
(1991) 05 DEL CK 0044

In the Delhi High Court

Case No : Suit No's. 1212A and 1213A of 1991

Amarnath Chiranji Lal and Co.

APPELLANT

Vs

Ferro Alloys Corporation Ltd.

RESPONDENT

Date of Decision : 28-05-1991

Acts Referred:

Citation : (1992) 46 DLT 476

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : A.S. Chandhiok, R. Srinivasan, Kapil Sibal, Arvind Nigam, Sanjeev Puri and S. Mahapatra, for the Appellant;

Judgement

Anil Dev Singh, J.

(1) -THIS order will dispose of two petitions u/s 20 of the Arbitration Act. 1940 (for short, the Act), which are numbered as.Civil Suit No. 1212-A/91 and 1213-A/91.

(2) The facts lie in a very narrow compass. The parties entered into two contracts dated 1.3.1989 and 18.3.1989 whereby the petitioner was to execute the construction work of the following projects of the respondents located at Bhadrak, Orissa: (a) A housing colony comprising 132 units. (b) A school building, including Nun's residence. The work was to be completed within a period of one year. However, the time for completion of the same was extended up to 26th January, 1991.

(3) It is alleged in the petition that the work was delayed because of various reasons, some of them attributable to climatic conditions and the other related to man made situations like Ram Janambhoomi and Mandal agitation. It is further alleged that the respondent committed various violations of the terms of the contracts which also contributed to the delay. Even the payments due to the petitioner were not made in time by the respondent is the allegation in the petition. It is an admitted case that

"ALL disputes arising out of or in any way connect with the Agreement shall be deemed to have arisen in Bhadrak and only the Courts at Bhadrak, ORISSA shall have jurisdiction to determine the same."

(4) In these petitions, interim applications were also filed in which the petitioner sought ad-interim injunction to restrain the respondent from awarding the contract of balance work to another person and to restrain the respondent from giving effect to the termination order. The petitioner has also sought appointment of a local commissioner to visit the sites of work and to make inventory of the plants and machinery, material and equipment as also to conduct an inspection and to undertake measurement of the work already executed. This Court on April 18, 1991 directed the respondent to maintain status quo in respect of the contracts.

(5) The short question involved in the present petitions is : Whether this Court should entertain the petitions in view of the forum selection clause.

(6) Learned Counsel for the respondent raising a preliminary objection to the maintainability of the petitions, submitted that according to the arbitration clause, all disputes arising out of or in any way connected with the agreement are deemed to have arisen in Bhadrak and only the Courts at Bhadrak, Orissa will have jurisdiction to entertain the petitions. In support of this contention, my attention has been drawn to The National Starch and Chemicals Vs. Weikfield Products Co. (India), and Hari Om Properties (P) Ltd. v. B. Datta, 1990 R. L R. 536

(7) On the other band, learned Counsel for the petitioner submitted that this Court has jurisdiction in view of the fact that communication terminating the contracts was received by the petitioner in New Delhi. He further submitted that in view of the provisions of Section 31(4) of the Act, the Court does not lack the jurisdiction to take cognizance of the matter.

(8) I have given my thoughtful and earnest consideration to the respective contentions of learned Counsel for the parties. In order to appreciate the submissions of the learned Counsel, it may be necessary to mention that the work has to be executed at Bhadrak. The contracts were signed at Bbadrak. The evidence relating to the respective claims of the parties is located at Bbadrak. The parties also agreed that only the Courts at Bhadrak shall have jurisdiction.

(9) According to Section 20 of the Act, any person having entered into an arbitration agreement may apply to a Court, having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. Where no sufficient cause is shown, the Court is bound to order the agreement to be filed and shall make an order of reference to an arbitrator named by the parties in the agreement. Where the parties cannot agree upon an arbitrator, the Court will make a reference to an arbitrator appointed by it. As is apparant, the application is to be filed in a Court having jurisdiction in the matter. The jurisdiction of the Courts under the Act to entertain proceedings is governed by the provisions of

the Code of Civil Procedure. In this regard it will be relevant to reproduce Section 41(a) of the Act: "41. Procedure and powers of the Courts-subject to the provisions of this Act and of rules made there under : 479 (a) the provision 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....."

(10) It is submitted by learned Counsel for the petitioner that since the communication terminating the contracts was addressed to them in Delhi, part of cause of action arose within the jurisdiction of this Court and their petitions cannot be thrown out in view of Section 20(c) of the Code of Civil Procedure.

(11) As pointed out earlier, there is venue selection clause in the agreement which expressly provides that the Courts at Bhadrak shall have jurisdiction in the matter. Where two Courts or more have jurisdiction to try a suit or proceedings, an agreement between the parties that disputes between them shall be tried in one of such Courts, is binding on them. In the present cases, parties having agreed to file proceedings only in the Courts at Bhadrak, cannot invoke the jurisdiction of any other Court for the purposes of Section 20 petition. The reason seems to be that the work was required to be performed at Bhadrak and the entire evidence relating to the matter of execution of the contracts lies there. The site of work provides the most eloquent testimony of the soundness or otherwise of the claims and counter-claims of parties about the nature and extent of the construction, deviations, extra work etc., if any, undertaken by a contractor. The situs of the proceedings must have been fixed by the parties on the basis of the above considerations.

(12) In *Hakam Sing Vs. Gammon (India) Ltd.*, , similar question arose. In this case the appellant had agreed to carry out certain construction work for the respondent. Clause 12 of the tender related to the appointment of an arbitrator, while clause 13 was the forum selection clause which provided that the Courts at Bombay alone shall have jurisdiction to adjudicate the disputes between the parties, in this case a petition u/s 20 of the Act was filed before a subordinate judge at Varanasi. An arbitrator was appointed by the Court to settle the disputes between the parties. On appeal, the High Court of Allahabad in exercise of its revisional jurisdiction, set aside the order of the subordinate judge and declared that the Courts in Bombay have exclusive jurisdiction by virtue of clause 13 of the Agreement. The matter was carried in appeal by way of Special Leave before the Supreme Court, which held that the Courts at Bombay alone had the jurisdiction in the matter. In the case of *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, , the Supreme Court cited *Hakam Singh's* case (supra) with approval and held as follows: "But where two Courts or more have under the CPC jurisdiction to try suit or proceedings 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 such an agreement did not contravene Section 28 of the Contract Act. Though this case arose out of an arbitration agreement there is no reason why the same rule should not apply to other agreements in so far as

jurisdiction is concerned..... Thus it is now a settled principle 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 there within, 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,"

(13) Again In S.C. Malik Vs. Union of India, , it was held that where Courts at two places have jurisdiction in a matter and by clause in the agreement the jurisdiction is confined exclusively in the Court at one place, the application u/s 20 can be filed in that Court alone.

(14) In view of the above judgments, it is not necessary to refer to other decisions of the various Courts, which have taken a similar view.

(15) Learned Counsel for the petitioner has drawn my attention to paras 39 and 42 of the petition (Suit No. 1212-A/91), wherein it is averred that the clause ousting the jurisdiction of the Courts at Delhi is clearly illegal and arbitrary and is not as a result of free consent of the petitioner. It is further alleged therein that the petitioner was forced to accept the forum selection clause. The learned Counsel for the petitioner submitted that the contract which is subject matter of the aforesaid petition, initially contained a clause to the effect that only the Courts in New Delhi were to have jurisdiction in regard to the matters arising out of the agreement in question. He says that this clause was subsequently amended and the amendment was foisted on his client. However, in regard to the contract, which is subject matter of other petition being Suit No. 1213-A/91. the situs for instituting the proceedings was fixed at Bhadrak from the very beginning. I have perused the agreements and find that in respect of the first contract which is subject matter of the Suit No. 1212-A/91. the venue was changed by a written agreement between the parties. The allegation of the petitioner that undue influence was exercised by the respondent over the petitioner, lacks material particulars and the bald allegation and assertion cannot be taken into consideration. Accordingly I am not inclined to accept the contention of the learned Counsel for the petitioner regarding the allegation of exercise of undue influence by the respondent over his client in fixing the venue for filing or instituting proceedings.

(16) Learned Counsel for the petitioner then submitted that in view of Section 31(4) of the Act, this Court has jurisdiction to entertain the petition u/s 20 of the Arbitration Act, despite the forum selection clause. To appreciate this argument, it will be necessary to analyze Section 31 of the Act. Sub clause (1) of Section 31 provides that an award may be filed in a Court having jurisdiction in the matter to which the reference relates. Sub-clause (2) enacts that all questions of validity, effect or existence of an award or an arbitration agreement between the parties to the agreement are to be decided by the Court in which award has been filed and by no other Court. Sub-clause (3) relates to the filing of the applications regarding the conducts of the arbitration proceedings before the Court. Sub-clause (4) on which much stress was placed by learned Counsel for the petitioner

may be quoted. It reads as follows: "(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."

(17) As is manifest from the above, clause (4) starts with a non-obstante clause, overriding any other provisions of this Act or any other law contained elsewhere. It lays down that where in any reference an application is made under the Act before a competent Court, that Court alone will have the jurisdiction over the arbitration proceedings and all subsequent applications arising 481 out of that reference. The question is what is the meaning of the phrase "in any reference". Whether this phrase covers only applications which are filed after the reference has been made or is it wide enough to cover an application u/s 20 for getting the matter referred to arbitration ? Learned Counsel for the petitioner submitted that the expression "in any reference" would also apply to the latter category as well and this being so, the present application u/s 20 would be maintainable in this Court being a Court of competent jurisdiction.

(18) Learned Counsel for the petitioner invited my attention to *Guru Nanak Foundation Vs. Rattan Singh and Sons*, in support of his contention. This case is of no assistance to the learned Counsel. The facts of the case were like this. An application u/s 5 read with Section 11 of the Act for removal of the arbitrator filed before the High Court was dismissed. The matter was brought to the Supreme Court in appeal. The Supreme Court removed the arbitrator and appointed another person to act as the sole arbitrator. Thereafter the Court gave further directions about the manner and method of conducting the arbitration proceedings and also fixed the time for the completion of the same. In these circumstances, it was held that the award was to be filed before the Supreme Court alone. It was further observed that merely because the initial application for filing arbitration agreement was made in the Delhi High Court, it could not be said that all subsequent applications will have to be made to that Court alone. It may be noted that the Supreme Court in that case, in the peculiar facts and circumstances, fixed the forum where the award was to be filed by the arbitrator, notwithstanding the fact that the application for the removal of the arbitrator was first filed before the High Court. Moreover, this was not a case u/s 20 of the Act nor a case where, by agreement of the parties, the jurisdiction of the Court/Courts was restricted. In that case the Supreme Court having appointed the arbitrator in place of the previous one, was alone competent to entertain the award and it could not be said that after appointment the Supreme Court lost seisin over the matter.

(19) Learned Counsel relied on another decision of the Supreme Court in *Kumbha Mawji Vs. Union of India (UOI)*, . This was a case where an application u/s 14(2) for a direction to the Umpire to file the award was first moved before the

subordinate judge at Guwahati, but the award was subsequently filed in the High Court at Calcutta. Before the single judge of the High Court, it was contended that an application u/s 14(2) having been made to the said Court at Guwahati before the award was filed in the High Court, the Court at Guwahati alone had the Jurisdiction. For this contention Section 31(4) of the Act was pressed into service. The point taken was that the application u/s 14(2) was made to the Guwahati Court as early as on 10th August, 1949. That Court was seized of the matter from that date and Therefore, any application u/s 14 on a later date to another Court, though otherwise competent, was barred u/s 31(4) of the Act. The learned Single Judge of the High Court was of the opinion that Section 31(4) related to an application made during the pendency of a reference to arbitration and not to an application made subsequent to making an award. Accordingly, he held that Calcutta High Court had jurisdiction in the matter. On appeal, the Supreme Court set aside the judgment of the High Court and held that Guwahati Court alone would have jurisdiction as that Court was seized of the matter prior to the application filed before the Calcutta High Court u/s 14(2) of the Act. It was of the opinion 482 that Section 31(4) would vest exclusive jurisdiction in the Court in which an application for filing of an award had been made u/s 14 of the Act. The Court gave a wider meaning to the expression "in any reference" so as to cover a case of an application u/s 14(2) of the Act. This decision is not an authority for the proposition that the provisions of Section 31 apply to an application filed u/s 20 of the Act. Filing an application under . Section 20 of the Act is a stage prior to a reference to an arbitration.

(20) This question has been squarely answered in a decision of the Supreme Court reported in Union of India (UOI) Vs. Surjeet Singh Atwal, wherein it was held that Section 31(4) of the Act applies to proceedings u/s 20 of the same Act even though such an application is anterior to the reference as it leads to a reference. It was observed that such an application is undoubtedly an application "in the matter of a reference" and may fall within the purview of Section 31(4) of the Act even though the application is made before the reference has taken place. Therefore, it is not open to doubt that application u/s 20 even though is a prelude to a reference, will fall within the provisions of Section 31(4) of the Act. The Supreme Court in that case was considering the question as to whether an application u/s 34 would attract the provisions of Section 31(4) or not. However, that was not a case where the parties excluded the jurisdiction of one of the competent Courts to try the case. Section 31(4) no doubt starts with a non-obstante clause but it merely over-rides other provisions of law. It leaves agreement between the parties untouched. It is well settled that parties in view of commercial expediency can contract out of the jurisdiction of a Court, where two or more Courts are competent to entertain a dispute. But this cannot be construed as parties contracting against the statute.

(21) The decision of the Supreme Court In Hakam Singh's case (supra) which was approved in the case of A.B.C. Leminart Pvt. Ltd. (supra) would apply in the present case as it directly related to a case where venue selection clause was

involved.

(22) The general principle is that everyone has a right to waive the advantage of a law without infringing any public right or public policy. It is well settled that parties can contract themselves out of the statute (See : Shri Lachoo Mal Vs. Shri Radhey Shyam,).

(23) Section 31(4) of the Act also came to be interpreted by Calcutta High Court in Ganpatrai Agarwall Vs. The Fertiliser Corporation of India, wherein it was held as follows : "13. According to him the provisions of the Indian Contract Act cannot prevail over this sub-Section and as such the ouster clause also cannot prevail over it. But an agreement is not an Act. A careful reading of this sub-Section clearly establishes that this sub-Section does not include a contract. Therefore, a contract will not come within the purview of this sub-Section and it will prevail over this statutory provision. An ouster clause certainly will not affect the jurisdiction of the "competent Court" mentioned in this sub-Section, but it is the duty of the "competent Court" to see that all lawful agreements between the parties are enforced. The competent Court, Therefore, should refrain from exercising jurisdiction in this matter to compel the parties to abide by their own agreement. If the competent Court refuses to exercise jurisdiction on account of the ouster clause, sub-Section (4) of Section 31 of the Act will not come into operation."

(24) Having regard to the above discussion especially the ouster clause whereby the parties agreed that the Courts at Bhadrak, Orissa alone will have jurisdiction to entertain the proceedings relating to arbitration was binding between them and this Court will not exercise jurisdiction. Accordingly, It is directed that the petitions be returned to the petitioners for presentation to the proper Court. The stay orders dated 18.4.1991 shall stand vacated. Parties will bear their own costs. .