

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

% *Judgment Reserved On :April 25, 2016*
Judgment Delivered On : April 28, 2016

+ **FAO (OS) 281/2015**

HELLENIC ELECTRICITY DISTRIBUTION
NETWORK OPERATOR S.A.

.....Appellant

Represented by: Mr.Jayant Mehta, Advocate with
Mr.Sumeet Lall, Ms.Ashmi
Mohan, Ms.Madhvi Khari and
Mr.Sidhant Kapoor, Advocates

versus

BHARAT HEAVY ELECTRICALS LTD. & ORSRespondents

Represented by: Mr.Neeraj Kishan Kaul,
Sr.Advocate instructed by
Mr.Prashant Mehta, Mr.Adarsh
Ramakrishnan and Ms.Chanan
Parwani, Advocates for R-1
Mr.R.P.Vats, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. We shall be referring to the parties as the plaintiff; defendant No.1; defendant No.2; and defendant No.3 respectively.
2. Bharat Heavy Electrical Ltd. (the first respondent in the appeal) is the plaintiff. Public Power Corporation SA (respondent No.3 in the appeal) is defendant No.1. Hellenic Electricity Distribution (the appellant in the appeal) is defendant No.2. State Bank of India (respondent No.2 in the appeal) is defendant No.3.

3. The plaintiff instituted a suit pleading that defendant No.1 is a company established in Greece and was in the business of power production and power supply. It invited a global tender for supply of five transformers. Plaintiff's bid was accepted and on February 05, 2009 a contract was executed containing, amongst others, terms on which liquidated damages for late supply could be levied. As per the contract, a performance guarantee had to be given to defendant No.1 and therefore, at the asking of the plaintiff the defendant No.3 issued, in favour of defendant No.1, a performance guarantee No.0999609FG in sum of €7,54,707.50 which was valid till August 25, 2012 and that as per the contract, as and when a transformer was supplied the value of the performance guarantee stood automatically reduced proportionately. Pleading certain facts concerning approval of a design and sourcing components i.e. a dispute relating to the contract (which we need not burden ourselves with for the reason the prayer in the suit was to restrain defendants No.1 and 2 from invoking the bank guarantee and to restrain defendant No.3 from paying under the bank guarantee), it was pleaded that three transformers were delivered in respect of which payment was released after deducting liquidated damages, in respect of which the plaintiff reserved the right to initiate appropriate proceedings, it was pleaded that in the month of March, 2012, defendant No.1 informed that defendant No.2 would be substituted as the contracting party and that discussions took place to execute a formal document replacing defendant No.2 in place of defendant No.1 as the contracting party and a bank guarantee in favour of defendant No.2 to be issued; it was pleaded that defendant No.2 illegally rescinded the contract and threatened to encash the bank guarantee. The prolix plaint running into 79 paragraphs spans 40 pages and learned senior counsel for the plaintiff during arguments in

the appeal stated that invocation of the bank guarantee was challenged on the ground that defendant No.2 was not the beneficiary and hence could not have invoked the bank guarantee; that no assignment under the contract could be made by defendant No.1 in favour of defendant No.2; that neither defendant No.1 nor defendant No.2 had assets in India and therefore if bank guarantee was allowed to be invoked, irretrievable injustice would be caused to the plaintiff; keeping in view the fact that three transformers were supplied, albeit belatedly in terms of the contract, the entire bank guarantee could not be invoked; and lastly that invocation of the guarantee would be an act of fraud.

4. Along with the suit an application for interim injunction was filed. Ex-parte ad-interim injunction was granted.

5. Issue currently awaits confirmation of the ex-parte ad-interim injunction granted and we are concerned in the instant appeal with the decision dismissing IA No.16803/2014 filed by defendant No.2 for return of the plaint under Order 7 Rule 10 of the Code of Civil Procedure on the plea that in view of clause 20 in the agreement executed between the plaintiff and the defendant No.1, the rights whereunder of defendant No.1 were assigned to defendant No.2, when in Greece due to legislation, generation, transmission and distribution of electricity was hived off with transmission and distribution assigned to defendant No.2, exclusive jurisdiction was vested in the Courts at Athens. The clause in question reads :

“20. Settlement of differences

In case of disagreement between Purchaser and Seller, effort shall be made for the settlement of the differences by representatives of the contracting parties. If the above negotiation, which is not obligatory, is not

effectual the differences shall be settled exclusively in Athens Courts and according to Greek Law.”

6. It was pleaded that no cause of action accrued in India. The global tender floated by defendant No.1 was from Greece. Offers were received in Greece. The contract between the plaintiff and defendant No.1 was executed in Greece. The transformers had to be delivered in Greece. The payment by defendant No.1 had to be released from Greece. It was pleaded that due to legislative reform, with generation, transmission and distribution of electricity which hitherto fore was the sole domain of defendant No.1 was, concerning transmission and distribution hived to defendant No.2. It was pleaded that the plaintiff had instituted a suit in the Court of competent jurisdiction in Athens against defendant No.2.

7. Vide impugned order dated January 21, 2015, the learned Single Judge has dismissed IA No.16803/2014.

8. The first reason given by the learned Single Judge (refer para 11 of the impugned order) is that under clause 17 of the agreement, whereas the plaintiff could assign the contract with the approval of defendant No.1, no such right was given to defendant No.1; and dovetailed to this reasoning is the reasoning that after the gazette notification dated August 12, 2011 was issued by the Government of Greece, hiving off the transmission and distribution of electricity from defendant No.1 and vesting said functioning in defendant No.2, the plaintiff and defendant No.1 exchanged correspondence to substitute defendant No.2 as the assignee under defendant No.1 and no such assignment took place. The second reason is that under the bank guarantee the privity of the bank was with defendant No.1 and if it had assigned the benefit under the contract to defendant No.2 the bank stood discharged from its liability. Overcoming the bar of clause 20 of the agreement, concerning exclusive jurisdiction of

the Courts in Athens, the learned Single Judge has held (refer para 20) that had defendant No.1 raised the objection to the maintainability the Court could have considered the said plea in light of clause 20, but defendant No.2, which was not a contracting party could not rely upon said clause.

9. We highlight that though the learned Single Judge has noted that the plaintiff had filed a suit in Athens against defendant No.1 and 2, the matter has been left at that i.e. just a reference to the suit without discussing the effect of the plaintiff accepting the exclusive jurisdiction of the Courts in Athens concerning any dispute arising under the contract.

10. Clause 17 of the contract concerning assignment, reads as under :-

“17. Assignment

17.1 With the exception of the supply of materials and accessories required for the construction of the object of the Contract, the Seller cannot assign the Contract or any part of it to any third party, without the Purchaser’s prior written consent. If the Purchaser approves of such an assignment, the Seller shall be entirely responsible for the actions and/or omissions of the assignee or his personnel, as if there were actions and/or omissions of the Seller himself.

17.2 Any assignment by the Seller of any claim against the Purchaser deriving from the present Contract is forbidden and considered null and void if made without the Purchaser’s prior written consent.”

11. No doubt it envisages assignment by the plaintiff with the permission of defendant No.1, but what the learned Single Judge has overlooked is that there is a distinction between assignment of an obligation and the assignment of a right. The Constitution Bench of the

Supreme Court in the decision reported as AIR 1962 SC 1810 Khardah Company Ltd. Vs. Raymon & Co. India Pvt. Ltd. observed in para 19:-

“19. . . . The law on the subject is well settled and might be stated in simple terms. An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promise, and when such consent is given, it is really a novation resulting in sub-situation of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.”

12. The principle of law that a bank guarantee is an independent contract between the issuing bank and the beneficiary and has no concern with the main contract between the beneficiary and the party at whose instance the bank guarantee has been issued, with reference to territorial jurisdiction of a Court, has to be understood in the context of jurisdiction with reference to the mother contract. The independence of a contract for guarantee simply means that the dispute concerning the bank guarantee has to be resolved in terms of the bank guarantee i.e. the bank guarantee is the complete contract between the bank issuing the guarantee and the beneficiary. But since the bank guarantee flows out of the mother contract the jurisdictional issue has to be resolved in the context of the cause of action arising under the contract for the reason a guarantee is invocable, though in terms of the guarantee, but in relation to the main contract. To wit. Instant guarantee is a performance guarantee. The performance of the contract by the plaintiff has to be in terms of the contract. The bank guarantee simply states that a demand by the

beneficiary, alleging non-performance, would require the bank to pay under the bank guarantee.

13. In the decision reported as (1996) 3 SCC 443 South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. & Ors. noting that the contract between the parties was executed at Bombay and had to be performed at Bombay, it was held that merely because the bank guarantee was executed by a bank at Delhi in terms of the mother contract would not constitute a cause of action at Delhi to lay a suit to injunct the bank from paying under the guarantee and to restrain the beneficiary from enforcing the right under the guarantee. Concerning jurisdiction under the Consumer Protection Act, in the decision reported as (1999) 8 SCC 357 Union Bank of India Vs. Seppo Rally OY the Supreme Court held that the consumer fora at the place where the office of the party at whose instance the bank guarantee was furnished would have no jurisdiction to entertain a complaint concerning the bank guarantee furnished by the branch of the bank from the place where the office of the party concerned was situated.

14. Concerning the assignment of the right under the contract, on hiving off the business of defendant No.1 and the hived off business vested in defendant No.2, having noted that the same was under a notification issued by the Government of Greece, the learned Single Judge was obliged to consider the effect of a legislative hiving off the business of defendant No.1 to defendant No.2 and the contract between plaintiff and defendant No.1 relating to the business vested in defendant No.2 on the issue of territorial jurisdiction. The learned Single Judge was also obliged to consider the effect of the plaintiff filing a suit in a Court in Athens against defendant No.1 and defendant No.2 concerning the contract.

15. Whether the contract was validly assigned or not and whether defendant No.2 could enforce the bank guarantee in its favour notwithstanding beneficiary being defendant No.1 is a matter of substance and has no concern with the issue of territorial jurisdiction. It is a dispute concerning the contract and suffice would it state that whether it is a dispute concerning the contract or relating to a contract or arising out of a contract would make no difference on the issue of territorial jurisdiction. Territorial jurisdiction has to be determined with reference to a cause of action arising under a contract and if there is an exclusive jurisdiction clause vesting jurisdiction in one Court and ousting jurisdiction in others, the same has to be respected.

16. As we have noted hereinabove, apart from the exclusive jurisdiction clause vesting jurisdiction in the Courts of Athens, no part of cause of action concerning the contract arose in Delhi or for that matter in India. Entire cause of action was in Athens. As held above, issuance of the bank guarantee from Delhi is not a part of the cause of action and territorial jurisdiction cannot be determined with reference to the said fact.

17. We terminate by holding that the impugned order is contrary to the principles of law and our reasons for disagreement have been noted above.

18. Noting that the bank guarantee has been invoked proportionally reduced to non-performance in the supply of two out of five transformers, we allow the appeal and set aside the impugned order dated May 21, 2015. IA No.16803/2014 filed by defendant No.2 is allowed. The plaint filed by the plaintiff is directed to be returned to be filed in the Court of competent jurisdiction in Athens. The ad-interim injunction granted in favour of the plaintiff is extended by us for a period of 45 days from

today to enable the plaintiff to file the suit in the Court of Competent Jurisdiction and pray for such orders from the Court as the plaintiff desires.

19. Issue on merits concerning invocation of the bank guarantee has not been discussed by us and the facts noted hereinabove are limited for the purposes of ascertaining whether Courts in Delhi had territorial jurisdiction to entertain the suit. Therefore, nothing said or observed would be treated as an expression on the merits of the dispute.

20. The parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 28, 2016

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