



IN THE HIGH COURT OF SIKKIM
GANGTOK

Writ Petition (C) No.50 of 2005

Mahesh Agarwal
S/o Late Bhaskaranand Agarwal,
R/o M. G. Marg, Gangtok,
Sole Proprietor of Agarwal Trading
Company, Jorethang,
South Sikkim. ***Petitioner***

Versus

1. Indian Oil Corporation Ltd.,
G - 9,
All Yavar Jung Marg,
Bandra (East),
Mumbai.
2. Indian Oil Corporation Ltd.,
2, Gariahat Road (South),
Calcutta.
3. The Divisional Retail Sales Manager,
Indian Oil Bhawan,
Paribahan Nagar,
Matigara,
Distt. Darjeeling.
4. The Depot-In-Charge,
Indian Oil Corporation Ltd.,
Rangpo Depot,
P.O.Majhitar,
Bagey Khola,
Dist. East Sikkim. ***Respondents***



For the Petitioner : Mr. S. P. Wangdi, Senior Advocate &
Ms. Sailaja Rai, Advocate.

For the Respondents: Mr. A. Moulik, Senior Advocate &
Mr. N. G. Sherpa, Advocate

Present : The Hon'ble Chief Justice Mr. B. K. Roy
The Hon'ble Mr. Justice A. P. Subba.

C.A.V.

J U D G M E N T

By filing this Writ Petition under Article 226 of the Constitution of India, the Petitioner seeks issuance of a Writ in the nature of prohibition, restraining the Respondents from continuing with their decision not to supply to him Superior Kerosene Oil (**SKO for short**) and Light Diesel Oil (**LDO for short**) and issuance of a writ in the nature of mandamus calling upon the Respondents to resume supply of SKO and LDO and also restraining them from appointing in his place any other person as dealer of SKO and LDO at Jorhang, South Sikkim.

2. The Petitioner's case, in brief, is as follows: -

He is the sole proprietor of the Firm by the name of M/S Agarwal Trading Company, a company duly registered under the Central Commercial Tax (Registration Turnover) Rules, 1957, and dealing in retail sale of Petrol (**POL for short**), High Speed Diesel(**HSD for short**), SKO and LDO, etc., in Jorhang, South Sikkim. Since he was minor, this Firm was run and



looked after by his cousin Bal Krishna Agarwal. On his attaining the age of majority, the proprietorship of the Firm was transferred to him in the year 1975.

In the year 1970, when the Firm was being looked after by Bal Krishna Agarwal, it (the firm) entered into an agreement with the Indian Oil Corporation Limited (Respondent No.1), for supply of POL and HSD, duly executing a written agreement and started business of the retail sale of petrol and diesel products from Jorhang Outlet. The Respondents also made to him an offer of dealership of SKO and LDO, for Jorhang, South Sikkim. He expressed his readiness to accept this offer. The Respondents commenced supply and he started lifting SKO and LDO for retail sale from Jorhang Outlet. This ad hoc mode of transaction continued for some time. After this offer was formally accepted by him, an agreement was drawn up between him and the Respondents on 19th March, 1982.

The transaction, which had commenced since before the execution of the formal agreement regarding dealership of SKO and LDO, was carried on without any problem till the year 2005.

With regard to the agreement for dealership of POL and HSD in the year 2002, he was served with a show cause notice stating that the sample of motor spirit drawn from his retail outlet by the representatives of the Respondent No.3, during routine inspection, failed to meet the specification in respect of final





boiling point, asking him to show cause as to why action against him should not be initiated in terms of the agreement. On his reply to the show cause notice, the Respondents issued an order dated 30th January 2003 suspending sales and supplies of POL and HSD for 30 days from the date of the letter directing him to deposit a sum of Rs.20, 000.00 as penalty for the alleged failure of the sample. Aggrieved by this action he filed a Civil Suit in the Court of Civil Judge, Junior Division, Siliguri, in which an interim order was passed restraining the Respondents from giving effect to the aforesaid order of suspension dated 30th January, 2003. Supply of petrol and diesel was resumed and the business was carried on. The Respondents in the Suit filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 invoking the arbitration clause of the agreement dated 18th February 1970. After hearing, the learned Civil Judge passed an order referring the dispute to arbitration and dismissed the suit by order dated April 18, 2005. Against this order he filed Revision in the Court of learned District Judge, Darjeeling, which was ultimately dismissed for non-prosecution.

Respondent No.3 vide letter dated 12.07.2005 terminated the agreement (Annexure P-1) on the allegations that he had violated the marketing disciplines; he had refused to pay the penalty; he has adulterated the product; and that he is running the retail outlet as an unauthorized person, without formal approval from the Corporation.



He has already taken up steps against this illegal termination of the agreement for the supply of POL/HSD in separate proceedings initiated in appropriate forums which have nothing to do with the present proceedings in respect of dealership of SKO/LDO.

He continued to be the legitimate dealer of SKO and LDO of the Respondents in Jorhang, South Sikkim under the relevant agreement. Respondent No. 3 also suspended supply of SKO and LDO from its depot at Majhitar, Bagay Khola, East Sikkim to him after 7th July, 2005 without giving any opportunity of showing cause. All fervent pleas made by him to the Respondents to reconsider and revise their decision were in vain. His dealership agreement being operative, the Respondents have no right to terminate/suspend the supply of SKO and LDO to his detriment. The stoppage of supply of SKO and LDO to him being based on irrelevant considerations with collateral purposes, was illegal and irrational. The decision to stop supply of SKO/LDO having been taken by the Respondents behind his back and without giving him any opportunity to show cause, is arbitrary, illegal and violative of the principles of natural justice.

Dealership of SKO and LDO given to him along with that of POL and HSD under the two agreements forms his major source of income and involves question of his bread and butter. Action of the Respondents of bringing to an end a long course of transaction running for nearly 27 years on irrelevant grounds is unfair and



cannot be sustained on the touchstone of the Constitutional provisions.

[3] Vide Order dated 19.12.2005, a learned Single Judge issued Rule to the Respondents. He also passed an adinterim injunction directing them to resume supply of kerosene oil to the Petitioner and restrained them from appointing anyone as dealer in kerosene oil in his place.

[4] The Respondents appeared and filed C.M.A. No. 32 of 2006 under Section 8 of the Arbitration and Conciliation Act, 1996 praying to issue show cause to the Petitioner as to why all the disputes raised in this Writ Petition be not referred to arbitration in terms of Arbitration Agreement dated 19.3.1982; stay this Writ Petition and all proceedings thereunder till disposal of the arbitration proceedings; dismiss this Writ Petition in view of the arbitration clause and/or return this Writ Petition or reject/dismiss this Writ Petition as this Court has no jurisdiction to entertain the same in view of the agreement and interim order dated 19.12.2005 be vacated, alleging inter alia, as follows: -

The Petitioner has failed or deliberately concealed to disclose that vide Memorandum of Agreement dated 19.3.1982 M/s Agarwal Trading Company entered into a kerosene/ light diesel dealership agreement with Respondent No. 1 for supply of superior kerosene oil and light diesel oil from its outlet at Jorethang, South Sikkim, (copy appended as Annexure R-1). Clause 27 of the



agreement provides resolving of any dispute arising between the parties in the Courts in the City of Kolkata alone and only such Courts have jurisdiction to entertain any suit, application or other proceedings in respect of any claim or dispute arising out of the agreement; and accordingly this Court has no jurisdiction to entertain this Writ Petition; The Petitioner has no right to file this case in the State of Sikkim, as clearly debarred by the agreement; The Arbitration clause contained in clause 28 of the agreement covers any type of dispute or difference arising between the parties; The disputes raised are arbitrable between the parties; The Respondents were all along ready and willing and still ready and willing to settle the dispute by referring the same to the Arbitrator as per the agreement; In relation to the dispute arising in relation to the agreement dated 18.2.1970 concerning related dealership of Motor Spirit and High Speed Diesel Oil the Petitioner filed Title Suit No. 2 of 2006 in Siliguri in the State of West Bengal. The instant case has been filed in order to obtain the interim order which is liable to be vacated; This application is being filed bonafide and to meet the ends of justice at the first opportunity before filing any Counter Affidavit.

[5] In the counter affidavit filed by the Petitioner in response to the application u/s 8 of Arbitration and Conciliation Act 1996, he has alleged, inter alia, as follows: -

He had failed to mention about the existence of agreement dated 19.3.1982 (Annexure R-1) executed between the



Petitioner and the Respondent in connection with the dealership of SKO and LDO, but this omission was not actuated by malice or with any deliberate intention to mislead this Court and an unqualified apology is being offered for this omission. The agreement in question completely slipped out of his memory, and he came to believe that the agreement regarding supply of SKO and LDO was made pursuant to the offer letter dated 13th March 1978, which was reflected in the letter dated 29.4.1978. The agreement dated February 8, 1970 (Annexure P-1 to the Writ Petition) had no relation with the agreement for supply of the SKO and LDO, which is the subject matter of this Writ Petition. The agreement dated 19.3.1982 goes in his favour, as there is a clear and categorical recognition of his status as proprietor of M/s Agarwal Trading Company, which is in contradiction to the conclusion arrived at by the Respondents in the impugned letter of termination dated 12.07.2005. He had no opportunity whatsoever to place his case before the Respondents, as there was no opportunity for doing so on account of the fact that the Respondents had terminated the supply of SKO and LDO to his detriment without any notice to him. The rule of exclusion of Writ Jurisdiction, even on the availability of alternative remedy, is a rule of discretion, and not one of compulsion. The question of dealership involves the question of his bread and butter. It is permissible for this Court under its wide powers under Article 226 of the Constitution to interfere in the present proceedings, instead of driving him to the alternative remedy of Arbitration proceedings.





[6] Mr. Moulik, the learned Senior Advocate of the Respondents made his submissions in regard to preliminary objections on April 17 and 25, 2006.

[6.1] His submissions were that as in view of Clause 27 of the agreement executed between the parties, which specifically provides that since the agreement has been made in all respects at Kolkata, the Courts in the City of Kolkata alone shall have jurisdiction to entertain any suit, application or other proceedings in respect of any claim or dispute arising under this agreement, the Petitioner stood estopped from filing this writ petition before this Court. Further, since the agreement provides for an effective and efficacious alternative remedy by way of arbitration, the Petitioner cannot prosecute this writ petition without exhausting such an alternative remedy.

[7] Mr. Wangdi, learned Senior Advocate appeared on behalf of the Petitioner on April 25, 2006 filed an application seeking amendment of the Writ Petition along with the amended Writ Petition which we took on the record. Mr. Wangdi also submitted his reply to the preliminary objections raised by Mr. Moulik.

[7.1] Mr. Wangdi, in his reply, submitted that the impugned action of the Respondents, not being related to any of the terms and conditions of the agreement, was *dehors* the agreement and, as such, access to justice by way of public remedy cannot be denied to the Petitioner as the *lis* involves public law character.





The arbitration clause in the agreement cannot curtail the right of the Petitioner to approach this Court under Article 226 of the Constitution, as because the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. Besides, the relief being sought for in this Writ Petition, namely, the restoration of dealership of SKO/LDO falls outside the forum of arbitration provided in the agreement. The impugned action has been taken in violation of the principles of natural justice and in such a case, the power of judicial review vested in the High Court under Article 226 of the Constitution of India being plenary in nature, can neither be whittled down by any provision of statute or by an agreement entered into between the parties.

[8] Mr. Moulik requested for further hearing on the ground of his unsound health and filing of Counter Affidavit to the amended Writ Petition. The case was then adjourned.

[9] On 1.6.2006 Counter Affidavit was filed by the Respondents which was taken on record.

[9.1] The Counter Affidavit asserts inter alia, as follows: -

Even though two agreements had been entered into with M/S Agarwal Trading Company, the Respondents did not recognize the Petitioner, Mahesh Agarwal as proprietor of the said M/S Agarwal Trading Company. It was Bhaskaranand Agarwal who was the proprietor of M/S Agarwal Trading Company when the agreements were entered into. Therefore, the offer for



dealership of SKO and LDO made by the Respondents in the year 1978 was to M/S Agarwal Trading Company, Jorhang, which was accepted by Bhaskaranand Agarwal for and on behalf of M/S Agarwal Trading Company. After his acceptance as the proprietor of M/S Agarwal Trading Company, no other person had any right to act or sign any paper as the proprietor of M/S Agarwal Trading Company. The agreement for supply of SKO and LDO was sent by post and was not signed across the table and the Respondents were given an impression that the same person who had accepted the offer earlier had signed the agreement. As per Clause 13 of the agreement any change in the constitution of the firm or proprietorship could only be effected with prior written permission of the Respondents. The Respondents had never given any written approval for any change of proprietorship of M/S Agarwal Trading Company. Bhaskaranand Agarwal continued to be the proprietor of M/S Agarwal Trading Company in their records. Their record neither showed the name of Bal Krishna Agarwal nor the name of the Petitioner as proprietor of M/S Agarwal Trading Company. The offer made by the Respondents to M/S Agarwal Trading Company for dealership of SKO/LDO was accepted by Bhaskaranand Agarwal himself as the proprietor of M/S Agarwal Trading Company. No information regarding change of name of proprietorship was given to the Respondents. They came to know about the death of Bhaskaranand Agarwal only in the year 2005 during course of routine investigation on the



mal practice adopted by M/S Agarwal Trading Company in respect of petrol and diesel dealership. Thus, the supply of SKO and LDO was suspended with effect from 7th July, 2005. The Petitioner is not the sole proprietor of M/S Agarwal Trading Company. The suspension of SKO/LDO to M/S Agarwal Trading Company was not illegal, irrational nor does it suffer from any procedural impropriety. The Respondents were not obliged to show any reason to the Petitioner for suspension of the supply of SKO/LDO on the death of the proprietor of the Firm. The Petitioner, who is a stranger as far as the agreement in question is concerned, had no right to claim any opportunity of hearing before the action was taken by them. The Petitioner has no locus standi to file this Writ Petition and, as such, it is not maintainable and liable to be dismissed.

[10] On July 20, 2006 the case was heard further. On July 21, 2006 the Petitioner filed an affidavit placing on record certain documents. On 1.8.2006 the Petitioner filed an application praying to call the documents mentioned in it. On 2.8.2006 Mr. Wangdi, pressed this petition in order to prove the Petitioner's proprietorship of the Firm submitting that these documents would prove that fact. Mr. Moulik took up a stand that the documents enumerated at Sl. Nos. (e), (f) and (j) were not received by the Respondents and thus there can not be any question of their production. Both learned counsel were heard further and thereafter judgment was reserved. On August 7 & 10, 2006 they also filed synopsis of their arguments.



[11] The moot question which requires primal adjudication is as to whether this Court in view of clause 27 of the agreement lacks territorial jurisdiction?

[12] The agreement with regard to the dealership of supply of Superior Kerosene Oil and Light Diesel Oil (SKO/LDO) entered into between parties in the year 1982 is not in dispute. Clause 27 of the said agreement, which provides for Jurisdiction of the Courts, is as follows:

"27 The courts in the city of Calcutta alone shall have jurisdiction to entertain any suit, or other proceeding in respect of any claim or dispute arising under this agreement".

[13] The maxim *expressio unius est exclusio alterius* – the express mention of one thing implies the exclusion of another, is well known. There is also otherwise worded maxim, *expressum facit cessare tacitum*. This rule enunciates one of first principles applicable to the construction of written instruments. (See Broom's Legal Maxims).

[14] In **A.B.C. Laminart (P) Ltd. v. A.P. Agencies**, (1989) 2 SCC 163, the Apex Court considered the effect of such a clause in an agreement and observed and held as follows: -

"11. The jurisdiction of the court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors.

X X X X

"20. When the court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly.

X X X X



"21.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."

[14.1] In *Angile Insulations v. Davy Ashmore India Ltd.*, (1995) 4

SCC 153, it was laid down as follows: -

"5. So, normally that court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties. In this case, clause (21) reads thus:

"This 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 reading of this clause would clearly indicate that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in *A.B.C. Laminart (P) Ltd. v. A.P. Agencies*.¹ Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the court will be unlawful and void being against the public policy under Section 23 of the Contract Act. We do not find any such invalidity of clause (21) of the contract pleaded in this case. On the other hand, this Court laid 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 Sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements.

6. In this view of the law and in view of the fact that the agreement under which clause (21) was incorporated as one



such clause, the parties are bound by the contract
.....

[14.2] In *Hanil Era Textiles Ltd. V. Puromatic Filters (P) Ltd.*, (2004) SCC 671: AIR 2004 SC 2432, it was held to the effect that when an arbitration clause is clarified by the words like "alone", "only" or "exclusive" then it has been inferred that there is exclusion of jurisdiction of other Court, except the Court chosen by the party is excluded. It is relevant and extracted the exact words used:

" When the clause is clear, unambiguous and specific 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 -fore to be properly construed. "

[14.3] In *New Moga Transport Co. v. United India Insurance Co. Ltd.*, (2004)4 SCC 677: AIR 2004 SC 2154, it was held as follows: -

"Import of use of words "only", "alone", "exclusive" in exclusion clause – Held the intention to exclude a court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms – Only the accepted notions of contract would bind the parties in such cases – Contract Act, 1872, S. 37 (Para 19)."

[14.4] Very recently in *Rite Approach Group Ltd. vs. Rosoboronexport*, (2006) 1 SCC 206, the Apex Court clearly laid down that "whenever there is a specific clause conferring jurisdiction on a particular court to decide the matter then it automatically ousts jurisdiction of the other court." (Paragraph 20).



[15] In the instant case, from Clause 27, it is crystal clear that the Courts at Kolkata alone were chosen for adjudication of all types of disputes between the parties. The word "Courts" will obviously include the Calcutta High Court. The dispute raised in this Writ Petition, on a bare reading of the Agreement, stands amply covered.

[16] In the said view of the matter the Sikkim High Court lacks territorial jurisdiction to entertain and adjudicate the dispute between the Petitioner and the Respondents.

[17] In view of our finding aforementioned it does not appear proper for us to consider all other submissions made and the decisions referred to by the learned counsel of the parties.

[18] Accordingly, we are constrained to dismiss this Writ Petition, but in the facts and circumstances, make no order as to cost.


(A.P. Subba, J)


(Binod Kumar Roy, CJ)

September 25, 2006.

[A.F.R.]

Anku Tshering Ghalay/Jaya Kumar. S