

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 21st December, 2011

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LPA No. 1003/2011

M/S KWALITY CATERERS

..... Appellant

Through: Mr. Naresh Thanai, Advocate

Versus

UNION OF INDIA & ANOTHER

..... Respondents

Through: Nemo

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the order dated 25th November, 2011 of the learned Single Judge disposing of W.P.(C) No. 5041/2011 preferred by the appellant by relegating the appellant to the Courts at Kolkata, *inter alia* on the ground that it is more convenient for the Courts at Kolkata to deal with the controversy, than this Court. The learned Single Judge in this regard has relied on *Sterling Agro Industries Ltd. v. Union of India* 181 (2011) DLT 658 where a five-Judge Bench of this Court has held that the Court may

refuse to exercise jurisdiction under Article 226 if the jurisdiction is invoked in a *malafide* manner or if, depending upon the factual matrix, it is found that it is more convenient for some other Court to deal with the controversy. The learned Single Judge for the said reason did not deal with the merits of the controversy. We also, as such have heard the counsel for the appellant only on the said aspect.

2. The factual matrix is as follows. The Indian Railways Catering and Tourism Corporation Limited (IRCTC) having its office within the jurisdiction of this Court, had in or about the year 2005 invited bids for operation and management of catering and on board services *inter alia* in respect of train no.s 8603-04 & 2817-18 known as Jharkhand Swarna Jayanti Kranti Express Train running between Delhi and Hatia (Ranchi, Jharkhand) Railway Station. The appellant being the highest bidder was awarded the contract and an agreement dated 29th July, 2005 was executed at Delhi between the appellant and IRCTC. The said contract *inter alia* provided for arbitration of disputes and provided for the jurisdiction of the Courts situated in the State of Delhi. The said contract was for a period of five years, expiring in July, 2010.

3. That in the year 2010, the Railway Board, Ministry of Railways, Government of India decided to take over the catering and allied services from the IRCTC and published the Catering Policy 2010 which came into force on 21st July, 2010 in supersession of earlier policies. As per the said Policy, the Railways decided to take over management of all mobile catering services from IRCTC. It further provided that all existing major and minor catering units will be awarded and managed by the zonal railways and all contracts, till then being managed by IRCTC, on expiry of the term thereof, will be awarded by the zonal railways and IRCTC will not renew any contract required to be handed over to the zonal railways on the expiry of the term thereof. It yet further provided that all existing contracts were to be managed by the zonal railways and were to be transferred to the zonal railways and the zonal railways only were made responsible for ensuring standards of services and the decision as to the extent, type and scale of catering services required to be provided on board trains was also vested in the zonal railways. The zonal railways were also made responsible for ensuring quality and quantity of food etc. The awarding of, management and monitoring of contracts was also left to the zonal railways. The Policy

further provided for the transfer of agreements/licences granted by IRCTC to zonal railways.

4. It is not in dispute that the contract (supra) of the appellant fell within the domain of South Eastern Railways, Kolkata.

5. In view of the changed Policy and to provide for the interregnum, IRCTC vide its letter dated 22nd June, 2010 extended the term of the contract (supra) which was to expire on 28th July, 2010, till 2nd January, 2011. However, on 24th December, 2010 a Tripartite Agreement was signed at Kolkata between the South Eastern Railways, IRCTC and the appellant whereunder in accordance with the Catering Policy 2010, the contract (supra) which was earlier between the IRCTC and the appellant was assigned by IRCTC in favour of South Eastern Railways, Kolkata. The said Tripartite Agreement *inter alia* provided “the terms and conditions as provided in the agreement dated 29th July, 2005 signed between M/s Kwaliti Caterers and IRCTC and extension letter dated 22nd June, 2010 shall form the basis of this agreement. However, the following amendments shall prevail over the earlier agreement”. The amendments *inter alia* were that the power of termination of the contract was to be with the South Eastern Railways, the power of inspection and imposition of fines was also to be

with the South Eastern Railways and the appellant was to pay all dues w.e.f. 24th December, 2010 to South Eastern Railways. By yet another amendment, the power of appointment of sole arbitrator which under the initial agreement (supra) was of IRCTC, was vested with the Chief Commercial Manager, South Eastern Railways.

6. The South Eastern Railways vide letter dated 20th January, 2011 extended the term of the contract dated 24th December, 2010 which was executed at Kolkata and which was to expire on 2nd January, 2011, for a further period of six months or until the finalization of further contract whichever may be earlier and with further right to enhance the licence fee w.e.f. 21st January, 2011.

7. The Railway Board at New Delhi vide its letter dated 1st July, 2011 to all zonal railways informed that the zonal railways “may permit further extension” of contracts earlier awarded for another six months w.e.f. 21st July, 2011 or until finalization of new contracts, “with a view to ensure uninterrupted catering services” in the trains.

8. However, the South Eastern Railways, Kolkata vide its letter dated 15th July, 2011 to the appellant, refused extension of the contract to the

appellant beyond 21st July, 2011 and called upon the appellant to vacate the pantry car of the train immediately.

9. Challenging the aforesaid letter dated 15th July, 2011 of the South Eastern Railways, Kolkata, the appellant filed the writ petition (supra) and vide order dated 20th July, 2011 the learned Single Judge restrained the respondent from implementing the said letter dated 15th July, 2011. The respondent Railways in their counter affidavit before the learned Single Judge *inter alia* took objection to the territorial jurisdiction of this Court to entertain the Writ Petition and which objection as aforesaid found favour with the learned Single Judge who has dismissed the Writ Petition on the ground that this Court does not have the territorial jurisdiction and/or that the Court at Kolkata is the *forum conveniens* for entertaining the writ petition.

10. The counsel for the appellant, in support of his contention that this Court is the only Court having jurisdiction to entertain the grievance and/or is the appropriate Court to entertain the petition has contended :-

- (i) that the agreement with respect to which the dispute has arisen is but an extension of the agreement initially signed on 29th July, 2005 which expressly provided for the jurisdiction of the Courts situated at Delhi;

(ii) that notwithstanding the absence of the words “only” or “expressly” in the agreement dated 29th July, 2005, it is clear that the agreement was for exclusive jurisdiction of the Courts at Delhi only. Reliance in this regard is placed on *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd* 2004 (4) SCALE 617;

(iii) that even now it is the Railways Board at Delhi which is taking all the policy decisions and guiding the respective zonal railways and the Railway Board at Delhi has directed for extension of the contract and the South Eastern Railways is acting in contravention of the said decision of the Railway Board and the petitioner/appellant in the Writ Petition is merely seeking to enforce the decision of the Railway Board at Delhi and thus this Court will have the jurisdiction;

(iv) that earlier also, though prior to 2010, arbitration proceedings relating to the agreement were filed at Delhi;

(v) that the learned Single Judge has wrongly assumed that the train subject matter of the agreement was not touching Delhi when in fact it is running between Delhi and Hatia (Ranchi) as aforesaid;

(vi) that since the agreement in the present case provides for the exclusive jurisdiction of the Courts at Delhi and the cause of action also has substantially arisen at Delhi, ***Sterling Agro Industries Ltd.*** (supra) has no application in the present case. Reliance is placed on the judgment dated 28th May, 2009 of the Division Bench of this Court in LPA 182/2009 titled ***Basant Bagde v. M/s Hindustan Prefab Ltd.*** where finding the tender process to have taken place, work order having been issued, monies having been paid, agreement having been executed at Delhi, it was held that the Writ Petition under article 226 of the Constitution of India was entertainable at Delhi;

(vii) reliance is also placed on ***Rajendran Chingaravelu v. R.K. Mishra, Additional Commissioner of Income Tax*** (2010) 1 SCC 457 laying down that Writ Petition under Article 226 of the Constitution can be entertained by the High Court within whose jurisdiction the cause of action arises wholly or in part and that even if a small fraction of the cause of action accrues within the territory of a State, the High Court of that State will have the jurisdiction;

(viii) reliance is also placed on ***Oil and Natural Gas Commission v. Utpal Kumar Basu*** (1994) 4 SCC 711 again laying down that the High

Court within those jurisdiction even a small part of cause of action accrues, will have jurisdiction to entertain the petition.

The thrust of the argument is that even though the Tripartite Agreement dated 24th December, 2010 (supra) was executed at Kolkata but the same also did not tinker with the term of the initial agreement dated 29th July, 2005 vesting the jurisdiction exclusively in the Courts at Delhi. On enquiry as to how the parties by consent could vest the jurisdiction in an alien Court, it is contended that the parties in the present case even though executed the agreement at Kolkata, were entitled to retain the clause in the earlier agreement of exclusive jurisdiction of the Delhi Courts for the reason of the train subject matter of the agreement running between Delhi and Hatia (Ranchi).

11. Having given our thought to the argument aforesaid, we are unable to persuade ourselves to hold that the High Court at Delhi would have jurisdiction in the present facts and/or the High Courts at Kolkata would not be the appropriate Court to entertain the present controversy. However, since the learned Single Judge has virtually not given any reason, we deemed it prudent to not only lay out the facts in detail as above but to also state the reasons which have prevailed with us.

12. Though undoubtedly the initial contract dated 29th July, 2005 was executed at Delhi but the same was for the period till 28th July, 2010 only. In July, 2010 there was a drastic change in policy with respect to such contracts. While earlier (i.e. when the contract dated 29th July, 2005 was entered into) the Railways had hived off the mobile catering services to IRCTC and which in turn had awarded the contract to the appellant, under the Catering Policy 2010, the Railways decided to remove IRCTC and to take over the catering services unto itself and for better management thereof entrusted the same to the zonal railways. Thus the powers which earlier were exercised by IRCTC vis-à-vis the train subject matter of the agreement aforesaid, stood vested in the South Eastern Railways. Even though the subject train plies between Delhi and Hatia (Ranchi) but still the management of the contract with respect thereto fell in the lap of South Eastern Railways and of which as aforesaid there is no dispute. Thus, the factum of Delhi being one of the stations between which the train plies, is immaterial.

13. IRCTC had in the initial agreement dated 29th July, 2005 provided for jurisdiction of the Courts at Delhi because then IRCTC was to manage the contract and IRCTC had its office at Delhi. However, the said position

changed upon assignment of the contract by IRCTC in favour of South Eastern Railways, Kolkata and which assignment was with the consent of the appellant; upon such assignment, the powers which under the initial contract were to be exercised by IRCTC, came to be exercised by the South Eastern Railways, Kolkata. It is important to note that when South Eastern Railways, Kolkata extended the licence for further six months from 2nd January, 2011, it did not extend the initial contract dated 29th July, 2005 but the contract dated 24th December, 2010 which was signed at Kolkata.

14. That takes us to the next argument of the effect of the Tripartite Agreement dated 24th December, 2010 not amending the clause in the initial agreement with respect to the jurisdiction of the Courts at Delhi. We may notice that the initial agreement not only provided for the jurisdiction of the Courts at Delhi but also provided for the arbitration of the disputes and in which arbitration the sole arbitrator was to be appointed by the Managing Director, IRCTC. In the Tripartite Agreement it was however expressly provided that the right of appointment of the arbitrator stood assigned to the Chief Commercial Manager, South Eastern Railways. It thus cannot be said that the parties at the time of entering into the Tripartite Agreement did not touch the Dispute Resolution Mechanism. The said Mechanism having

provided for arbitration, the parties agreed to the arbitration of arbitrator to be appointed by the CCM, South Eastern Railways and who can reasonably be expected to nominate an officer of the South Eastern Railways only as the Arbitrator. The clause in the initial agreement as to the jurisdiction of the Courts at Delhi and the amended agreement dated 24th December, 2010 have to be viewed in the light of the said change/amendment.

15. The grievance of the appellant in the Writ Petition is also with respect to the decision of the South Eastern Railways, Kolkata. It is *inter alia* the plea of the appellant that notwithstanding the directive of the Railway Board at New Delhi for renewal of the existing contracts, the South Eastern Railways, Kolkata has not done so. The challenge in a Writ Petition is to the arbitrary action of the South Eastern Railways, Kolkata. The Court competent to entertain such a challenge would be the Court at Kolkata only within whose territorial jurisdiction the South Eastern Railways with respect to whose action writ of certiorari is claimed is situated and not this Court. It is for this reason only that much emphasis cannot be laid on the agreement, even if any, between the parties of the jurisdiction of the Courts at Delhi. The said agreement was in the context of the then decision making authority being situated within the jurisdiction of this Court. However, now when

under the changed policy and the agreement and to which the appellant has consented, the decision making authority is situated outside the jurisdiction of this Court, it cannot be said that the agreement of the jurisdiction of the Courts at Delhi subsists. In the said state of affairs, the judgments aforesaid cited by the counsel for the appellant are not found to be applicable.

16. It cannot also be lost sight of that the appellant is approaching the Court in the exercise of its jurisdiction under Article 226 of the Constitution for impugning the action of the South Eastern Railways and seeking directive against the South Eastern Railways, Kolkata who are beyond the jurisdiction of this Court. The Catering Policy 2010 having vested all decisions in the matter in the zonal railways and the subject train having fallen in the South Eastern Zone, such jurisdiction can be exercised only by the High Court having jurisdiction over the said zone and which this Court admittedly does not have. We may notice that the Supreme Court recently in *Interglobe Aviation Ltd. v. N. Satchidanand* (2011) 7 SCC 463 has held that a clause in an agreement which ousts jurisdiction of all Courts having jurisdiction and conferring jurisdiction exclusively in one Court is valid only when the cause of action in part accrues within the jurisdiction of the Court

in which exclusive jurisdiction is conferred and would have no application where no part of cause of action has accrued within the jurisdiction of such Court. It was further held that such an invalid clause conferring exclusive jurisdiction in the Courts at Delhi would not be validated if the entire cause of action had accrued outside Delhi and merely because the flight with respect whereto grievance was made had originated at Delhi. Similarly, in the present case, the clause even if any, of exclusive jurisdiction of Courts at Delhi would be invalid when the cause of action for the writ petition is the action of the South Eastern Railways at Kolkata.

We therefore do not find any merit in the appeal and dismiss the same.

No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

DECEMBER 21, 2011/M