

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.27 of 2018
(Through hybrid mode)**

M/S. Kalinga Oil and Refineries* *Appellant

Mr. S. K. Sanganeria, Advocate

-versus-

M/S. National Bulk Handling Corporation Ltd. and another* *Respondents

Mr. P.Mukherji, Advocate

CORAM: JUSTICE ARINDAM SINHA

**ORDER
16.02.2022**

Order No.

12. 1. Mr. Sanganeria, learned advocate appears on behalf of appellant and submits, order dated 23rd March, 2018 made by Court of District Judge, Cuttack rejecting his client's challenge to award dated 8th September, 2012 has been impugned. His client's consistent position has been that there could not be arbitration held in Mumbai. To that end, his client filed preliminary objection before the tribunal. The objection was rejected. His client did not thereafter participate in the reference. Ex-parte award was made. His client approached the District Court with challenge to the award. He submits further, his client has other contentions, principally that the agreement dated 5th

May, 2008 was not duly executed by respondent no.1 and, therefore, could not be enforced including, inter alia, arbitration clause therein.

2. Mr. Mukherji, learned advocate appears on behalf of respondents and submits, clause 19 in the agreement is the exclusive jurisdiction clause regarding venue of arbitration. The clause is reproduced below:-

*“ All disputes and differences between the parties hereto in connection with this Agreement including the interpretation of any term of condition hereof, shall be first referred to NBHC for settlement, if NBHC fails fulfill his duty, then the dispute, difference between the parties shall be governed by the provisions of the Arbitration & Conciliation Act, 1996 or its statutory modifications for the time being in force. A single arbitrator shall be appointed and it is a sole discretion, right of Managing Director of NBHC to appoint the same. **The Arbitration shall always be held in Mumbai and the Courts of Mumbai shall alone have jurisdiction in the matter.** The expenses for the procedure under the act will borne by both the parties.”*

(Emphasis supplied)

He submits further, his client has filed counter affidavit. The appeal should be dismissed.

3. It appears from impugned order there has been recital of respective contentions put forth by the parties. Respondent no.1 urged

on merits to contend that appellant was provided with 6,619.25 quintals of paddy for milling. There was short delivery equivalent to 2,345.08 quintals of Custom Milling Rice (CMR) of value Rs.32,00,689/- and said respondents' claims were for recovery and interest thereon. Impugned order also records appellant's contention of having challenged the jurisdiction as well on the agreement not having been duly executed.

4. The Court below found that appellant, after putting in preliminary objection and it not accepted, chose to remain silent. Appellant did not put forth its claim (defence) in the tribunal. The Court held that appellant not having put up its claim (defence) in the tribunal, could not thereafter complain before it of having been prejudiced. As such, the challenge was rejected.

5. The agreement clearly says that it was made and executed on 5th May, 2008 at Chauliaganj, Cuttack. Appellant had by the preliminary objection contended before the tribunal, inter alia, regarding jurisdiction. On query from Court, Mr. Mukherji is unable to demonstrate that either supply of paddy, delivery of CMR or any other event giving rise to part of the cause of action happened in Maharashtra. The Court below, in impugned order, has said that

adjudication was under Arbitration and Conciliation Act, 1996 as stood before amendment. There is also nothing on record to show that a Court other than the Court below was approached by the parties. It is clear from the record that sole arbitrator was appointed in terms of clause 19 in the agreement. Adjudication must be as per provisions in the Act, before amendment.

6. Clause 19 says, inter alia, the arbitration shall always be held in Mumbai and Courts of Mumbai shall alone have jurisdiction in the matter. It is not an individual agreement clause by the sentence, regarding venue but also includes in the clause, jurisdiction of Courts. The first approach to Court, of parties in the reference, appears to be the challenge to the award. Section 34 says recourse to a Court against an arbitral award may be made by an application. Section 2(1) (e) defines Court to mean, in the context, the principal civil Court of original jurisdiction in a district having jurisdiction to decide the question forming the subject matter of the arbitration, if the same had been the subject matter of suit. Respondent not only did not file cross objection but has supported impugned order in its counter affidavit. Parties, by their first approach to Court, have confirmed inference of this Court from the agreement, that no part of the cause of action arose

in Maharashtra. The venue agreement being linked to the jurisdiction of Court, therefore cannot stand on its own.

7. Mr. Mukherji submits, parties have put their signatures on the agreement and there is no dispute regarding the agreement being genuine. As such, there is an agreement regarding venue and jurisdiction. It is a valid exclusive jurisdiction agreement, ousting jurisdiction of other Courts. It is appellant, who approached the Court below. Defendant in a suit can take contrary pleas, so, therefore, his client's participation in the challenge proceeding, cannot cause his client's present contention to be barred by acquiescence, waiver or estoppel, in urging the exclusive jurisdiction clause.

8. There can be ouster of jurisdiction of a Court on agreement by the parties only when there are two or more Courts at two or more places, within whose jurisdiction the causes of action arise. It is in such a situation that parties agree to go to a particular Court, to the exclusion of the other(s). It has already been found that no part of the cause of action arose in Maharashtra. Therefore, the agreement clause on ouster of jurisdiction of Courts is not legal.

9. Impugned order is reversed. Award dated 8th September, 2012 is set aside. Parties are at liberty to cause fresh reference for

adjudication of their disputes. Mr. Mukherji submits, hereby setting aside of the award should not prejudice other pending proceedings between the parties. Needless to say that is so.

10. The appeal is disposed of.

(Arindam Sinha)
Judge

Prasant

