

\$~26

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

Date of decision: 31st May, 2018

+ **RFA 1021/2016 & CM APPL. 47581/2016**

GAUTAM BUDHA UNIVERSITY Appellant

Through: Mr. Vaibhav Chaudhary, Mr. S.K. Singh, Advocates along with Mr. P.S. Chaudhary, AR, Mr. Pappan Babu, AR.

versus

M/S EFFICIENT BOOK DISTRIBUTORS Respondent

Through: Mr. Narender Vashista, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is an appeal against the impugned judgment/order dated 24th August, 2016 by which the delay in filing of memo of appearance by the Appellant/Defendant – Gautam Budha University (*hereinafter*, ‘*Defendant University*’) was not condoned leading to the suit of the Respondent/Plaintiff (*hereinafter*, ‘*Plaintiff*’), filed under Order 37 CPC, being decreed in the following terms:

“12. The suit of the plaintiff is decreed for recovery of Rs.36,93,531/- as claimed by the plaintiff and pendentlite and future interest @ 9% per annum from the date of institution of the suit till the realization of the decretal amount with costs. Decree sheet be prepared accordingly. File be consigned to record room.”

2. The brief background is that the Defendant is the Gautam Budha University which has filed the present appeal. The Plaintiff - M/s Efficient

Book Distributors claims that it made continuous supply of several books to the University for which payments were not made. Accordingly, the suit came to be filed, under Order 37 CPC, with a prayer for recovery of amount of Rs.36,93,531/- along with the future and *pendente lite* interest. Along with the suit, the Plaintiff placed on record the various purchase orders and invoices and also the ledger account.

3. Summons under Order XXXVII CPC was issued on 12th February, 2014 by the Joint Registrar of this Court as the suit was filed on the Original Side of the Delhi High Court. The Defendant University was served with the summons on 26th March, 2014, however, they did not enter appearance and the matter was placed before the Court on 21st August, 2014. By the time, the matter was listed before the Court, the University filed an application seeking condonation of delay in filing the memo of appearance under Section 5 of the Limitation Act. In the said application, two paragraphs are relevant and are set out herein below:

“7. It is most respectfully submitted that in the instant matter, the defendant has reasons to believe that there has been collusion between the assistant librarian and the plaintiff in the instant matter. It shall be pertinent to mention at this stage that the order of the outdated, obsolete and un needed books towards which the plaintiff is seeking to recover the money by way of the instant suit, was got illegally placed by the assistant librarian, in collusion with the plaintiff. Due to the afore stated fact, an enquiry has been instituted against the assistant librarian with the Hon'ble Lokayuta UP, and he has been placed under suspension, pending the said enquiry.

8. Due to the aforestated reasons, the defendant believed that the Asst. Librarian, deliberately kept the Registrar in dark regarding the receipt of

summons of the captioned case.”

Thus, the Defendant University prayed for condonation of delay by alleging collusion between its own officials and the Plaintiff. The condonation of delay was however rejected by the Trial Court and the suit was decreed.

4. Before this Court, counsel for the Defendant University has contended that the suit involves a huge liability to the Defendant University and the delay of 48 days was due to the circumstances mentioned in the application. The University heavily relied upon the report of the Lokayukta dated 9th July, 2013 in which various irregularities in the procurement of books by the library of the University was pointed out. He has taken the court through paragraph 8a, 13(iv), 14, 21(iv) and 22(iii) of the Report to submit that the allegations against the staff of the library and the librarian and other officials are very serious and it appeared that several outdated and unwanted books were being procured in collusion with the officials of the University. He further submits that as per the bid empanelment, the jurisdiction of the Trial Court is under serious challenge. Clause 29 of the said document is relied upon by the University.

“29. For any dispute/arbitration the legal jurisdiction will be that of the judicial court at Gautam Budh Nagar District.”

5. On the other hand, counsel for the Plaintiff submits that Clause 29 has no application as it was not a part of the bid form which was filled by the Plaintiff.

6. This Court has perused the Clause relating to jurisdiction. There is no doubt that the Plaintiff's Head Office is at Delhi and supplies have been made from the Delhi. Even as per the clause which is contended as being

applicable in the present case, it does not confer exclusive jurisdiction to the courts at Gautam Budh Nagar. Unless and until the words ‘only’ and ‘exclusive’ are contained in the jurisdiction Clause, a court otherwise having jurisdiction, cannot be ousted, unless from the conduct of parties, such an inference can be drawn. This is clear from the judgment of the Supreme Court in **A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies (1989) 2 SCC 163s** which held 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 “expression unius est exclusion alterus” – 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.”

7. The above judgement of the Supreme Court has been subsequently followed in **Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd. (2013) 9 SCC 32** where again the Court observed:

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 that 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.”

8. Thus, there can be an inference of ouster, depending on the facts of each case. However, in the present case, the tender document/bid form relied upon by the Appellant is different than the one for which the Respondent had submitted its offer. The absence of the clause as referred to by the Appellant in the Empanelment letter dated 26th July, 2011, which is the subject matter of the present suit, shows that there was no intention to vest jurisdiction in the courts at Noida. The jurisdiction of courts in Delhi exists

as the Plaintiff carries on its business in Delhi and the supplies have been made from here.

9. Insofar as the condonation of delay in filing the memo of appearance is concerned, the Court has perused the application filed by the Plaintiff from the Trial Court Record. It cannot be said that there is no merit in the same inasmuch as there is a possibility, considering the Lokayukta's report that there has been collusion as alleged by the staff of the University, who may have received the summons from the Court.

10. The Court does not wish to comment on the merits of the claims of both the parties inasmuch as the same may affect the decision in the suit. Be that as it may, Order XXXVII provides that a sufficient cause shown by the Defendant in delay of entering the appearance can be excused. The Court has perused the application and the Lokayukta's report and is of the opinion that this constitutes a sufficient cause to permit the Defendant University to file its memo of appearance. The delay in filing the memo of appearance is condoned.

11. In the present appeal, the University has already deposited the entire decretal amount. The same is in a Fixed Deposit in the account of the Registrar General, Delhi High Court. Instead of sending the matter back for filing of Summons for Judgement and then Leave to defend, the suit can be expedited, by granting conditional leave to defend with the condition that the amount shall continue to lie in the Fixed deposit before this Court. Counsel for the Plaintiff, upon instructions from the Plaintiff who is present in Court, submits that this approach is agreeable to the Plaintiff.

12. The interest of the Plaintiff is adequately secured as the Defendant University had already deposited the decretal amount in this Court along

with interest. The total sum lying deposited is to the tune of Rs.46,63,083/- . The same is lying in a FDR. The Registry is directed to ensure that the same is in automatic renewal mode.

13. Accordingly, the Appeal is allowed in the following terms:

- a) The Defendant University shall file its written statement by 10th July, 2018 with advance copy to the Plaintiff.
- b) Plaintiff to file its replication within four weeks thereafter.
- c) Issues shall be framed by the Trial Court on or before 31st July, 2018.
- d) The trial shall be conduct before the Trial court. The Trial Court may expedite the trial in the matter and endeavour to conclude the same on or before 31st October, 2018.
- e) The trial court would endeavour to hear arguments and expeditiously dispose of the suit after conclusion of trial.

14. The above directions are being issued with the consent of parties. The parties are directed to appear before the Trial Court on 10th July, 2018.

15. Appeal and pending application are disposed of in the above terms. Trial Court record be sent back.

PRATHIBA M. SINGH
JUDGE

MAY 31, 2018
Rahul