

AGREEMENT AS TO CHOICE OF PLACE OF SUING

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1. THE PROLOUGE

In the Code of Civil Procedure, 1908 (the Code hereinafter) the group of sections from 15 to 25 in PART-I has been given the sub-heading "place of suing". Only one aspect of place of suing covered by sections 16 to 20 among this group is being considered in this essay. Broadly stated Sections 16 to 20 of the Code speak of three factors that determine the place of suing. The place where the property is located, the place of residence or business of defendants and/or the place where the cause of action wholly or partly arises determine the place of suing in suits governed by those sections. The proviso to Section 16 and the illustrations two in number each added to Section 19 and 20 amply demonstrate that there may be plurality of places of suing in a given case. Increasing commercial activity nationally and internationally has led parties engaged in such ventures to avoid plurality of places of suing by choosing one among the places convenient to them as the place of suing. Thus in cases based on contract courts are frequently confronted with problems of judging the validity, the efficacy and the enforceability of agreements as to choice of forum. This essay attempts a comprehensive view on the law in this regard.

2. THE STATUTORY PROVISIONS

A perusal of the provisions of Section 16, 17 and 18 of the Code dealing with suits relating to immoveable property shows that suits falling within one or the other of these provisions may involve plurality of places of suing. Similar is the effect of the provisions of section 19 of the Code relating to suits on torts. It is however apparent that despite such a possibility in suits falling within any of those provisions there cannot be any agreement as to place of suing seeking to select a particular Court from amongst the two or more of competent courts. Thus the only provision which may produce an agreement as to selection of place of suing between parties is Section 20 of the Code which reads thus :-

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

- (a) the defendants, or each of the defendants where there are more than one at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation – A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

3. THE LAW LAID DOWN BY THE SUPREME COURT

Before the establishment of the Supreme Court under Article 124 of the Constitution of India in 1950 many High Courts particularly those of Lahore, Madras, Calcutta, Bombay and Allahabad dealt with the question of choice of forum by agreement of parties. For obvious reasons concentrating on the decisions of the Supreme Court on the question the Writer could, so far as reported cases go, discover the following fourteen cases till the 31st day of August, 2007.

- (i) The first case where the Supreme Court had an occasion to deal with the question of choice of place of suing by agreement of parties is the most frequently cited case of *HAKAM SINGH VS M/S GAMMON (INDIA) LTD.*, AIR 1971 S.C. 740, (1971) 1 SCC 286 dated the 8th of January 1971. In that case the terms and condition of a written tender for a construction work contained an arbitration clause as also a clause known in common parlance as an ouster clause in the following words :

“ Notwithstanding the place where the work under the contract is to be executed, it is mutually understood and agreed by and between the parties hereto that the contract shall be deemed to have been entered into by the parties concerned in the City of Bombay and the Court of law in the City of Bombay alone shall have jurisdiction to adjudicate thereon.”

Disputes having arisen between the parties ignoring the ouster clause as above Hakam Singh filed a petition under Section 20 of the Indian Arbitration Act 1940 before the Court of Subordinate Judge Varanasi. M/S Gammon (India) objected to the jurisdiction of the Varanasi Court relying on the ouster clause. The Trial Court held that the entire cause of action had arisen at Varanasi and that the parties could not by agreement confer jurisdiction on the Courts at Bombay which they did not otherwise possess. The High Court set aside the order of the Trial Court holding that under the general law the courts in Bombay had jurisdiction, that the covenant in the agreement is binding between the parties and the Courts at Bombay alone had jurisdiction and the Trial Court at Varanasi could not entertain the petition. The petition was directed to be returned for presentation to the proper Court. The Supreme Court fully concurred with the decision of the High Court. The Supreme Court held thus :

“It is not open to the parties by agreement to confer by their agreement jurisdiction on a court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene S.28 of the Contract Act.”

Two other important holdings in the decision are that (1) by the terms of Section 20(a) read with Explanation II (as it then existed) of the Code the Company was liable to be sued in Bombay where it had its principal place of business and (2) that the word “corporation” in the Explanation does not mean only a Statutory Corporation but includes a Company registered under the Companies Act.

(ii) Twelve years later on the 31st of March, 1983, the Supreme Court decided *GLOBE TRANSPORT CORPORATION VS TRIVENI ENGINEERING WORKS (1983) 4 SCC 707*. The point of jurisdiction arose out of a term in the contract of carriage which provided that “the court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of goods entrusted for transportation”. The suit for damages to the goods entrusted for transportation to Baroda was filed in the Court of Civil Judge Allahabad. The Trial Court ignored the ouster clause as above so did the High Court of Allahabad on a view that the Court at Jaipur had no jurisdiction. The Supreme Court without mentioning *HAKAM SINGH (Supra)* reiterated the law laid down in that case. Two important holding

in the case are these (A) the jurisdiction of the Court in Jaipur City could not be invoked on the ground that the cause of action or part thereof has arisen in Jaipur. But the jurisdiction under Section 19 or Section 20 of the Code can also be invoked on the ground that the defendant resides or carries on business or personally works for gain and since the Transport Corporation carries on business in City of Jaipur the Court in Jaipur City would have jurisdiction to entertain the suit. (B) it was finally held thus :-

“ We accordingly allow the appeal Taking the view that the Court of the Civil Judge, Allahabad has no jurisdiction to entertain the suit, we direct that the plaint may be returned to the respondents for presentation to the appropriate Court in Jaipur City.”

(iii) On the 13th of March, 1989 the Supreme Court decided *A.B.C. LAMINART PVT. LTD. Vs. A.P. AGENCIES* (1989) 2 SCC 163, AIR 1989 S.C. 1239 where the effect of an ouster clause in an agreement between the parties came up for consideration. The ouster clause there read thus :- “Any dispute arising out of the sale shall be subject to Kaira jurisdiction.” Referring to several decisions of different High Courts the Supreme Court reiterated *HAKAM SINGH* (Supra) and on the construction of an ouster clause spoke thus :-

“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 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.”

Construing the ouster clause there thus the Supreme Court did not find the ouster clause to exclude clearly, unambiguously and explicitly the jurisdiction of Salem Court where the suit had been filed.

(iv) On the 6th day of August 1991 a Three Judge Bench of the Supreme Court decided *PATEL ROADWAYS LIMITED, BOMBAY Vs. PRASAD TRADING COMPANY*, (1991) 4 SCC 270, AIR 1992 S.C. 1514. There the appellant transport Company having their principal office in Bombay sought to oust the jurisdiction of the Court of Subordinate Judge Periakulam in Tamilnadu on the

strength of an ouster clause that the jurisdiction to decide any dispute between the parties relating to the contract of carriage would be only with the Courts at Bombay. The Supreme Court reiterated the law laid down in **HAKAM SINGH (Supra)** and **GLOBE TRANSPORT CORPORATION (Supra)** and considering Section 20 of the Code and its Explanation found that Bombay Courts had no jurisdiction and as such the ouster clause was held ineffective.

(v) On the 3rd of February 1993 another Three Judge Bench of the Supreme Court in **R.S.D. FINANCE Co.(P) LTD. Vs. SHREE VALLABH GLASS WORKS**, (1993) 2 SCC 130, AIR 1993 S.C. 2094 reiterated the holding in **A.B.C. LAMINART (Supra)** and observed that “it cannot be held that merely because the deposit receipt contained the endorsement ‘subject to Anand jurisdiction’ it excluded the jurisdiction of all other courts who were otherwise competent to entertain the suit.”

(vi) In **ANGILE INSULATIONS Vs. DAVY ASHMORE INDIA LTD. AND ANOTHER** (1995) 4 SCC 153, AIR 1995 SC 1766 decided on the 18th April 1995 the Supreme Court upheld the order of return of the plaint by the subordinate Judge, Dhanbad relying on an ouster clause as follows :-

“The 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.”

A.B.C. LAMINART (Supra) was followed. It was held that ouster clause is unambiguous and explicit and therefore the parties having agreed to vest the jurisdiction of the Court situated within territorial limit of High Court of Karnataka, the Court of Subordinate Judge, Dhanbad in Bihar has no jurisdiction to entertain the suit.

(vii) On the 16th November 2000 the Supreme Court decided **SHRIRAM CITY UNION FINANCE CORPORATION LTD. Vs. RAMA MISHRA** (2002) 9 SCC 613, AIR 2002 S.C. 2402 where the validity of a suit filed at Bhubaneswar in the teeth of an ouster clause limiting jurisdiction to Courts in Calcutta only fell for determination. **HAKAM SINGH (Supra)** was followed and developing the law, further THE Supreme Court spoke thus :-

“We have to keep in mind that there is difference between inherent lack of jurisdiction of any court on account of some statute and the other where parties through agreement bind themselves to have their dispute decided by any one of the Courts having jurisdiction. Thus the question is not whether

the Orissa Courts have the jurisdiction to decide the respondent's suit but whether the respondent could have invoked the jurisdiction of that Court in view of the aforesaid clause 34. A party is bound either by provision of the Constitution, statutory provisions or any rule or under terms of any contract which is not against the public policy In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can file the suit in that court alone to which they have so agreed..... Once parties bound themselves as such it is not open for them to choose a different jurisdiction as in this case by filing a suit at Bhubaneswar. Such a suit would be in violation of the said agreement.

For the said reasons we have no hesitation to hold that the suit filed by the respondent in the Civil Court at Bhubaneswar would not be valid, in view of the agreement.....”

Finally, it was held that in view of clause 34 of the agreement there it is the courts at Calcutta alone which would be competent court to adjudicate the dispute between the parties.

(viii) CHEEMA ENTERPRISES Vs. M/S MAYUR ENTERPRISES, 2001 (6) SUPREME 303 decided on the 29th of March 2001 is the next decision of the Supreme Court where an ouster clause reading “all disputes are subject to Kashipur jurisdiction” proved ineffective to oust the jurisdiction of other competent courts. The ouster clause there was held to be on all fours with the ouster clause in A.B.C. LAMINART (Supra) met with similar interpretation.

(ix) M/S HANIL ERA TEXTILES LTD. Vs M/S PUROMATIC FILTERS (P) LTD., (2004) 4 SCC 671, AIR 2004 S.C. 2432 decided on the 16th of April 2004 is the next Supreme Court decision dealing with the ouster clause. The purchase order there contained the ouster clause providing that “any legal proceeding arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai”. Despite this the suit was filed before the District Judge, Delhi where also part of the cause of action undoubtedly arose. The defendant applied under Order VII Rule 10 of the Code to have the plaint returned but failed both before the Trial Court and the Delhi High Court. The Supreme Court followed HAKAM SINGH (Supra), A.B.C. LAMINART (Supra) and reversed the holdings of the Trial Court and the Delhi High Court. Despite the absence of exclusionary words like “only” “alone” etc as indicated in ABC LIMINART (Supra) the Supreme Court considering all the circumstances held that the ouster clause

indicates “clear intention to confine the jurisdiction of the courts in Bombay to the exclusion of all other courts”. The Supreme Court further held that “The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit”. The plaint was ordered to be returned for presentation before competent Court at Bombay.

- (x) **On the 19th of April 2004 the judgment in MAN ROLAND DRUCKMACHINEN AG Vs. MULTI COLOUR OFFSET LTD. AND ANOTHER, (2004) 7 SCC 447 was delivered by the Supreme Court where occurs the following :-**

“9. Undoubtedly, when parties have agreed on a particular forum, the Courts will enforce such agreement. This is not because of a lack or ouster of its own jurisdiction by reason of consensual conferment of jurisdiction on another court but because the court will not be a party to a breach of an agreement. Such an agreement is not contrary to public policy nor does it contravene Section 28 or Section 23 of the Contract Act. This has been held in HAKAM SINGH Vs. GAMMON (INDIA) LTD., ABC LAMINART (P) LTD. Vs. A.P. AGENCIES”

10. The principle we have outlined in the previous paragraph is applicable to a situation where the Court is called upon to enforce rights arising under a contract which contains such a jurisdictional clause.”

- (xi) **Four days later on the 23rd day of April 2004 the Supreme Court delivered the Judgment in NEW MOGA TRANSPORT CO. Vs. UNITED INDIA INSURANCE CO. LTD. (2004) 4 SCC 677, AIR 2004 S.C. 2154 where reiterating the law enunciated in HAKAM SINGH (Supra), PATEL ROADWAYS (Supra) and SHRIRAM CITY (Supra) the principle of law applicable in interpreting and applying an ouster clause was further illucidated thus :-**

“The intention of the parties can be culled out from use of the expressions ‘only’ , ‘alone’, ‘exclusive’ and the like with reference to a particular Court. But the intention to exclude a Court’s jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such a case only the accepted notions of contract would bind the parties. The first appellate Court was justified in holding that it is only the Court at Udaipur which had jurisdiction to try the suit.”

The Court at Barnala was directed by the Supreme Court to return the plaint to the plaintiff for presentation before proper court at Udaipur.

- (xii) In *SHREE SUBHLAXMI FABRICS (P) LTD. Vs. CHAND MAL BARADIA AND OTHERS* (2005) 10 SCC 704, AIR 2005 S.C. 2161 decided on the 29th day of March 2005 the Supreme Court dealt with the topic of place of suing vis-a-vis ouster clause from paragraph 15 to 20 of the Judgment. *HAKAM SINGH (Supra)*, *ABC LAMINART (Supra)* and *ANGEL INSULATIONS (Supra)* were reiterated. In that case the ouster clause in the indent is very clear that “Court of Bombay and no other Court” shall decide the dispute. The Trial Court held that the Court at Calcutta had no jurisdiction to try the suit. The High Court did not agree. The Supreme Court concurring with the Trial Court gave effect to the ouster clause.
- (xiii) In *MAYAR (H.K.) LTD. Vs. OWN & PARTIES, VESSEL M.V. FORTUNE EXPRESS & ORS.*, AIR 2006 S.C. 182 decided on the 30th day of January 2006 on the construction of an ouster clause the paragraph from *ABC LAMINART (Supra)* quoted earlier in this essay has been referred to with approval.
- (xiv) Lastly, on the 20th day of July 2007 in *SANDEEP POLYMERS PVT. LTD. Vs. BAJAJ AUTO LTD. AND ORS.*, 2007 (9) SCALE 304 the Supreme Court dealing with a clause in purchase order ousting jurisdiction of courts except the court situated in Pune concurring with the decision of the High Court enforced the ouster clause relating to the purchase orders by ordering filing of a separate suit at Pune and directing amendment of the plaint to that effect in the suit filed at Nagpur.

4. THE ANALYSIS OF THE LAW LAID DOWN.

It is remarkable that from *HAKAM SINGH (Supra)* of 8th January, 1971 to *SANDEEP POLYMERS (Supra)* of 20th July 2007 there is no discordance among the above fourteen decisions of the Supreme Court in the matter of place of suing vis-à-vis ouster clause. The core principle throughout has been that although parties cannot confer jurisdiction on a court which does not possess it under the Code or any other law the parties can, if there are more courts than one competent under the law, by a clear, unambiguous, explicit and valid contract, select one among them. Parties will be bound by such a contract and the courts will enforce the contract. Of the fourteen cases noticed above in *HAKAM SINGH (Supra)*, *GLOBE TRANSPORT (Supra)*,

ANGILE INSULATIONS (Supra), M/S HANIL ERA TEXTILES (Supra) and M/S NEW MOGA (Supra) the Supreme Court enforced the ouster clause by directing return of the petition and /or the plaint for presentation in the Court chosen by the parties through the ouster clause. In SHRIRAM CITY UNION (Supra) and SHREE SUBHLAXMI FABRICS (Supra) the Supreme Court enforced the respective ouster clauses by holding the suit at Bhubaneswar and Calcutta, places not selected by agreement to be invalid and without jurisdiction respectively. Because of the peculiar nature of the suit consisting of several causes of action in SANDEEP POLYMERS (Supra) the Supreme Court enforced the ouster clause by directing a separate suit to be filed at Pune in accordance with the ouster clause and to amend the plaint in the suit at Nagpur. The ouster clause was held ineffective in PATEL ROADWAYS (Supra) because Court chosen did not otherwise possess jurisdiction to try the suit. In A.B.C. LAMINART (Supra) R.S.D. FINACE (Supra) and CHEEMA ENTERPRISE (Supra) the ouster clause was held ineffective on the ground of lack of clarity and specificity and as being ambiguous. Clauses in these three cases failed to oust the jurisdiction of other competent court because of their phraseology. Summing up one may say that unless the ouster clause is specific, clear and unambiguous or unless it amounts to vesting of jurisdiction on a court lacking in jurisdiction under the law and above all unless it suffers from absence of ad idem between the parties the contract will bind the parties and the court not chosen by the agreement but otherwise competent would enforce the ouster clause by refraining from exercising jurisdiction vested in it by law.

5. APPLICATION OF THE LAW BY THE HIGH COURTS.

The High Courts have by and large applied the law as interpreted by the Supreme Court specially in HAKAM SINGH (Supra) and AB.C. LAMINART (Supra). However views not conforming to the law laid down by the Supreme Court are also available. In this paragraph only the discordance from a few High Courts would be highlighted. The discordance seems to have originated from the Gujrat High Court when the Judgment in M/S SNEHALKUMAR SARABHAI Vs. M/S ECONOMIC TRANSPORT ORGANIZATION, AIR 1975 GUJ 72 dated 18.03.1974 was delivered. In that case the Trial Court at Ahmedabad in Gujrat “refused to pass a decree granting relief solely on the ground that there was a printed clause at the back of the transport receipt obliging the consignor to institute a suit in the Calcutta Court only.” These facts narrated in the Judgment should have been sufficient to read absence of ad idem and to invalidate the ouster clause and thereby uphold the maintainability of the suit at Ahmedabad. However the High Court seems to have gone at a tangent and observed further that the courts are not obliged to respect the agreement between the parties restricting jurisdiction to a particular competent Court specially when claim is paltry such as Rs.1207.92 in that case because it would be oppressive to drive the plaintiff all the way

to Calcutta in that case. Apparently no case law was placed before the High Court. Had that been done the Full Bench decision of the Lahore High Court in MUSA JI LUKMAN JI Vs DURGA DAS, AIR 1946 Lahore 57 of the 8th of May 1944 where plaints comprising claims of Rs. 1200/- and Rs.3000/- were ordered to be returned basing on the ouster clause would probably have been sufficient to overwhelm the discordance in SNEHAL KUMAR (Supra) as a precedent. Indeed, the Supreme Court noticed SNEHAL KUMAR (Supra) in ABC LAMINART (Supra) and only comment made was "In such a case the free consent may be wanting and injustice may be avoided."

The Gujrat High Court has in two other judgments reported in (1975) 16 Guj LR 31 and AIR 1980 Guj 184 followed the innovation made in SNEHAL KUMAR (Supra). Both these Judgments mentioned HAKAM SINGH (Supra) but seem to have overlooked the implication of the Supreme Court Judgment that the petition was returned to be filed in appropriate Court implying that the Court at Varanasi was not the appropriate Court.

The influence of SNEHAL KUMAR (Supra) spread to the Orissa High Court where in TARCHAND BOID Vs SHIKAM CHAND BHORA, AIR 1995 Orissa 199 the High Court held that the ouster clause can be ignored. Incidentally it may be stated that the High Court also seems to have acted on the provisions of the Hire Purchase Act, 1972 which had never been brought into force and had now been repealed by the Hire Purchase (Repeal) Act, 2005. By the date of TARACHAND (Supra) that is 28.10.1994 the first five Judgments of the Supreme Court considered here including A.B.C. LIMINART (Supra) were available but none were placed. Lastly, the Orissa High Court in DILIP KUMAR RAY Vs TATA FINANCE LTD., AIR 2002 Orissa 29 following specifically the Supreme Court Judgment in SHRIRAM CITY (Supra) seems to have rid itself of the influence of SNEHAL KUMAR (Supra) and enforced the ouster clause there.

In RENOWN BISCUIT CO. Vs. KAMALANATHAN, AIR 1980 Mad 28 dated 25.01.1979 SNEHAL KUMAR (Supra) was again referred to with approval by the Madras High Court. But in M/S CONSOLIDATED AGENCIES Vs M/S GUJRAT CARBON AND INDUSTRIES, AIR 2002 MADRAS 396 a Division Bench of the High Court followings A.B.C LAMINART (Supra) and ANGILE INSULATIONS (Supra) has shaken the foundation of RENOWN BISCUIT (Supra).

All the three Gujrat cases mentioned above were considered by the Gauhati High Court in ALL BENGAL TRANSPORT AGENCY Vs HAREKRISHNA BANIK, AIR 1985 Gau 7 and following Gujrat High Court, the Gauhati High Court refused to enforce the ouster clause. The High Court did not notice the implication of HAKAM SINGH (Supra) and GLOBE TRANSPORT (Supra) read with the provisions of Order VII Rule 10 of the Code. The Full Bench decision of the Lahore High Court was also not placed by the Counsel. Holding in the Judgment and its foundation in the three Gujrat cases will be in the teeth of the later

Supreme Court decisions indicated earlier more particularly the extracts quoted in this article from A.B.C. LAMINART (Supra) SHRIRAM CITY (Supra) and MAN ROLAND (Supra). If the agreement is valid, specific and unambiguous courts are bound to enforce it by returning the plaint to be presented in the Court selected by the parties which will be the only appropriate Court within Order VII Rule 10 of the Code.

One may say that the Supreme Court in some of the cases considered here has used expressions such as lack of jurisdiction of the court presentation of the plaint wherein had been objected to. Obviously there is no question of lack of jurisdiction. It was succinctly pointed out in the concurring judgment of Justice Abdur Rahman J in the Lahore Full Bench Judgment (Supra) thus :

“ But in agreeing not to bring suits in one out of the two courts, both of which are competent to try them, parties cannot be said to have contracted out of the jurisdiction vested in that court or to be depriving it of the jurisdiction which it otherwise possessed but to have deprived themselves of the right of proceeding in that Court The parties did not thus deprive any court of its inherent or even territorial jurisdiction but themselves of their right of exercising it partially in one out of two or three courts. Jurisdiction is one thing, right to exercise it another.”

The discordance explicit in the above decisions from the Gujrat and Gauhati High Court has thus to yield to law laid down by the Supreme court already considered in this article.

6. THE EPILOGUE

The upshot is that parties entering into a valid contract selecting one among two or more places of suing provided by statute with open eyes and minds cannot be allowed to break the contract and the court would not be a party to a breach of contract by continuing a suit filed in a court not chosen by the parties by such a contract. Any subsequent event making such a contract onerous or oppressive may, however, be taken care of by the provisions for transfer available in the Code.

The Orissa High Court and the Madras High Court seem to have gotten rid of the influence of SNEHAL KUMAR (Supra) in the light of the later decisions of the Supreme Court. A hope that the Gauhati High Court would do likewise would be an appropriate end to this writing.