

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH

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WRIT PETITION No.41519 of 2015

BETWEEN

Consortium of Sai Rama Engineering Enterprises and Megha Engineering & Infrastructures Ltd.

... PETITIONER

AND

Oil and Natural Gas Corporation Limited, Rep. by its Managing Director, Jeevani Bharati Tower 2, 124, Indira Chowk, New Delhi and others.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 07.01.2016

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

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| 1. | Whether Reporters of Local newspapers may be allowed to see the Judgments? | No |
| 2. | Whether the copies of judgment may be marked to Law Reporters/Journals? | No |
| 3. | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | No |

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ORDER:

The present writ petition is directed against the order of the second respondent dated 19.12.2015 invoking the bank guarantee furnished by the petitioner on the third respondent bank.

2. Petitioner states that he is the successful tenderer, who was awarded the work, in question, under an agreement dated 27.03.2008 with respondents 1 and 2. In terms of the said contract, the petitioner has given performance guarantee as per clause 3.3 of the agreement. Petitioner also submits that the time for completion of the contract was extended up to 31.12.2015 and the respondents had reserved their right to levy liquidated damages for delay in completion of the work. While so, the invocation of bank guarantee is questioned by challenging the impugned letter of the second respondent, primarily, on the ground that the bank guarantee itself is conditional and is only invocable subject to any breach having been committed.

Petitioner states that there is no allegation of breach of any term of the contract by the petitioner and as such, the invocation of the bank guarantee is clearly arbitrary. The present writ petition is, accordingly, filed by contending that the petitioner is executing the work of more than Rs.8,000/- crores under various contracts in the country and the credit rating of the petitioner would come down having adverse impact on the business, if the bank guarantee is allowed to be encashed.

3. This Court on 21.12.2015, after hearing the learned counsel for the petitioner, passed the following order while issuing notice to the first respondent:

“Learned counsel for the petitioner is permitted to take out personal notice to respondents 1 to 3 by RPAD and file proof of service.

List on 28.12.2015 in Motion List.

Prima facie the bank guarantee is invokable on breach of contract. However, the impugned letter of the invocation of respondents 1 and 2 addressed to respondent No.3 does not allege any breach against the petitioner.

In view of the fact that the contract is still under execution, there shall be interim stay of encashment of the bank guarantee for a period of one week.”

4. Learned standing counsel for respondents 1 and 2 has since filed counter raising preliminary objection as to the jurisdiction of this Court by the petitioner.

5. I have heard learned counsel for the petitioner and learned standing counsel for respondents 1 and 2 on the aforesaid issue.

6. Learned counsel for the petitioner submits that though the agreement between the parties dated 27.03.2008 was executed at Mumbai, the bank guarantee, in question, was issued by the third respondent bank located at Hyderabad and the letter of invocation was also received at Hyderabad. Learned counsel also points out that the clauses 1.3.1 and 1.3.11, which are extracted hereunder, of the General Conditions of the Contract, clearly show that there is no exclusive jurisdiction conferred on the Courts at any particular place.

“1.3.1 **Applicable Laws**

All questions, disputes or differences arising under, out of or in connection with this Contract shall be settled in accordance with law of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the Court in India, subject to the provisions of clause 1.3.2.

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1.3.11 The Arbitration shall be held at the place from where the contract has been awarded. However, parties can mutually agree for a different place.”

Reliance is also placed on clause 3.3.2, which provides as follows:

“3.2.2 In the event of completion of Works is delayed beyond the Scheduled Completion Date for any reasons whatsoever, the Contractor shall get the validity of the guarantee suitably extended so as to make it valid for 12 months plus 60 days from the actual date of completion of Works. However if the delay is attributable to the

Company, Company shall bear the cost of extension of such Performance Guarantee for such extended period at the normal bank rates as applicable to International Banking procedures.”

7. The terms and conditions of the bank guarantee viz. clause 2 thereof is relied upon to substantiate that the bank undertakes to pay immediately the amount of Rs.3,88,89,000/- on breach of contract by the contractor. This part of the bank guarantee is contended to be a conditional one and as there is no allegation of any breach by the contractor, the petitioner contends that the letter of invocation is contrary to the terms and conditions of the bank guarantee, which is accepted by the first respondent.

8. Learned counsel for the petitioner also placed reliance upon a decision of the Supreme Court in **STATE OF MAHARASHTRA v. NATIONAL CONSTRUCTION COMPANY**^[1], particularly, paras 13 and 14 thereof to contend that the bank guarantee is ordinarily a contract quite distinct and independent of underlying contract, the performance of which it seeks to secure and to that extent it cannot be said to give rise to a cause of action separate from that of the underlying contract. Reliance is also placed upon another decision of the Supreme Court in **HINDUSTAN STEEL WORKS CONSTRUCTION LTD. v. TARAPORE AND CO.**^[2] where the Supreme Court in para 14 dealt with a case of unconditional bank guarantee, which is not dependent upon any dispute or proceeding between the parties at whose instance the bank guarantee is given and the beneficiary. Learned counsel contends on the basis of the aforesaid decisions that firstly the bank guarantee in the case on hand is conditional and secondly, it being a separate contract apart from the contract underlying with the first respondent, unless the conditions under the bank guarantee are fulfilled, the same cannot be invoked and submits that since there is no restriction or exclusive jurisdiction conferred on Court at any particular place, this writ petition is maintainable before this Court.

9. Per contra, Mr. Kakarla Venkat Rao, learned standing counsel for respondents 1 and 2, who has filed preliminary counter, submits that the contract was entered into in Mumbai and various extensions were granted to the petitioner up to 31.12.2015 and only, thereafter, the bank guarantee is invoked. Learned standing counsel submits that mere giving of bank guarantee by the third respondent bank at Hyderabad does not amount to giving a cause of action for maintaining the present writ petition. Learned standing counsel also relied upon the decision of the Supreme Court in **SOUTH EAST ASIA SHIPPING CO. LTD. v. NAV BHARAT ENTERPRISES PVT. LTD.**^[3] to explain the manner as to when cause of action arises. Another decision of the Supreme Court in **OIL & NATURAL GAS COMMISSION v. UTPAL KUMAR BASU**^[4] is also relied upon wherein it was held that territorial jurisdiction is to be decided on the facts pleaded in the petition disregarding the truth or otherwise thereof and that the facts pleaded must form integral part of the cause of action. Learned standing counsel also relied upon a decision of this Court rendered by me, in **N. KUMARA SWAMY v. UCO BANK**^[5] where similar question was considered but with reference to a writ petition arising out of service matter and the decision of the Supreme Court in **OIL & NATURAL GAS COMMISSION's** case (4 supra) was already noticed and followed in the aforesaid decision and it was held in para 25 as follows:

"25. Considering the legal position as settled by the decisions aforesaid, it is already noticed that there are no pleadings on the part of the petitioner, as to how any part of cause of action arises within the territorial jurisdiction of this Court. On the contrary, taking the averments, as noted above, no part of cause of action arises within the territorial jurisdiction of this Court inasmuch as on the date of service of show cause notices, which were originally impugned at the time of filing of the writ petition and when the charge memos were sought to be served on the petitioner, he was working at head office at Kolkata. It is not only essential for the petitioner to show that a part of cause of action has arisen within the jurisdiction of this Court but he must also show that the said cause of action is an integral part having nexus to the substantial cause of action. The mere residence of the petitioner at Hyderabad after his retirement and

merely because the charges relate to the alleged omissions and commissions of the branch of the respondent bank at Hyderabad, in my view, has no nexus with the cause of action relating to initiation of disciplinary proceedings against the petitioner. In a given case, the charges may relate to any event happening in any branch in any part of India but the situs with respect to initiation of disciplinary proceedings cannot be said to have any integral nexus with the omissions and commissions at all/any of such branches. The show cause notices as well as the charge memos in the present case incidentally refer to omissions and commissions at Banjara Hills branch at Hyderabad, but even if it could have been at some other branch in Karnataka or Kerala, it would not be permissible, under Article 226(2) of the Constitution of India, for the petitioner to invoke the territorial jurisdiction of the High Court within whose territorial limits, such branch is situated.

The preliminary objection raised by the learned senior counsel for the respondents has, therefore, to be held as well founded and sustainable and consequently, the writ petition is liable to be dismissed on this ground alone.”

10. Since the preliminary objection as to jurisdiction is proposed to be dealt with first, the merits of the claim of the petitioner and the first respondent are not dealt with hereunder and would depend upon the decision on the following preliminary issue:

“Whether this Court has territorial jurisdiction to entertain this writ petition in terms of Article 226(2) of the Constitution of India?”

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ISSUE:

11. Admittedly, the agreement as well as the extensions and impugned proceedings between the parties have all been held at Mumbai, though the head office of first respondent is at New Delhi, the entire correspondence including the invocation under the impugned proceedings emanated from the Delhi office of the first respondent. The relevant clauses of the agreement are already extracted above.

It is, however, necessary to notice one other clause in the bank guarantee viz. clause 8, which reads as follows:

“8. The Bank also agree that this guarantee shall be governed and construed in accordance with Indian Laws and subject to the exclusive jurisdiction of Indian Courts of the place from where

tenders have been invited.”

It would, thus, be evident from the above that the agreement does not specify the exclusive jurisdiction for the Courts at any particular place and under the aforesaid clause, the third respondent bank also agrees that the bank guarantee shall be governed and construed in accordance with the Indian laws subject to exclusive jurisdiction of the Indian Courts of the place from where tenders have been invited.

12. On the face of it, therefore, it is difficult to accept the contention of the learned counsel for the petitioner that the cause of action would arise in the jurisdiction of this Court merely because the third respondent bank is located and the bank guarantee is given at Hyderabad. That apart the decision in **SOUTH EAST ASIA SHIPPING CO. LTD.’s case** (3 supra) clearly answers the contention of the learned counsel for the petitioner, as under:

“3. ... In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay, performance of the contract was also to be done within the jurisdiction of the Bombay High Court; merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original side of the Delhi High Court. The contention that the Division Bench was right in its finding and that since the bank guarantee was executed and liability was enforced from the bank at Delhi, the Court got jurisdiction, cannot be sustained.”

13. Secondly, in the decision of this Court in **N. KUMARA SWAMY’s** case (5 supra) it was found that there was no pleading on the part of the petitioner as to how part of cause of action arises within the territorial jurisdiction of this Court. In the present writ petition also, there are no pleadings to that effect and the thrust in the affidavit is only on the contention that the bank guarantee is conditional and without any allegation of breach of contract, the same cannot be invoked. In the absence of any pleadings, therefore, in the present writ petition, to support the contention that cause of action arises within the jurisdiction of this Court, I am clearly of the opinion

that the ratio of the decision in **SOUTH EAST ASIA SHIPPING CO. LTD.'s case** (3 supra) applies to the facts and circumstances of the case.

The issue is thus required to be held against the petitioner.

The writ petition is liable to be dismissed and is accordingly dismissed. However, petitioner is at liberty to approach the appropriate competent Court for appropriate relief. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

January 7, 2016
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[\[1\]](#) (1996) 1 SCC 735

[\[2\]](#) AIR 1996 SC 2268

[\[3\]](#) (1996) 3 SCC 443

[\[4\]](#) (1994) 4 SCC 711

[\[5\]](#) 2013 (1) ALD 30