

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No.116/2006**

Judgment delivered on: August 21, 2009

RITES LIMITED Petitioner
! Through : Mr. Anil Airi, Advocate
Ms. Sadhna Sharma, Advocate

Versus

\$ RAMJEE POWER CONSTRUCTION LIMITED
.....Respondent
^ Through : Mr. Raman Kapur, Advocate
Ms. Nidhi Jain, Advocate

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

JUDGMENT

ARUNA SURESH, J.

OMP No.116/2006 & IA No. 4585/2006 (objections)

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter

referred to as Act).

2. Petitioner was awarded work of construction of 11 KV/Line/LT Line/D/S/S on 200 kg. working load PSC Poles including supply of all related materials on turnkey basis for electrification of 4923 villages. Petitioner entered into an agreement with M/s. Jharkhand State Electricity Board (JSEB) for the execution of the said work. Petitioner thereafter entered into a sub-contract with respondent Ramjee Construction Ltd. on 25th September, 2004 for the execution of the work. As per the petition, this sub-contract was entered with the consent of the client i.e. JSEB. The said agreement entered into between the parties contained an arbitration clause which has been invoked by the parties as a dispute has arisen between them within the meaning of the contract. Petitioner came to know that 27 bank guarantees furnished by the respondent to the petitioner as original bank guarantees were in fact not original but were forged bank guarantees. Some of these bank guarantees were towards mobilisation advance and

others by way of bank guarantee/security deposit. As per the petition letters from the bank also indicate that the bank guarantees which were in the possession of the petitioner as supplied by the respondent were not original bank guarantees. As a matter of fact 22 out of 27 bank guarantees had been cancelled by the bank upon request being made by the respondent, whereas petitioner remained under the impression that the original bank guarantees were with it and could be invoked whenever the necessity and exigency arose. This conduct of the respondent indicated that it retained the original bank guarantees with it and handed over the forged copies to the petitioner, claiming them to be the originals though they are nothing but, worthless piece of papers. Since petitioner felt that his rights under the contract were in jeopardy, he has filed the present petition seeking interim measures for protecting its rights under the contract which, otherwise would have been protected by the genuine bank guarantees.

3. Respondent contested this petition on various

grounds, contended inter alia, that the petition is not maintainable as this court at Delhi has no territorial jurisdiction to entertain the petition. The pleadings in the petition do not disclose any cause of action or the events which happened within the territorial jurisdiction of Delhi. The memorandum of understanding dated 15.4.2002 for participation in tender invited by JSEB for rural electrification work was executed in Ranchi and bears the stamp of Ranchi treasury. This MoU was further amended on 17.6.2005 which also bears the stamp of Ranchi treasury. It is further averred that agreement was entered into between the parties for rural electrification work in the State of Jharkhand on 25.9.2004 which was signed and executed at Ranchi by petitioner's Additional General Manager, Electric, Ranchi bearing Ranchi's treasury stamp. The said agreement is signed by witnesses at Ranchi. It is further averred that work of rural electrification was monitored by the petitioner's office at Ranchi where it has its subordinate office and the respondent is solely Ranchi based company

which does not reside or carry out business in Delhi. The entire correspondence between the parties was carried out from Ranchi and Gurgaon. It is also averred that the bank guarantees were also issued from Ranchi, the bills were submitted at Ranchi, payments were made at Ranchi, the materials were supplied and stored in Jharkhand and the work was executed in Jharkhand. Therefore, this Court has no jurisdiction to entertain this petition.

4. Mr. Anil Airi, learned counsel for the petitioner, has submitted that before the filing of this petition petitioner had appointed arbitrator but it was respondent who failed to do the needful and since petitioner is having its office at Delhi, courts at Delhi have jurisdiction to entertain the present petition. It is also argued that as per article 11 of the agreement dated 25.9.2004, executed between the parties, any dispute arising out of the contract is subject to the jurisdiction of court located at New Delhi. It is emphasised that in view of this agreement between the parties, this Court has the

jurisdiction to entertain the present petition.

5. Mr. Raman Kapur, learned counsel for the respondent, has submitted that the agreement between the petitioner and JSEB was executed at Ranchi, the work of electrification was to be carried out in the State of Jharkhand in different districts, the respondent has its office and is working for gain at Ranchi and petitioner has also its subordinate office at Ranchi. The dispute if any within the meaning of agreement has arisen in the State of Jharkhand and by consent even if the jurisdiction has been vested by the parties in this Court, this Court has no jurisdiction because no part of cause of action arose at Delhi for the filing of the present petition. He has submitted that the petition is liable to be rejected for want of jurisdiction.
6. The petition came up for hearing before this Court on 27.3.2006. On that day an ex-parte ad-interim order was passed in favour of the petitioner as regards prayer contained in paragraph 34 (b), (c)

and (d) of the petition which are as follows:

“(b) respondent is further liable to be restrained from selling, alienating, transferring all its moveable and immovable assets pending arbitration proceedings.

(c) bank accounts of the respondent bearing No. 131010200003360 with UTI Bank, DLF, Gurgaon and bank account with Bank of India, Clubside Branch, Main Road, Ranchi-834 001, Bank of Baroda, 715, Mahatma Gandhi Marg, Kataruka House, 1st Floor, Ranchi-834 001 be attached.

(d) M/s Jharkhand State Electricity Board, Engineering Bhawan HEC Township, Dhurwa, Ranchi, Jharkhand, be directed to deposit all amounts held by them pertaining to the respondent in this Hon’ble Court.

7. Subsequently, an application was filed by the respondent being IA No.5833/2006 seeking clarification of order dated 27.3.2006 in view of the interim orders granted in favour of the petitioner in terms of para 34 (b), (c) and (d) of the petition. This application was considered and disposed of by this Court on 18.5.2006. It was made clear that the interim order/protection granted to the petitioner was in relation to the contract in question and not pertaining to unconnected and unrelated works as

the OMP filed is under Section 9 of the Act which can only refer to interim measures/protection in relation to dispute in question.

8. The only issue to be considered by this Court is whether this Court has the territorial jurisdiction to entertain the present petition. As per Section 2(E) of the Act, a Court means the principal Civil Court of original jurisdiction in a State and includes the High Court in exercise of its ordinary original jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit. Section 42 of the Act speaks of jurisdiction of a Court to entertain petition under the Act. As per this section, where in an arbitration agreement any application has been made in a court, that court alone has the jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings have to be made in that court and in no other court. Therefore, Section 20 of the Civil Procedure Code (hereinafter referred to as

CPC) regulates the jurisdiction and consequent proceedings of a Court under the Act. Section 20 CPC so far as is relevant for the purposes of this petition reads as under:

“S. 20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a)....

(b)....

(c) the cause of action, wholly or in part, arises.

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

9. ‘Cause of action’ means the circumstances forming the infraction of the right or the immediate occasions for the action. In wider sense it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. It means every fact which if

traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment. An application for appointment of an arbitrator in matter of dispute arising out of breach of contract is maintainable in Court where a part of cause of action arises even though the contract between the parties was executed outside the jurisdiction of the Court. In suits on contract where two courts have jurisdiction, choice of forum is with the plaintiff.

10. There are numerous decisions of the Supreme Court wherein it has been specifically held that where may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one Court to try the dispute which might arise as between themselves such an agreement ousting the jurisdiction of the other court is valid and binding on the parties. However, parties by a consent cannot confer jurisdiction by way of an agreement on a Court which otherwise does not possess such jurisdiction under the Act. Parties to arbitration

agreement, therefore by consent cannot confer jurisdiction on a Court where no part of cause of action accrued.

11. In ***A.B.C. Laminart (P) Ltd. v. A.P. Agencies - MANU/SC/0001/1989***, the Supreme Court observed:

“21. From the foregoing decisions it can be reasonably deduced that 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. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.”

12. In ***Harshad Chiman Lal Modi v. DLF Universal & Anr. - (2005) 7 SCC 791***, it was held that if a particular Court does not have jurisdiction to deal with the matter and no part of cause of action has arisen within the jurisdiction of that court, the parties of their own cannot vest jurisdiction in the said Court. Therefore, a clause vesting jurisdiction on a Court which otherwise does not have jurisdiction to decide the matter would be void as against the public policy.

13. Reference is also to made to ***S.B.P. & Co. v. Patel Engineering Ltd. - (2005) 8 SCC 618***, ***Patel Roadways Limited Bombay v. M/s Prasad Trading Company - (1991) 4 SCC 270***, ***Oil & Natural Gas Commission v. Utpal Kumar Basu and others - (1994) 4 SCC 711***, ***South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. - (1996) 3 SCC 443***, ***Escorts Ltd. v. M/s G.K. Automobile - 2006 DLT 127-559***, ***Sri Ganesh Research Institute v. Union of India an Ors - 2004-AD (Del) - 7-327***, ***Jitendra Nath Banerjee & Ors. v. Union of***

India & Ors. - 2006-DLT-129-1.

14. Thus, it is clear that emphasis has been given to the place where the cause of action has substantially arisen. The principle of law enunciated by the Supreme Court while interpreting clause (c) of Section 20 of CPC has been repeatedly followed by this Court in various judgments.
15. The relevant articles of the agreement dated 25.9.2004 need consideration in the light of the above said principles which govern the jurisdiction of a Court to entertain this petition. It is not in dispute that there is an arbitration article no.10 contained in the Schedule III, General Conditions of Contract executed inter se the parties. Article 11 contained in the agreement dated 25.9.2004 read as under:

“Jurisdiction of Court”
Dispute arising out of the
contract if any will be subject to the
jurisdiction of court located at New
Delhi.

16. Thus, by agreement parties conferred jurisdiction

on Delhi Court to entertain this petition. It is be seen, if any part of cause of action arose in Delhi so as to vest jurisdiction in this Court. Cause of action is a prerequisite to confer jurisdiction in a Court to ouster the jurisdiction of other Courts which may also have jurisdiction to entertain the dispute inter se the parties.

17. Agreement which is the subject matter of the dispute dated 25.9.2004 admittedly was executed at Ranchi. It was signed by the parties at Ranchi and was witnessed at Ranchi only. The work to be executed by the respondent by virtue of this sub-contract was electrification of villages in the State of Jharkhand only. The agreement between the petitioner and Jharkhand State Electricity Board was also executed at Ranchi. It is pertinent that the bank guarantees provided by the respondent to the petitioner were also of various banks at Ranchi only. Respondent is a company which has its roots at Ranchi and has no office at Delhi whereas petitioner has its subordinate office at Ranchi.

18. On 15.4.2002 the parties to the petition had entered into MoU for participation in the tender invited by JSEB at Ranchi. This memorandum of understanding was amended on 17.6.2005 at Ranchi. Petitioner had been monitoring the work of rural electrification through Ranchi office. The dispute inter se the parties arose at Ranchi only. Therefore, no part of cause of action arose inter se the parties at Delhi.
19. On the day when this petition was filed petitioner also filed a petition being AA No.202/2006 under Section 11 of the Act for appointment of an arbitrator. Before the petitioner filed these two petitions in this Court respondent had already filed a petition under Section 11 of the Act in the High Court of Jharkhand on 20.3.2006. In its petition AA No.202/2006 petitioner did plead "both the parties have appointed their nominee (Mr. S.M. Singla by petitioner and Mr. R.K. Sarkar by respondents) and the said arbitrators so appointed have failed to agree on a common name for the third Arbitrator". Order dated 27.3.2006 of this

Court whereby interim protection was granted to the petitioner also finds mention that arbitration clause has already been invoked by the parties in respect of the dispute which arose between them.

20. Arbitration Application No. AA No.9/2006 was filed by the respondent, Ramjee Power Construction Ltd. in the Ranchi High Court. Parties mutually agreed to give the name of the umpire and sought short adjournment. The relevant order dated 16.6.2006 in the said petition reads as follows:

“Heard the counsel for the parties at length.

After some arguments, both the counsels have finally agreed to give the name of a third person to act as umpire and for that purpose they jointly seek a short adjournment.

As jointly, agreed, put up this case under the same heading on 29th June, 2006.”

21. The question of jurisdiction also arose in the said petition when respondent; RITES Ltd. pointed out that it had filed a petition before this court under Section 11 of the Act for appointment of arbitrator which was still pending adjudication and had alleged that Court at Delhi had the jurisdiction as

memorandum of understanding was not executed at Ranchi though, stamp papers were purchased by the respondent; RITES Ltd. (petitioner herein) at Ranchi. Perusal of the order of the High Court of Jharkhand indicate that Ramjee Power Construction Ltd. in its rejoinder dated 4.7.2006 filed in the said Court had categorically stated that respondent RITES Ltd. had admitted before the Delhi High Court on affidavit that contract (memo of understanding) was executed at Ranchi. The relevant observations of M.Y. Eqbal, J. of the High Court of Jharkhand in his order dated 13.7.2006 read as follows:

“9. It transpires from the record that petitioner appeared in Delhi High Court and took specific stand that no cause of action, either wholly or partly arose within the jurisdiction of the Delhi High Court. Although this fact was not denied by the respondent but in the counter affidavit filed in the instant case, it is stated in paragraph 7 that in C.M.No.12810/05 it was categorically admitted that no part of cause of action arose within the jurisdiction of Delhi High Court. The petitioner in the rejoinder dated 4.7.2006 has very categorically stated that respondents have admitted before the Delhi High Court on affidavit that the Contract

(M.O.U.) was executed at Ranchi.”

22. Thus, it is clear that petitioner RITES Ltd. itself disputed the jurisdiction of this Court in the writ petition CWP(C)No.16350/2005. In the said reply to CM No.12810/2005 petitioner herein specifically pleaded that no cause of action or even a part of cause of action had arisen in Delhi in the ten contracts awarded by the respondent RITES Ltd. to Ramjee Power Construction Ltd. for rural electrification of villages in Jharkhand State. The contracts were signed at Gurgaon and not in Delhi.
23. Respondent Ramjee Power Construction Ltd. had filed the petition under Section 11 of the Act in the Jharkhand High Court on 20.3.2006. The petitioner RITES Ltd. was informed about filing of the said petition and report was duly received and acknowledged by the petitioner. Despite this knowledge petitioner filed the arbitration application no.202/2006 under Section 11 of the Act and OMP No.116/2006 under Section 9 of the Act in this Court on 25.3.2006. Ramjee Power

Construction Ltd. has also filed objections under Section 42 of the Act challenging the territorial jurisdiction of this Court. Since more than one request had been made to the Chief Justice of different High Courts, the Chief Justice or his designate to whom the request has been made under relevant sub sections (4), (5) and (6) of Section 11 first, alone is competent to decide the request petition. Consequently, the said Court appointed third arbitrator or umpire with directions to him to enter into reference and give his award within a period of six months. It is pertinent that petitioner agreed to give name of the third person to act as third arbitrator or umpire.

24. Undisputedly, the arbitrator has entered into reference and the parties have filed their claims and counter claims. Fate of the arbitration proceedings is not known despite the fact that petitioner took time to file certain documents received by him from Jharkhand High Court and were relevant for the proper adjudication of this petition by this Court. No such documents were

placed on record. It is pertinent that the said order of the Jharkhand High Court was challenged by the petitioner in appeal. However, petitioner withdrew the appeal with a view to file an application before the Jharkhand High Court for modification/clarification of the order dated 13.7.2006.

25. Since no part of cause of action arose in favour of the petitioner and against the respondent at Delhi, this Court has no jurisdiction to entertain this petition seeking interim relief under Section 9 of the Act even if the parties by consent vested jurisdiction in this Court to entertain a dispute which arose within the meaning of the contract. In the order dated 3.9.2007 it was observed that since dispute in the present OMP is the same which has been referred by Jharkhand High Court to the arbitrator, present application on the face of it had become infructuous.

26. In view of the aforesaid findings, since this Court has no jurisdiction to entertain the present petition, the same is hereby rejected.

27. The interim order dated 27.3.2006 stands vacated.

**ARUNA SURESH
(JUDGE)**

**AUGUST 21, 2009
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