

(2002) 12 AHC CK 0059
In the Allahabad High Court
Case No : F.A.F.O. No. 344 of 2002

U.P. Co-operative Sugar Factories Federation Ltd. and Others	APPELLANT
Vs	
P.S. Misra and Another	RESPONDENT

Date of Decision : 11-12-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7
Contract Act, 1872 — Section 23, 28

Citation : AIR 2003 All 123 : (2003) 2 ARBLR 102 : (2003) 3 AWC 1763

Hon'ble Judges : Pradeep Kant, J;G.K. Gupta, J

Bench : Division Bench

Advocate : Virendra Misra, K.B. Sinha, Alok Singh and Saurabh Devani, for the Appellant; P.K. Khare, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Kant, J.—This is an appeal u/s 39 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) against the judgment and formal order dated 14-3-2002 passed by District Judge, Lucknow rejecting the application u/s 34 of the Act. The appeal has been dismissed on the ground that the District Judge, Lucknow has no jurisdiction to entertain the said application.

2. The only question involved in the appeal is as to whether the Court of District Judge, Lucknow was having jurisdiction to entertain the application u/s 34 of the Act at Lucknow against the award pronounced by the Arbitrator in view of the following clause of the agreement :

"33. "In the event of any question, dispute or difference arising out of the contract between the parties with regard to the interpretation of working or this agreement or the rights, liabilities or duties arising out of it or otherwise in connection within the contract, the matter shall be referred for the decision of sole arbitrator appointed by the Legal Remembrancer to Government of Uttar Pradesh. The provisions of the Indian Arbitration Act as amended from time to time shall apply to such arbitration if work under the contract has not been

completed. When dispute is referred to arbitration the work shall continue during the arbitration proceedings and the payment due to contractors within the provisions of the contract shall not be withheld on account of arbitration proceedings unless authorised or required by the arbitrator. The decision of such arbitrator shall be final and "binding on the parties. Any Court proceedings as may arise out of the dealing could be in Court having jurisdiction over the District concern subordinate in the High Court of Judicature at Allahabad."

3. The U.P. Co-operative Sugar Factories Federation Ltd., 9-A, Rana Pratap Marg. Lucknow, as apex body, invited tender for construction of new Sugar Factories at Rupapur (Hardoi), Behreri Brahman (Moradabad) and Dhuriapur (Gorakhpur). In Dhuriapur, factory was to be raised for Dhuriapur Kisan Sahkari Chini Mills Ltd., appellants 2 and 3. The notice inviting tenders were issued by appellant No. 1, U.P. Co-operative Sugar Factories Federation Ltd., Lucknow mentioning therein that sealed tenders would be received by 3.00 p.m. on 15-12-1989 by the Federation at Lucknow for the construction of the above mentioned factories. Respondent No. 1-M/s. P. S. Misra, Sumer Sugar, Gorakhpur also submitted its tender at Lucknow. The tenders were opened at Lucknow and they were also accepted at Lucknow. Thereafter the Project Manager at Dhuriapur Kisan Sahkari Chini Mills Ltd. on 3-3-1990 sent a letter to respondent No. 1 intimating them that their tender submitted in the office of the U.P. Co-operative Sugar Factories Federation Ltd., Lucknow has been accepted and called upon them to attend the Chini Mill's office at Gorakhpur to execute the agreement with the Mill Society. Prior to this, on 13-2-1990, the Chief Project Engineer, U.P. Co-operative Sugar Factories Federation Ltd., Lucknow wrote a letter to the General Manager, Dhuriapur Kisan Sahkari Chini Mills Ltd. at Dhuriapur, Gorakhpur requiring him to issue a letter of intent to the concerned party and enter into an agreement in order to start the work immediately. Pursuant to all this, an agreement was executed between appellant No. 2 through its Project Manager and M/s, P. S. Misra, Sumer Sugar, respondent No. 1 on 5-4-1990- This agreement consisted of:

- (a) agreement
- (b) tender document and
- (c) letter of intent

4. This very fact finds mention in para 3 of the agreement. Respondent No. 1 carried, the work under the contract at Gorakhpur. However, a dispute relating to and arising out of the contract had arisen between the parties. On dispute having arisen, respondent No. 1 moved an application u/s 11 of the 1996 Act before Hon'ble the Chief Justice or his nominee for appointment of arbitrator. This application was moved at Allahabad and vide order dated 16-11-1999, nominee of the Chief Justice appointed the Legal Remembrancer to the Government of U.P. to be the sole arbitrator. The sole arbitrator Sri N.K. Mehrotra adjudicated the dispute between the parties and delivered the award on 2-7-2001 in favour

of respondent No. 1. The aforesaid award was challenged by the present appellants on various grounds: u/s 34 of the Act.

5. Respondent No. 1 raised the question of jurisdiction of the Lucknow Courts, namely, District Judge, Lucknow, to entertain the application u/s 34 of the Act, as, according to respondent No. 1, in terms of Clause 33 of the agreement, only Gorakhpur Courts were having jurisdiction to entertain the application and not the Courts at Lucknow.

6. Learned District Judge, Lucknow, on consideration of various case law and the facts of the case, rejected the application after holding that the Lucknow Courts would have no Jurisdiction to entertain the application u/s 34 and it was only Gorakhpur Courts where such an application could have been moved.

7. Learned counsel for the appellants urged that unless there is an exclusion clause in the agreement ousting the jurisdiction of one or the other Court by specific mention therein, the exclusion of the jurisdiction of the other Court cannot be inferred, if otherwise, the said Court is having jurisdiction to entertain the application. Reliance was placed on the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, wherein the Apex Court, while considering the clause in the agreement which provided : "any dispute arising out of this sale shall be subject to Kaira jurisdiction," held as follows (Para 21 of AIR) :

"From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone," "only," "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio, unius est exclusio alterius" expression of one is the exclusion of another -- may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

8. "The Supreme Court found that Kaira Courts were having jurisdiction and this clause would not mean exclusion of other Courts where the cause of action had accrued in part or otherwise, which Court, otherwise had jurisdiction to entertain the matter.

9. Explaining the judgment in the case of M/s. R. N. Singh Pvt. Ltd. v. Cement Corporation. 1995 (13) LCD 65 learned counsel for the appellant submitted that in that case jurisdiction of the Court was found to be excluded because the expression was"..that Courts at New Delhi/Delhi alone shall have Jurisdiction to decide or adjudicate upon any disputes which may arise out of or be in connection with this agreement" and it was held that the Dehradun Courts

where the action was filed had no jurisdiction. The agreement clause in the instant case, namely, Clause 33 with respect to the Jurisdiction of the Courts reads as under :

"33. Any Court proceedings as may arise out of the dealings could be in Court having jurisdiction over the district concern subordinate in the High Court of Judicature at Allahabad."

10. On behalf of respondent No. 1, it has been asserted that in view of Clause 33 of the agreement only Gorakhpur Courts shall have jurisdiction, as the action of inviting tenders from Lucknow, receiving tenders at Lucknow, acceptance of tenders at Lucknow and issuance of letter of intent on the direction of the Federation at Lucknow would not constitute, firstly, the cause of action or part thereof for the present dispute and secondly, it is the proceedings which have arisen out of the dealings under the contract which has been entered into at Gorakhpur. In support of his submission, great reliance has been placed on the words used in Clause 33 of the agreement, which says "any Court proceedings as may arise out of the dealings could be in Court having jurisdiction over the district concern subordinate in the High Court of Judicature at Allahabad." The words "district concern" have been pressed into service to buttress the submission that the "district concern" would be the district where factory was to be constructed or work was to be completed and where the agreement has been entered into.

11. Reliance has been placed by respondent No. 1 on the case of South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others, wherein the Supreme Court found that merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original side of the Delhi High Court. In this case the contract was executed in Bombay but the Bank guarantee was executed by respondent in Delhi, which was transmitted for performance to Bombay, Reliance was also placed on the case of M/s. R. N. Singh Pvt. Ltd. v. Cement Corporation. 1995 (13) LCD 65 in which Clause 11 provided ; "Subject to Clause 10 above, it is hereby agreed that Courts at New Delhi/Delhi alone shall have jurisdiction to decide or adjudicate upon any dispute which may arise out of or in connection with this agreement."

12. In the case of M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another, the Supreme Court found that normally that Court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties. In this case Clause (21) read as under :

"This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above Court only."

13. The proposition of law with respect to the determination of jurisdiction can

thus be concluded by observing that if there is a specific clause in the agreement which confers jurisdiction exclusively on one Court and excludes the jurisdiction of other Courts, though they may be having otherwise jurisdiction to entertain the matter shall be binding between the parties and such a clause would not be hit by Section 23 or Section 28 of the Contract Act. The exclusion or ouster of jurisdiction of one or the other Courts, if the action can be brought in various Courts, confining it to only one Court, is to be gathered or inferred from the language used in every agreement and on the facts and circumstances of each case. In the cases where in the agreement the expression like "alone." "only" "exclusive" or the like are used, it call for no mandate for determination of the Jurisdiction of the Court but where such words are lacking, the sum and substance of the agreement clause regarding jurisdiction has to be seen and Interpreted so as to achieve the aims and objects of the clause and the interpretation should be such which neither extend the Jurisdiction to such an extent (normally to such Courts) which the Jurisdiction clause does not permit nor it should be read in the manner so as to exclude the Jurisdiction of other Courts, as the case may be, if otherwise such Courts are having Jurisdiction and the agreement clause does not Intend to oust their Jurisdiction or the agreement clause does not even by inference means ouster of Jurisdiction of other Court/ Courts.

14. Clause 33 of the agreement, in the nstant case, would mean that there should be a Court proceeding which should arise out of the dealing (contract) and if such Court proceedings arise, they could be in a Court having Jurisdiction over the district concern subordinate to the High Court of Judicature at Allahabad. The aforesaid clause uses the words "could be" and, therefore, we have to see the meaning of the aforesaid words "could be" used in the aforesaid clause. It is not disputed that the Gorakhpur Courts would have jurisdiction even otherwise, as the work was to be performed and completed at Gorakhpur and the agreement was also entered at Gorakhpur. The words "could be" cannot be taken to mean as "must be." By using the aforesaid words "could be" the intention appears to be such that a proceeding could be brought in the Courts having jurisdiction over the district concern, namely, Gorakhpur. The aforesaid phraseology does not show that such proceeding could not be brought in any other Court which otherwise has jurisdiction to entertain the matter. The intention of the Jurisdiction clause in the agreement has to be gathered from the words used. The plain and simple meaning of the words "could be" would mean that the aggrieved party may file an action in the Court of Gorakhpur, namely, the district concern but it does not either by intention or by specific words or by inference exclude the jurisdiction of other Courts which might be having Jurisdiction to entertain the matter because the cause of action or part thereof has accrued within the territorial Jurisdiction of such Court/ Courts. In support of the submission that the words "could be" cannot be taken to be "must be," learned counsel for the appellant placed reliance upon the case of Shashikant Singh Vs. Tarkeshwar Singh and Another, wherein the Supreme Court while

considering the Intention of Section 319 of the Code of Criminal Procedure held "the Intention of Section 319 is that where in the course of any inquiry Into, or trial of, an offence, it appears to the Court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At this stage, the Court would consider that such a person "could be" tried together with the accused who Is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. The words "could be tried together with the accused" in Section 319(1), appears to be only directory. "Could be" cannot under these circumstances be held to be "must be." The Supreme Court, however, was considering the question of intention of the provisions of Section 319 of the Code of Criminal Procedure in which the meaning of the words "could be tried together with the accused" were explained. But for the purpose of the present case, it can be easily inferred that the words "could be" used in the agreement would only be an enabling provision giving right to the party aggrieved to file a claim in the district concern, namely, Gorakhpur, so far as the case in question is concerned. The words "could be" cannot be read as "could only be." In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , the Supreme Court while considering the clause in the agreement which provided "Any dispute arising out of this sale shall be subject to Kaira jurisdiction" held that this was not a clause which would mean exclusion of jurisdiction of other Courts where it has jurisdiction to entertain the matter as the cause of action or part thereof has accrued within the jurisdiction of that Court. The Supreme Court held that such ouster of Jurisdiction of Civil Court should not and ought not be Inferred from an ambiguous provision,

15. From the foregoing discussion, it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts,

16. On a reading and construction of the Jurisdiction clause mentioned in Clause33 of the agreement, it would be difficult to hold that the words used, either by Inference or expressly, exclude the Jurisdiction of other Courts, which otherwise have Jurisdiction to entertain the action, as part of the cause of action has accrued within the territorial jurisdiction of Lucknow Courts also.

17. Learned District Judge has also held as under :

"This Court also has no doubt in its mind that cause of action also arose at Gorakhpur, where the work has been executed and I am of the opinion that part of cause of action also arose at Lucknow, where tender notice was issued, tender was submitted and accepted."

18. Learned District Judge refused to entertain the application u/s 34 of the Act on the ground that in view of Clause33 of the agreement, jurisdiction of Lucknow

Courts stands excluded and construed it to be a clause ousting the jurisdiction of Lucknow Courts and confining it to the jurisdiction of Gorakhpur Courts and the application of the appellants has been rejected. In our opinion, the view taken by the learned District Judge cannot be upheld, as the jurisdiction clause, for the reasons stated above, cannot be construed to mean that it ousts the jurisdiction of Lucknow Courts.

19. Another argument was raised against the maintainability of the appeal by the learned counsel for respondent No. 1 on the ground that the present judgment and order is an order by means of which the application of the appellants moved u/s 34 has been rejected for want of jurisdiction and, therefore, in view of the provisions of Section 37 of the 1996 Act, the appeal would not be maintainable, as no such appeal is envisaged under the said provision. We are unable to accept the submission made by the learned counsel for respondent No. 1 in view of the specific provisions of Section 37 of the Act. Section 37 of the Act, occurring in Chapter IX of the Act, deals with appeals and provides as under :

37. "(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely-

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order of the arbitral Tribunal-

(a) accepting the plea referred to in subSection (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17,

(3) No second appeal shall lie from an order passed in appeal under this section but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

20. Sub-section 1 (b) of Section 37 specifically makes such an order appealable, which either set aside or refuse to set aside the arbitration award u/s 34. The rejection of the application moved u/s 34 of the Act of the appellants would fall within the aforesaid clause and it would be immaterial as to whether the application u/s 34 has been rejected for want of jurisdiction or otherwise on merit. The said provision does not clarify anywhere that if an application u/s 34 is rejected on merits alone, only then the appeal would lie. The ground of rejection may be multifarious but it is only the rejection of application, which would give a right to the appellant to file an appeal. The argument of the learned counsel for respondent No. 1 attempts to create artificial classification with respect to the orders passed on the application u/s 34 which classification is neither provided in the aforesaid provisions of the Act nor can be imported nor infused in the specific provisions. The application of the appellants having been

rejected, the appellants have rightly filed an appeal u/s 37 of the Act.

21. For the reasons stated above, the appeal is allowed. The judgment and order dated 14-3-2002 passed by learned District Judge, Lucknow is hereby set aside and the matter is remanded to the learned District Judge, Lucknow for deciding the application on merits.