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

\+ CS(COMM) 1308/2016 & IA No. 11691/2016 (under Order 39 Rule 1 & 2)

BHARAT HEAVY ELECTRICAL LIMITED ..... Plaintiff

Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr. S. Mathur, Ms. N. Kaul, & Ms. Sweta Singh, Advocates

versus

JYOTI LIMITED & ANOTHER ..... Defendants

Through: Mr. Arvind Nigam, Sr. Advocate with Mrs. Maneesha Dhir, Ms. V. Banerjee & Ms. Saloni Choudhary, Advocates

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

% **29.09.2016**

1. Mr. Rajiv Nayyar, Senior Advocate for the plaintiff and Mr. Arvind Nigam, Senior Advocate who appeared for defendant No.1 on its own on the last date of hearing have been heard at length, with the first defendant seeking to point out absence of jurisdiction in this Court to entertain the suit at hand. With their assistance the relevant pleadings and documents have been perused.

2. The plaintiff is a Government of India undertaking engaged in the business of electrical and Hydraulic engineering equipment. Upon the first defendant furnishing a letter of intent dated 07.10.2014 (pages 10 to 15 of the documents filed by the plaintiff) for supply of goods in a project in Karnataka, a purchase order was issued on 18.03.2005 (pages 21-28 of the

documents). Noticeably, both the letter of intent and the purchase order carried identical stipulations as to jurisdiction in the event of dispute arising between the parties. Since the documents that came to be executed between the said parties brought about an enforceable contract, the following clause on jurisdiction operates as binding :-

> *"Clause 16 Jurisdiction*
> *Any dispute that may arise in connection with this order shall be subject to the exclusive jurisdiction of Vadodara Court (Gujarat State, India) only".*

3. Further, the contract contains an arbitration clause which is extracted, from the purchase order, and reads as under:-

> "*If the disputes/disagreements could not be solved amicably then the same shall be referred to adjudication under THE ARBITRATION AND CONCILIATION ACT 2000 including all or any statutory modification thereafter or reenactment thereof for the time being in force. In that case each party will reserve a right to appoint an Arbitrator themselves and each Arbitrator shall constitute a tribunal and jointly elect a third Arbitrator as UMPIRE."*

4. In terms of the aforesaid contract, advance on the purchase order could be availed subject to furnishing of a bank guarantee equivalent to 10% of the contract value, it amounting to a guarantee in the sum of ₹ 2,25,00,000/-. The plaintiff made arrangements with the second defendant (ICICI Bank Ltd.) and furnished unto the first defendant bank guarantee in the said sum of money, initially issued on 10.12.2014, it being bank guarantee No.0007BG00189415 (pages 29-48 of the documents of the plaintiff), with validity upto 31.05.2015. It was extended from time to time, lastly with claim expiry date indicated as 30.09.2016 (per the document dated 12.5.2016 at page 46).

5. From the pleadings and the submissions of the parties, it is vivid that dispute arose between the plaintiff and the first defendant eventually resulting in a communication dated 14.05.2016 (page 179 of the plaintiff's documents) addressed to the second defendant (the surety bank) stating that the contract with the plaintiff had been cancelled and the bank guarantee was being invoked, demanding the guaranteed sum to be paid by way of demand draft in favour of the first defendant. This was followed by another communication dated 16.05.2016 (page 180 of the plaintiff's documents).

6. The plaintiff pleads in (para 13 of) the plaint that feeling aggrieved with the invocation of the bank guarantee, it filed in this Court on 17th May, 2016, a petition under Section 9 of the Arbitration and Conciliation Act, 1996, it being O.M.P. (I) (Comm) No. 197/2016 seeking interim relief in the nature of restraint order against the surety bank from making any payment to the first defendant in terms of the bank guarantee. It is stated further in the plaint that a status quo order was passed by a learned single judge in the said petition on 17.05.2016. It is also averred that during arguments on the application of the opposite party seeking vacation of the said interim stay, objection to the jurisdiction of the court was agitated. When the arguments commenced in the present case today, it was submitted that the plaintiff (which is the petitioner in the petition under Section 9 of the Arbitration and Conciliation Act) has been advised to withdraw the other petition. It was submitted around the time of the conclusion of the hearing that the said petition has since been withdrawn and accordingly dismissed.

7. The first defendant has pointed out at the threshold the above quoted clauses in the contract between the parties to submit that this Court does not have territorial jurisdiction and further that in terms of the arbitration clause, the cause of action agitated here is subject matter of arbitration and,

therefore, the jurisdiction of the Court is barred by Section 5 of the Arbitration and Conciliation Act. *Per contra,* it was argued by the learned senior counsel for the plaintiff that the contract in the nature of bank guarantee was independent of the contract between the plaintiff and the first defendant which contains the arbitration clause and the stipulation as to the exclusive jurisdiction of Vadodara Court in the State of Gujarat. In his submissions, the said stipulations in the contract between the plaintiff and the first defendant cannot come in the way of the plaintiff approaching this Court within its right under Section 9 of the Code of Civil Procedure, 1908 (CPC) to seek appropriate relief. He referred to *Hindustan Construction Co. Ltd. vs. State of Bihar and Ors. (1999) 8 SCC 436* in support of this submission.

8. In *A.B.C. Liminart Pvt. Ltd. vs. A.P. Agencies Salem AIR 1988 SC 1239,* the Supreme Court observed that under Section 20(c) of CPC, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. In disputes arising out of contracts, question of jurisdiction routinely arises. The determination of the place where the contract was made is part of the law of contract. Making of an offer at a particular place does not form cause of action. It is the acceptance of offer and its intimation which results in a contract and, therefore, a suit arising out of breach of contract may be filed in Court within whose jurisdiction the acceptance was communicated. It is, however, well settled that parties to a contract may with mutual consent decide the jurisdiction they would invoke in the event of dispute arising.

9. In *South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises Pvt. Ltd. (1996) 3 SCC 443,* the contract out of which dispute had arisen had been executed in Bombay and the performance thereunder was also required to be

made in Bombay, the bank guarantee, however, in its terms having been executed at Delhi and transmitted to Bombay. The suit filed for perpetual injunction against the enforcement of the bank guarantee had been entertained by this Court on the original side. Against this backdrop, the Supreme Court ruled thus:-

> "3. *It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if transferred, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. 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 has executed at Delhi and transmitted for performance in 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".*

10. In *DLF Industries vs. ABN Amro Bank & Ors. 2000 (55) DRJ (DB),* the issue of territorial jurisdiction was raised against the backdrop of a petition under Section 9 of Arbitration and Conciliation Act, 1996. Taking note of the submissions of the petitioner, the Court ruled thus:-

> *"Submission of learned counsel for DIL that since parties reside in Delhi or that State Bank of India in whose favour contract stand novated has no objection as regards jurisdiction and since payments were received in Delhi or even most of the*

meetings were held at Delhi, therefore, Delhi Courts will have jurisdiction since part of the cause of action has arisen in Delhi, have no force in view of the exclusion clause and particularly in view of the fact that the main purport of the petition is seeking of a relief of an interim measure with respect to the bank guarantees, which were furnished pursuant to the agreements, which contain the exclusion clause and pursuant to which agreements alone the bank guarantees were furnished".

11. In the considered view of this Court, general principles enunciated in *Hindustan Construction Co. Ltd* (supra) about independent nature of contract of bank guarantee do not assist the plaintiff. Instead, the view taken by the Supreme Court in *South* East *Asia Shipping Co. Ltd. (supra)* and by a division bench in *DLF Industries (supra)* are complete answer to the questions raised. It cannot be ignored that the plaintiff itself invoked the arbitration clause and approached the Court for interim relief under Section 9 of Arbitration and Conciliation Act, 1996. Thus, the proper forum was invoked, the only hiccup there also being exclusionary clause on jurisdiction. The filing of the civil suit at hand, in fact, is inconsistent with the steps earlier taken. By filing the petition under Section 9 of Arbitration and Conciliation Act 1996, the plaintiff has acknowledged that it is bound by the arbitration clause even in the context of the bank guarantee which essentially was furnished pursuant to the contract of supply of goods. Having invoked the said clause, it may perhaps be even bound to join the arbitral proceedings in terms of Section 9(2). But then, such effect on the future course will have to be determined, if required, by the appropriate forum. Suffice it to note for the present that both contracts are inextricably linked to each other and given the nature of reliefs sought here, as further discussed hereinbelow, the relevant stipulation quoted earlier excludes the jurisdiction of all courts other than at Vadodara in Gujarat.

12. The very fact that the cause of action as pleaded in the present case is relatable to the contract which contains the exclusionary clause on jurisdiction, and stipulation for arbitration, with the first relief of declaration being directed against the first defendant, the relief of injunction against payment by the second defendant under the bank guarantee being consequential to the first relief, this Court finds it to be a case of lack of territorial jurisdiction. To put it more clearly, if a cause of action has arisen in favour of the plaintiff to approach the Civil Court against the above mentioned background facts, the plaintiff will have to approach the appropriate court at Vadodara in the State of Gujarat only.

13. In the result, the plaint is directed to be returned in terms of the provision contained in Order 7 Rule 10 CPC for being presented to the court/forum of appropriate jurisdiction.

14. The registry shall carry out the necessary follow up compliance.

R.K.GAUBA, J.

SEPTEMBER 29, 2016
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