" in Sub-section (1) of Section 20 of the Act mean before proceeding in a Court or before taking a proceeding. Otherwise, even if an Arbitration Agreement is entered into u/s 4, which is included within, chap. II of the Act, it will be held that the parties had proceeded under chap. II. The counsel said that the facts of the case clearly show that the disputes arose between the parties and the said disputes were connected directly with the contract and must be held to be matters agreed to be referred by the arbitration clause. The counsel also relied on the cases of Re Hohenzollern Aden Gessellschaft Pur Locomotiban v. The City of London Contract Corporation 54 Law Times 596, Woolf v. Collis Removal Service (1948) 1 K.B. 11, Ramji Dayawahla and Sons Private Ltd. Vs. Messrs. Invest Import, , Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, , Government of Gibraltar v. Kenney and Anr. (1956)

2 Q.B. 410 and Edwards v. Skyways Ltd. (1964) 1 All E.R. 494.

23. It is clear, according to the learned Counsel, that the disputes that have arisen between the parties in respect of the contract in the instant case are disputes covered by the arbitration clause and should be referred. The counsel submits that the judgment and order of the learned trial Judge thus is correct and should not be interfered with.

24. In the instant case, the invitation to submit tender was circulated and/or advertised by the predecessor-in-title of the Appellant, hereinafter referred to as the principal, in different countries of the world. In other words, the tender was a global tender. The work under the contract was to be performed at Baroda. The total value of the contract exceeded one crore of rupees. It was only natural that the principal would intend that all legal proceedings that might be necessary to initiate by the parties in respect of the contract would be initiated at a competent Court at Baroda where it would be comparatively easy for the principal to adduce all evidence. Thus, the principal included a specific term in the contract to the following effect, to wit:

The contract shall be deemed to be an Indian contract and shall be governed by and construed according to the laws in force in India from time to time and Indian Courts shall have jurisdiction to hear and determine all actions and proceedings arising out of the contract and the contractor hereby submits to the jurisdiction of Courts situated at Baroda for the purpose of any such actions and proceedings.

25. By the aforesaid clause incorporated in the contract the principal guarded against being dragged into any Court outside India or for that event any Court other than a competent Court at Baroda. The principal further specifically provided for application of the Indian laws to the contract. In a global tender any party resident in any part of the world may submit tender and may raise disputes with regard to the applicability of the law of the country of the contractor and maintainability of the proceedings in a Court situated in his country. The principal only sought to prevent the applicability of any foreign law to this contract and institution of any proceedings in respect of the contract in any Court other than a Court at Baroda. The contractor by entering into the said contract accepted, inter alia, the aforesaid condition and agreed to the same. Two commercial people or corporation with their eyes wide open entered into the said contract containing the aforesaid term. No special circumstances like'' fraud, coercion, undue influence or mutual mistake of fact which go to vitiate a contract has been alleged in the instant case. In the absence of any special circumstance we should think that the said term would be binding upon the parties.

26. The first attack of Mr. Chatterjee levelled against the binding nature of the said term was want of mutuality of obligation under the said term as noted above.

27. Section 28 of the Indian Contract Act does not militate against this term nor does it make this term void inasmuch as the agent is not restricted absolutely from

enforcing his rights under or in respect of this contract by the usual legal proceedings in the ordinary Tribunals. All that this term seeks to impose is an obligation upon the contractor, where more than one Courts have jurisdiction, to have case tried at a competent Court at Baroda, the chosen forum of the parties.

28. The next challenge to the term made by Mr. Chatterjee was that the term in the instant case was and is superfluous and redundant inasmuch as both the parties to the contract are of Indian domicile. But, merely because both the parties are of Indian domicile, do not, in our opinion, make the said term as to the applicability of Indian law to the contract in the instant case superfluous or redundant. It is common knowledge and indeed we can take judicial notice of the fact that the Appellant, which is a Central Government undertaking, controls the entire petroleum, petroleum products and natural gas in India and; as such, the Appellant has its offices in different major cities of the world. Thus the Respondent could in the instant case initiate proceedings against the Appellant even in other parts of the world where the Appellant has its offices. In that event, dispute might arise as to which law was applicable to the contract. To obviate all possible doubts and difficulties the aforesaid term, even as between the Appellant and the Respondent, can be taken recourse to and relied upon. In any event, in our opinion, only such part of a term, as may be inapplicable in a particular case, may be treated to be superfluous and even if we hold that the first part of the said term making the Indian law applicable to the contract be redundant in the instant case; the last part of the said term providing for submitting to a competent Court at Baroda by the Respondent can in any event not be said to be redundant or superfluous. The said term, it appears, is binding on the Respondent.

29. In the case of Motabhai Gulabdas and Co. v. Mahaluxmi Cotton Mills Ltd. Supra the relevant clause was.... This contract is subject to Bombay jurisdiction. In the said case the said clause was construed to be held to mean that the contract was subject to the jurisdiction of the Bombay Courts for any litigation in respect of the contract. It is well-settled that a covenant conferring jurisdiction upon a particular Court, where'' that Court together with others have jurisdiction to adjudicate upon the disputes between the parties, is legal in view of the fact that the restriction is only partial and the parties have chosen only one of several Courts having jurisdiction under the ordinary law of the land to decide their disputes. Such covenants are enforced ordinarily by the Courts by means of an injunction restraining the prosecution of a suit instituted in a Court other than the one agreed by the parties. The Courts have also enforced such covenants by returning the plaint under Order 7, Rule 10 of the CPC for presentation to the chosen forum. See Pachhablall Keshablall Mehta v. Vijayam and Co. 49 M.L.J. 185.

30. Inasmuch as the Defendants in the said case denied the very existence of the contracts including the aforesaid relevant covenant, it, was held that the Court could not grant any relief on the basis of the said covenant unless its existence was either

admitted or established and the suit was allowed to be continued in this Court which, undoubtedly also had jurisdiction together with the Bombay Courts.

31. The clause in the instant case seems to be similar to the one considered by the Court of Appeal in England in Austrian Lloyds Steamship Co. v. Gresham Life Assurance Society Ltd. Supra. In the said case a policy of life insurance in the French language was effected by a foreigner with an English insurance company having a branch office at Budapest provided that the premiums of insurance money would be payable at Budapest and contained a condition of which the English translation was as follows:

For all disputes which may arise out of the contract of insurance all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters.

32. The said clause was construed by the English Court of Appeal to mean that the parties would not only take exception to the jurisdiction of the chosen forum if any proceeding was instituted therein but also that all the disputes in respect of the contract would be determined by the Courts at Budapest.

33. Mathew L.J. observed in the course of the judgment as follows:

...It might often be of great importance to the Insurance Companies in case of a dispute arising under a policy of insurance effected at Budapest that they should not have to bring witnesses from thence to distant places....

34. In the instant case, instead of both the parties, the contractor, he one of the parties to the contract, has bargained with the principal that

Indian Courts shall have jurisdiction to hear and determine all actions and proceedings arising out of the contract and the contract hereby submits to the jurisdiction of Courts situated at Baroda for the purpose of any such actions and proceedings.

35. The reason for making a competent Court at Baroda, that is to say, the place of performance, of the contract to be the chosen forum of the contractor might very well be that it would be comparatively easy for the principal to produce its evidence at the proceedings that might be instituted by the contractor in respect of the contract. By and under the said agreement the contractor agreed, in our opinion, to institute all actions and proceedings arising out of the contract in a competent Court at Baroda and also not to object to the jurisdiction of such a Court at Baroda in case the principal instituted any proceedings there.

36. This clause cannot be said to be bad for want of mutuality for the doctrine of mutuality applies only where one of the parties to a contract suffers from any disability, where both the parties are adult, able and competent to contract, the said doctrine cannot apply. u/s 20(4) of the Specific Relief Act, 1963, also lack of mutuality

in a contract is not an absolute bar to grant of specific performance of the contract. Reference may also be made in this connection to the case of G.W. Davis v. Maung Shwe Go 38 I.A. 155. The contractor has not alleged fraud, misrepresentation or undue, influence perpetrated or made by the principal. Nor is there any challenge to the said term as unconscionable.

37. The said covenant is also not bad in view of the fact that Section 28 expressly contemplates such covenant by any of the parties to a contract. Section 28 of the Indian Contract Act quoted above expressly exempts such partial restriction in a covenant by any of the parties to a contract from being hit by the mischief of the said section. Thus, the aforesaid restriction imposed, upon the contractor by the aforesaid covenant, in our opinion, is valid.

38. In the case of Hakam Singh v. Gammon (India) Ltd. Supra there was an arbitration clause between the parties to refer any dispute arising out of the said contract which was in effect a sub-contract to arbitration by two Arbitrators under the Arbitration Act, 1940. There was a further clause in the said contract (in effect a sub-contract); to the following effect:

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.

39. Disputes and differences arose between the parties and the Appellant in the said case submitted a petition at the Court of the Subordinate Judge at Varanasi u/s 20 of the Arbitration Act for direction for filing the Arbitration Agreement and for making the order of reference to the Arbitrator or Arbitrators to be appointed by the Court. The Respondent contended before the learned Subordinate Judge that in view of the aforesaid clause whereby the parties agreed to submit to a competent Court in the city of Bombay the said petition should not be accepted by the Subordinate Judge at Varanasi and no direction should be given consequent thereto. The learned Subordinate Judge rejected the contention of the Respondent whereupon the Respondent appealed to the High Court at Allahabad in its revisional jurisdiction and got the said order passed by the Subordinate Judge set aside. The High Court held that, in view of the aforesaid bargain between the parties, the Bombay Court was the chosen forum to file the Arbitration Agreement and the Arbitration Agreement could not be entertained by the Courts at Varanasi. The High Court, therefore, directed the return of the petition to-the Petitioner for presentation to the proper Court.

40. Against the said order passed by the High Court of Allahabad an appeal was preferred to the Supreme Court. The Supreme Court rejected the appeal with the following observations:

Since an application for filing aft award in respect of a dispute, arising out of the terms of the agreement could be filed in the Courts in the city of Bombay, both because of the terms of Clause 13 of the agreement and because the Respondents had their head office where they carry on business at Bombay, the agreement between the parties that the Courts in Bombay alone shall have jurisdiction to try the proceeding relating to arbitration was binding between them.

41. From the aforesaid position it is apparent that although no application was made for either, injunction restraining the Petitioner from proceeding with the said reference or for stay of the said petition, the Supreme Court approved of the direction passed by the High Court at Allahabad for the return of the said petition to the Petitioner for presenting the said petition at the competent Court at Bombay. The facts of the said case seems to us to be on all fours with the facts of the instant case.

42. Mr. Chatterjee contended that Section 31 of the Arbitration Act governs contracts regarding arbitration and no contract can override the express provision of the said section. Section 31, according to Mr. Chatterjee, is a complete code in regard to arbitration on the question of jurisdiction of the Courts. Under the provision of Section 31 of the Arbitration Act, since the application has been first made in this Court, all applications have to be made in this Court Section 31 of the Arbitration Act is set out hereunder:

31(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or Existence of an award or an Arbitration Agreement between the parties to the'' agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been or may be filed and by no other Court.

(3) All applications regarding the conduct of arbitration proceeding or otherwise arising out of such proceeding 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.

43. Applications under Sections 8 and 20 fall within ambit of Section 31(4) of the Act as has been held by the Supreme Court in the case Union of India v. Surjeet Singh Supra.

44. Section 31(4) as well as the case mentioned above certainly lay down that if an application in regard to arbitration is first filed in one Court, then that Court and that Court alone will have jurisdiction in the matter and all subsequent proceedings and/or applications in regard to that matter has to be instituted in the said Court., In the instant case, we are not concerned with any subsequent application. We are considering the initial stage, i.e. the filing of the first application and whether such application shall be allowed to be filed in a Court other than the chosen forum of the parties.

45. Although such question was not raised in the Hakam Singh''s case Supra, the issue involved before the Supreme Court is the same as in the instant appeal, that is to say, as to whether this petition can be admitted or allowed to be filed in this Court in view of the specific covenant between the parties mentioned above. Notwithstanding the observations in the cases Madhav Rao Scindia v. Union of India Supra, Sundarajan v. Union of India Supra and 22 Halsbury (p. 796, Article 1682), we are of the opinion that the said judgment in Hakam Singh''s case Supra cannot be said to be per in curium and is binding on us. We are fortified in our view by the observations of the Supreme Court in Smt. Somavanti and Others Vs. The State of Punjab and Others, to the following effect, to wit,

the binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which the argument was subsequently advanced was actually decided.

46. In view of the said decision of the Supreme Court in Hakam Singh''s case Supra we feel we are bound to direct the return of the petition to the Petitioner for presenting the same to a competent Court at Baroda. In view of our finding as to the aforesaid we need not deal with the other cases, on this point cited at the Bar.

47. The next point that arises for our consideration is as to whether the application is maintainable in view of the fact that the Petitioner served the notice dated September 27, 1969. The said letter has been annexed to the petition and appears at pp. 18 to 26 of the paper-book. The last two paragraphs of the said letter are relevant and are set out hereunder:

Questions, disputes and differences having arisen as between us regarding the matters as set out above, we appoint Mr. Pritimoy Bhattacharjee of 26 Old Ballygunge Road, Calcutta-19, to be the Arbitrator. Therefore, we require you to concur with us in the appointment of the Arbitrator for the settlement of the questions, disputes and or differences that have arisen between us, arising out of and or relating to and or connected with the contract and agreed variations above-mentioned dated August 1964. Further, in default of your so doing within fifteen clear days after the service of this notice upon you, we intend without further notice to apply to the Court to appoint Arbitrator.

48. The said notice, it seems, was given in terms of Section 8(1)(a) of the Act. The Appellant contended before the learned trial Judge that by serving that notice the Respondent had elected to proceed under chap. II of the Act and thus must be held to be debarred from making this application u/s 20 contained in chap. Ill of the Act. Section 20 of the Arbitration Act reads as follows:

20(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 applications 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.

49. The question is whether the service of the said notice debarred the Respondent from making the application u/s 20 of the Act. This question was considered by a Division Bench of this Court in India Hosiery. Works v. Bharat Woollen Mills Ltd. Supra. There the Respondent served a notice on the Appellant requiring it to concur in the appointment of an Arbitrator and on the Appellant''s declining to do so it applied to the Court u/s 20 of the Arbitration Act for filing the agreement and referring the disputes to an Arbitrator appointed by the Court. The Court directed filing of the agreement and appointed an Arbitrator and referred the disputes involved to such Arbitrator. In the said case also no question was raised or considered as to whether after serving a notice u/s 8 contained in chap. II of the Act a party to an Arbitration Agreement could invoke Section 20 of the Act contained'' in chap. III. But the issue on this point in the said case, it appears, was the same as in the instant case.

50. In another unreported case decided by a Division Bench of this Court In the matter of Sree Hurdutrai Jute Mills Pvt. Ltd. v. Sree Bajrang Jute Mills Ltd. Unreported, Appeal from Original Order No. 98 of 1963 wherein judgment was delivered by Bose C.J. and was concurred in by G.K. Mitter J. on June 17, 1964, an application was filed u/s 20 of the Act, although the parties on the basis of the Arbitration Agreement contained in the contract between them had previously gone before the named Arbitrator, that is to say, the Tribunal of arbitration of the Bengal Chamber of Commerce and Industry and filed their respective statements of claims before such Tribunal. A point was taken by the Appellant in the said case in the counter statement filed by them before the Bengal Chamber of Commerce and Industry that, as the Arbitration Agreement was vague, the Bengal Chamber of Commerce and Industry had no jurisdiction to adjudicate upon the matter. Bengal Chamber of Commerce and Industry thereupon refused to adjudicate upon the disputes submitted to them on the ground that there was no specific agreement between the parties for arbitration by Bengal Chamber of Commerce and Industry. Thereafter, application was made u/s 20 of the Act by the Respondent. The Court of the first instance directed the filing of the Arbitration Agreement and referred the disputes to the Arbitrator appointed by it.

51. In appeal from the said order passed in the said application the only point on behalf of the Appellant urged was that the Respondent having previously taken recourse to chap. II of the Act was debarred from applying thereafter u/s 20 contained in chap. HI of the Act. It is clear that the provisions contained in chaps. II and III of the Arbitration Act are alternative and are mutually exclusive.

52. Bose C.J. observed in the said case as follows:

It is quite possible for parties to proceed under chapter II without invoking the aid of any of the sections referred to by the learned Judge. If an Arbitrator has entered on the reference and the parties have filed their statements of claim and counter statement that in my view is proceeding under chapter II. I am inclined to agree with Mallick J. that the act of mere reference to arbitration may not amount to proceeding under chapter II, but entering on the reference is in my view proceeding under chapter II. The words ''instead of proceeding under chapter II'' indicate that Section 20(1) is intended to be an alternative remedy and if the provisions of chapter II have been availed of in the sense that there has been entering upon the reference, it is not open to the parties to have recourse to Section 20.

53. In the instant case, only notice dated September 27, 1969, was served. There was no step taken thereafter and no entering upon the reference was done by any Arbitrator. The said two judgments, it appears, are binding upon us and we consequently hold that the said contention of Mr. Roy Chowdhury must fail and the Respondent could file the application u/s 20 of the Act.

54. The next contention of the Appellant that there was no dispute between the parties and thus the arbitration clause could not be invoked, in our opinion, cannot stand any scrutiny.

55. It is true that the first letter dated December 20, 1966, making this claim described the claim as claim for ex gratia payment. That claim was further made by the two letters dated September 27, 1969. The first letter of the said date being annes. C to the petition withdrew, according to the claimant, concession made in the previous letter dated December 20, 1966, by describing its'' claim as ex gratia. The use of the word ''ex gratia'' by itself, however, does not mean that the Respondent did not make any legal claim or did not assert any legal right. Reference in this connection may be made to the observations of Megaw J. in Edwards v. Skyways Ltd. Supra.

56. The different heads of the claim have been set out in the letters dated September 27, 1969. Some, of the claims, it seems to us, to be covered by the arbitration clause, The arbitration clause, in the instant case, seems to us to be couched in very wide terms. From the clause recited in the earlier part of the judgment, it is clear that all kinds of matters or things, howsoever arising out of or in any way relating to or connected with the contract, may be referred to arbitration. We are unable to say on the basis of the said arbitration clause that the disputes raised by the Respondent are not covered by the very wide arbitration clause in the instant case. The said claims, in our opinion, certainly have arisen only because of the entering into the said contract and are connected with the said contract. See Ramji Dayawahla and Sons Pvt. Ltd. v. Invest Import Supra.

57. For the reasons stated above, we are of the view that this appeal must succeed. The appeal is allowed. The order of the learned trial Judge is set aside.

58. The Petitioner will be at liberty to take back the petition after furnishing a loco copy thereof to this Court for presenting the same at the chosen forum of the parties.

59. In the facts and circumstances of this case, we direct each party to pay and bear its costs, of this appeal.

A.N. Sen J.

60. I agree.