Agreements which restrain legal proceedings – An analysis

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Section 28 of the Indian Contract Act, 1872

“28. Agreements in restraint of legal proceedings void. - Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) Which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent. Saving of contract of refer to arbitration dispute that may arise. -

Exception 1.- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.- Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration”.

Amendment of Section 28 of Act 1872.

Law Commission report

The Law Commission in its 97th report recommended that Section 28 of the Indian Contract Act, 1872 be amended. This suggestion was made because Section 28 as it is on the statute book now has created some sort of uncertainty about a party’s rights to enforce their rights under any agreement.

Agreement restricting law of limitation

Prior to amendment, Section 28 says that ‘No one can contract himself out of the statute of limitation and consequently where the result of a compromise is that the limitation provided by law is extended it is open to the judgment-debtor to plead that the decree-holder’s application was barred by time’. It is only when a period of limitation is curtailed that Section 28 of the Contract Act comes into operation. It does not apply when the term spells out an extinction of the right of the plaintiff to sue or spells out the discharge of the defendant from all liability in respect of the claim. A voluntary agreement to curtail the period of limitation for filing a suit is void. A clause in a contract providing that no claim or dispute of any sort whatever can be recognized if not made in writing within sixty days of the due date of payment does not take away the statutory right of a plaintiff to bring his claim within the time prescribed by law.

The clause in the agreement that the appellant would not have any right under the bond after the expiry of six months from the date of termination of the contract has been held not to be contrary to section 28 of the Act nor it imposed any restriction to file a suit within six months; [Food Corporation of India –vs- New India Assurance Co. Ltd., AIR 1994 SC 1896].

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Jurisdiction of the proper court

The jurisdiction of the Courts cannot be ousted by an agreement of the parties. The principle contained in this section is an exception to the rule of the ‘maxim modus et conventio vincunt legem, the form of agreement and the convention of parties overrule the law. But if the agreement merely provides that an award, fixing the debt or the damages, shall be a condition precedent to the recovery thereof by action, it is not only valid, but is a defence to the action if brought before the award and this is incorporated in Exception 1. It may be noted that in a contract there may be two separate stipulations one of which is valid and the other void, e.g., a provision to refer to arbitration and another ousting the jurisdiction of Court. When two or more courts are competent to entertain a suit parties can contract to vest jurisdiction in one court only. The section has not the effect of making the whole agreement void, but only the stipulation in the contract which ousts the jurisdiction of the Court. The validity of an agreement by which the parties prefer one of the two Courts depends upon the fact that both the Courts must have jurisdiction in deciding the matter. It has been held that it is not open to the parties by agreement to confer jurisdiction on any court which it did not otherwise possess under section 20 of Code of Civil Procedure; [Patel Roadways –vs- Prasad Trading Company, AIR 1992 SC 1514]. The parties can by mutual consent no more take away the jurisdiction vested by law in any Court than they can confer on it when it is not so vested by law. By a private agreement the parties cannot divest the Court of its inherent jurisdiction to try disputes arising out of the agreement. The principle that the parties cannot by consent confer jurisdiction on a Court or deprive a Court of jurisdiction only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit, but the question of territorial jurisdiction is not a question of inherent jurisdiction.

Change of procedure

An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on merits. Therefore an agreement that a particular suit should be decided in accordance with the result of another suit between the parties is not valid.

Party’s agreement not to sue

Forbearance by a creditor from suing a debtor or a promise to forbear absolutely or for a time is not unlawful. So a compromise of doubtful rights is outside the scope of Section 28 though the parties thereby agree that they abandon their rights under the original contract which necessarily includes a right to resort to a Civil Court in regard to the contract.

Exception 1 ‘Saving of contract to refer to arbitration dispute that may arise’ indicates that for making an agreement conform to Exception 1, the jurisdiction of court must be excluded in all respects except in matters which are the result of the arbitrator’s award.

Exception 2 ‘Saving of contract to refer question that have already arisen’ indicates that Section 28 shall not render illegal any contract in writing in which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of law in force for the time being as to reference to arbitration. In order to invoke this action it is necessary that (i) the agreement must be in writing; (ii) it must be to refer any question which has already arisen; and (iii) it should also be in conformity with the law relating to arbitration.

The Supreme Court of India/AP High Court has dealt with certain cases under section 28 holding that some actions of entering into contract are void. They are given below for ready reference.

Decisions of Supreme Court of India

Agreement

1. After six months of expire period of contract appellant could not claim to fidelity insurance guarantee which neither against contrary of Section 28 nor against public policy under Section 23 - insurance company has no liability after expiry date of termination of contract - notice sent by appellant for mere demand after expiry cannot be enforceable - Apex Court found that non filling of suits within six months not mean that suit barred by limitation - law of limitation allows person to


Amendment of Plaint

3. Suit for declaration that appellant-plaintiff entitled to payment of compensation for loss of insured vehicle - suit dismissed on ground that suit for mere declaration without consequential relief for payment of compensation for loss of vehicle not maintainable - question of granting amendment to include prayer for consequential relief - granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specific amount bad in law. Alternative relief was available to appellant to be asked for when he had filed suit for declaration but he failed to do so. He cannot be permitted to amend plaint after suit was barred by limitation during pendency of proceeding in Appellate Court. [Muni Lal vs . The Oriental Fire & General Insurance Company Ltd. and another MANU/SC/0162/1996 = AIR 1996 SC 642 = 1996 Civil CC 467 = [1996] 86 Comp Cas 60 (SC) = JT 1995 (8) SC 283 = 1996 (6) Kar LJ 616 = 1996 (1) LW 349 = (1996) 113 PLR 209 = 1995 (6) SCALE 501 = (1996) 1 SCC 90 = [1995] Suppl 5 SCR 42(SC)]

Arbitration

4. Whether award passed is liable either to be remitted under Section 16(1) (c) of Act or liable to be set aside under Section 30(c) of Act? Held, relying on decision in Haigh –vs- Haigh, Court said that required an arbitrator to act fairly in the course of its duties. Rule of law should be allowed to remain as it is until competent legislature amends law. Court hold that an award passed under Act is not liable to be remitted or set aside merely on ground that no reasons have been given in its support except where arbitration agreement or deed of submission or an order made by Court is such as one under Sections 20, 21 and 34 of Act or statute governing arbitration requires that arbitration should give reasons for award. Court reverted case back to Division Bench for disposal in accordance with law. [Raipur Development Authority etc . etc . vs- M/s . Chokhamal Contractors etc. 1989 (2) SCC 721 = 1989 (3) SCR 144(SC)]


6. Appointment of arbitrator. Whether when dispute not constituting excepted matter under arbitration clause, appointment of arbitrator by High Court can be faulted with by raising contention of being excepted matter? Held, no. No infirmity in impugned judgment. Clauses in arbitration agreement in restraint of legal proceedings are contrary to Section 28 of Indian Contract Act, 1872 and is bad in law. If the Appointing Authority did not respond to the notice requiring the appointment of Arbitrator and failed to act within the time prescribed under Section 4 of the Arbitration and Conciliation Act, 1996 then appointing authority loses the right to object and such right is deemed to

7. Appointment of arbitrator, whether, when dispute not constituting excepted matter under arbitration clause, by High Court cannot be faulted with by raising contention of being excepted matter. No infirmity in impugned judgment. Clauses in arbitration agreement in restraint of legal proceedings are contrary to Section 28 of Indian Contract Act, 1872 and are bad in law. If the Appointing Authority, did not respond to the notice requiring the appointment of Arbitrator and failed to act within the time prescribed under Section 4 of the Arbitration and Conciliation Act, 1996 then appointing authority loses the right to object and such right is deemed to have been waived. Appeal dismissed. [Bharat Sanchar Nigam Ltd. and Anr. vs. Motorola India Pvt. Ltd. AIR 2009 SC 357 = 2010 (1) ALD 92 (SC) = 2008 (3) ALR 531 (SC) = 2009 (12) SCALE 720 = 2009 (1) ALT 1 (SC) = 2008 (4) AWC (Suppl) 4082 SC = 2008 Bus LR 885 (SC) = (2009) 4 Comp LJ 313 (SC) = 2008 (12) SCALE 720 = (2009) 2 SCC 337(SC)]

8. Reference to Arbitral Tribunal. Sub-clause (7) of Clause 25A of agreement requiring claimant to deposit 7% of total claim made coming to Rs. 1,81,14,845. Accepting objection in that regard, Tribunal held that on account of non-compliance, Arbitrators cannot assume jurisdiction to proceed with arbitration. Challenge before High Court failed. No interference is called for. Concept of unequal bargaining power, has no application to commercial contracts. Provisions of Sections 31 (8) and 38 cannot be pressed into service to get over sub-clause (7) of Clause 25A. Plea that there should be cap in quantum payable in terms of sub-clause (7) of Clause 25A, without substances. Appeal dismissed. [S. K. Jain vs. State of Haryana and Anr. JT 2009 (7) SC 128 = 2009 (3) SCALE 236 = 2009 (4) SCC 357 = 2009 (2) SCR 1080(SC)]

9. The facts very briefly are that on 30.11.2007 the Board of Control for Cricket in India (for short ‘BCCI’) invited tenders for IPL (Indian Premier League) Media Rights for a period of ten years from 2008 to 2017 on a worldwide basis. … This arbitration agreement in Clause 9 is wide enough to bring this dispute within the scope of arbitration. To quote Redfern and Hunter on International Arbitration (Fifth Edition page 134 para 2.141) where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction. Hence, it has been rightly held by the learned Single Judge of the Bombay High Court that it is for the arbitrator to decide this dispute in accordance with the arbitration agreement. [World Sport Group (Mauritius) Ltd. –vs- MSM Satellite (Singapore) Pte. Ltd. MANU/SC/0054/2014(SC)]

Civil

10. Suit for declaration that appellant-plaintiff entitled to payment of compensation for loss of insured vehicle. Suit dismissed on ground that suit for mere declaration without consequential relief for payment of compensation for loss of vehicle not maintainable. Question of granting amendment to include prayer for consequential relief. Granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specific amount bad in law. Alternative relief was available to appellant to be asked for when he had filed suit for declaration but he failed to do so. He cannot be permitted to amend plaint after suit was barred by limitation during pendency of proceeding in Appellate Court. [Muni Lal vs. The Oriental Fire & General Insurance Company Ltd. and another AIR 1996 SC 642 = JT 1995 (8) SC 283 = 1995 (6) SCALE 501 = 1996 (1) SCC 90 = 1995 Suppl (5) SCR 42(SC)]

Commercial

11. Preamble of Carriers Act, 1865 indicates that Act was passed with view to limit liability of carriers and to declare liability of carriers. Any contract or bargain which seeks to defeat liability of carriers as enacted by law defeat provisions of Act. Section 23 provides that consideration or object of agreement lawful unless provision was of such nature that if permitted would defeat provisions of any law. Parties had not by express contract limited their liability as contemplated under Section 6. Condition in question of way bill designed to avoid liability contemplated under Section 10 of Act of 1865. Held, condition void. [M. G. Brothers Lorry Service vs. Prasad Textiles 1983 ACJ 507 = AIR 1984 SC 15 = 1983 (1) SCALE 481 = 1983 (3) SCC 61 = 1983 (2) SCR 1027(SC)]
Consumer

12. Repudiation clause in the policy that claims shall be deemed to have been abandoned and not recoverable if filed after 3 months of repudiation. National Consumer Disputes Redressal Commission rejected the matter on basis of earlier view that such clause was void. Final decision about repudiation conveyed on 28.7.1994. Till then appellant promising that repudiation of claim was being considered afresh. Complaint made on 6.8.1994 within three months. Order of National Commission needs no interference. Not necessary to go into question of Section 28 of Contract Act. Period of limitation for filing complaint against repudiation of claim is to be reckoned from the date when final decision about repudiation is conveyed. Appeal dismissed. [Oriental Insurance Co . Ltd. – vs- Prem Printing Press MANU/SC/0095/2009 = (2010) 14 SCC 773(SC)]

Contract

13. Initiation of insolvency proceedings does not terminate all contracts entered into by insolvent. Performing of insolvency proceedings acts as notice for other party to terminate contract at will. Official Receiver can enforce contract if he is willing to perform contract to some extent. Transfer under contract is valid till Official Receiver or other party terminates it.(ii) Powers of official receiver. Interim receiver appointed under Section 56 does not have power to dispose of property of insolvent. Insolvency Court cancels adjudication Order passed earlier under Section 43. Court appoints an Official Receiver to realize or distribute assets of insolvent. Receiver appointed after cancellation of adjudication can only continue pending proceeding but cannot initiate them under Sections 53 and 54. Held, plaintiff can be awarded decree of their title to property. Appeal allowed. [Kusampudi Sunadra Rama Raju –vs- Official Receiver , Guntur and Ors . MANU/AP/0117/1964 = AIR 1964 AP 299(AP)]

14. No compensation for breach of agreement can be awarded either in addition or substitution of the performance of agreement unless relief for compensation has been claimed either in the plaint or included later on by amendment of the plaint. Cost awarded in the suit cannot form part of compensation. The Defendant/appellants entered into an agreement of sale with the Plaintiff/Respondents, on 20th October 1994 for sale of 15125 cents of land owned by her at the rate of Rs. 3,15,000 per cent for a total consideration of Rs. 44,66,385. A sum of Rs. 10 lakhs was paid as advance. The sale deed was agreed to be executed within three months. As the appellants failed to execute the sale deed the Respondents filed a suit in the sub court for specific performance of the agreement. The suit was decreed on 24th July 1997. Respondents in terms of the decree deposited a sum of Rs. 34,66,385 as balance of consideration on 23rd October 1997. On 17th February 1998 the Respondents moved I.A. No. 951/98 under Section 28 (3) of the Specific Relief Act, 1963, claiming an interest at the rate of 12 per cent on Rs. 44,86,385 from the date of deposit of the amount till the registration of the sale deed and delivery of possession of the property. The sale deed was executed on 17th August 1999 and Respondents were put in possession of the property. On measurement of the property it was found that the property was only 14177 instead of 15-125 mentioned in the agreement for sale. The Respondents were entitled to recover Rs. 12,77,870 by way of compensation which included the costs in the suit, excess amount deposited and interest by way of compensation on the sale consideration. The Appellant challenged the order in C.R.P. No. 2267/99 in the High Court. The learned Single Judge held that Section 28 of the Act has no application but invoking Section 21 of the Act held that the Respondents would be entitled to get compensation. Order of the Trial Court was modified as to the rate of interest payable and disposed of the revision petition. The Judgment of the High Court is challenged in appeal. It was contended in appeal that the High Court has misunderstood the scope of Section 21, that compensation for breach or agreement of sale either in addition to or in substitution of the performance of the agreement cannot be granted unless the Plaintiff claimed such compensation in the plaint and since the Respondents failed to claim the compensation either in original plaint or by amending the plaint, the Respondents were not entitled to any compensation. Counsel for the Respondents controverted the contention. Accepting the contention of the appellants; It is admitted position before us that in the original plaint the Respondents did not claim compensation for the breach of agreement of sale either in addition to or in substitution of the performance of the agreement. Further the Respondents did not amend their plaint and ask for compensation either in addition to or in substitution of the performance of the agreement of sale. Sub-section (5) of Section 21 emphatically provides that no compensation shall be awarded under Section 21(5) unless the relief for compensation has been claimed either in the plaint or included later on by amending the plaint at any stage of the proceedings. The High Court has clearly erred in granting the compensation under Section 21 in addition to the relief of specific performance in...
the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance. Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law. The learned Single Judge has also erred in including the amount of cost which has been awarded in the main suit towards the amount of compensation. Of course, the Plaintiff/Respondents are entitled to recover the amount of cost which has been decreed in the main suit but the same cannot form part of compensation by way of additional relief to the specific performance of the agreement of sale. Appeal allowed. [Shamsu Suhar Beevi -vs- G . Alex and Anr. JT 2004 (6) SC 457 = 2004 (7) SCALE 265 = 2004 (8) SCC 569 = 2004 Suppl (3) SCR 653(SC)]

Deficiency in service


Insurance:

16. After six months of expire period of contract appellant could not claim to fidelity insurance guarantee which neither against contrary of Section 28 nor against public policy under Section 23. Insurance company has no liability after expiry date of termination of contract. Notice sent by appellant for mere demand after expiry cannot be enforceable. Apex Court found that non filling of suits within six months not mean that suit barred by limitation. Law of limitation allows person to recover amount up to three years. Agreement time for recovery cannot be circumscribed against provisions of Act of 1963. Appeals allowed. [The Food Corporation of India vs . The New India Assurance Co. Ltd . and others AIR 1994 SC 1889 = JT 1994 (1) SC 703 = 1994 (1) SCALE 591 = 1994 (3) SCC 324 = 1994 (1) SCR 939 (SC)]

Interpretation of contract


Jurisdiction

18. Respondent was agent of appellant for sale of certain fertilizers in Kakinada. Respondent entered into agency agreement with appellant and deposited certain amount as agency deposit. Agency agreement provided that all disputes arising in relation to agreement shall be referred in Madras Court. Respondent brought suit in Court of District Munsif, Kakinada for recovering agency deposit. Suit could be filed only in Court of Madras as suit arising out of agency agreement. Appeal allowed. [Lloyds Commercial Corporation vs . Veeravilli Satyanarayana and Satti Rami Reddi Registered Firm , Kakinada MANU/AP/0142/1966 = AIR1966AP256(AP)]

19. Firm ‘A’ asked good from Calcutta firm ‘B’ and received the same at Rajahmundry. Poor quality goods received. ‘A’ filed suit for damages. Bill of ‘B’ contained words ‘subject to Calcutta jurisdiction’. Bill did not confer exclusive jurisdiction on Calcutta Court to exclusion of other Courts.

20. Jurisdiction of Court to decide dispute regarding delivery of goods in international contract was in question. Shortfall of goods in Contract discovered after consignment landed at Visakhapatnam. Certificate regarding shortfall given by port authorities of same. Claim arises from Visakhapatnam. Second petitioner-agent of first petitioner also present in Visakhapatnam - in interest of justice Court hold that Court of Visakhapatnam has jurisdiction to entertain suit. [The Black Sea Steamship U.L. Lastochkina Odessa, Union of Soviet Socialist Republic and Anr. vs. The Union of India MANU/AP/0102/1976= AIR1976AP103(AP)]

21. Transporter failed to make delivery of goods transported from Bangalore to Hyderabad. Suit filed in Hyderabad for recovery of value of goods objected on ground of jurisdiction. Transporter claimed that Court having territorial jurisdiction in the area where its head office situated only has jurisdiction to try such suit. Such claim on basis of stipulation in consignment note. Nothing on record to show that respondent accepted such stipulation. No cause of action arise in the place where head office of transporter situated. Held, Court situated in Hyderabad has got jurisdiction to try such suit. [Patel Roadways Pvt. Ltd. vs. The Republic Forge Co. Ltd. MANU/AP/0093/1985 = 1986 ACJ 390 = 1986 ACJ 390 = AIR 1985 AP 387 = 1985 (2) APLJ 93(S)]


23. Appellant entered into an agreement with respondent for purchase of plot situated in Gurgaon. Head office of respondent was also situated in Gurgaon. Despite regular payment of installments by appellant, a contract was unilaterally cancelled by respondent. Suit against same was filed in Delhi High Court which was later on transferred to District Court, Delhi. Question which arose for consideration was as to whether Delhi Civil court has jurisdiction to try and entertain the present suit. District Court held in negative and returned the plaint to appellant to be filed in appropriate case. Petition filed against same in High Court also dismissed. Present appeal filed for challenging the same. As per Section 16 a suit can be instituted where the property is situated. Since the suit was for specific performance of agreement and possession of immovable property situated outside the jurisdiction of Delhi Court, the trial court was right in holding that it had no jurisdiction. Appeal dismissed. [Harshad Chiman Lal Modi –vs- DLF Universal and Anr. MANU/SC/0710/2005 = AIR 2005 SC 4446 = 2005 (6) ALD 1 (SC) = 2005 (61) ALR 647 = 2006 (1) ALT 4 (SC) = (SCSuppl) 2006 (2) CHN 160 = 101 (2006) CLT 5 (SC) = 2005 (5) CTC 133 = [2006 (3) JCR 222 (SC)] = JT 2005 (8) SC 561 = 2006-2-LW 85 = 2006 (100) RD 394 = RLW 2005 (4) SC 2459 = 2005 (7) SCALE 533 = (2005) 7 SCC 791(SC)]

24. High Court allowed Respondent's Appeal and set aside judgment of Trial Court with direction to take plaintiff on file and dispose of suit filed by Respondent for recovery of a sum. Hence, this Appeal. Whether, order passed by High Court was erroneous. Held, connecting factor with Kaira jurisdiction was ensured by fixing situs of contract within Kaira. However, delivery of goods at address of Respondent at Salem provided connecting factor for Court at Salem to have jurisdiction. Clause 11 was included in general terms and conditions of sale. In clause exclusive words like 'exclusive', 'alone', 'only' and like were not used. Hence, jurisdiction of Court at Salem was not expressly excluded. Further, other general terms and conditions were not indicative of exclusion of other jurisdictions. Thus, there was no error inimpunityment in impugned judgment of High Court. Appeal dismissed. Court shall entertain matter unless jurisdiction is expressly excluded by relevant clause of contract. [A. B. C. Laminart Pvt. Ltd. and Anr. –vs- A. P. Agencies, Salem AIR 1989 SC 1239 = 1989 (2) ALR 340 (SC) = JT 1989 (2) SC 38 = 1989 (1) SCALE 633 = 1989 (2) SCC 163 = 1989 (2) SCR 1 (SC)]
25. Jurisdiction of civil court. If two courts or more have jurisdiction to try suit. Agreement between parties that dispute between them to be tried in any one of such Courts is not contrary to public policy. Specific indication in consignment notes that Udaipur court alone has jurisdiction. Contrary view not sustainable. Appeal allowed. [New Moga Transport Company, through its Proprietor Krishanlal Jhanwar -vs- United India Insurance Co. Ltd. and Ors. AIR 2004 SC 2154 = 2004 (3) ALD 143 (SC) = 2004 (4) ALT 26 (SC) = JT 2004 (Suppl (1) SC 294 = 2004 (5) SCALE 73 = 2004 (4) SCC 677 = 2004 Suppl (1) SCR 623(SC)]

26. Rejecting objection relating to jurisdiction, Principal Senior Civil Judge, Vijayawada, by his judgment and decree, decreed Respondent's Suit (Original Suit No. 519 of 1991) with costs for a sum of `3,86,453.05, together with interest at rate of 12% per annum, from date of Suit till realization of principal amount of `2,98,267.50. Single Judge of High Court dismissed Appeal filed by Petitioner. Hence, present Special Leave Petition. Held, in A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies this Court observed that, where there might be two or more competent Courts which could entertain a suit consequent upon a part of cause of action having arisen there within, if parties to contract agreed to vest jurisdiction in one such Court to try dispute which might arise as between themselves, agreement would be valid. If such a contract was clear, unambiguous and explicit and not vague, it was not hit by Sections 23 and 28 of Contract Act and could not also be understood as parties contracting against statute. Cause of action for Original Suit No. 519 of 1991, filed by Respondent before Principal Senior Civil Judge, Vijayawada, arose partly within jurisdiction of Calcutta Courts and Courts at Vijayawada. Though, Courts at Vijayawada would also have jurisdiction, along with Courts at Calcutta, to entertain and try a suit relating to and arising out of Agreement dated 23rd December, 1988, and Mutual Understanding dated 15th May, 1989, such jurisdiction of Courts at Vijayawada would stand ousted by virtue of exclusion clause in Agreement. Decree passed by Principal Senior Civil Judge, and impugned judgment of High Court were set aside. Trial Court at Vijayawada was directed to return plaint of Original Suit No. 519 of 1991 to Plaintiff to present same before appropriate Court in Calcutta having jurisdiction to try suit. Petition allowed. [A. V. M. Sales Corporation vs . Anuradha Chemicals Pvt . Ltd . JT 2012 (1) SC 175 = 2012 (1) SCALE 349 = 2012 (2) SCC 315(SC)]

27. Designate Judge held that Rajasthan High Court did not have any territorial jurisdiction to entertain Application under Section 11 of Arbitration Act and dismissed same. Hence, present Appeal. Whether in view of clause 18 of consignment agency agreement (agreement) dated 13th October, 2002, Calcutta High Court had exclusive jurisdiction in respect of Application made by Appellant under Section 11 of Arbitration Act. Held, absence of words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' in jurisdiction clause was not decisive. For construction of jurisdiction clause, like clause 18 in agreement, maxim expression uni us est exclusion alterius came into play as there was nothing to indicate to contrary. That legal maxim meant that expression of one was exclusion of another. By making a provision that agreement was subject to jurisdiction of Courts at Kolkata, parties had impliedly excluded jurisdiction of other Courts. Where contract specified jurisdiction of Courts at a particular place and such courts had jurisdiction to deal with matter, an inference might be drawn that parties intended to exclude all other Courts. Therefore, in view of clause 18 of consignment agency agreement (agreement) dated 13th October, 2002, Calcutta High Court alone had exclusive jurisdiction in respect of Application made by Appellant under Section 11 of Arbitration Act. Impugned order did not suffer from any infirmity. Appeal was dismissed. In jurisdiction clause of an agreement, absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" was neither decisive nor did it make any material difference in deciding jurisdiction of a Court. Very existence of a jurisdiction clause in an agreement made intention of parties to an agreement clear and it was not advisable to read such a clause in agreement like a statute. In present case, only Courts in Kolkata had jurisdiction to entertain disputes between parties. Appeal was dismissed. [Swastik Gases P. Ltd. vs . Indian Oil Corporation Ltd . 2013 (3) ALR 161 (SC) = JT 2013 (10) SC 35 = 2013 (8) SCALE 433 = 2013 (9) SCC 32(SC)]

Liability

28. Preamble of Act of 1865 indicates that Act was passed with view to limit liability of carriers and to declare liability of carriers. Any contract or bargain which seeks to defeat liability of carriers as enacted by law defeat provisions of Act. Section 23 provides that consideration or object of agreement lawful unless provision was of such nature that if permitted would defeat provisions of any law. Parties had not by express contract limited their liability as contemplated under Section 6. Condition in question of way bill designed to avoid liability contemplated under Section 10 of Act of
Procedure

29. Whether award passed is liable either to be remitted under Section 16(1) (c) of Act or liable to be set aside under Section 30(c) of Act? Held, relying on decision in Haigh –vs- Haigh, Court said that required an arbitrator to act fairly in the course of its duties. Rule of law should be allowed to remain as it is until competent legislature amends law. Court hold that an award passed under Act is not liable to be remitted or set aside merely on ground that no reasons have been given in its support except where arbitration agreement or deed of submission or an order made by Court is such as one under Sections 20, 21 and 34 of Act or statute governing arbitration requires that arbitration should give reasons for award. Court reverted case back to Division Bench for disposal in accordance with law. [Raipur Development Authority etc. etc. –vs- M/s. Chokhamal Contractors etc. etc. MANU/SC/0280/1990 = 1989 JLJ 511 (SC) = 1989 MPJR (SC) 584 = (1989) 2 SCC 721 = [1989] 3 SCR 144(SC)]

Restrictive covenant

30. Matter related to validity of post service restrictive covenant of trade as contained in clause 10 of service agreement between parties. Under Section 27 service covenant beyond termination of service is void. Under Section 27 to determine whether agreement is void one has to see reasonableness of restraint and onus being upon covenanter to show it to be unreasonable. As per clause 10 negative covenant not to serve anywhere else or enter into competitive business in similar lines. Restriction contained in clause 10 is restraint of trade and therefore illegal and unenforceable under Section 27. [Superintendence Company of India (P) Ltd. –vs- Shri Krishan Murgai MANU/SC/0457/1980 = AIR 1980 SC 1717 = [1980 (41) FLR 137] = (1981) I LLJ 121 SC = (1981) 2 SCC 246 = [1980] 3 SCR 1278(SC)]

Restructuring Package

31. Company’s scheme of expansion financed by obtaining term loans and issuance of debentures by various financial institutions including appellant No.2. For various reasons company suffered cumulative loss of Rs. 228.58 Crores. Company approached Industrial Development Bank of India (IDBI) with request for restructuring package to clear its liabilities. Restructuring proposal mooted. Two meetings held wherein Unit Trust of India (UTI) participated. All debenture holders upon due deliberations agreed to concerned proposal of restructuring package except appellants. Pursuant to restructuring package company paid sum of Rs. 64.44 crores to various financial institutions. Total sums invested by financial institutions in concerned debentures is of Rs. 197.43 crores whereas UTI invested sum of Rs. 19.57 crores that is only about 10% of total investment. Agreement specifies rights and privileges of parties and in particular rights and privileges of debenture holder either collectively or individually. Each party would indisputably try to protect its interest when advancing loans or making investment. It must also be conceded that parties were aware of risk factor involved. Loss by company was result of market situation then prevailing. Restructuring package was evolved at instance of IDBI which was largest lender and trustee upon obtaining report in that behalf from a reputed concern. Scheme envisaged under Section 391 is well- settled and is commercial document. Scheme applies equally to all debenture holders. Appellants cannot be treated as separate class. Company prima facie showed scheme to be fair and reasonable and that requisite majority of debenture holders recorded their decision in its favour. Court in absence of any unforeseen unjustness or unreasonableness therein ought not to reject same. Appeal dismissed. [Administrator of the Specified Undertaking of the Unit Trust of India and Anr. –vs- Garware Polyester Ltd. MANU/SC/0375/2005 = AIR 2005 SC 2520 = III (2005) BC 14 (SC) = [2005] 125 Comp Cas 389 (SC) = (2005) 4 Comp LJ 531 (SC) = JT 2005 (5) SC 300 = (2005) 10 SCC 682 = [2005] 60 SCL 512 (SC) = [2005] Suppl (1) SCR 192(SC)]

Service

32. Matter related to validity of post service restrictive covenant of trade as contained in clause 10 of service agreement between parties. Under Section 27 service covenant beyond termination of
service is void. Under Section 27 to determine whether agreement is void one has to see reasonableness of restraint and onus being upon covenanter to show it to be unreasonable. As per clause 10 negative covenant not to serve anywhere else or enter into competitive business in similar lines. Restriction contained in clause 10 is restraint of trade and therefore illegal and unenforceable under Section 27. [Superintendence Company of India (P) Ltd. vs. Shri Krishan Murgai AIR 1980 SC 1717 = 1981 (2) SCC 246 = 1980 (3) SCR 1278(SC)]

Transfer of case

33. Transfer of Arbitration application from Gujarat to Calcutta High Court. Parties knowingly and voluntarily agreed that contract would be subject to Kolkata jurisdiction and even if Courts in Gujarat also had jurisdiction to entertain any action arising out of agreement. It has to be held that agreement to have disputes decided in Kolkata by Arbitrator therein was valid. And respondent company had wrongly chosen to file its application under Section 9 of Arbitration and Conciliation Act before Bhavnagar Court (Gujarat) in violation of such agreement. Application allowed. Arbitration application pending in Bhavnagar Court (Gujarat). Transferred to Calcutta High Court. [Balaji Coke Industry Pvt. Ltd. –vs- Maa Bhagwati Coke (Guj) Pvt. Ltd. JT 2009 (12) SC 250 = 2009 (12) SCALE 343 = 2009 (9) SCC 403 = 2009 (14) SCR 241(SC)]

Arbitration


2. Arbitration agreement executed in India for work to be done in India. Application of English law on arbitration specifically mentioned and accepted. Reference to arbitrator made. Civil Court cannot issue injunction to stay proceedings. Arbitration agreement not contrary to public policy. Suit for injunction against institution of arbitration proceedings on basis of fraud granted by Trial Court. Suit filed for injunction without prayer for cancellation of arbitration agreement which is alleged as induced by fraud. No specific allegation made nor evidence brought to prove fraud. Injunction could not be granted. Injunction Order set aside. Petitions allowed. Cultor Food Science Inc. –vs- Nicholas Piramal India Limited and Ors . 2002 (1) ALD 154(AP)]

Civil

3. Firm ‘A’ asked good from Calcutta firm ‘B’ and received the same at Rajahmundry. Poor quality goods received. ‘A’ filed suit for damages. Bill of ‘B’ contained words ‘subject to Calcutta jurisdiction’. Bill did not confer exclusive jurisdiction on Calcutta Court to exclusion of other Courts. Held, Rajahmundry had territorial jurisdiction over case. Petition allowed. [Grandhi Pitchaiah , Venkataraju and Co. –vs- Palukuri Jagannadham and Co. , Calcutta and Ors . AIR 1975 AP 32(AP)]

Civil

4. Agent covenanted to principal to submit to jurisdiction of particular Court in case of suit filed by principal. Can agent be barred from filing suit against principal in Court having territorial jurisdiction. Covenant between parties deals with suit against agent by principal only. Held, as there was no exclusivity of jurisdiction provided to any Court in covenant agent had right to file suit in Court having territorial jurisdiction. [Basa Jagannadharao –vs- Bharat Motor Parcel Service , Head Officer , Rajahmundry 2001 (2) ALD 75 = 2001 (1) ALT 684(AP)]

Commercial

5. Respondent was agent of appellant for sale of certain fertilizers in Kakinada. Respondent
entered into agency agreement with appellant and deposited certain amount as agency deposit. Agency agreement provided that all disputes arising in relation to agreement shall be referred in Madras Court. Respondent brought suit in Court of District Munsif, Kakinada for recovering agency deposit. Held, suit could be filed only in Court of Madras as suit arising out of agency agreement. Appeal allowed. [Lloyds Commercial Corporation –vs- Veeravilli Satyanarayana and Satti Rami Reddi Registered Firm, Kakinada AIR 1966 AP 256(AP)]

Contract

6. Initiation of insolvency proceedings does not terminate all contracts entered into by insolvent. Performing of insolvency proceedings acts as notice for other party to terminate contract at will. Official Receiver can enforce contract if he is willing to perform contract to some extent. Transfer under contract is valid till Official Receiver or other party terminates it. (ii) Powers of official receiver. Interim receiver appointed under Section 56 does not have power to dispose of property of insolvent. Insolvency Court cancels adjudication Order passed earlier under Section 43. Court appoints an Official Receiver to realize or distribute assets of insolvent. Receiver appointed after cancellation of adjudication can only continue pending proceeding but cannot initiate them under Sections 53 and 54. Held, plaintiff can be awarded decree of their title to property. Appeal allowed. [Kusampudi Sunadra Rama Raju –vs- Official Receiver, Guntur and Ors. AIR 1964 AP 299(AP)]

Evidence

9. By cancellation deed, sale deed executed in favour of Petitioner was cancelled. Division Bench held that Registration Act did not enable registering authority to conduct enquiry before registering cancellation deed, and therefore, the dispute lies essentially in the realm of private law. Whether Registering authority could cancel the sale deed by requested by seller. Held, a sale of immovable property is a contract, which gives an individual civil right to the buyer, if such sale is in accordance with entrenched common law principles. When Sections 7 and 8 of TP Act contemplated that only person was competent to contract and entitled to transfer property could transfer, any other transfer must be treated as void. Likewise, if a transferee reserved power to himself to revoke transfer, such transfer/sale was not rendered void but transferor could even revoke sale deed without going to any Court. Person, who has ex facie right, could always approach registering authority, with a request to cancel a sale deed. Therefore, there was no prohibition operating on exercise of inherent power by the registering authority to cancel the sale deed. Petition dismissed. Yanala Malleshwari and Ors. –vs- Ananthula Sayamma and Ors. AIR 2007 AP 57 = 2006 (6) ALD 623(AP)]

Insurance

10. Trial Court decreed Suit for recovery of amount as damages and subsequent interest. In Appeal, Additional District Judge confirmed judgment and decree of Trial Court. Hence, this Appeal. Whether, findings recorded by Trial Court and Appellate Court about Copy of Insurance Policy marked by Plaintiff suffered from any irregularity. Held, there was no specific condition in policy that Defendant Company would be liable to pay only amounts that were covered by bills. No exception was made.
that Company would not be liable under policy if bills for spare parts were not submitted to company. However, failure on part of Defendants to submit minimum price and failure to furnish minimum labor charges would drive Court to accept final report of second Surveyor as reasonable. Thus, there was no irregularity in findings of Trial Court and Appellate Court. Court cannot allow Second Appeal when materials on record satisfactorily proved that Trial Court and Appellate Court had properly appreciated in evidence of parties. Appeal dismissed. Divisional Manager, Oriental Insurance Co. Ltd., DMC and Anr. vs Dwara Mani Kumari 2005 (4) ALD 86 = 2005 (4) ALT 524(AP)

Jurisdiction

11. Article 226 of Constitution of India. Whether, a Writ Petition was maintainable for invalidation of a cancellation deed or for cancellation of an instrument which purports to nullify a sale deed, Held, jurisdiction under Article 226 of Constitution of India could not be exercised if order passed could not be carried out without prejudicing rights of others. There were serious disputed questions of fact regarding the allegations of fraud and misrepresentation. These matters had to be decided based on evidence and affidavit evidence available on record. Therefore, parties should be relegated to Civil Court. What has not been provided for in a statute cannot be supplied by Courts and to do so will amount to legislating which is not the function of the Courts. Petition dismissed. Yanala Malleshwari and Ors. vs Ananthula Sayamma and Ors. AIR 2007 AP 57 = 2006 (6) ALD 623(AP)

Conclusion:

Section 28 was amended by section 2 of the Amendment Act 10 of 1997 which came into force with effect from 8-1-1997. The amended Section 28 prohibits clauses in agreements which seek to extinguish the rights of any party to the contract or discharge any party from any liability under the contract of the expiry of period specified in the contract with a view to restrict any party from enforcing his rights. The condition in an insurance policy that the claim must be made within a period of 12 months has been held to be valid because this decision was given on the basis of un-amended Section 28 and this position was changed after the 1997 amendment which is prospective in nature. Presently, Section 28 allows parties to an agreement to substitute their own period of limitation in place of the period laid down in the general law of limitation. But they are free to provide that if a party does not sue within a specified period, within the rights accruing under the contract, it shall be forfeited or extinguished or that party shall be discharged from all liability under the contract. This distinction is very fine and a number of litigating contracting parties have found it difficult in practice to ascertain this very fine difference between what is meant by extinguishing (quenching) of a right and what is meant by extinction (disappearance) of a remedy. This anomaly is sought to be cleared by virtue of this Section 28.