

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.753 OF 2015

IN

SUIT NO.1723 OF 2011

Hindustan Zinc Limited

....Applicant/Org. Defendant

IN THE MATTER BETWEEN :

Damani Shipping Pvt. Ltd.

....Plaintiff

Vs.

Hindustan Zinc Limited

....Defendant

Mr. Anant B. Shinde for the plaintiff.

Mr. K.J. Presswalla a/w. Mr. Sandeep Goyal i/b. M/s. Mulla and Mulla and
CBC for the applicant/defendant.

CORAM : K.R.SHRIRAM, J.

DATE : 7th DECEMBER, 2016

P.C.

1 This chamber summons is taken out by the defendant to
revoke the leave granted under Clause 12 of the Letters Patent in favour of
the plaintiff on 21st June, 2011.

2 The plaintiff has approached this court seeking a decree in the
sum of Rs.1,89,28,120.72/- together with interest thereon @ 18% p.a. till
final payment and/or realisation.

3 On or about 11th June, 2003 the plaintiff submitted quotation
to the defendant for clearing cargo from Mumbai Port and Jawaharlal
Nehru Port, Nhava Sheva, that was imported by the defendant.

In response, the defendant issued work order dated 26th June, 2003 and appointed the plaintiff to act as their Custom House Agent for custom clearance of zinc metal as per the terms and conditions mentioned in the work order. Since the work contemplated under the said work order was completed and as the defendant was importing further cargo through Mumbai Port and Jawaharlal Nehru Port, Nhava Sheva, the plaintiff submitted a fresh quotation for clearance of the goods from the Port and to also act as a Custom House Agent. The defendant agreed to appoint the plaintiff and forwarded to the plaintiff the contract dated 30th June, 2004 for custom clearance of imported consignments and called upon the plaintiff to send the duplicate of the same duly signed and stamped as a confirmation of acceptance. Accordingly the defendant signed the same and sent it back to the plaintiff. While signing the defendant made an endorsement "as per letter enclosed which may please be reviewed". That letter only be relates to the charges for clearance and survey and also the bank guarantee that was to be given by the plaintiff. Nothing to do with the issue in hand in this chamber summons.

4 The clause that is important for this chamber summons is clause no.13 which reads as under :

"13. GOVERNING LAW AND ARBITRATION :

This work order contract shall be construed in accordance with and governed by the laws of India. In the event of any litigation, the courts in Udaipur (Rajasthan), India shall have the jurisdiction.

All disputes or differences whatsoever arising between the parties out of or relating to this work order shall be settled by arbitration in accordance with procedures described in the Arbitration and Conciliation Act, 1996, with all the modifications and re-enactments thereto, as is prevalent in India. The venue of arbitration shall be Udaipur.

Similar clause was there in the earlier contract as well which is clause no.7.

5 The plaintiff filed a petition for leave under Clause 12 of the Letters Patent and leave was granted on 21st June, 2011. The relevant paragraphs in the plaint and in the petition based on which leave was granted are paragraph 11 in the plaint and paragraph 9 in the petition, which are reproduced hereunder for the ease of reference :

“11. The plaintiffs state that the defendants requested the plaintiffs to act as their CHS in Mumbai. The plaintiffs accepted the request of the defendants in Mumbai. All the invoices, after completing the work of clearing the goods have been raised by the plaintiffs upon the defendants at their Mumbai Office as mentioned in the cause title. The defendants to make payment to the plaintiffs at Mumbai. The entire cause of action has arisen in Mumbai. Therefore, this Hon'ble Court has jurisdiction to entertain and try the suit. The plaintiffs state that the defendants are having their office at Udaipur, Rajasthan, which is outside the jurisdiction of this Hon'ble Court. The plaintiffs seek leave under Clause XII of Letters Patent to sue the defendants in this Hon'ble High Court.

9. The petitioners state that the respondents requested the petitioners to clear the goods from the Port Trust at the registered office of the petitioners at Mumbai. All the bills, after completing the work of clearing the goods have been raised by the petitioners upon the respondents at their Mumbai Office as mentioned in the cause title. The respondents to make payment to the petitioners at Mumbai. The respondents are having their office in Udaipur, Rajasthan State, outside the jurisdiction of this Hon'ble High Court. The petitioners state that the cause of action has arisen in Mumbai. Therefore, this Hon'ble Court has jurisdiction to entertain and try the suit. The petitioners seek leave under Clause XII of Letters Patent to sue the respondents in this Hon'ble High Court since the respondents are carrying on their business in Rajasthan.

6 The present chamber summons is taken out by the defendant stating that the averment in the plaint and in the petition that (a) the entire cause of action has arisen in Mumbai is incorrect and (b) in any event, the contract provided for an exclusive jurisdiction clause, i.e., Udaipur and Udaipur will have jurisdiction because part of the cause of action arose in Udaipur. It should also be noted that nowhere in the plaint has the plaintiff mentioned about this exclusive jurisdiction clause and explained why despite that exclusive jurisdiction clause this court should exercise jurisdiction.

7 It is the defendant's case that since the work order had a specific provision that the copy of work order duly signed and stamped as a token of acceptance by the plaintiff should be sent to the defendant which was done by the plaintiff and a contract came to be formed/the acceptance was complete when the contract was received in Udaipur and hence part of the cause of action has arisen in Udaipur.

8 The counsel for the plaintiff Mr. Presswalla, relied upon a judgment of a Single Judge of this court (S.J. Vazifdar, J. as he then was) in *Pacific Refractories Limited vs. Stein Heurtey India Projects Private Limited*¹ and a judgment of the Court of Appeal, Civil Division, England in *Holwell Securities Limited vs. Hughes*². Mr. Presswalla, counsel for the

1. AIR 2006 Bombay 231

2. 1974 (1) ALL ER 161

applicant submitted relying on these judgments that where the acceptance of an offer had to be sent back as a confirmation of acceptance, the acceptance would be complete at the place where the communication of the acceptance is received, if the parties required the communication of acceptance to be intimated. Mr. Presswalla further submitted that in any event the contract provided that the courts in Udaipur (Rajasthan), India shall have jurisdiction in the event of any litigation. Mr. Presswalla submitted that there is no need to use the terms “exclusive” or “alone” or “only” because the reason is quite obvious, the parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. Mr. Presswalla submitted that the very fact that such a clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. Therefore, Udaipur court will certainly have jurisdiction since part of the cause of action arose in Udaipur. Mr. Presswalla also relied upon the judgment of the Apex Court in ***Swastik Gases Priave Limited vs. Indian Oil Corporation Limited***³.

9 In ***A.B.C. Laminart (P) Ltd. v. A.P.Agencies***⁴ Clause 11 of the Agreement was, “Any dispute arising out of this sale shall be subject to Kaira jurisdiction.” Disputes having arisen out of the contract between the

3. (2013) 9 SCC 32

4. (1989) 2 SCC 163

parties, the respondent therein filed a suit for the recovery of an amount against the appellants therein and also claimed damages in the Court of Subordinate Judge at Salem. Appellants, inter alia, raised preliminary objection that the Subordinate Judge at Salem had no jurisdiction to entertain the suit as 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. While dealing with this question as to whether the Court at Salem had jurisdiction or not, Court stated that the jurisdiction of the Court in the matter of contract would depend upon the status of the contract and the cause of action arising through connecting factors.

Paragraphs 21 and 22 of the said judgment read as under:

“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.

22. Coming to clause 11 we already found that this clause was included in the general terms and conditions of sale and the order or confirmation No. 68/59 dated 2.10.1974 with the general terms and conditions was sent from Udyognagar, Mohmadabad, Gujarat to the respondent's address at 12 Suramangalam Road Salem, Tamilnadu. The statement made in the Special Leave Petition that Udyognagar, Mohamadabad, Gujarat is within the jurisdiction of the Civil Court of 13 Kaira has not been controverted. We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place

where it was made. Thus Kaira court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for Court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by Clause 11 it would not absolutely oust the jurisdiction of the Court and, therefore, would not be void against public policy and would not violate sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of the Court at Salem. In the clause 'any dispute arising out of this sale shall be subject to Kaira jurisdiction' ex facie we do not find exclusive words like 'exclusive', 'alone', 'only' and the like. Can the maxim 'expressio unius est exclusio alterius' be applied under the facts and circumstances of the case? The order of confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which Court otherwise had jurisdiction under law through connecting factor of delivery of goods there at was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court."

10 This was followed in various other judgments and the Courts were of the view that exclusionary words like 'exclusive', 'alone', 'only' and 'like' were required to confer exclusive jurisdiction in the Courts. These judgments were considered by the Apex Court in the matter of Swastik Gases (Supra). The Apex Court held that very existence of the exclusion of jurisdiction clause in agreement would be rendered meaningless if not given its natural and plain meaning. Hence, use of words like only, exclusively, alone in exclusion of jurisdiction clause of agreement are not necessary to convey intention of parties. At the same time, the Apex Court also stated that where the contract specifies the jurisdiction of the Courts at a particular place and such Courts have

jurisdiction to deal with the matter, then an inference may be drawn that the parties intended to exclude all other Courts and the clause like that would not be hit by Section 23 of the Indian Contract Act, 1872 as such clause is neither forbidden by law nor it is against the public policy and does not offend Section 28 of the Indian Contract Act, 1872. Paragraphs 31,32, 37 and 57 of the said judgment read as under:

“31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded ?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties by having Clause 18 in the agreement is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like “only”, “exclusively”, “alone” and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject matter of the proceedings vested, by agreement, only in the courts in Kolkata.

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties.

11 In this case the contract provided for sending the acceptance to the defendant. The defendant has received the contract in Udaipur. As held in *Pacific Refractories* (supra) and *Holwell Securities* (supra) certainly the acceptance would be completed at Udaipur where the communication was received, as the parties required the communication of acceptance to be intimated.

12 During the course of submissions today, the counsel for the defendant stated that the statement of the plaintiff in the plaint that the entire cause of action arose within Mumbai may not be correct and it is a typographical error. This would mean that part of the cause of action arose in Udaipur. It is not the case of anybody that part of cause of action arose in any place other than Mumbai or Udaipur. If entire cause of action had

arisen within Mumbai, no leave under Clause 12 was required.

To the query as to why the plaint was silent about the exclusive jurisdiction clause and why was it not mentioned in the petition for leave under Clause 12, the counsel chose to remain silent.

Therefore, Mr. Presswalla is justified in insisting that the court should return the plaint to the plaintiff to be filed in Udaipur.

13 In view of the exclusive jurisdiction clause, the plaint is returned to the plaintiff to be filed in the appropriate court at Udaipur. All the contentions of the parties, including limitation are kept open.

14 The counsel for the plaintiff requests this court to fix a date for the appearance of the parties in which the plaint is proposed to be presented under Order 7 Rule 10(a) of the Code of Civil Procedure.

The parties to appear before the appropriate court in Udaipur on 13th February, 2017.

15 The plaintiff to give notice of not less than three weeks before 13th February, 2017 informing the defendant with the details of the court and the address where the plaint is going to be represented with the newly assigned suit number.

16 The chamber summons accordingly stands disposed.

(K.R. SHRIRAM, J.)