

(1983) 06 CAL CK 0013
In the Calcutta High Court
Case No : Matter No. Nil of 1983

Ganpatrai Agarwall

APPELLANT

Vs

The Fertiliser Corporation of India

RESPONDENT

Date of Decision : 27-06-1983

Acts Referred:

Arbitration Act, 1940 — Section 31, 31(4)
Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 28

Citation : AIR 1984 Cal 35

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : Deb and Anindya Mitra, for the Appellant; Milan Banerjee and Umesh Banerjee, for the Respondent

Judgement

Pratibha Bonnerjea, J.—The long history of this case is as follows:--

The petitioner entered into a contract with the respondent for purchase of abandoned fertiliser plants for Rupees 40,02,500/- on "as is where is" basis pursuant to respondent's invitation to tender No. 14/80 dated 30-5-1980. The terms of the said contract are contained in the petitioner's offer dated 23-5-1980 and the respondent's letter of acceptance dated 30-5-1980. By this letter, the respondent (hereinafter referred to as the FCI) admitted having received Rs. 5,00,000/- from the petitioner by way of earnest money. The petitioner was to pay Rs. 5,00,00,000/- by way of security deposit. By this letter of acceptance, the FCI adjusted this aforesaid earnest money against the said security and directed the petitioner to pay the balance Rs. 45.00.000/- within 15 days in the manner as follows:--

(1) Rs. 5,00,000/- by crossed bank draft.

(2) Rs. 40,00,000/- by unconditional and irrevocable bank guarantee.

2. Pursuant to the said letter, the petitioner furnished one bank guarantee for Rs.

4,00,00,000/- through the Punjab and Sind Bank on 11-6-1980 and paid Rs. 5,00,000/- in cash on 12-6-80. On 7-7-80 the FCI issued a sale letter in favour of the petitioner which provided that all the general terms and conditions of sale as specified in the tender document subject to agreed amendment/modification on the basis of the discussions on 20/21-3-1980 and 9/5/1980, would govern the transaction. The modified terms arrived at on 20/21-3-1980 and 9-5-1980 would appear from the minutes of the said two meetings which form part of this sale letter. The two important variations which were made are as follows :--

1. That the weights of plants indicated in the notice inviting tender were inclusive of weights of the foundations and those weights should be treated as deleted and the weights should be treated as approximate weights.

2. Dismantling and lifting of the plants should be completed within 18 months from the date of acceptance of petitioner's offer. The entire payment of the price to be made to the FCI by equal monthly instalments within 12 months time. The value of the goods lifted by the petitioner should not be more than the payment of quarterly instalments and this would be assessed by the FCI and the assessment will be binding on the petitioner.

3. The said sale order also contains a dismantling schedule which shows the sequence in which different plants have to be dismantled and removed by the petitioner in four instalments. It appears that the net effect of these modifications is that the FCI agrees to accept purchase price in four equal instalments as also to give delivery of the plants in four instalments. The petitioner will be entitled to lift the goods after FCI will assess the proportionate value of the goods to see that it may not exceed the amount of instalment paid. This agreement was challenged by the Workers' Union of the FCI and it obtained an order of stay from the Supreme Court on 25-8-1980. The said petition was, ultimately dismissed on 13-11-1980.

4. On 2-12-1980 the petitioner paid the first instalment of Rs. 1,00,06,250/- and Rs. 4,00,250/- on account of sales tax and prayed for permission to lift the first lot of the plants mentioned in the dismantling schedule of the sale letter. The FCI allowed the petitioner to remove the Ammonia plants as per dismantling schedule on 5-12-80. The dismantling, however, could not be completed due to local labour trouble which started on 7-2-81. Faced with this situation, the petitioner prayed for rearrangement of payment up to 29-3-1981. On 27-3-1981, the On 9-3-81 the FCI granted extension of time for payment of the second instalment up to 29-3-1981. On 27-3-1981, the petitioner however, requested the FCI to extend the period up to 28-4-1981 and alleged that the FCI did not allow the petitioner to lift the entire Ammonia plant although 9 months had elapsed. On 31-3-1981 the petitioner paid to the FCI another sum of Rs. 50,00,000/- on the understanding that the FCI would allow the petitioner to lift the proportionate quantity of SWG plant mentioned in item No. 2 of the dismantling schedule of the sale letter. On 23-4-1981, the FCI allowed the petitioner to remove the same. On 30-4-1981, the petitioner paid to the FCI Rs.

50,06,000/- being the balance of the second instalment which was accepted by the FCI. Thereafter the FCI went on complaining about the poor performance of the contract by the petitioner and the petitioner went on complaining that the FCI did not allow removal of the entire goods from the factory premises. It appears from paragraph 10 (b) of the affidavit-in-opposition of the FCI filed in this proceeding that on 27-7-1981, the petitioner asked for further extension of time for payment of third instalments by six months and the period to complete the work by another two months. On 9-10-1981 the FCI agreed to give three months extension for payment of the 3rd instalment from 31-7-1981 till 31-10-1981 on condition that the petitioner would pay interest on the said sum at the rate of 18%. By letter dated 12-10-1981 the petitioner complained that the FCI had given a very short extension after taking a long time and also disputed its right to claim interest. On 4-1-1982, the FCI, at the request of the petitioner, gave further extension for payment of 3rd instalment for 12 days from the date of lifting of the lockout and reminded the petitioner that the 4th instalment must be paid within 3 months from the date of payment of the third instalment and in default of removal of the goods within 6 months from the date of lifting of the lockout, the FCI would charge 3% of the value of the unremoved goods in terms of Clause 4 of the sale letter. On 2-2-1982, the FCI informed the petitioner that the removal of the parts of Ammonia plant and SWG plant would be stopped unless the petitioner would deposit with the FCI one crore with interest plus sales tax within one week. On 27-3-1982 the FCI stopped removal of the materials and seized the gate passes. It appears that thereafter the FCI granted extension for payment of 3rd instalment up to 30-6-1982 on payment of 18% interest by the petitioner from 17-1-82- The petitioner paid Rs. 25,00,000/- towards the third instalment on 28-6-82 and requested the FCI to allow them to remove proportionate value of goods but the FCI demanded full payment and informed the petitioner that Rs. 25,00,000/- paid would be adjusted against sales tax and interest. The petitioner disputed the FCI's right to adjust the money in the manner as aforesaid. The petitioner also complained, that in spite of the fact that the first instalment had been paid in full, the FCI did not allow the petitioner to dismantle and remove the entire Ammonia plant since 28-6-1982,

5. All these disputes between the parties were settled on 1-10-1982 pursuant to the discussions held by parties on 29-9-1982 and 30-9-82 respectively. The terms of the said settlement are recorded in the petitioner's letter dated 1-10-82 which are as follows:--

(1) Regarding the FCI's claim for 18% interest on the 3rd instalment which could not be paid due to various reasons beyond control, the petitioner would furnish a bank guarantee for Rs. 10 lacs by 15-10-1982 subject to the decision of the FCI whether to waive the claim for interest or not,

(2) Payment to be made by monthly instalment against delivery in accordance with terms mentioned in this letter.

(3) The petitioner will also furnish another bank guarantee for Rs. 25 lacs by 15-10-1982 as security towards payment of instalments on due dates mentioned in this letter and on payment as aforesaid, the FCI will allow the petitioner to remove the dismantled materials.

6. The terms contained in the aforesaid letter were partially accepted by the FCI by a letter, dated 1-10-1982. This letter records that upon the petitioner furnishing the bank guarantees for Rupees 10 lacs and Rs. 25 lacs within 15-11-1982 the FCI would allow the petitioner to remove Ammonia and SWG plant. On payment of instalments on due dates the FCI would authorise removal of materials in phased manner.

7. Pursuant to this agreement the two Bank guarantees for Rs. 10 lacs and Rs. 25 lacs were duly furnished by the petitioner and the 1st instalment of Rs. 25 lacs was paid by 31-10-1982. It is alleged by the FCI that the draft for Rs. 25 lacs on Allahabad Bank, Dhanbad made over to them by the petitioner was not credited due to want of funds. It is an admitted position, that the petitioner could not pay the instalments in time and the FCI stopped removal of the dismantled materials and tried to enforce all three Bank guarantees for Rs. 50 lacs Rs. 10 lacs and Rs. 25 lacs. The agreement between the parties contained an arbitration clause. Disputes and differences having arisen between the parties, the petitioner filed a special suit u/s 20 of the Arbitration Act for filing the arbitration agreement and also took out an application u/s 41 of the said Act for restraining the FCI from enforcing the three bank guarantees. An interim order of injunction was passed in this matter in favour of the petitioner.

8. There is no dispute that this court has jurisdiction to entertain this application. But the contract between the parties however contained a forum selection clause as follows:--

"The contract shall in all respect be construed and operate as an Indian Contract and in accordance with Indian Law and is subject to the Jurisdiction of the Dhanbad Court."

Now the question is what is the effect of this clause on the present application? According to Mr, Milan Banerjee the counsel for the respondent this Court and Dhanbad Court both have jurisdiction in this matter but the present application should not be entertained by this court in view of the aforesaid express agreement between the parties and the application should be returned for filing the same in the Dhanbad court, The counsel for the petitioner, however, submits that this forum selection clause cannot take away the jurisdiction vested in this court by the Letters Patent, and the Constitution. The court therefore has discretion in the matter whether to entertain this application or to return the same for filing in Dhanbad Court. According to him for the purpose of exercising this discretion, the court will have to consider whether the balance of convenience is in favour of retaining this application or returning the same. In support of his contention he relies on Union of India (UOI) and Another Vs.

Navigation Maritime Bulgare, . In that case the parties had agreed that the dispute should be decided by the Bulgarian Court Ignoring this agreement, one party filed a suit in this court and the defendant in that suit applied for stay of this suit on the ground that there was a jurisdiction clause as aforesaid. After considering the question of balance of convenience, this court stayed the suit holding that the suit would be more conveniently prosecuted in the court at Bulgaria where all the evidences would be available. The petitioner's counsel also cited Jokai (Assam) Tea Co. Ltd. and Another Vs. Bhawani Shankar Bagaria, in support of his contention that the court has discretion in the matter. In this case, the parties had agreed that the transaction was subject to Dibrugarh jurisdiction. One party in breach of this agreement instituted a suit in this court Thereupon the defendant applied for stay on the basis of the ouster clause. The court after considering the balance of convenience, stayed the suit without prejudice to the plaintiffs right to file the suit in proper forum,

9. Mr. Milan Banerjee on behalf of the respondent submits that the court would consider the balance of convenience in cases where two or more courts have jurisdiction in the matter and a suit or proceeding has been started in one of such courts having jurisdiction. But where there is an express and clear forum selection clause in the agreement, the question of court's discretion or consideration of balance of convenience will not arise at all because such an agreement is binding on the parties and court should enforce that contract. In support of his contention, the respondent's counsel relies on Hakam Sing Vs. Gammon (India) Ltd., and Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, . In the first case, the parties agreed that "The court of law in the City of Bombay alone shall have jurisdiction to adjudicate thereon". One party started a proceeding in the Court at Varanasi and that Court held that it could entertain the proceeding but this decision of the trial Court was set aside in appeal. The aggrieved party moved the Supreme Court which held:--

"Parties by argument could not confer jurisdiction on court not possessed by it under the Code but where two courts have jurisdiction, an agreement between the parties that disputes should be decided by one of such courts would not be contrary to public policy and would not contravene Section 28 of the Contract Act." The Supreme Court dismissed the appeal holding that the jurisdiction clause was binding between the parties. Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, is a Division Bench decision of this court. There the parties had agreed that legal proceedings should be instituted in the appropriate Civil Court at Durg District Both Durg Court and Assansol Court had jurisdiction in the matter. This contract also contained an arbitration clause. One party appointed a sole arbitrator. Thereupon the other party made an application in the Assansol Court challenging the validity of the arbitration agreement and the appointment of the sole arbitrator. On behalf of the respondent, it was urged that Assansol Court did not have jurisdiction in the matter in view of the ouster clause. The Assansol Court, however, entertained the application and held that the appointment of the sole Arbitrator was valid. The aggrieved party moved this

High Court in its revisional jurisdiction. Relying on *Hakam Sing Vs. Gammon (India) Ltd.*, , this court held that the parties were bound by the express jurisdiction clause and the application should not have been entertained by the Assansol Court. Strongly relying on these two authorities, it is contended on behalf of the respondent that in the present case there is an express ouster clause binding between the parties and as such the question of balance of convenience is irrelevant and immaterial. The respondent's counsel further submits that the law laid down in *Union of India (UOI) and Another Vs. Navigation Maritime Bulgare*, and *Jokai (Assam) Tea Co. Ltd. and Another Vs. Bhawani Shankar Bagaria*, cannot be considered as good law as in none of these cases the decision in *Hakam Sing Vs. Gammon (India) Ltd.*, has been considered. If that case was cited, the decisions would have been different and in accordance with the law laid down by the Supreme Court. The respondent's counsel also cited *Express Cables (P) Ltd. Vs. Punjab State Electricity Board*, where relying on *Hakam Sing Vs. Gammon (India) Ltd.*, , I dismissed an application u/s 41 of the Arbitration Act holding that the ouster clause contained in the agreement was binding on the parties. Mr. Anindra Mitra on behalf of the petitioner argues that if the court cannot consider the balance of convenience when ouster clause is there, certainly the court has the discretion to consider whether the ouster clause is oppressive or not. If in the opinion of the court, the clause is bound to be oppressive, the court will ignore it. In support he cites *Renown Biscuit Company Vs. Kamalanathan*, . In that case the parties had agreed. "No court other than the Court in the city of Bombay shall have jurisdiction to decide the dispute that may be arising between the parties". One party ignoring this clause filed a suit in Coimbatore Court for recovery of Rs. 2,500/-. The defendant raised the preliminary point of jurisdiction but the trial Court held that it had jurisdiction to entertain the matter. Against this order the Madras High Court was moved in its revisional jurisdiction. The Madras High Court relying on *Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others*, upheld the decision of the trial court on the ground that the ouster clause was oppressive.

10. According to Mr. Mitra the ouster clause in the present case is also oppressive and as such this court should ignore the clause and entertain the present application. In *Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others*, , the court on the ground that the ouster clause does not affect its jurisdiction observes that the excluded court must make a new approach and ignore the ouster clause if it is oppressive as will be clear from the extract set out below:--

"A new approach to this question deserves to be made for the ouster clause is calculated to operate as an engine of oppression as a means to defeat the ends of justice..... Now such a stipulation may be legal and binding on parties. That, however, does not mean that it divests the court of its jurisdiction.....

But the court on its part is not bound by the stipulation. The stipulation can be ignored by the excluded court which otherwise possess jurisdiction if it is

considered to be oppressive having regard to the surrounding circumstances including the stakes involved."

11. A careful reading of the facts in *Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others*, and *Renown Biscuit Company Vs. Kamalanathan*, will reveal that what these excluded courts have done in these two cases was to consider only the "balance of convenience" in the name of "new approach" and nothing else. When two or more courts have jurisdiction in a matter and a proceeding has been started in one of such courts, if there is no ouster clause, then certainly the court which has been moved, has the discretion to consider the balance of convenience if that point is agitated by any party to the proceeding and to release or retain the matter accordingly. But when a clear unambiguous ouster clause is there, the legal position would be entirely different. In such a case, the ouster clause may not be binding on the excluded court or may not affect its jurisdiction, but the effect of the excluded court exercising its jurisdiction in the matter would be to absolve the parties from their solemn agreement which is otherwise binding on them. Now a court ordinarily will not allow parties to get out of their lawful bargain. It is true that in some exceptional cases, the court has the power to release the parties from their agreement if it causes hardship but that is done under the statutory provisions of the Specific Relief Act. When a party comes to court with the allegations that the contra has been brought about by fraud, coercion, undue influence, mistake or misrepresentation and the court finds it to be true, it releases the party from the contract. But it can do so because such contracts have been made voidable under the Indian Contract Act. Normally the courts will have to enforce all valid and lawful agreements. In my opinion, if the excluded court finds that there is a valid ouster clause in the agreement but the court has been moved in breach of it, the excluded court should not exercise its jurisdiction. If the excluded court exercises jurisdiction by making a new approach it would be an encouragement to the parties to commit breach of contract and a court should not be a party to it. In my opinion, when parties enter into a forum selection agreement with free consent and as a result thereof, the parties have to face botheration and expenses, these are no grounds for releasing them from their contract. In such a case the excluded court cannot consider the balance of convenience or make a new approach to relieve the parties from their bargain. The theory of "new approach" if implemented will open the floodgate for committing breach of contract by unscrupulous litigants who want to get out their solemn bargain. I am also of the opinion that a contract cannot be avoided only because it contains stringent terms and the court has no jurisdiction to ignore such contracts unless such contracts are found to be voidable or void under the law,

12. Mr. Deb, the senior counsel for the petitioner submits that this application has been made in this court which is "competent" within the meaning of Sub-section (4) of Section 31 of the Arbitration Act and the ouster clause does not affect its jurisdiction. Therefore, u/s 31 Sub-section (4) of the Arbitration Act, this court has exclusive jurisdiction to entertain this application as well as all

applications in connection with the present arbitration proceeding. In the premises this ouster clause has no legal consequence whatsoever. To appreciate his argument it would be convenient to look into the provisions of this Section 31(4) of the Act:

"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 proceeding and all subsequent application arising out of that reference and the arbitration proceeding shall be made in that court and in no other court"

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 the ouster clause, the Sub-section (4) of Section 31 of the Act will not come into operation,

14. In my opinion, facts of this case do not establish that the balance of convenience is in favour of keeping the matter in this court. The ouster clause, in my opinion, is clear and not oppressive. In any event, in view of the clear ouster clause which is binding on the parties, no discretion is left to this court either to consider the balance of convenience or to make any "new approach". In humble agreement with *Hakam Sing Vs. Gammon (India) Ltd.*, and *Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others*, and following my own decision in *Express Cables (P) Ltd. Vs. Punjab State Electricity Board*, , I hold that the forum selection clause in the present agreement is binding on the parties and as such this court should not entertain this application. This application is, therefore, returned to the petitioner for filing in the proper forum. All interim orders are to continue for a fortnight. Each party to pay and bear its own cost of this application.