

REPORTED

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 113/2008**

SWATCH LIMITED

..... Appellant

Through: Mr.Suhail Dutt and Mr.Digvijay Kumar,
Advocates.

Versus

PRIYA EXHIBITORS PRIVATE LIMITED

..... Respondent

Through: None

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

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07.03.2008

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DR. MUKUNDAKAM SHARMA, CJ. (ORAL)

1. This appeal is directed against the order dated 20th December, 2007 whereby the learned Single Judge, relying on the relevant provisions by which the parties are governed and which have a binding effect on them, dismissed the suit filed by the appellant on the ground that Courts at Delhi will have no jurisdiction to decide the present matter. The relevant provisions as appear in the letter dated 1.07.2003, are reproduced below for reference:-

“The legal effect of all dealings between the parties is to be interpreted according to the internal laws of Switzerland. Without limiting the generality of the foregoing, the parties expressly exclude the applicability of the United Nations Convention on Contracts for the International Sale of Goods of April, 11, 1980.

All disputes and controversies arising between the parties are to be submitted for determination exclusively to the Courts of the Canton of Bern in Switzerland. Notwithstanding the foregoing, Swatch Ltd. may at its option seek interim and permanent injunctive relief before any Court or like judicial instance, which in the absence of the foregoing provision, would have jurisdiction to grant the relief sought”.

2. The learned Single Judge has held that though the appellant/plaintiff reserved its rights to invoke jurisdiction of the Swiss Court and the application of Swiss laws but it also kept an option with it to seek interim and permanent injunctive relief before any Court, which in the absence of the provisions extracted above, would have jurisdiction to grant the relief. It is also required to be mentioned at this stage that even in the subsequent letters dated 18.7.2003, 25.7.2003 and 31.7.2003, these two paragraphs have been repeated in verbatim. The expression used by the appellant/plaintiff in the said clauses, according to the learned Single Judge, were in the nature of ouster clause. It was held that Delhi Courts would have no jurisdiction to decide the aforesaid suit. While coming to the aforesaid conclusion, the learned Single Judge referred to the provisions of Halsbury's Laws of India, 10th Edition, particularly paragraphs 75.237 and 75.238. Reference was also made to the decision of the Hon'ble Supreme Court in ***British India Steam Navigation Co.Ltd. Vs. Shanmughavilas Cashew Industries and Others (1990) 3 Supreme Court Cases 481.*** The following passage from ***British India Steam Navigation Co. Ltd.*** (supra) would have relevance and, therefore, the same is extracted below for proper interpretation of the provisions relevant for the purpose of deciding this case.

“28. Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English law and disputes are to be determined according to English law. Is the selection of law binding? In Cheshire and North's Private International Law (11th edn., page 495), while discussing about the interpretation of

contract the authors say: “When the stage has been reached where an obligation, formally and essentially valid and binding on parties of full capacity, has been created, then in the further matters that may require the intervention of the court, there is, speaking generally, no reason in principle why the parties should not be free to select the governing law.” The express choice of law made by parties obviates need for interpretation.

29. In the absence of an express choice the question of the proper law of contract would arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary.

30. Dicey and Morris in the Conflict of Laws formulate the following rule on proper law of contract as Rule 180:

“Rule 180: The term “proper law of a contract” means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Sub-rule 1: When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract.

Sub-rule 2: When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.”

*There can, therefore, be no doubt that the instant contract of affreightment evidenced by the bills of lading will be governed by English law. As the law has been chosen, the proper law will be the domestic law of England and the proper law must be the law at the time when the contract is made throughout the life of the contract and there cannot be a “floating” proper law. It has been recognized since *Gienar v. Meyer* that at the time of making the contract the parties may expressly select the law by which it is to be governed and they may declare their common intention by a simple statement that the contract shall be governed by the law of a particular country. This has been settled by a long line of decisions, as *Rex v. International Trustee for the Protection of Bondholders AG*, *Vita Food Products Inc v. Unus Shipping Co. Ltd.*, *James Miller and Partners Ltd. v. Whitworth Street**

Estates (Manchester) Ltd., Mackender v. Feldia AG, Compagine d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA, Acrow (Automation) Ltd. v. Rex Chainbelt Inc”.

3. The decision of the Supreme Court in ***A.B.C. Laminart Pvt. Ltd. and Anr. Vs.***

A.P.Agencies, Salem, AIR 1989 Supreme Court 1239, would have direct relevance

and, therefore, relevant portion is being extracted below.

“18.....Thus, it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague it is not hit by Ss.23 and 28 of the Contract Act. This cannot be understood as parties contracting against the Statute. Mercantile Law and practice permit such agreements.

21. 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”

4. A bare perusal of the aforesaid relevant clause in letters dated 11.07.2003, 18.07.2003, 25.07.2003 and 31.07.2003 would disclose that what the plaintiff/appellant desired by incorporating the aforesaid provision was to stipulate that a particular court would have jurisdiction to decide the dispute arising between the parties. The aforesaid clause uses the expression “exclusively to the Courts of the

Canton of Bern in Switzerland”, which appears to us to be the ouster clause in respect of all other courts. In paragraph-21 of the judgment in *A.B.C. Laminart Pvt. Ltd.* (supra), the Hon’ble Supreme Court has categorically and clearly stated that as regards construction of the ouster clause, when words like ‘alone’, ‘only’, ‘exclusive’, and the like have been used there may be no difficulty. Since the aforesaid clause which is relied upon also has an expression which exclusively vests the territorial jurisdiction on the Bern Court, the jurisdiction of all other courts is ousted and, therefore, the learned Single Judge was justified in coming to the aforesaid conclusion.

5. So far as the subsequent expression in the said clause is concerned, that was applicable only when there is not a clause of the aforesaid nature governing the terms and conditions of the agreement between the parties and only in that event it was possible for the appellant/plaintiff to ask for interim order from any other court. The contention of the counsel appearing for the appellant is that the defendant/respondent has waived the objection. In our considered opinion, the same is not the case here, for if jurisdiction by the act of parties is vested in a particular Court, there cannot be any waiver so far that jurisdiction is concerned.

6. We find no merit in this appeal and the same is accordingly dismissed.

CHIEF JUSTICE

REVA KHETRAPAL, J

MARCH 07, 2008

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