
(2001) 04 CAL CK 0042
In the Calcutta High Court
Case No : A.P.O. No"s. 462 and 463 of 1992

Universal Petrochemicals Ltd.	Vs	APPELLANT
Rajasthan State Electricity Board		RESPONDENT

Date of Decision : 17-04-2001

Acts Referred:

Arbitration Act, 1940 — Section 11, 2, 20, 2E, 31
Contract Act, 1872 — Section 23

Citation : AIR 2001 Cal 102 : (2001) 2 CALLT 417 : (2001) 2 CHN 300 : 105
CWN 1098

Hon'ble Judges : Pranab Kumar Chattopadhyay, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Mr. Pratap Chatterjee and Mr. Amitesh Banerjee, for the
Appellant;Mr. Ajoy Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd., (2009) 1 JT 315 : (2009) 1 SCALE 354 : (2009) 3 SCC 107 : (2009) 1 SCR 138 : (2009) 1 UJ 311 : (2009) AIRSCW 607 : (2009) 1 Supreme 121

P.K. Chattopadhyay, J.—These two appeals arise out of two separate judgments and orders passed by the learned trial Judge while dealing with one proceeding. Both the appeals were heard analogously as the facts are same, subject matter of disputes are similar and the parties are identical. The facts of the case are briefly summarised hereinbelow.

2. Universal Petrochemicals Ltd. the appellant herein, entered into two separate contracts for supply of transformer oil to Rajasthan State Electricity Board {hereinafter called the Board}. In terms of those agreements, the appellant was to furnish bank guarantee for a total sum of Rupees 1,79,200/-. The appellant furnished four bank guarantees to cover the said amount. The case of the appellant is that the entire quantity of transformer oil under Contract No. TN

1261 was duly supplied by it by December, 1986 and the same was accepted by the Board without any objection. In respect of the other contract, being Contract No. TN 1312, the appellant contended that the transformer oil was delivered after it was tested and certified in Calcutta by the representative of the Board. Such supply was completed by June, 1988.

3. But the disputes and differences arose between the parties on the Board's unauthorised invoking of the bank guarantee alleging that the oil supplied by the appellant is of defective quality.

4. So in view of the arbitration clause contained in the agreement, the appellant on 28th June, 1990 filed an application u/s 20 of the Arbitration Act, 1940 (hereinafter called the Act) after obtaining leave under clause 12 and 14 of the Letters Patent. An application u/s 41 of the Act was also filed on that date seeking an interim order, restraining the Board from demanding or receiving any payment under the Bank Guarantees and an interim order was passed on that date which was later on confirmed.

5. Then an application was also filed by the Board wherein the Board prayed for, inter alia, dismissal of the application filed by the appellant herein u/s 20 of the Act and alternatively, made a prayer for a direction that the said application u/s 20 filed by the appellant herein be taken off the file. In the said application the Board further prayed for revocation of leave under Clause 12 and 14 of the Letters Patent. The Board also prayed for dismissal of the application filed by the appellant herein u/s 41 of the Arbitration Act and the stay of the operation of the interim order dated 25th June, 1990 passed by the Court on the application u/s 41 filed by the appellant.

6. On 6th March, 1991 application u/s 20 filed by the appellant herein and also the application filed by the Board came up for hearing before the learned trial Judge when the said learned Judge dismissed the application filed u/s 20 of the Act by the appellant herein and also vacated the interim order passed on the section 41 application though the said application filed u/s 41 of the Arbitration Act had been finally disposed of on an earlier date.

7. On an appeal filed by the appellant, the said order of 6th March, 1991 was set aside by the Appeal Court and the matter was remanded to the Trial Court for fresh consideration. The learned trial Judge, thereafter heard the matter again pursuant to the direction of the Appellate Court and passed similar order dismissing the section 20 application filed by the appellant herein and the final order passed in section 41 application was also vacated.

8. Curiously enough the learned trial Judge delivered two separate judgments and passed two different orders on the same day that is on 13th March, 1992 in order to dismiss the section 20 application filed by the appellant therein and also to vacate the final order passed in section 41 application though the said application u/s 41 was finally disposed of by an earlier order dated 1st August, 1990. From the said two different orders passed by the learned trial Judge, two

appeals were preferred as mentioned before and which were heard analogously by us.

9. It is an admitted position that the appellant herein entered into two separate contracts with the Board on 23rd September, 1985 and 2nd December, 1987 respectively for supply of transformer oil to the Board. The second contract dated 2nd December, 1987 contains a forum selection clause which is absent in the first contract.

10. Mr. Pratap Chatterjee, learned senior Counsel, appearing on behalf of the appellant submitted that this Hon'ble Court has the pecuniary and territorial jurisdiction to entertain and try both the applications filed u/s 20 and section 41 of the Arbitration Act, 1940. Mr. Chatterjee submitted that in view of section 31(4) of the Arbitration Act, 1940 the Board was not entitled to any order in its favour. It was submitted on behalf of the appellant that section 31(4) of Arbitration Act, 1940 contains a non--obstante clause and if an application u/s 20 is made to a Court which is competent to entertain such application, then that Court alone is entitled to exercise jurisdiction.

11. Learned counsel of the appellant further submitted that in view of section 31(4) of the Arbitration Act, all subsequent applications shall be made to the Court where the first application had been made. According to the appellant, the statutory provisions contained in section 31(4) will over--ride any agreement between the parties. A private contract cannot override the provisions of any statute. section 31(4) of the Arbitration Act is unqualified according to the appellant and the same has not been made subject to contract between the parties unlike some provisions of Contract Act and Sale of Goods Act.

12. Mr. Pratap Chatterjee also submitted that an application u/s 20 of the Arbitration Act, 1940 has been made in the Calcutta High Court and as such this Hon'ble Court is the only Court which is competent to entertain the application u/s 20 and related matters and the appellant cannot be directed to withdraw the application and to file the same before any other Court as according to appellant, section 31(4) of the Arbitration Act will be a specific bar in this regard.

13. It has been submitted on behalf of the appellant that a proceeding u/s 20 of the Arbitration Act is in the matter of a reference and the learned counsel referred to an relied upon decisions reported in 1977 (2) CLJ 538 , (Sm. Kamat Srimal v. Padam Chand Sindhar), Ramkripal Sharma Vs. Union of India (UOI) and Another, and Union of India (UOI) Vs. Surjeet Singh Atwal, in support of the aforesaid contention.

14. The learned counsel further submitted that the view expressed by the learned single Judge of this Court in the case of Ganpatrai Agarwall Vs. The Fertiliser Corporation of India, is erroneous as it was held In the said judgment that a contract between the parties would supersede the statutory provisions of section 31(4) of the Arbitration Act and Mr. Chatterjee also submitted that the said judgment is contrary to settled law and is also inconsistent with other

judgments of the same learned judge.

15. It has been further submitted on behalf of the appellant that the hands of the Court are not tied in view of the existence of a forum selection clause and reference was made to the decision reported in *Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others*, and in (1989) 2 SCC 162, (*A.B.C. Laminart Put. Ltd. and another v. A.P. Agencies. Salem*) in which the Gujarat judgment has been affirmed.

16. The learned counsel for the appellant also submitted that in any event forum selection clause is absent in one of the contracts. So if the contention of the Board is to be accepted, the application will have to be bifurcated. Such a situation is wholly opposed to balance of convenience between the parties.

17. The appellant further submitted that as the dominus litus it has the right to choose its own forum and such choice cannot be interfered with except on very compelling grounds and no such ground, according to the appellant, has been made out herein. The appellant also submitted that it would be extremely inconvenient to both the parties if the matters are tried by two different Courts.

18. It was submitted by Mr. Ajay Chatterjee, learned counsel on behalf of the Board that in the present case there was no order of reference to Arbitration as the application u/s 20 filed by the appellant for an order of reference has been dismissed. The learned counsel further submitted that in the present case there was no order of reference within the meaning of section 2(e) of the Act.

19. It was also submitted by the learned counsel for the respondent that mere filing of an application u/s 20 of the Arbitration Act does not commence a reference to arbitration. A reference to arbitration, according to the learned counsel, can only be said to have commenced when an order under sub-section 4 of section 20 of the Arbitration Act is made and according to the learned counsel before an order of reference is made on an application u/s 20 of the Arbitration Act, section 31(4) of the Act does not come into operation.

20. In support of his submission, the learned counsel referred to and relied upon the decision reported in *Guru Nanak Foundation Vs. Rattan Singh and Sons*, . It has been further submitted by the Board that Courts have consistently refused to entertain petition u/s 20 of the Arbitration Act when filed before the excluded Court. In support of the above proposition, learned counsel of the respondent Board relied upon the following decisions:

1. *Hakam Sing Vs. Gammon (India) Ltd.*,
2. 1978(2) CLJ 514 [*Sitaram Rice Mills v. Union of India*]
3. AIR 1977 Cal 20 (DB) [*Batsukh Refractories and Ceramics Ltd. v. Hindusthan Steel Ltd.*]
4. *Tobu Enterprises Pvt. Ltd. Vs. Camco Industries Ltd.*,

5. Ganpatrai Agarwall Vs. The Fertiliser Corporation of India,

21. The learned counsel for the Board further submitted that u/s 39 of the Act no appeal lies from an order passed u/s 41 of the Act. Therefore the order dated 13.3.92 by which the learned single Judge vacated the interim order cannot be the subject matter of an appeal before this Court as the said order is not appealable.

22. The learned counsel further submitted that since the application u/s 20 of the Act was dismissed by the Court, no interim order passed u/s 41 can survive, so the learned Judge was within his jurisdiction to recall the interim order passed u/s 41 of the Act.

23. These being the rival contentions of the parties, the Court proceeds to deal with the same as follows:

For a proper appreciation of the points at issue. In the fitness of things, it would be proper to set out the provisions of section 31(4) of the said Act. section 31(4) runs as follows:

"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."

24. From a reading of the section it is clear that it starts with an overriding clause. The said section comes into operation where in any reference any application under this act has been made in a Court competent to entertain it,

25. It is nobody's case that the Calcutta High Court is not competent to entertain the application u/s 20 filed by the appellant. The only factor which has been urged by the Board as an alleged impediment to the entertaining of the said application is the forum selection clause existing in one of the contracts.

26. It also cannot be disputed from the facts of this case that the cause of action of the appellant arising out of the two separate agreements is against the same Board. A part of cause of action has arisen within the jurisdiction of this Court as the Board has made part payment of the dues of the appellants at its registered office in Calcutta. The agreement was signed at Calcutta. Therefore, Calcutta High Court is the competent Court for the appellant in respect of one of the agreements. But since in respect of both the agreements the application u/s 20 has been filed before this Court, the objection is taken by the Board. Therefore, the Court has to consider the question whether in view of the existence of forum selection clause which is an act of the parties, the provision of section 31(4) will become redundant when an application under section 20 which has been filed before Calcutta High Court.

27. Before dealing with the impact of section 34 on such forum selection clause this Court proposes to deal with the argument made by the counsel for the Board that unless reference has been allowed and prayer in section 20 application has been granted, section 31(4) will not apply. Since in this case no reference has been allowed u/s 20 application, the provision of section 31(4) cannot be pressed into service.

28. The said argument cannot be sustained after a plain reading of section 31(4) of the act. It is clear from the language used therein that where in any reference any application has been made in a Court, competent to entertain. In that case that Court along shall have jurisdiction. The requirement is not that the application should be allowed. Since in the instant case admittedly an application u/s 20 has been made, which is an application in a reference, Calcutta High Court will have jurisdiction.

29. An application u/s 20 of the Act is certainly an application anterior to a reference but it normally leads to a reference. In *Union of India (UOI) Vs. Surjeet Singh Atwal*, , it was held that applications u/s 20 of the Act are "undoubtedly applications in the matter of a reference and may fall within the purview of section 31(4) of the Act even though these applications are made before any reference has taken place" (Paragraph 5).

30. That being the settled position, it is not possible for this Court to hold that section 31(4) of the Act has no application in the facts of the case.

31. Since an application u/s 20 of the Act is an application in the matter of a reference, the impact of section 31(4) of the Act is not only confined in matter of conferring exclusive jurisdiction on the Court to which "an application is made in a reference", but simultaneously the effect of the sub--section is that it operates as an ouster of jurisdiction of all other Courts which may have jurisdiction in the matter. This is how the section has been interpreted by the Hon"ble Supreme Court in *Guru Nanak Foundation Vs. Rattan Singh and Sons*, . At the paragraph 15, page 2080 of the report the Hon"ble Supreme Court laid down as follows:

"Thus sub--section (4) not only confers exclusive jurisdiction on the Court to which an application is made in any reference but simultaneously ousts the jurisdiction of any other Court, which may as well have jurisdiction this behalf."

32. In *Ram Kripal Sharma (supra)* all these principles have been noted and the learned judge held in paragraph 7 of the judgment that forum selection clause which is governed by Indian Contract Act "cannot prevail over sub-section (4) of section 31". This Court is in respectful agreement with the said view.

33. In *Kumbha Mawji Vs. Union of India (UOI)*, , the Hon"ble Supreme Court considered all the sub-sections of section 31 of the Act and held in paragraph 13 that the "necessity for clothing a single Court with effective and exclusive jurisdiction" is for the purpose of "avoidance of conflict and scramble" and this is essential even if the question arises "during the pendency of the arbitration or

after the arbitration is completed or before the arbitration is commenced".

34. This being the dominant legislative intent behind sub--section (4) of section 31 of the Act, and an application u/s 20 of the Act being an application "in the matter of reference", and the same having been filed in Calcutta High Court, which is a Court competent to entertain it, Calcutta High Court will have and other Court will not have the jurisdiction notwithstanding the forum selection clause in one of the agreements.

35. Similar views have been expressed in the decision in the case of Globe Paper Mills Ltd. v. Printpak Machinery Ltd., reported in 1984 (1) CLJ 329. In that case, a learned single Judge of Calcutta High Court held when two parties filed two different special suits i.e. section 20 application under the Act, before two different High Courts, the Court in which the first special suit was filed will have jurisdiction.

36. In this connection the attention of the Court has been drawn to a judgment of Gujarat High Court in the case of Snehalkumar Sarabhai Vs. Economic Transport Organisation and Others, . In that case Justice Thakkar, (as His Lordship then was) a learned Judge was considering the effect of a similar forum selection clause on the jurisdiction of a Court and referred to a new approach to the effect that a mere existence of forum selection clause does not tie the hands of the Court nor does it deprive the Court of its power to do justice in a case where such a clause is oppressive.

37. On the doctrine of a part of cause of action, Calcutta High Court has jurisdiction in this matter and the admitted position is that out of the two agreements in one there is no forum selection clause. So the section 20 application can be legitimately filed in Calcutta High Court in respect of one of the agreements. The situation as is prevalent in this case, this Court finds that it would be oppressive to both the parties to file two litigations at two different places. The observations made by Justice Thakkar [as His Lordship then was] while presiding over a single Bench of Gujarat High Court has received (he approval of the Hon"ble Supreme Court in the case of A.B.C. Laminor Pvt. Ltd v. A.P. Agencies, Salem, reported in 1989(2) SCC 162 [see paragraphs 19 & 20].

38. Various decisions have been cited by Mr. Ajoy Chatterjee, the learned counsel for the Board which the Court proposes to deal with hereinafter.

39. Mr. Chatterjee placed reliance on a judgment of the Supreme Court in the case of Guru Nanak Foundation Vs. Rattan Singh and Sons, . Reliance was placed in the said judgment in order to contend that in the instant case Calcutta High Court will have no jurisdiction despite the fact that an application u/s 20 which is an application in the matter to reference has been filed in this Court first and having regard to the effect of section 31(4) on such filing of application.

40. This Court is unable to find anything from the ratio in the case of M/s. Gurunanak Foundation (supra) to the above effect. In Gurunanak"s case the

facts were that an application was made to Delhi High Court u/s 20, the said proceeding ended with an order of reference to an arbitrator. Thereafter, a subsequent application was filed in Delhi High Court u/s 5 read with section 11 of the Act for the removal of the arbitrator. The Delhi High Court dismissed the said application and against that an appeal was taken to the Hon''ble Supreme Court. The Hon''ble Supreme Court removed the arbitrator. After removing the arbitrator, the Hon''ble Supreme Court appointed another arbitrator and gave certain direction about the conduct of the arbitration proceedings.

41. In those facts the Hon''ble Supreme Court held that just because the Hon''ble Supreme Court disposed of the appeal by appointing another arbitrator that would not mean that the Hon''ble Supreme Court was not in seisin of the matter. The Apex Court held that it gave several directions about conducting the arbitration. The Hon''ble Supreme Court held since it was in the seisin of the matter, it therefore, alone had the jurisdiction to entertain the award and such award cannot be filed before the Delhi High Court. Therefore, the Hon''ble Supreme Court while saying so virtually affirmed the principles of section 31(4) of the said Act in the peculiar facts of that case. So the ratio in the case of Gurunanak Foundation (supra) is of no assistance in the instant case to the Board and does not at all support the judgment of the learned single Judge.

42. The other Supreme Court judgment on which Mr. Ajoy Chatterjee relied, was in the case of Hakam Singh Vs. Gammon (India) Ltd., . In Hakam Singh's case it 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 Code of Civil Procedure. But where two Courts or more have, under the Code of Civil Procedure, jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy.

43. Here it is nobody's case that the forum selection clause is contrary to public policy. But the question is whether such a clause will override the express provision of section 31(4) of the Act. The answer has to be in the negative as it is well settled as a principle of law that act of parties cannot defeat the intention of the legislature.

44. Therefore, the propositions laid down in Hakam Singh (supra) have no application here. The learned counsel also relied on the judgment In the case of Balsukh Refractories and Ceramics Ltd. Vs. Hindusthan Steel Ltd. and Others, . In that Division Bench judgment, the Court was considering whether in a case if two Courts have jurisdiction there can be an agreement by restricting jurisdiction to one only. The learned Judges relying on the principles of Hakam Singh's case, held that in view of the specific agreement between the parties under which the appropriate Court is the Civil Court of Durg district in M.P., the application filed in the Court of Subordinate Judge, Asansol is not valid. Unfortunately, before the Division Bench the question that fell for our consideration is not the same in the instant case despite the forum selection clause. Here forum selection clause is absent in one of the agreements and the appellant has filed an application u/s

20 before the Calcutta High Court after obtaining leave under Clause 12 and Clause 14 of the Letters Patent and section 31(4) has been invoked. But in the case of Balsukh Refractories (supra) the question of section 31(4) was never considered. Therefore, the said case was decided on a totally different fact situation.

45. Reliance was also placed by the learned counsel on a single Bench judgment of the Calcutta High Court in the case of Sitaram Rice Mills v. Union of India, reported in 1978 (2) CLJ 514. The learned Judge while considering the scope of section 20 of the Act held that parties cannot confer jurisdiction on Courts not having such jurisdiction nor can they oust the jurisdiction of a competent Court, But the parties are competent to bargain that out of two Courts having jurisdiction one would be preferred to other. In this case also the principle in Hakam Singh (supra) was relied upon and there can be no dispute with the aforesaid proposition but the said proposition does not have much relevance to the facts of this case where the provision of section 31(4) has come into play. It may be mentioned that in Sitaram Rice Mills (supra) the learned Judge did not have the occasion to consider the provision of section 31(4) of the Act.

46. The learned counsel also relied on another Division Bench judgment of Calcutta High Court, in the case of Tobu Enterprises Pvt. Ltd. Vs. Camco Industries Ltd., , In the said judgment the learned Judges were considering the requirement of obtaining leave under Clause 12 of the Letters Patent in a case where cause of action arises in part only within the ordinary original jurisdiction of the High Court. The learned judges after considering the provision of section 2(c) read with section 31 of the Act held that obtaining of leave in such cases is required.

47. The learned Judges further held that normally in a case where parties have restricted their forum by an agreement, leave under Clause 12 of Letters Patent should not have been granted. But in this case also the learned Judges have not considered the provision of section 31(4) of the Act which we are considering here. So the question not having fallen for consideration before the Court, the decision of Tobu Enterprise (supra) cannot be regarded as an authority for the proposition with which the Court is concerned in the present case.

48. The learned counsel very strongly relied on a single Bench judgment of this Court in the case of Ganpatrai Agarwall Vs. The Fertiliser Corporation of India, . There a learned single Judge held that sub--section 4 of section 31 of the Act cannot override a contract between the parties. The exact wordings of the learned Judge while interpreting sub-section 4 of section 31 of the Act are quoted below:

"A careful reading of this sub-section clearly establishes that this subsection 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."

49. This Court, with great respect to the learned Judge, cannot accept the

aforesaid proposition. The proposition that a contract between the parties will prevail over an overriding statutory provision is contrary to basic norms of jurisprudence. A statutory provision is the sovereign will of the legislature and the same binds every one and certainly the parties who are coming under it unless the provision is made subject to contract or the law is repealed or declared unconstitutional by a competent Court. If the proposition laid down in Ganpatrai (supra) is followed the same will lead to disastrous consequences. Any two individuals would be allowed to contract out of a statutory liability. It is well settled that there can be no contract which could defeat the provision of any law. This is one of the important facets of section 23 of the Contract Act. So this Court, with respect to the learned Judge, holds that the interpretation given by the learned Single Judge is opposed to all cardinal principles of construction. Therefore, this Court is of the view that the decision in Ganpatrai (supra) case was not correct and it was wrongly decided and this Court is unable to follow the same.

50. Learned counsel appearing on behalf of the appellant also assailed the validity of the order passed by the learned trial Judge vacating the final order passed on the application. The learned counsel submitted that the learned Trial Judge was admittedly not exercising any appellate jurisdiction nor was entertaining the application for review or revision on any of the grounds specified in the CPC and as such according to the appellant, learned trial Judge had no jurisdiction to recall the final order passed u/s 41 application.

51. Referring to a decision reported in Lakshmi Kanta Kahar Vs. State of West Bengal and Others, and particularly relying upon the paragraph 21 of the said Judgment, the learned counsel submitted that even if an order is erroneous, it can only be set aside or recalled in accordance with the procedure established by law. In the present case, section 41 application filed by the appellant herein had been finally disposed of and the learned trial Judge, not sitting in appeal over that order, cannot re-open the same and recall the order of 13th March, 1992.

52. In our opinion, learned trial Judge unfortunately erred in recalling the order passed on the section 41 application as the order passed on the said application having become final, it was not open to the learned trial Judge to re--open the matter and recall the said order on merits when the learned Judge was neither exercising any appellate, revisional or review jurisdiction over the final order passed on section 41 application.

53. Mr. Ajoy Chatterjee, learned counsel of the Board, however, submitted that when an application u/s 20 of the Act is dismissed by the Court no interim order, although finally disposed of, could survive but as a natural corollary it comes to an end and is bound to be set aside. According to the learned counsel of the Board, learned trial Judge was well within his jurisdiction to recall the final order passed earlier on the section 41 application.

54. We are unable to accept the aforesaid contention of the learned counsel of

the Board. The learned trial Judge unfortunately passed the order recalling a final order of this Court passed on an application which had been finally disposed of on an earlier date and the said application being finally disposed of could not be placed before the learned trial Judge on a subsequent day for adjudication and/or for passing any order when the learned Judge was not exercising any appellate, revisional or review jurisdiction as pointed out above.

55. Learned counsel appearing on behalf of the respondent Board, however, raised a point that u/s 39 of the Arbitration Act no appeal lies from an order u/s 41 and the appeal filed by the appellant from the order passed on section 41 application by the trial Judge, therefore, according to the learned counsel of the respondent Board, is not at all maintainable.

56. On the ground of appealability, learned counsel of the appellant, rightly submitted that there was only one application made by the respondent Board and since the learned trial Judge delivered two separate judgments on the same application, it could not mean that there existed two applications and two orders. It cannot be disputed that the order is really a single one and in any event they are so inter-connected that it is not possible to disassociate one from the other. We also find much force in the submissions of the learned counsel of the appellant on this point.

57. On the question of appealability of the order passed by the learned single Judge on section 41 application, we are further of the view that the order which has been passed by the learned single Judge, after disposal of the interim application finally is not an order which the learned single Judge could have passed collaterally while dealing with an application u/s 20. Since the order is otherwise bad and strictly speaking is not an order to be passed by the learned single Judge u/s 41, the present appeal is maintainable and the appellate court can rectify those errors.

58. The learned single Judge has held that disputes relating to bank guarantee cannot be the subject matter in an arbitration proceedings, This Court finds in the peculiar facts and circumstances of this case, the alleged attempt by the Board for invocation of bank guarantee is intimately connected with the decision of the dispute between the parties about the quality of oil. This Court prima facie is of the view that the dispute raised by the appellant in this case is a bonafide dispute and as such before any decision on the said dispute is arrived at, if the Board is allowed to invoke the bank guarantee, that will amount to injustice and hardship to the appellant.

59. So the Board could have invoked the bank guarantee provided the breach by the appellant is admitted. But that is not the case here and there are bonafide disputes about the breach, if any, committed by the appellant.

60. In a somewhat similar situation, the Supreme Court while construing a government contract held in the case of State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, , as follows:

"A right to adjudicate upon an issue relating to a breach of conditions of the contract cannot be said to flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages is a subsidiary and consequential power and not the primary power. Even assuming that the terms of the relevant clause afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as the quantum of damages, the adjudication by the officer of State Government, regarding the breach of the contract cannot be sustained under law because a party to the agreement cannot be an arbiter in his cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract."

61. Following the aforesaid principles, this Court finds that the approach of the learned single Judge is not right.

62. For the forgoing discussions, we are of the opinion that the learned Trial Judge erred in dismissing the section 20 application and also recalling the final order passed earlier on the section 41 application. For the reasons discussed above, the arguments advanced on behalf of the respondent Board are not accepted by us..

63. We cannot allow forum selection clause to operate inspite of the specific prohibition of section 31(4) of the Act Since appellant had already made an application before this Court which is a Court of competent jurisdiction, this Court alone is entitled to exercise Jurisdiction in the present case and all subsequent applications should be made to this Court as the first application had been made in this Court by the appellant herein. We make it clear that the statutory provision will obviously override any agreement between the parties and a private contract cannot override a statute.

64. In the result we allow the appeals and set aside the judgments and orders passed by the learned trial Judge.

65. The section 20 application filed by the appellant is therefore maintainable before this Court and the same may be placed before the appropriate Bench immediately for early disposal in the light of the observation made above. The order passed on section 41 application is restored.

In the facts and circumstances of the present case, there will be, however, no order as to costs.

A.K. Ganguly, J.—I agree.

2. Later

3. After pronouncement of this judgment, learned counsel appearing on behalf of the respondent prays for stay of operation of this judgment. We find no reason to allow such prayer for stay. Accordingly, prayer for stay is refused.

4. Xerox certified copy of this judgment, if applied for, be made available to the parties on urgent basis.
5. Appeal allowed