

(1995) 01 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No"s. 1298 and 6300-CII of 1993 and Civil Miscellaneous No"s. 6301-CII of 1993 and 3601-CII and 12241-CII of 1994

Union of India (UOI)

APPELLANT

Vs

Harbans Singh Tuli and Sons and Another

RESPONDENT

Date of Decision : 10-01-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 4

Citation : (1995) 111 PLR 144

Hon'ble Judges : V.K. Jhanji, J

Bench : Single Bench

Advocate : Viney Mittal and Raman Walia and Arvind Bansal, for the Appellant; Salil Sagar, for the Respondent

Final Decision : Allowed

Judgement

V.K. Jhanji, J.—Present Civil Revision is directed against order dated 11.2.1993 passed by Sub Judge 1st Class, Chandigarh, whereby application of the respondent u/s 28 of the Arbitration Act, 1940 (for short the Act) was allowed and four months" time was granted to the Arbitrator to make and announce the Award from the date of again entering into reference.

2. Petitioner invited tenders for the construction of married accommodation at Pithoragarh (U.P.). In response to the notice of tender, M/s. Harbans Singh Tuli and Sons, Chandigarh (respondent herein) submitted their tender and the tender was accepted at Lucknow on 11.2.1977. The acceptance of the tender was conveyed to the respondent at Chandigarh. It appears that after the respondent undertook the work, some dispute between the parties arose and as provided under Condition No. 71 of the General Conditions of the Contract, respondent applied to the Army Headquarters for appointment of an Arbitrator. One Brig. S.P. Sehgal was appointed Arbitrator but before he could enter into reference, he

resigned and thereafter one B.R. Govind was appointed Arbitrator who too resigned. On 22.9.1980, Shri V.K. Gupta, Chief Engineer was appointed Arbitrator. He entered into reference and held some proceedings firstly at Pithoragarh and thereafter, held some sittings at Delhi. During the course of proceedings it came to the notice of the petitioner that Shri V.K. Gupta had acted as a counsel in disciplinary case which was pending before the Vigilance Committee against one Shri Bhalla who was Engineer-in-Charge of the work, for making over payment in another contract to the respondent. Apprehending that justice may not be done, petitioner filed an application in the Court of District Judge, Pithoragarh for removal of Shri Gupta and for appointment of a fresh Arbitrator. Application was dismissed by the learned District Judge vide order dated 17.4.1982. Feeling aggrieved against the said order of the learned District Judge, Pithoragarh, petitioner filed Civil Revision No. 402 of 1982 in Allahabad High Court. On 11.10.1982, Allahabad High Court admitted the civil revision and vide interim order of the same date, operation of the judgment of learned District Judge was stayed, Civil Revision before the Allahabad High Court is pending and has not been decided till date.

3. Respondent, on 23.4.1992, filed an application in the Court of Sub Judge 1st Class, Chandigarh u/s 28 of the Act for enlargement of time for making the Award. Respondent in his application stated that Shri V.K. Gupta, Chief Engineer entered into reference on 25.10.1980 and held four hearings and subsequently agreed to hold hearings at Delhi and this action of the Arbitrator annoyed the petitioner. Petitioner thus moved an application u/s 5 of the Act seeking to revoke the authority of the arbitrator. That application was dismissed by the District Judge, Pithoragarh and that order has been impugned in Civil revision in the High of Allahabad. Respondent has also stated in the application that he received notice from the Allahabad High Court fixing the date as 28.11.1988 for hearing and on the date fixed, respondent moved an application for vacation of stay which came up for hearing on 17.1.1992 when Hon"ble Mr. Justice D.S. Sinha of Allahabad High Court was pleased to observe orally that there was no stay against the Arbitrator to proceed with the matter. Accordingly, in the application, prayer has been made to extend time for making the Award. Petitioner, Union of India contested the application and in their reply, not only raised the objection with regard to territorial jurisdiction of Chandigarh Court but also submitted that Shri V.K. Gupta who was appointed Arbitrator by the Engineer-in-Chief, entered into reference on 25.10.1980 but did not complete the arbitration proceedings till his retirement i.e. 30.6.1982. Petitioner has further stated that as per Clause 70 of General Conditions of Contract, if the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place. Shri V.K. Gupta having vacated his office on his retirement is not competent to act as an Arbitrator. The learned trial Court, vide impugned order held that the Court at Chandigarh has jurisdiction to entertain the prayer of the respondent for enlargement of time and accordingly

allowed application and granted four months" time to the Arbitrator to make and announce the Award. This order is now being impugned in this civil revision by Union of India.

Shri Vinay Mittal, Senior Advocate, counsel for the petitioner contended that the contract between the parties was accepted at Lucknow part of the work was executed at Pithoragarh and breach has been committed at Pithoragarh in the State of Uttar Pradesh. According to him, no part of the contract was required to be performed at Chandigarh and, therefore, the Court at Chandigarh had no jurisdiction to entertain the application for enlargement of time.

4. Mr. Salil Sagar, Advocate, counsel for the respondent, relying on Clause (c) of Section 20 of Code of Civil Procedure, contended that the suit can be filed where cause of action, wholly or in part, arose. According to him, acceptance of tender was communicated at Chandigarh, some of the cheques were received at Chandigarh and notice of cancellation of the contract too was received at Chandigarh and thus part of cause of action arose at Chandigarh. In support of his argument he placed reliance on :-

(i) A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,

(ii) Union of India v. Shibho Mal and Sons 1989 1 P.L.R. 264.

5. The only question to be determined in this Civil Revision is as to whether Court at Chandigarh has the jurisdiction to entertain application for enlargement of time. At this stage, it would be relevant to notice the relevant provision of the Act relating to jurisdiction of Court. "Court" for purposes of Arbitrator Act has been defined in Section 2(c) of the Act as a Civil Court having jurisdiction to entertain a suit with respect to the subject matter of the reference. Section 31 of the Act defines jurisdiction for application under the Act. Four points covered u/s 31 of the Act are:-

(i) The award may be filed in any Court having jurisdiction to entertain a suit with respect to the subject-matter of the reference;

(ii) All questions relating to the validity, effect or existence of an (i) award or (ii) arbitration agreement as between the parties or their representatives in interest are to be decided by the Court in which the Award has been filed or (if it has not already been filed) by the Court in which it may be filed under Sub-sections (1) and (4);

(iii) All applications relating to the conduct of arbitration proceedings or arising out of the same are also to be filed in the same Court (as in case (b) above);

(iv) Once an application has been filed in a Court (having jurisdiction) under any of the sections of this Act, that Court alone will have jurisdiction to entertain subsequent applications with respect to the same arbitration.

6. Section 41 of the Act provides that the provisions of the CPC shall apply to all proceedings before the Court, and to all appeals under the Act. The code in its

entirety has been made applicable to the proceedings under the Act. Sections 15 to 20 of the Code regulate the forum for the institution of the suit. Section 20 of C.P.C. inter alia provides that subject to the limitations prescribed u/s 15 to 19 of C.P.C. a suit shall be instituted in a Court within the local limits of whose jurisdiction :-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

7. According to learned counsel for the respondent, his case falls in Clause (c) of Section 20 of the Code of Civil Procedure.

8. In determining the objection of lack of territorial jurisdiction, Court has to take into consideration all the facts pleaded in support of the cause of action without questioning the correctness or otherwise of the facts. What has been pleaded in paragraph 7 of the application is that the acceptance of the tender was communicated to the applicant at Chandigarh. u/s 66 of the Contract, facility to receive cheques at Chandigarh was given by the respondent to the applicant and the notice regarding the cancellation of the contract was also served upon the applicant at his Chandigarh Office. Therefore, this Hon'ble Court has the jurisdiction. Moreover, the applicant contractor had earlier moved an application u/s 41 of the Arbitration Act on 9.9.1977 before Chandigarh Court and as such in view of the provisions of Section 31 of Arbitration Act, only Court at Chandigarh has the jurisdiction in the matter.

9. In the present case, even if the averments made in the applications are taken as true, it cannot be said that a part of cause of action arose within the jurisdiction of Chandigarh Court. The fact that the formal acceptance of tenders was communicated to the respondent at Chandigarh or some of the cheques were sent to the respondent at Chandigarh or notice regarding cancellation was received at Chandigarh by the respondent, would not confer jurisdiction on a Court at Chandigarh unless it is established that cause of action on the basis of which relief is being claimed has arisen within the territorial jurisdiction of the Court. The relief sought in the application is for extension of time for making the Award. It is not in dispute that the tender was accepted at Lucknow for the work to be executed at Pithoragarh. A part of the work was executed at Pithoragarh; order for cancellation of the contract was passed at Lucknow; order of appointment of Arbitrator was not passed by the competent authority within the

jurisdiction of Court at Chandigarh; Arbitrator did not hold any proceedings in Chandigarh; application for revocation of the authority of the Arbitrator was filed before the District Judge, Pithoragarh and the order of the learned District Judge, Pithoragarh is pending in Civil revision before the Allahabad High Court. Thus, merely because formal acceptance was received at Chandigarh or some cheques were received at Chandigarh, would not constitute facts forming an integral part of cause of action. So also the order of cancellation conveyed to the respondent at Chandigarh, would not give any cause of action to the respondent to file an application for extension of time at Chandigarh. In *State of Rajasthan and Others Vs. Swaika Properties and Another, The Improvement Trust, Jaipur* issued a notice intimating that the State Government proposes to acquire land for implementing and developing a Scheme. The notice was served on the respondent therein at Calcutta. Respondent made an effort to get the land exempted but having failed to get the land released from acquisition, filed writ petition in the High Court at Calcutta, Supreme Court, on the basis of these facts, held that the cause of action neither wholly nor in part arose within the territorial jurisdiction of Calcutta High Court. In *Subodh Kumar Gupta v. Shrikant Gupta and Ors.* 1993 2 P.L.R. 728 (S.C.) plaintiff had brought a suit for dissolution of firm, the Head Office of which was situated at Bombay whereas its factory was situated at Mandsaur where father of the plaintiff and his brothers lived and attended to the partnership business. Plaintiff's case was that after he shifted to Chandigarh he used to call for and receive statements of accounts of the business carried at Mandsaur and he also booked and received orders for the firm at Chandigarh which he forwarded to Mandasur for execution. He also alleged that the Branch office of the firm was at Chandigarh. On mere bald allegation that he was having a Branch Office of the firm at Chandigarh, Supreme Court held that it will not confer jurisdiction unless it is shown that a part of cause of action arose within the territorial jurisdiction of that court. Since none of the defendants was residing at Chandigarh or did any business whatsoever in Chandigarh, it was held that Chandigarh Court had no jurisdiction to entertain the suit. In *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, Engineers India Limited*, acting as consultants for Oil and Natural Gas Commission, having a Gas Processing Plant at Hazira, issued an advertisement in leading newspapers of the country including that of West Bengal inviting tenders for setting up a Kerosene Recovery Processing Unit. NICCO, having its registered office in Calcutta, read and became aware of the tender notice printed in Times of India circulated within the jurisdiction of the Calcutta High Court. NICCO alongwith others submitted their offer in response to the tender notice. All the bids were scrutinised by Engineers India Limited, New Delhi. NICCO's bid was rejected on the ground that it did not fulfill the requisite experience criteria stipulated in the tender. NICCO represented. The Tender Committee re-examined the view of Engineers India Limited and agreed with the same. NICCO again represented and their representation was considered by Engineers India Limited as well as by Tender Committee but they saw no reason to depart from their earlier view. The final decision was taken by the Steering Committee at New

Delhi, pursuant where to it was decided to award the contract to M/s. CIMMCO Ltd. NICCO filed writ petition in the High Court at Calcutta. Vide order dated 17.12.1993 the Calcutta High Court directed as under:

"There will be an order directing the respondents to consider the offer of the petitioner along with the others and in the event the petitioner's offer is otherwise found to be valid and lowest and in the event petitioner otherwise complies with the formalities, petitioner's offer should be accepted by the respondent authorities."

In appeal against the order of the High Court, Supreme Court held that merely because NICCO read the advertisement at Calcutta and sent offer from Calcutta and made offer from Calcutta, would not constitute the fact forming integral part of cause of action at Calcutta. Accordingly, appeal was allowed and the writ petition was ordered to be dismissed for want of jurisdiction.

10. Learned counsel for the respondent placed strong reliance on the decision in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, and contended that a part of cause of action accrued at Chandigarh since acceptance of the contract was conveyed at Chandigarh. The facts of A.B.C. Laminart's case (supra) reveal that Clause 11 of the agreement entered into between the parties provided as follows:-

"Any dispute arising out of this sale shall be subject to Kaira jurisdiction."

Dispute having arisen out of the contract, respondent therein filed a suit against the appellants in the Court of Subordinate Judge at Salem for recovery of the amount. One of the preliminary objections taken was that the Court at Salem had no jurisdiction as the parties, by express contract had agreed to confer exclusive jurisdiction in regard to all disputes arising out of the contract on the civil Court at Kaira. The question thus arose whether Clause 11 should be construed to have excluded the jurisdiction of Court at Salem. The Court found that the clause did not have the words "exclusive", "alone", "only, and the like and other clauses were also not indicative of exclusion of jurisdiction of other Courts. In these circumstances, it was held that the jurisdiction of the Court at Salem which Court had otherwise jurisdiction under law, was not expressly excluded. In this judgment, the Supreme Court observed thus :-

"In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a Court within whose jurisdiction the acceptance was communicated. The

performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and no where else."

11. Counsel is not correct in contending that in all cases, suit can be filed in a Court within whose jurisdiction, acceptance was communicated. Section 4 of the Contract Act which deals with this subject provides that communication of acceptance is complete as against the proposer when it is put in a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the receiver when it comes to the knowledge of the proposer. Accordingly, as soon as acceptance is posted, acceptance is complete against the proposer and the contract is concluded. This is clear from illustration (b) to Section 4 of the Contract Act which is as under :-

"Illustration (b)

B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete, as against A when the letter is posted; as against B when the letter is received by A."

Thus, when a breach of contract is complained, an action for breach of contract can be brought at the option of the plaintiff either at the place where the contract is made or a place where breach was committed. For deciding the question as to where the contract is made, the Court has to take into consideration the provisions of Section 4 of the Contract Act. A contract is made when an offer of one party is accepted by the other party. The communication of acceptance to the proposer cannot be said to be an integral part of completion as to constitute a part of cause of action in a suit and even if the acceptance does not reach the proposer being lost or misplaced in transit, the contract would be complete. It always depends upon the facts and circumstances of each case. In the present case, as already noticed, tender was submitted at Lucknow and the same was admittedly accepted at Lucknow. It was only the acceptance that has formally been conveyed to the respondent at Chandigarh who has an office at Chandigarh. Therefore, mere conveying of acceptance will not form integral part of cause of action and confer jurisdiction at Chandigarh. In *Union of India v. Shiboo Mal and Sons*. 1989(1) P.L.R. 264 some of the observations go in favour of the respondent but in that case not only acceptance of offer was conveyed at Chandigarh but as is clear from paragraph 7 of the judgment, proceedings u/s 28 of the Arbitration Act in respect of extension of time for making of the Award by the Arbitrator, were also initiated at Chandigarh. Since application u/s 28 of the Arbitration Act was filed at Chandigarh, the Court at Chandigarh alone had the jurisdiction to entertain the subsequent application as provided under Sub-section (4) of Section 31 of the Arbitration Act.

12. Learned counsel for the respondent then contended that in this case too,

application u/s 41 of the Arbitration Act was filed before the Chandigarh Court and as such in view of Sub-section 4) of Section 31 of the Act and also in view of judgment in Kumbha Mawji Vs. Union of India (UOI), and Guru Nanak Foundation Vs. Rattan Singh and Sons, subsequent application was maintainable only at Chandigarh and no where else. Further, according to Mr. Salil Sagar, Advocate, counsel for the respondent, the Court at Pithoragarh and High Court of Allahabad has no jurisdiction to entertain the prayer of the petitioner to revoke the authority of the Arbitrator. There is no dispute with the proposition as canvassed by the learned counsel for the respondent that once an application has been filed in a Court under any of the Sections of Arbitration Act, that Court alone will have to entertain subsequent application with regard thereto. This has been so provided under Sub-section (4) of Section 31 of the Arbitration Act. However, the exception is that the first application must have been filed in a Court having jurisdiction in the matter to which reference relates. In this case, respondent has failed to bring on record the application u/s 41 of the Arbitration Act which was stated to have been filed some where in the year 1977 and the order, if any, passed thereon. Counsel, during the course of arguments, admitted that the application has been dismissed in default. Thus, from the admission, it is clear that the petitioner had no opportunity to object to the jurisdiction of Court at Chandigarh to entertain the application u/s 41 of the Arbitration Act. Otherwise too, as dealt with in the earlier part of the judgment, no cause of action having been accrued within the territorial jurisdiction of Chandigarh Court, filing of application u/s 41 of the Act is of no consequence. It may be noticed at this stage that Clause 66 of the General Conditions of Contracts provides for making of all payments due under the contract by means of crossed cheques to the Contractor at the treasury located in the station where either the work is executed or service rendered or at the treasury nearest to the station where the office of Garrison Engineers is located. The act of the petitioner in sending some of the cheques to the respondent at Chandigarh, would not confer jurisdiction on a Court at Chandigarh when it is not the case of the respondent that the cheques sent to him at Chandigarh were of the Treasury nearest to the Station where office of Garrison Engineers is located because work was admittedly executed at Pithoragarh and services, if any, were rendered at that place alone.

13. Learned counsel for the petitioner contended that application u/s 28 of the Arbitration Act for enlargement of time for making the Award is not maintainable for the reason that Shri V.K. Gupta, the Arbitrator, on his retirement, has vacated his office and in view of condition No. 70 of the General Conditions of Contracts, is not competent to act as an Arbitrator. He also referred to the judgment of LA. No. 1 of 1991 in SLP (c) No. 13278 of 1986 in the case of Prestressed Concrete and Shell Roofs (Pvt.) Ltd. v. Union of India, in which the plea that after the retirement, Arbitrator does not cease to be as such and is entitled to proceed with the arbitration proceedings, was not accepted and it was held in paragraph 3 as under :-

"We do not agree with the respondents. In the 4th sub-para of the arbitration

clause being Clause No. 70 of Annexure 5 it was provided that if the Arbitrator resigned or vacated his office or was unwilling or unable to act due to any reason whatsoever, another arbitrator would be appointed b his place. In view of this provision, we hold that after his retirement, Brig. Gur Dayal having vacated his office was not competent to proceed with the arbitration proceedings. Accordingly, we allow the prayer made on behalf of Union of India and permit the Engineer-in-Chief, Army Headquarter, New Delhi to appoint the Brigadier who is the present incumbent as the fresh arbitrator. The application is allowed."

14. It is not necessary for me to deal with this contention of learned counsel for the petitioner as the matter with regard to revocation of the authority of the Arbitrator is pending decision before the Allahabad High Court in Civil revision preferred against the order of learned District Judge, Pithoragarh. Petitioner, of course, shall be at liberty to raise this contention before that Court.

15. For the reasons recorded above, this Civil revision is allowed, the order under revision is set aside and in consequence thereof application u/s 28 of the Arbitration Act seeking extension in time for making and announcing the Award by the Arbitrator shall stand dismissed. Civil Misc. No. 3601 CI1 of 1994 for dismissing the civil revision as having become infructuous, shall stand dismissed. No order need be passed in Civil Misc. 12546-CII of 1994 for transfer of the case to some other Court which was filed at the stage when arguments were heard in part, in view of the statement made by counsel for the respondent as also the respondent that the application may be dismissed as withdrawn. There shall be no order as to costs.