

(1995) 08 CAL CK 0029

Calcutta High Court

Case No: Civil Order No. 1490 of 1994

Union of India (UOI)

APPELLANT

Vs

Ashoke Industries

RESPONDENT

Date of Decision: Aug. 2, 1995

Acts Referred:

- Arbitration Act, 1940 - Section 20, 41
- Constitution of India, 1950 - Article 227
- Contract Act, 1872 - Section 23, 28

Citation: (1996) 2 ILR (Cal) 340

Hon'ble Judges: Basudeva Panigrahi, J

Bench: Single Bench

Advocate: Asit Banerjee, for the Appellant; Sanjeeb Banerji, T.K. Roy and Partha Basu, for the Respondent

Final Decision: Allowed

Judgement

Basudeva Panigrahi, J.

This is an application filed under Article 227 of the Constitution of India praying to set aside the judgment and/or order dated April 1, 1993 passed by the learned Assistant District Judge, 5th Court Alipore in Title Suit No. 80/92 appointing one of the retired District Judges to be the sole arbitrator.

2. The Petitioner, Central Railway i.e. Controller of Stores, Central Railway Bombay had invited quotation by issuing the tender notice in the News-paper for procurement of Side Hung Type Glazed Steel Window. The opposite party Asoke Industries who is the Plaintiff in the lower court submitted in response to the advertisement an application expressing its inclination for supply of the articles invited under the tender. The Petitioner also accepted the tender purported to have been submitted by the Plaintiff/opposite party in response to the tender notice of the Petitioner. Sometimes thereafter an agreement was executed between the

parties wherein certain terms and conditions had been stipulated. It is the case of the Plaintiff that despite supply of the articles to the Applicant. Central Railway, the letter did not clear up the dues of the company, therefore, the Plaintiff was obliged to file a suit for referring the dispute to an arbitrator. As per the terms of the agreement, in case of a dispute between the parties, it is open to either party to move to the court for appointment of an arbitrator. Accordingly, the Plaintiff-opposite party has filed a suit before the 5th Assistant District Judge, Alipore u/s 20 of the Indian Arbitration Act, 1940 in T.S. No. 80/92 for resolving the dispute differences between the parties. It is further stated that the Applicant despite notice did not raise any objection and accordingly the learned Court below appointed an arbitrator directing him to resolve or settle the dispute between the parties. It is submitted by the Plaintiff that the Applicant not only did appear before the arbitrator but had taken time after time and finally did not cooperate with him. It is further claimed by the Plaintiff/ opposite party that an adjournment was sought before the arbitrator that Central Railway Administration had decided to file appeal against the decision of the Assistant District Judge and preparation were on for requesting the Court for reviewing and setting aside the orders of appointment of the sole arbitrator in the aforementioned suit. Such application was presented before the arbitrator on April 8, 1994. Instead of filing appeal in any forum the Central Railway rushed to this Court by filing an application under Article 227 of the Constitution of India on July 25, 1994.

3. The main thrust of the Applicant's submission is that the Respondent/opposite party Plaintiff while entering into contract had agreed to abide by the term.: and conditions stipulated in the agreement. Governing Rules of the said contract are quoted hereunder:

2702 Irrespective of the place of delivery, the place of performance of place of payment under the contract the contract shall be deemed to have been made at the place from which the acceptance of tender has been issued.

2703 Jurisdiction of Courts -- The Courts of the place from where the acceptance of tender has been issued shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract. 2900 Arbitration

(a) In the event of any questions, dispute of difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator, by the GENERAL Manager in the case of contracts entered into by the Zonal Railways and Production Units by any Member of the Railway Board, in the case of contracts entered into by the Railway Board, and by the Head of the Organisation to respect of contracts entered into by the other organisations under the Ministry of Railway. If, however, the arbitrator is a Railway servant, he will not be one of those who had an opportunity to deal with the matters

to which the contract relates or who in the course of their duties as Railway servants have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

(d) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

4. It is further submitted by the Petitioner that the opposite party/Plaintiff filed the suit in the Court of the 5th Assistant District Judge, Alipore by circumventing the provisions of law falsely bringing within the jurisdiction of that Court with an ill-motive to harass the Applicant. The Plaintiff/opposite party since failed to deliver the materials within the contractual period and also there was substantial difference of the articles from the specification and drawings the Applicant could not release the funds pursuant to the agreement. Alipore Court has no territorial or inherent jurisdiction to entertain the suit.

5. Only pivotal issue in this case is to find out whether the Alipore Court could siege the jurisdiction to try dispose of the suit or as per the agreement of the parties conferring territorial jurisdiction to the Bombay Courts which would be competent to dispose of the same. So far as the question of jurisdiction is concerned the Applicant has stated that the Controller of Stores, Central Railway is the contracting party on behalf of the Applicant. The articles were to be supplied and received at Stores Supervisor Officer, Central Railway, Nighatpur. Paying authority under the contract was financial Adviser and Chief Accounts Officer, Central Railway, Bombay. Bill passing officer was the Deputy Chief Engineer (Construction) Central Railway, Bhopal.

6. Mr. Sanjeeb Banerjee, the learned Counsel appearing for the opposite party has strongly urged that since the Plaintiff has been residing within jurisdiction of the Alipore Court and the Articles were to be scrutinised within that jurisdiction, the Plaintiff was competent to maintain the suit at Alipore. He further took an inexorable plea that the jurisdiction of a court cannot be created by consent or acquiesce by a party. The Plaintiff at the time of contract, was further tied to such clause lest Central Railway could not have given the company of an opportunity to supply the articles. Therefore, the clause conferring jurisdiction to Bombay Court being illegal, unenforceable, arbitrary whimsical and void, the Plaintiff was not legally obliged to file the suit at Bombay as per the agreement.

7. Mr. Banerjee, however, advanced an interesting argument that the Defendant, Central Railway after appearance in the Trial Court since did not raise any objection regarding the lack of territorial or inherent jurisdiction, rather, they participated in the suit, therefore, accordingly, the learned trial Court was justified in referring the

dispute to an arbitrator. It was open to them to move before the higher forum to quash the proceeding if they were aggrieved by such order. They, participated before the arbitrator and appraised him that they intended to file appeal against the order of appointment of arbitrator on April 8, 1994, instead of filing appeal, they moved this Court by filing an application under Article 227 of the Constitution of India.

Therefore, there is malafide on the part of the Petitioner for which their prayer is to be spurned.

8. Mr. Banerjee strongly relied on a decision in the case of [Pattnaik Industries Pvt. Ltd. Vs. Kalinga Iron Works and Another](#). In the aforementioned case Hon"ble Justice R.C. Patnaik (as His Lordship then was) held that -

it is not open to the parties by agreement to confer jurisdiction on a Court which it does not possess under the CPC ; but where two courts or more have under the CPC an agreement between the parties that the dispute between them shall be tried in one of such courts, is not contrary to public policy. Such an agreement between the parties does not oust the jurisdiction of the Court. It may operate as an estoppel against the parties but it cannot deprive the Court of its power to do justice. Ordinarily the Court would have regard to the choice of the parties; where, however, the Court whose jurisdiction has been ousted is satisfied that the stipulation would operate harshly, is oppressive in character, inequitable or unfair, for the ends of justice, it can relieve the party of the obligation. There could be no quarrel over the legal position. The principle that has been emerged from the above decision is that the agreement between the parties does not oust the jurisdiction of the Court which it originally retained. But when two courts have concurrent jurisdiction agreements between them in preferring one over the other would prevailed.

Section 41 of the Arbitration Act, 1940 provides in so far as is relevant subject to the provisions of this Act and the Rules made thereunder: (a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals under this Act.

The jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure. The parties had agreed as per the terms of the agreement that the contract would be deemed to have been made at the place from which the acceptance of the tender was issued. They had, however, agreed that the Courts of the place where the acceptance of the tender has been issued shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract. The Head Office of the Central Railway is at Bombay. As per the terms of the agreement, the Plaintiff had agreed to deliver the goods at Bombay. The paying authority, i.e. Financial Adviser and Chief Accounts Officer is located at Bombay. Of course, the inspection authority is situated in Calcutta. It cannot be assumed that merely as the

inspection authority is located at Calcutta, the Court at Calcutta will have only the jurisdiction and not the courts at Bombay. On the other hand, where two courts have jurisdiction, it is open to the parties by an agreement to confer jurisdiction to one of the courts. As per the agreement, the parties have agreed that the Courts located at Bombay shall only be competent to settle/ resolve the dispute of the parties. In such event, it cannot be argued that conferring of such jurisdiction is opposed to public policy, rather, such consent will operate as an estoppel against the Plaintiff.

9. The learned Counsels appearing for the Respondent have submitted a decision *Angile Insulations v. Davy Ashmore India Ltd.* and Ors. 1905 (4) S.C.C. 153 and vehemently argued that the learned 5th Assistant District Judge, Alipore has jurisdiction to decide the issue and appoint an arbitrator. But on a careful reading of the judgment, it does not support his contentions. It has been held in the aforementioned decision:

Considering the entire case law on this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy u/s 23 of the Contract Act. We do not find any such invalidity of Clause (21) of the contract pleaded in this case. On the other hand, this Court laid 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 therewith if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute.

10. The learned Counsel appearing for the Petitioner, Mr. Asit Roy, has referred to a decision in the case of [Hakam Sing Vs. Gammon \(India\) Ltd.](#), it has been held in the aforementioned decision that by agreement between the parties they can confer jurisdiction to one of the courts who has otherwise such jurisdiction. Such course is not contrary to public policy nor is it contrary to Section 28 of the Contract Act. Exactly the similar situation had arisen in the case of [Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others](#), where a Division Bench of this Court held that by virtue of the acceptance of the tender it shall be presumed that the parties have agreed to the terms of the contract. It is not open to one of the parties to turn-round and say that it was procured by the other contracting party to his own advantage. In the decision it has been held:

Where goods were sold and delivered to company A of M.P. by B at B's factory site in West Bengal within the jurisdiction of Court C and the contract between the parties provided that any legal proceeding against A shall be instituted in the appropriate Civil Court of District (District) in M.P. it was held that ordinarily the application u/s 31 relating to arbitration reference could be filed either in Court C or in appropriate Court in District but in view of the express agreement between the parties the application was not maintainable in Court C.

11. In another decision [Patel Roadways Pvt. Ltd. Vs. Bata India Ltd.](#), it has been held:

Where the Plaintiff had delivered certain goods to the company at their "P" head office for carriage to "D" against certain consignment notes which provided that "B" court alone would have jurisdiction in respect of all claims arising under the consignment or with regard to the goods entrusted for transport, the Plaintiff on breach of contract for carriage could not institute his money suit at "A" on the ground that "A" court had jurisdiction to entertain the suit since the goods being deliverable at "D" within the jurisdiction of the said court as he could not resist from the terms of contract which he accepted as binding between the parties. Though the parties by mutual agreement cannot confer jurisdiction upon a court which it does not possess nor can oust the jurisdiction of a court otherwise possessed by it, they can, however, choose between them one out of several courts having concurrent jurisdiction. Such an agreement does not violate Section 28 of the Contract Act, nor is it opposed to public policy. Therefore, when both the courts at B" where lay the head office of the company and the court at A" did have concurrent jurisdiction to entertain a suit of such nature, the parties to the contract having chosen by mutual agreement the B" forum, the suit should be filed there and not at A".

12. The learned Counsel for the opposite party/ Plaintiff referred to a decision in the case of [Mahaluxmi Bank Ltd. Vs. Chotanagpur Industrial and Commercial Association](#), On closer reading of the judgment I am not in a position to agree with his contention inasmuch as the facts of the above decision is contradistinguished from the present facts. Accordingly the above decision is not applicable.

13. The learned Counsel appearing for the Respondent/opposite party has, however, strongly urged that the Applicant having submitted to the jurisdiction of the arbitrator in Calcutta cannot now be allowed to say that this Court has no jurisdiction. I am unable to agree with this contention since the Plaintiff was estopped from filing the suit in Calcutta in view of the specific clause of ouster of jurisdiction. This Court can assume jurisdiction under Article 227 of the Constitution of India where the subordinate authority seized jurisdiction not being conferred under law. Even Article 227 can be invoked suo-moto at times as [J.D. Jain Vs. Management of State Bank of India and another](#), . It is a running cause of action so long as there has been wrong exercise of jurisdiction by 5th Assistant District Judge, Alipore.

14. From the above conspectus of the case, I found that Alipore Court is devoid of jurisdiction from entertaining such dispute as the parties by terms of agreement had conferred jurisdiction to Bombay Courts which it is also otherwise competent. Accordingly, the application under 227 is allowed and consequently the arbitrator is directed to return the reference to the Court of learned 5th Assistant District Judge Alipore.

15. But in the circumstances without costs.