

(1984) 03 CAL CK 0012
In the Calcutta High Court
Case No : Matter No. 1559 of 1983

Sm. Kumud Agarwalla

APPELLANT

Vs

Fertilizer Corporation of India Ltd.

RESPONDENT

Date of Decision : 22-03-1984

Acts Referred:

Arbitration Act, 1940 — Section 2
Contract Act, 1872 — Section 28

Citation : AIR 1985 Cal 89

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Judgement

Pratibha Bonnerjea, J.—The present application has been taken out by the petitioner under Sections 9, 11 and 12 of the Arbitration Act for removal of the sole Arbitrator and appointment of a new one in his place and stead under the circumstances as follows :--

It is alleged by the petitioner that she entered into four contracts with the respondent on 2-6-1973, 21-6-1974, 6-9-1974, 16-12-1974 for supply of polythene Lined Jute Bags. Each of the said contract contained an arbitration clause. These contracts are admitted by the respondent. The petitioner further alleged that the respondent issued purchase orders pursuant to the said contracts from within the jurisdiction and the same were received by the petitioner at No. 6. Nawab Dilarjung Road, Calcutta outside the jurisdiction of this Court. The said facts are not disputed by the respondent. The petitioner supplied some goods and manufactured some for giving delivery but the respondent did not pay the full price of the goods delivered and also wrongfully failed and neglected to take the delivery of the balance goods. Thereupon disputes and differences arose between the parties. The arbitration clause provided that the disputes will be referred to an agreed arbitrator. If, however, parties fail to agree then both the parties will appoint one arbitrator each and the disputes will be referred to the joint arbitrators. It is alleged that on account of the failure of the respondent to agree to an arbitrator, the petitioner appointed

her arbitrator and gave notice to the respondent for appointing its arbitrator. The respondent failed to comply with the said notice. The petitioner then appointed his own arbitrator as the sole arbitrator and the sole arbitrator entered upon the reference and served notice on the respondent. At that juncture, the respondent objected and asked the arbitrator not to proceed in the matter. The petitioner, however, repeatedly called upon the arbitrator to proceed with the reference but the arbitrator failed and neglected to proceed in the matter. Hence this application.

2. The only point pressed by the respondent in this application is the jurisdiction clause contained in the contracts which is set out below : --

"The contract shall be deemed to have been entered into at Gorakhpur and all causes of action in relation to the contract will thus be deemed to have arisen only within the jurisdiction of Gorakhpur Court."

3. It is contended on behalf of the respondent that on account of this jurisdiction clause the petitioner is not entitled to move the present application in this Court. In support of his contention, the respondent's counsel cited Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, . The petitioner does not dispute the existence of the jurisdiction clauses in the agreements but submits that these clauses only refer to filing of the suits and have nothing to do with arbitration matters. In Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, , the jurisdiction clause was : --

"That in case any legal proceeding are instituted against the plant, they shall be instituted in the appropriate Civil Court of Durg (District)"

In that case both Durg and the Assansol Courts had jurisdiction to entertain an application under Sections 9, 31 and 33 of the Arbitration Act and such an application was made in the Court at Assansol. The jurisdiction clause was agitated and the matter went up to the Supremo Court. It was held relying on Hakam Sing Vs. Gammon (India) Ltd., that in view of the aforesaid agreement between the parties, such an application in the Assansol Court was not maintainable. In (1980) 84 CWN 79, the jurisdiction clause was :

"All civil suits in connection with this purchase order shall be to the jurisdiction of local Courts at Patiala."

In that case also, there was no dispute that both Patiala as well as Calcutta High Court could entertain the application u/s 41 of the Arbitration Act. Considering the jurisdiction clause set out above and relying on Hakam Sing Vs. Gammon (India) Ltd., , I also gave effect to the jurisdiction clause holding that the said application should have been made in an appropriate Court at Patiala.

4. The petitioner's counsel, however, submitted that the ouster of jurisdiction clauses in the agreement must be strictly construed. Unless the agreements clearly provide that only a particular Court will have jurisdiction in the matter, the jurisdiction of the other Court, which is otherwise competent to entertain the suit

or the legal proceeding, will not be excluded. In support, he cited Patel Bros. Vs. Vadilal Kashidas Ltd., . That was a case for recovery of damage for non-delivery. In evidence, a bill was tendered and marked as Ext. P1. At the top of this bill it was written "subject to Bombay jurisdiction". As both the Madras Court and the Bombay Court had jurisdiction in the matter, the plaintiff filed a suit in Madras Court against the defendant for recovery of damages for non-delivery of goods. The defendant contended that Madras Court did not have jurisdiction to entertain the suit in view of the ouster clause contained in Ext. P1. The Madras Court held : --

"The mere recital on the top of the bill could not be incorporated as a term of the contract."

"Ouster of jurisdiction of a Court to which a person is entitled to resort to under the CPC or any other statute cannot be a matter of assumption or presumption but one to be proved by express words contained in the contract or at least by necessary or inevitable implication. It could not be said that this test was satisfied in this case."

This authority is not helping the petitioner in the present case. The ouster clause in the present case is contained in Clause 12.00 in the Special terms and conditions attached to the said four contracts and/or purchase orders. It clearly shows that parties intended that the contract will be deemed to have been entered into within the jurisdiction of Gorakhpur Court. In the affidavit-in-reply, the petitioner did not deny this agreement. The petitioner, however, relies on Clause 11 of Order No. 843 dated 2-6-1973 which contains as follows : --

".....the venue of all arbitration shall be Calcutta."

5. There is no conflict between Clause 12.00 and Clause 11, Clause 11 only records the agreement between the parties regarding the venue of arbitration. It has no reference to the proceeding in Court.

6. It is true, that it is not open to the parties by agreement to confer jurisdiction on a Court which does not possess any or to take away the jurisdiction vested in a Court by any statute by agreement. When two or more Courts have concurrent jurisdiction to entertain a suit or a proceeding, the parties by agreement cannot affect the jurisdiction of any of such Courts. In spite of the ouster clause in the agreement, the Courts concerned continue to have such inherent jurisdiction in the matter. But the Court excluded by the agreement, refuses to entertain the suit or the proceeding not due to any lack of jurisdiction but on the principle that contract is binding on the parties and they must abide by their own agreement.

7. It is submitted by the petitioner's counsel that the ouster clause in the present case indicated that the parties contemplated that if any suit would have to be filed in connection with these contracts, that should be filed in an appropriate Court at Gorakhpur. This clause would have nothing to do with the arbitration proceeding. I am unable to accept this submission. For the purpose of

filing an application under the arbitration Act, if one has to ascertain whether a particular Court has jurisdiction in the matter or not, it has to be found out whether a suit could have been filed in that Court on the same cause of action. If the Court is competent to entertain the suit then that Court will also be the competent Court to entertain the application under the Arbitration Act. Applying this test. I find that the appropriate Court at Gorakhpur should be the competent Court to entertain the present application.

8. In that view of the matter, I hold that Clause 12.00 of the special terms and conditions of the agreement is binding on the parties and this application ought to have been made in the appropriate Court at Gorakhpur. This application is, therefore, returned to the petitioner for filing in the proper Court. The petitioner will pay be taxed cost of this application to the respondent.