REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 2904 OF 2020
(arising out of SLP (Civil) No(s). 16893 of 2018)

M/S. EXL CAREERS AND ANOTHER ...APPELLANT(S)

VERSUS

FRANKFINN AVIATION SERVICES
PRIVATE LIMITED ..RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

Leave granted.

2. The present appeal has been placed before us on a reference by a two Judge Bench opining a perceived conflict between two Division Bench decisions in ***Joginder Tuli vs. S.L. Bhatia,*** (1997) 1 SCC 502 and ***Oil and Natural Gas Corporation Ltd. vs. Modern Construction & Co.,*** (2014) 1 SCC 648. The question of law we are required to answer is that if a plaint is returned under Order VII Rule 10 and 10A of the Code of Civil Procedure 1908, (hereinafter called as "the Code") for presentation in the court in which it should have been instituted, whether the suit shall proceed *de novo* or will it continue from

the stage where it was pending before the court at the time of returning of the plaint. The order of reference also leaves it open for consideration if the conduct of the appellant disentitles it to any relief notwithstanding the decision on the issue of law.

3. The respondent filed a suit for recovery against the appellant arising out of a franchise agreement dated 24.03.2004, before the Civil Judge (Sr. Division) at Gurgaon. In view of the exclusion clause in the agreement, the plaint was returned holding that the court at Gurgaon lacked territorial jurisdiction and that the court at Delhi alone had jurisdiction in the matter. The High Court by the impugned order dated 13.03.2018 has held that the suit at Delhi shall proceed from the stage at which it was pending at Gurgaon before return of the plaint and not *de novo*. Aggrieved, the appellant preferred the present appeal. Further proceedings were stayed on 13.07.2018 culminating in the order of reference.

4. Shri Manoj Swarup, learned senior counsel appearing on behalf of the appellant, submitted that there is no conflict between the decisions in ***Joginder Tuli*** (supra) and ***Modern***

Construction (supra) requiring consideration by a larger Bench. The latter lays down the correct law that the suit will have to proceed *de novo* at Delhi and cannot be continued from the earlier stage at Gurgaon. ***Joginder Tuli*** (supra) cannot have any precedential value not being based on consideration of the law, but having been passed more in the facts of that case.

5. Shri Swarup submitted that the High Court erred in not appreciating that it was not exercising transfer jurisdiction under Section 24 of the Code. The plaint could be returned at any stage of the suit under Order VII Rule 10 and 10A. The fact that the pleadings and evidence may have concluded before the Gurgaon court was inconsequential. The suit was filed on 06.01.2011. The appellant had preferred the objection under Order VII Rule 10 promptly on 26.08.2011. Order XVIII Rule 15 also could not be invoked in view of the nature of jurisdiction conferred under Rule 10 for return of the plaint. Rule 10A is only a *sequitur* with regard to the procedure to be followed for the same. It cannot be interpreted as providing for continuation of the suit. The High Court in the first revisional order dated 05.09.2017 had rejected the objection with regard to the advanced stage at which the suit

was at Gurgaon. The mere use of the words 'return the file' are irrelevant and cannot be construed as enlarging the scope of jurisdiction under Order VII Rule 10. The order attained finality as no appeal was preferred against the same. Significantly under Order VII Rule 10A fresh summons had to issue upon presentation of the plaint before the court of competent jurisdiction. Shri Swarup in this context referred to Order IV Rule 1 with regard to the institution of the suit by presentation of a plaint and issuance of summons under Order V Rule 1 to contend that under Rule 10A when summons are issued by the new court where the plaint is presented the proceedings go back to the inception of the suit by institution.

6. In support of his submission that the suit has necessarily to proceed *de novo* on return of the plaint, he relied upon ***Ramdutt Ramkissen Dass vs. E.D. Sassoon & Co.***, AIR 1929 PC 103; ***Amar Chand Inani vs. The Union of India,*** (1973) 1 SCC 115; ***Harshad Chimanlal Modi (II) vs. DLF Universal Ltd.,*** (2006) 1 SCC 364 and ***Hasham Abbas Sayyad vs. Usman Abbas Sayyad,*** (2007) 2 SCC 355, to submit that the institution of the

suit at Gurgaon being *coram non judice* the suit had necessarily to commence *de novo* at Delhi.

7. Shri P.S. Patwalia, learned senior counsel appearing for the respondent, submitted that the special leave petition suffers from suppression of material facts. Had the materials placed in the counter affidavit been brought to the attention of the court perhaps the special leave petition may not have been entertained. The appellant in his first objection did not raise the ground under the exclusion clause 16B of the agreement but limited it to the grounds that no business was carried on at Gurgaon and that defendant no.2 did not reside there also. The first order of rejection dated 12.03.2015 has not been annexed to the appeal. Thereafter jurisdiction was framed as a preliminary issue which was again decided in favour of the respondent on 06.09.2016. The revision by the appellant having been allowed by the High Court on 05.09.2017, it did not take any steps for having the plaint retuned to the respondent. It was left for the respondent to file a fresh application under Order VII Rule 10 praying for transfer of the entire judicial file from Gurgaon to Delhi considering the advanced stage of the suit which was allowed by

the Civil Judge and affirmed in the impugned order by the High Court.

8. Shri Patwalia next submitted that the High Court on 05.09.2017 had consciously directed for return of the file. Nothing precluded the High Court from directing the return of the plaint. The Trial Court has justifiably reasoned that the order of the High Court for return of the file was based on the premise of the advanced stage of the suit for continuation of the same at Delhi, as otherwise it would be a travesty of justice if the suit was to proceed *de novo* at Delhi. The High Court correctly affirmed the same by the impugned order. The present was not a case where the Gurgaon court lacked complete jurisdiction. The respondent has been non suited at Gurgaon only in view of the exclusionary clause at 16B of the franchise agreement. It shall be a question on the facts of each case, if the trial should proceed afresh or continue from the earlier stage and the matter could not be put in a straight jacket. The present being a case of overlapping jurisdictions it would be a travesty of justice and will cause great injustice and prejudice to the respondent if the suit is directed to proceed *de novo* at Delhi. Shri Patwalia relied upon

R.K. Roja vs. U.S. Rayudu, (2016) 14 SCC 275 and ***Oriental Insurance Company Ltd. vs. Tejparas Associates and Exports Pvt. Ltd.***, (2019) 9 SCC 435, to submit that the latter also follows ***Joginder Tuli*** (supra).

9. We have considered the submission on behalf of the parties and considered the materials on record. The franchise agreement was executed between the parties at New Delhi on 24.03.2004 for running courses in Aviation, Hospitality and travel Management at Meerut in accordance with the prescriptions and standards of the respondent. Clause 16B of the agreement stipulated as follows:

> "B. JURISDICTION
> Only Courts in Delhi shall have exclusive jurisdiction to settle all disputes and differences arising out of the AGREEMENT, whether during its term or after expiry/earlier termination thereof."

10. The respondent on 06.01.2011 instituted a suit before the Civil Judge (Sr. Division) at Gurgaon against the appellant for recovery of Rs.23,11,190/-. The appellant filed an application under Order VII Rule 10 CPC on 26.08.2011 contending that the Gurgaon court had no territorial jurisdiction as it did not carry

on any business within its jurisdiction and neither was it a resident, requiring the plaint to be returned to the respondent. No objection was raised under clause 16B of the agreement. The Civil Judge, Gurgaon on 12.03.2015 rejected the objection opining that it could not be decided summarily and was required to be framed as a preliminary issue. The appellant then filed its written statement and the respondent its replication. Issues in the suit were framed on 01.10.2015 inadvertently ignoring the earlier order leading to framing of the preliminary issue on 01.10.2015 with regard to jurisdiction. The appellant offers no explanation why the objection under clause 16B of the agreement was not raised in its application dated 26.08.2011 under Order VII Rule 10 CPC.

11. The Civil Judge Gurgaon by his order dated 06.09.2016 rejected the argument with regard to exclusive jurisdiction at Delhi under clause 16B of the Agreement. The High Court in revision on 05.09.2017 set aside the order of the Civil Judge dated 6.9.2016 holding that in view of clause 16B of the franchise agreement, the Gurgaon court lacked territorial jurisdiction directing return of the file. The submission of the

respondent with regard to the advanced stage of the suit at Gurgaon was rejected. Prior thereto, the suit had made substantive progress as in the meantime evidence of the parties had been closed and the matter has been fixed for final argument on 01.06.2017. We are of the considered opinion that the mere use of the words 'return the file' in the order dated 05.09.2017 cannot enlarge the scope of jurisdiction under Order VII Rule 10 to mean that the High Court has directed so with the intention for continuance of the suit. Firstly, that objection was expressly rejected. Secondly the order itself states that the file be returned under Order VII Rule 10 and 10A of the Code. Clearly what the High Court intended was the return of the plaint.

12. Thereafter it was left for the respondent who moved an application on 11.10.2017 before the Civil Judge at Gurgaon that in the peculiar facts of the case, the advanced stage at which the proceedings were at Gurgaon, it would be in the interest of justice that the entire judicial file be transferred to the court having jurisdiction at Delhi, which was allowed by the Civil Judge Gurgaon on 14.02.2018 noticing that the High Court in revision had directed for transfer of the file. In the fresh revision preferred

by the respondent against the order, the High Court by the impugned order dated 13.03.2018 declined to interfere and rejected the contention of the appellant for a *de novo* trial at Delhi. We have referred to the facts of the case with brevity to notice the conduct of the parties and all other relevant aspects to be kept in mind while passing final orders.

13. It is no more *res-integra* that in a dispute between parties where two or more courts may have jurisdiction, it is always open for them by agreement to confer exclusive jurisdiction by consent on one of the two courts. Clause 16B of the agreement extracted above leaves us in no doubt that the parties clearly indicated that it was only the court at Delhi which shall have exclusive jurisdiction with regard to any dispute concerning the franchise agreement and no other court would have jurisdiction over the same. In that view of the matter, the presentation of the plaint at Gurgaon was certainly not before a court having jurisdiction in the matter. This Court considering a similar clause restricting jurisdiction by consent in ***Swastik Gases (P) Ltd. vs. Indian Oil Corpn. Ltd.***, (2013) 9 SCC 32, observed as follows:

> "32. ....It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement —is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

14. This was reiterated in ***State of West Bengal vs. Associated Contractors***, (2015) 1 SCC 32, holding that presentation of the plaint in a court contrary to the exclusion clause could not be said to be proper presentation before the court having jurisdiction in the matter.

15. That brings us to the order of the reference to be answered by us. In ***Joginder Tuli*** (supra) the original court lost jurisdiction by reason of the amendment of the plaint. The Trial Court directed it to be returned for presentation before the District Court. This Court observed as follows:

> "5. … Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."

To our mind, the observations are very clear that the suit has to proceed afresh before the proper court. The directions came to be made more in the peculiar facts of the case in exercise of the discretionary jurisdiction under Article 136 of the Constitution. We may also notice that it does not take into consideration any earlier judgments including ***Amar Chand Inani vs. The Union of India*** (supra) by a Bench of three

Honourable Judges. There is no discussion of the law either and therefore it has no precedential value as laying down any law.

16. ***Modern Construction*** (supra), referred to the consistent position in law by reference to ***Ramdutt Ramkissen Dass vs. E.D. Sassoon & Co.***, ***Amar Chand Inani vs. The Union of India, Hanamanthappa vs. Chandrashekharappa***, (1997) 9 SCC 688, ***Harshad Chimanlal Modi (II)*** (supra) and after also noticing ***Joginder Tuli*** (supra), arrived at the conclusion as follows:

> "17. Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order 7 Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same."

Joginder Tuli (supra) was also noticed in ***Harshad Chimanlal Modi (II)*** (supra) but distinguished on its own facts.

17. We find no contradiction in the law as laid down in ***Modern Construction*** (supra) pronounced after consideration of the law and precedents requiring reconsideration in view of any conflict with ***Joginder Tuli*** (supra). ***Modern Construction*** (supra) lays down the correct law. We answer the reference accordingly.

18. We regret our inability to concur with ***Oriental Insurance Company Ltd.*** (supra), relied upon by Mr. Patwalia, that in pursuance of the amendment dated 01-02-1977 by reason of insertion of Rule 10A to Order VII, it cannot be said that under all circumstances the return of a plaint for presentation before the appropriate court shall be considered as a fresh filing, distinguishing it from ***Amar Chand Inani*** (supra). The attention of the Court does not appear to have been invited to ***Modern Construction*** (supra) and the plethora of precedents post the amendment.

19. Order VII Rule 10-A, as the notes on clauses, indicates was inserted by the Code of Civil Procedure (Amendment) Act, 1976 (with effect from 01.02.1977) for the reason:

> "New Rule 10-A is being inserted to obviate the necessity of serving summonses on the defendants where the return of plaint is made after the appearance of the defendant in the suit."

Also, under sub-rule (3) all that the Court returning the plaint can do, notwithstanding that it has no jurisdiction to try the suit is:

> "**10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.**
>
> xxx xxx xxx
>
> (*3*) Where an application is made by the plaintiff under sub-rule *(2),* the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, —
>
> (*a*) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and
>
> (*b*) give to the plaintiff and to the defendant notice of such date for appearance."

20. The language of Order VII Rule 10-A is in marked contrast to the language of Section 24(2) and Section 25(3) of the Code of Civil Procedure which read as under:

> "**24. General power of transfer and withdrawal.**

xxx xxx xxx

(*2*) Where any suit or proceeding has been transferred or withdrawn under sub-section (*1*), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

25. Power of Supreme Court to transfer suits, etc.

xxx xxx xxx

(*3*) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it."

21. The statutory scheme now becomes clear. In cases dealing with transfer of proceedings from a Court having jurisdiction to another Court, the discretion vested in the Court by Sections 24(2) and 25(3) either to retry the proceedings or proceed from the point at which such proceeding was transferred or withdrawn, is in marked contrast to the scheme under Order VII Rule 10 read with Rule 10-A where no such discretion is given and the proceeding has to commence de novo.

22. For all these reasons, we hold that ***Oriental Insurance Co.*** (supra) does not lay down the correct law and over-rule the same.

R.K. Roja *(supra)* has no direct relevance to the controversy at hand.

23. That brings us to a question with regard to the nature of the order to be passed in the facts and circumstances of the present case. In ***Penu Balakrishna Iyer vs. Ariya M. Ramaswami Iyer,*** AIR 1965 SC 195, this court observed as follows:

> "7. …The question as to whether the jurisdiction of this Court under Article 136 should be exercised or not, and if yes, on what terms and conditions, is a matter which this Court has to decide on the facts of each case."

24. In ***Balraj Taneja v. Sunil Madan,*** *(1999) 8 SCC 396* it was observed as follows :-

> "47….It is true that the jurisdiction under Article 136 of the Constitution is a discretionary jurisdiction and notwithstanding that a judgment may not be wholly correct or in accordance with law, this Court is not bound to interfere in exercise of its discretionary jurisdiction…."

25. In ***ONGC Ltd. vs. Sendhabhai Vastram Patel,*** (2005) 6 SCC 454, it was observed:

> "23. It is now well settled that the High Courts and the Supreme Court while exercising their equity jurisdiction under Articles 226 and 32 of the Constitution as also Article 136 thereof may not exercise the same in appropriate cases. While exercising such jurisdiction, the superior courts in India may not strike down even a wrong order

> only because it would be lawful to do so. A discretionary relief may be refused to be extended to the appellant in a given case although the Court may find the same to be justified in law."

26. The nature of jurisdiction under Article 136 of the Constitution was again considered in ***Shin-Etsu Chemical Co. Ltd. (2) vs. Vindhya Telelinks Ltd.***, (2009) 14 SCC 16. In ***Karam Kapahi vs. Lal Chand Public Charitable Trust***, (2010) 4 SCC 753, it was observed as follows:

> "65. The jurisdiction of this Court under Article 136 of the Constitution is basically one of conscience. The jurisdiction is plenary and residuary in nature. It is unfettered and not confined within definite bounds. Discretion to be exercised here is subject to only one limitation and that is the wisdom and sense of justice of the Judges (see *Kunhayammed* vs. *State of Kerala, (2000) 6 SCC 359*). This jurisdiction has to be exercised only in suitable cases and very sparingly as opined by the Constitution Bench of this Court in *Pritam Singh* vs. *State*, AIR 1950 SC 169…"

27. In the peculiar facts and circumstances of the case, because the appellant did not raise the objection under clause 16B of the agreement at the very first opportunity, the first order of rejection attained finality, the objection under clause 16B was raised more as an after-thought, the second application under Order VII Rule

10 had to be preferred by the respondent, that pleadings of the parties have been completed, evidence led, and that the matter was fixed for final argument on 03.07.2017, we are of the considered opinion that despite having concluded that the impugned order is not sustainable in view of the law laid down in the ***Modern Construction*** (supra), in exercise of our discretionary jurisdiction under Article 136 of the Constitution and in order to do complete and substantial justice between the parties under Article 142 of the Constitution in the peculiar facts and circumstances of the case nonetheless we decline to set aside the impugned order of the High Court dated 13.03.2018.

28. The appeal stands disposed of.

.....J.
(R.F. Nariman)

.....J.
(Navin Sinha)

.....J.
(Indira Banerjee)

New Delhi,
August 05, 2020