

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

% *Judgment reserved on: 28th January, 2016*
Judgment pronounced on: 22nd February, 2016

+ **OMP(I)(Comm) No.25/2015, I.A. Nos.21580/2015, 21890/2015 & CCP (O) No.103/2015**

TATA TELESERVICES LIMITED AND ANR. Petitioners
Through Mr.Ramji Sridhran, Sr. Adv. with
Mr.M.A.Shokat, Mr.Nitin Kala &
Mr.Kumar Singh, Advs.

versus

GTL INFRASTRUCTURE LIMITED AND ANR Respondents
Through Mr.Rajiv Nayar, Sr. Adv. with
Ms.Shyel Trehan, Mr.Saurabh Seth &
Ms.Tejaswi Shetty, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) seeking, inter alia, that the respondents be directed to restore the services at the sites closed and injunct the respondents from disconnecting further sites.
2. The case of the petitioners as per their pleadings is that the petitioners are telecom companies providing telecommunication services to millions of subscribers across various circles in India (including Delhi circle) by using their own infrastructure and/or through passive infrastructure (e.g. cell sites etc.) obtained/availed from various Infrastructure Providers (IP Vendors), including the respondents.

3. The petitioners entered into various Agreements with the respondents, whereby the respondents agreed to provide passive infrastructure facilities including telecom sites to the petitioners. In terms of these Agreements, the respondents are required/mandated to maintain certain percentage of Uptime (i.e, availability of all infrastructure equipment provided by infrastructure provider measured per site/per month basis on a percentage basis). In the event of an outage, i.e. a site going out of traffic on account of failure of any infrastructure provided by the infrastructure provider leading to a down time (i.e. shortfall in meeting the agreed percentage of Uptime), the petitioners are entitled to withhold/deduct payments to the extent of outage penalty prescribed under the agreements. The right of the petitioners to deduct money for SLA breaches is not disputed by the respondents.

3.1. During the subsistence of these Agreements, certain payment related disputes arose between the parties. These financial disputes culminated in a settlement between the parties which was recorded in writing in the form of an agreed settlement agreement between the parties. The settlement agreement records the cumulative claim of the respondent under all the agreements of deductions being to the tune of Rs. 53.08 crores upto October, 2014 and claimed that the same had been wrongly made by the petitioner. This claim was finally settled between the parties for an amount of Rs.22.5 crores. This amount of Rs.22.5 crores was to be paid by the petitioners subject to respondents investing Rs.7 crores for upgradation and permitting the petitioners to retrieve its equipment which had been illegally withheld by the respondents. Parties agreed that the formality of signing this settlement agreement will be carried out at Delhi. In its application for vacation of stay,

the respondents have not denied and/or disputed the Settlement Agreement as also the terms thereunder. Rather they have sought enforcement of the settlement terms by seeking payments of Rs.22.5 crores from the petitioners.

3.2. But, reneging from the above agreed settlement agreement, the respondents demanded payment of approx. Rs.99.98 crores vide the letter dated 5th October, 2015 from the petitioners and illegally and arbitrarily disconnected cell sites of the petitioners across various circles in India (including Delhi circle) thus disrupting telecommunication services of the petitioners and its subscribers. The respondents had disconnected approx. 1831 sites across different circles, impacting a total of 2065 sites, including 18 sites in Delhi. As a consequence of such disconnection of sites, customers who are under the coverage of those sites, are unable to make and/or receive calls and are also unable to use telecom services in emergency situations. Dispute is not under various agreements but is a dispute under the Settlement Agreement.

3.3. The disconnection of sites by the respondents is totally illegal and contrary to the agreements as also the settlement agreement. The Agreements continue to subsist and provide that under no circumstances the respondents shall stop services to the petitioners. In this context the relevant clauses of the Master Service Agreement dated 27th January, 2009 executed between the parties at New Delhi is noteworthy and is quoted hereunder:-

"1.28.2 REMEDIES IN EVENT OF DEFAULT

Without prejudice to any and all other legal rights and remedies which the Recipient Party may have, may exercise at its discretion, in case of any of the events of default the rights after the defaulting

Party's failure to cure such default within the period as prescribed in clause 1.29.1, to

- a) Require the defaulting Party to pay damages
- b) Sue for damages
- c) Terminate the applicable Telecom Site or the entire Agreement; without waiving its right to sue for damages.

Such remedies should be cumulative and concurrent or sequential at the election of the Recipient Party in addition to all other rights and remedies that Recipient may have at law or equity.

1.28.3 In the event of any default by the Cellular Operator, the Infrastructure Provider shall notify the Cellular Operator about the same. However, even if the payment remains due, Infrastructure Provider shall not be at liberty to stop operations and in no circumstances the services to the Cellular Operator shall be stopped."

3.4. It is averred that in view of stipulation in all telecom infrastructure contracts, since telecom is in the nature of an essential service for the general public and it is fundamental to such an essential service, it cannot be stopped under any circumstances. Similar clause is present in the other agreements executed between the parties. As is evident, the Infrastructure Provider (i.e. the respondents) do not have a right to stop services to the cellular operator (i.e. the petitioners). This is so as telecom is an essential service and a lifeline in today's world and their seamless operation is of prime importance. Thus, it is a fundamental obligation that telecom service is continuously provided to customers without disruption. It is for this reason that the Infrastructure Agreements do not permit Infrastructure Providers to disconnect/discontinue services under any circumstance, whatsoever.

3.5. Thus, the disconnection of cell sites by the respondents is wholly illegal and against general public interest and the respondents be restrained from doing so again under any circumstances.

3.6. Apprehending that further sites, including sites in Delhi, could soon be disconnected/impacted and requiring immediate re-connection of already disconnected sites in order to restore telecommunication services to millions of consumers, the petitioners were left with no option but to invoke the jurisdiction of this Court.

4. When the present petition was listed before Court on 9th October, 2015 this Court had passed an interim order directing the respondents to restore the services at the cell sites closed by them and not to take any further precipitate action *apropos* the amounts which may be due from the petitioners till the next date of hearing. The extract of the order is reproduced herein below:

“Issue notice by all modes including dasti, returnable before the Court on 28.10.2015.

It is the petitioners' case that the lis between the parties is to be adjudicated through an Arbitrator in terms of the arbitration clause stipulated in the Master Service Agreement dated 10.12.2007.

Mr. Salman Khurshid, the learned Senior Advocate for the petitioners would submit that the respondents have arbitrarily switched off several cell sites, which affect the mobile services of over 2 million subscribers of the petitioners; that the respondents' action is against the terms of the aforesaid agreement which requires a notice period of 30 days to be given to the other side before such precipitate action is taken. He relies upon Clause 1.28.1(m) in particular, which states that any default or failure on the part of any party in performing its obligation in the agreement is to be notified

to the other party by calling upon the addressee to cure the default; that it is only upon the failure to do so within the 30 days' notice period that any precipitate action may be taken by the other party; that no such notice period has been given to the petitioners and the act of switching off of the cell sites by the respondents is against the terms of the agreement. He seeks restoration of the services which were being provided by the respondents as per the agreement. Clause 1.28.1(m) reads as under:

"1.28.1 EVENT OF DEFAULT: Each of the following should constitute an event of default under the Agreement:

(a).....

(b).....

(m) Failure of any of the Party to perform its part of obligations under this Agreement or violation of any of the terms of this Agreement. However, in the event of every such default, the defaulting Party needs to be intimated by the other Party by way of a written notice, allowing them 30 days to cure the default. The 30 days cure period will be extended as reasonably necessary to permit the defaulting Party to perform a cure as long as the defaulting Party commences cure within such 30 days cure period and thereafter continuously and diligently pursues and completes such cure. "

Mr. Khurshid would further submit that under the terms of the Master Service Agreement, the petitioners have already made a payment to the tune of Rs.97.96 crores to the respondents, and that the parties had agreed that Rs.22.50 crores would be paid by the petitioners to the respondents as per the schedule given at page 377 and that the petitioners are ready and willing to abide by the said schedule.

The learned Senior Advocate further submits that although the said schedule would have come into effect only after the parties had consented to the terms of the settlement agreement, nevertheless, the first installment shall be paid to the respondents within one week from today.

In the aforesaid context, this Court is of the view that mobile services to over 2 million subscribers would be affected

because of the non-adherence to the 30 days' notice period which was to be provided to the petitioners. In the circumstances, the balance of convenience would lie in favour of adherence with the terms of the agreement, to continue with the provision of internet services till the 30 day notice period is exhausted, therefore the respondents are directed i) to restore the services at the cell sites closed by them and ii) to not take any further precipitate action apropos the amounts which may be due from the petitioners to the respondents till the next date of hearing.

Dasti under the signature of the Court Master.”

5. The petitioners submit that the respondents did not restore the sites despite being informed of and were served with a copy of the order of this Court by the petitioners. It was only after a Contempt Petition, being CCP (O) 103/2015, was filed and this Court once again directed restoration of services, that the respondents fully restored services on the evening of 14th October, 2015, five days after the initial order.

6. During the pending present petition, the petitioners have commenced arbitral proceedings by issuing a notice invoking arbitration on 6th January, 2016 to the respondents and nominating their Arbitrator. It is prayed in the petition that keeping in view the balance of convenience of the parties and the irreparable harm to the general public, this Court may reject the application for vacation of stay and confirm the interim order and refer the parties to arbitration for adjudication of their dispute.

7. The prayer is strongly opposed by the respondents on merits as well as on the objection of territorial jurisdiction of this Court.

8. The main objection of the respondents are:-

- a) This Court has no territorial jurisdiction to entertain the present petition filed under Section 9 of the Act.
 - b) The respondents have alleged that settlement agreement as alleged by the petitioners are merely proposals. The same was not finalized. The respondents have not signed the agreement. The said alleged settlement agreement does not have arbitration clause. The agreements which are subject matter of present dispute have arbitration clause which do not disclose the jurisdiction of Delhi Court.
 - c) The petitioners are also guilty of concealment of material fact as there is a claim of Rs.100 crores by the respondents towards deductions made by the petitioners from the monthly payments.
 - d) Respondents have also pleaded financial distress for non-performance of their obligation under the Agreements. It is denied that the respondents do not have a right to disconnect cell sites of the petitioners.
9. It is argued by Mr. Rajiv Nayar, learned Senior counsel that once this Court has no jurisdiction, there is no need to go into the merit of the case.
10. It is argued by the learned Senior counsel that the terms of the alleged settlement agreement were in fact never concluded. Emails would indicate that the terms of the draft settlement agreement were never agreed upon. In fact, the letter dated 7th October, 2015 called upon the petitioner to pay all pending dues.

11. Even otherwise, it is not the case of the petitioner in the petition filed under Section 9 of the Act that the draft Settlement Agreement is a concluded agreement, as from their assertions as recorded in the order dated 9th October, 2015 it is stated that "*The learned Senior Advocate further submits that although the said schedule would have come into effect only after the parties had consented to the terms of the settlement agreement, nevertheless...*" it is also acknowledged in the petition itself that the settlement agreement was yet to be executed

12. It is submitted on behalf of the petitioners that the terms of the Settlement Agreement are final and binding, though not signed by the respondents there was no other term to be agreed. The various emails exchanged between the parties including the sign off sheet clearly show that the parties had conclusively agreed to terms of the settlement, all terms have been agreed upon and recording of the same in the format at best was a formality. Signing of the said agreement was only an administrative act. The execution of a written contract is not a condition precedent for coming into force of the contract. Reliance is placed on ***Nanak Builders and Investors Pvt. Ltd. v. Vinod Kumar Alag*** AIR 1991 Delhi 315.

13. It is submitted that mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. In this regard, reliance is placed on the following cases:-

a) ***Kollipara Sriramulu v. T.Aswathanarayana***, (1968) 3 SCR 387
[Paras 3&4]

b) ***Trimex International Ltd. v. Vedanta Aluminium Ltd.***, 2010 (3) SCC 1 [Para 49]

c) **Brij Mohan v. Sugra Begum**, (1990) 4 SCC 147 [Paras 20, 23 & 24]

14. It is submitted that though the agreed settlement agreement between the parties was yet to be signed, its binding nature, more particularly of the terms with reference to financial settlement, cannot be disputed. The petitioners have also relied upon the case of **Old World Hospitality Private Limited v. India Habitat Center**, 73 (1997) DLT 374 (Paras 48 to 50], wherein it was held as under.-

"(48) The argument on behalf of the defendant is that there has been no concluded contract. But a perusal of the Memorandum dated 5.4.1994 and the 'Draft Agreement' would show that the contract is 'symbiotic' containing not only reciprocal obligations, complete duties and responsibilities and parties had agreed and come to a complete understanding about the operations by the plaintiff. The further argument is that there has been no consent by the defendant. Section 2H of the Contract Act states an agreement enforceable in law is a contract. Section 13 of the Contract Act defines consent "Two or more persons are said to consent when they agreed upon the same thing in the same sense". It is axiomatic that a contract is complete as a contract as soon as the parties have reached an agreement as to what to each of the essential terms is or with certainty be ascertained....."

The Court took the view that the words 'usual conditions of acceptance are meaningless. The Court observed that "a clause which is meaningless can often be ignored while still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms."

(49) The Court indicated a test to find out the intention, that on a true construction of the document essential terms are yet to be agreed then there is no contract, but if vague and uncertain words

can be ignored without impairing the efficacy of the other terms the parties can be said to have had consensus ad-idem with reference to material terms. The Court of Appeal eventually held "in the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties agreed that the usual conditions of acceptance apply. That clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole and it should be so rejected.

A contract could be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it creating binding obligations between them; and it will be most unfortunate if the law should say otherwise. You would find faults by scanning their contracts to find some meaningless clause on which to ride free".

(50) In the instant case, everything had been done and there was no scope for any further negotiations and therefore, it cannot be said that there was no concluded contract. The principle applicable is that where you have proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject of a formal contract it becomes a question of construction whether the parties intended that the terms agreed on are merely be put in to form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail. If the principle is applied to the facts in the instant case, there is no room for any arguer that the parties had not come to a concluded contract."

15. On the issue of territorial jurisdiction, it is submitted by the petitioners that though the Agreements are with respect to different cell sites spread across various circles, they are almost identical and for all purposes treated as one arrangement/agreement for providing passive infrastructure to the

petitioners to enable them to provide services to their subscribers. The agreements contain identical dispute resolution clause providing for arbitration. Under the agreements, exclusive jurisdiction is vested with three different courts, namely, courts at Mumbai, Chennai and Delhi.

It cannot be said that this Court being of natural jurisdiction has been ousted and the contention of the respondents have no merit. Since the disconnection by the respondents is of cell sites (obtained under these Agreements) across India and admittedly there have been sites disconnected in Delhi, therefore, part cause of action has arisen at Delhi. Hence, this Court has jurisdiction.

16. It is also submitted that the respondents themselves are treating all the agreements as one for the purposes of dispute resolution and the disputes have not been treated as agreement specific as it appears from communications from the respondent. Now the respondent cannot be allowed to approbate and reprobate in such manner. A single disconnection letter gives rise to a single cause of action. The parties have agreed to the jurisdiction of courts in Delhi and to that extent this Court has jurisdiction to entertain the present petition. Approaching three different High Courts for the same relief would have only lead to unnecessary multiplicity of proceedings.

17. It is stated on behalf of the petitioners that as per the settlement agreement, unlike the various individual Agreements, admittedly the parties have not conferred exclusive jurisdiction on a particular court. Thus, in the absence of any exclusive jurisdiction clause, the principles of Civil Procedure Code, 1908 (CPC) shall apply for the purposes of jurisdiction.

Section 20 of the CPC permits exercise of territorial jurisdiction by the court within whose territory cause of action wholly or in part arises.

18. Counsel for the petitioner states that even though the settlement agreement does not contain express arbitration clause, the parties have agreed to arbitration in as much as.-

- a) The settlement agreement has by reference incorporated all the Agreements, which contain identical arbitration clauses. By virtue of Section 7 of the Act, reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement; and
- b) Admittedly, the respondents do not object to invocation of arbitration in respect of disputes arising out of settlement.

19. Counsel for the respondents has pointed out that the petitioners themselves are conducting business as per the MSAs cited above and not as per the terms of the supposed Settlement Agreement. Recent deductions of Rs.3.94 Cr, indicate that they continue to make deductions at rates prescribed under the agreements summarized in the table below, contrary to their own argument that the Settlement Agreement was a concluded contract. Thus, a draft settlement agreement has no bearing in the eyes of the law. The communications between the parties clearly demonstrate that there was no consensus *ad idem* on the terms of the agreement. The settlement agreement was never signed or executed.

20. As far as terms of settlements are concerned, the petitioners have not denied the fact that the same is not signed by the parties. It is also admitted that the said alleged settlement does not have arbitration clause. On one

hand, the petitioners are relying upon the settlement agreement which does not have the arbitration clause and on the other hand, for the purpose of filing the present petition at the strength of Arbitration clauses, they are also relying upon the original agreements executed between the parties. Counsel for the petitioners specifically made the statement on behalf of his clients that as far as agreed amount of Rs. 22.50 crore as per settlement is concerned, his client is prepared to pay the same in 2-3 installments but the respondents cannot take the u-turn after settling the full and final disputed amount in the settlement agreement. He states that if the entire conduct of the parties is seen in meaningful manner, it would show that the respondents almost accepted all the terms and to receive the amount in the settlement agreement. They have now changed their mind in order to harass the petitioners and subscribers. In view of above said circumstances, without expressing any opinion as to whether the terms of settlement are binding or the said exchange of communications draft and emails amount to agreement within the meaning of Section 7 of the Act or by implication of correspondences exchanged between the parties, it is a valid settlement agreement or it is binding upon the respondents or not, let me first decide the objection of territorial jurisdiction raised by the respondents, in view of the decision of Supreme Court in the case of **Jagraj Singh v. Birpal Kaur** reported in 2007 (2) SCC 564 at page 573 para 27 wherein it is mandated that once the Court holds that it has no jurisdiction, it should not consider the merits of the matter.

21. Admittedly, the petitioners and respondents have entered into the following series of agreements, each for a different set of towers. These

Agreements, the relevant clauses and corresponding towers with their locations have been reproduced herein below:-

Date	Parties	Governing Law	Dispute Resolution	Removal of Equipment	Location and Number of Towers
15.12.2004	Dishnet Wireless Ltd. and TTSL	Laws of India	Arbitration in Mumbai (Cl.9)	Not present in the Agreement [N/A]	Chennai-16; Rest of TN-33;HP-03;Rest of Bengal-6;Odisha-7; Total-65
Master Service Agreement Dated 10.12.2007	GTL Infra and TTSL	Courts of Mumbai only. (Cl.1.27)	Arbitration in Mumbai	Clause 1.33	Rajasthan-17; Madhya Pradesh-64;Gujrat-60; Andhra Pradesh-140; Karnataka-266; Kerala-14;Chennai-79;Rest of TN-56;Punjab-52; Haryana-16;Delhi-7; UP(East)-152;UP (West)-26; Calcutta-60;Rest of Bengal-14; Bihar-1; Jharkhand-13;Odisha-26; Total-1064
Master Service Agreement Dated 28.01.2008	GTL Infra and TTSL	Courts of Mumbai Only (Cl.1.27)	Arbitration in Mumbai	Clause 1.33	Maharashtra and Goa-49;Mumbai-17 Total-66
Master Service Agreement Dated 27.01.2009	GTL Infra and TTSL	Courts of Mumbai Only (Cl.1.27)	Arbitration in Mumbai	Clause 1.33	Total-0
Master Infrastructure	Aircel Ltd.,	Clause 17.2 Courts in	Arbitration in Chennai	Not present in Agreement	Andhra Pradesh-16; Karnataka-

Agreement dated 09.02.2009	Aircel Cellular Ltd. and TTSL	Chennai only		[N/A]	16; Kerala-40;Chennai-43;Rest of TN-83;Delhi-11;UP(E)-34;UP(W)-13;Calcutta-214;Rest of Bengal-31;Bihar-44;Odisha-82; Total-617
08.07.2009	Aircel Ltd.and TTML	Clause 17.2 Courts in Mumbai only	Arbitration in Mumbai	Not present in Agreement	Maharashtra & Goa-28; Mumbai-11;Total-39
Deed of Novation dated 20.07.2010	Aircel Ltd.,CNIL and TTML	Clause 3.2 Courts in Mumbai only			
Deed of Novation dated 20.07.2010	CNIL, Dishnet Wireless Ltd. and TTSL	Clause 5.2 Jurisdiction of Delhi only.			
Deed of Novation dated 20.07.2010	Aircel Ltd., Aircel Cellular Ltd., Dishnet Wireless Ltd.,CNIL and TTSL	Clause 3.2 Courts in Chennai			
11.04.2012	CNIL and TTML	Courts 1.27.1 Courts in Mumbai	Arbitration in Mumbai	Clause 1.33	Maharashtra & Goa-49;Mumbai-17 Total-66

22. From the above mentioned details, as admitted by the petitioners the dispute between the parties relates to Master Services Agreement (MSA) dated 10th December, 2007 and Master Services Agreement dated 27th January, 2009. The interim order dated 9th October, 2015, itself records the reliance of the petitioner on MSA dated 10th December, 2007 as the relevant

agreement under which disputes arise. In the petition, also petitioners assert rights under the said MSA at Paras 1 and 8(a)(i) and MSA dated 27th January, 2009, at Paras 3, 8(a)(iii). MSA dated 10th December, 2007 and MSA dated 27th January, 2009 both contains exclusive jurisdiction clauses for courts at Mumbai. The other agreement under which the dispute arises is Master Infrastructure Agreement dated 9th February, 2009, which contains an exclusive jurisdiction clause for Courts in Chennai.

23. The petitioners have invoked the territorial jurisdiction in para 34 of the petition on the ground that the part of cause of action has arisen in Delhi in as much 18 cell sites have been closed by the respondents as also the Agreement dated 15th December, 2004 as novated by the Novation Deed dated 20th July, 2010 specifically provide that the courts at Delhi would have exclusive jurisdiction to adjudicate upon the disputes and as such substantial cause of action has arisen within the territorial jurisdiction of this Court.

24. In para 4 of the petition, it is stated by the petitioners that *"There is no default on part of the petitioners to make the payments as consideration for sites/services provided by respondents"*. On the other hand it is pleaded by the respondents that the petitioners owe the respondents dues (without interest) of over Rs. 75 crores though the amount of 53.08 crores is admitted by the petitioners, yet they claim that no dues are owed, as per their own pleadings in Para 8(b)(ii) wherein it is admitted by the petitioners that *"In terms of the Deed of Novation, the courts at Delhi have exclusive jurisdiction to deal with issues arising out of the Deed of Novation."* The said document

is available at page 281 in the list of documents filed by the petitioners themselves, which contains a jurisdiction clause stating,

"This deed shall be governed by and construed in accordance with the laws of India. Any disputes or claims arising out of or in connection with this deed shall be subject to exclusive jurisdiction of the courts at Chennai."

25. The relevant jurisdiction clauses are reproduced herein below:-

(i) MSA dated 10th December, 2007, Clause 1.27

"This Agreement and each Site Level Agreement is governed by the laws of India and Courts in Mumbai only shall have jurisdiction in case the dispute arise out of the terms of the Agreement or its interpretation".

(ii) MSA dated 27th January, 2009, Clause 1.27

"This Agreement and each Site Level Agreement is governed by the laws of India and Courts in Mumbai only shall have jurisdiction in case the dispute arise out of the terms of the Agreement or its interpretation."

(iii) Master Infrastructure Agreement dated 9th February, 2009, Clause 17.2 provides, *"The courts of Chennai shall have exclusive jurisdiction regarding any issue arising out of the arbitration process above and with respect to injunctive relief, all in accordance with the Arbitration and Conciliation Act, 1996."*

26. As it is settled law that if the Court has no jurisdiction to entertain the present petition, the petitioner cannot obtain the relief otherwise.

27. The exclusive jurisdictions in the present matters are in Mumbai or Chennai. Reliance is placed on the following judgments:-

- (i) ***Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke Gujarat Pvt. Ltd.***, (2009) 9 SCC 403, paras 24 to 30 reads as under:-

“24. The only question which falls for our consideration is whether, notwithstanding the mutual agreement to make the high-seas sale agreement subject to Kolkata jurisdiction, it would be open to the respondent Company to contend that since a part of the cause of action purportedly arose within the jurisdiction of the Bhavnagar Court, the application filed under Section 9 of the Arbitration and Conciliation Act, 1996, before the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat), would still be maintainable.

25. The aforesaid question has often troubled the courts with one view being that since the parties to the agreement had agreed to a particular forum, they could no longer resile from the said position and claim that other courts, where a part of the cause of action may have arisen, would also have jurisdiction to entertain a suit or other proceeding. The other view has been that, if by the said agreement the rightful jurisdiction of a court was sought to be ousted and a court was vested with the jurisdiction to entertain a suit, which it did not have, the same would be contrary to the provisions of Section 28 of the Contract Act, 1872, being contrary to public policy. One of the earlier judgments on this dichotomy of views is that of this Court in *Hakam Singh* [(1971) 1 SCC 286 : AIR 1971 SC 740].

26. Faced with the question as to whether an agreement arrived at between two parties that one of the two courts having jurisdiction, would decide all the disputes relating to such agreement, was hit by the provisions of Section 28 of the Contract Act, 1872, this Court in *Hakam Singh case* held that where two courts or more have the jurisdiction to try a suit or proceeding under the provisions of the Code of Civil Procedure, an

agreement between the parties that one of such courts would have the jurisdiction to decide the disputes arising between the parties from such agreement would not be contrary to public policy and would not, therefore, be contrary to the provisions of Section 28 of the Contract Act, 1872.

27. The said question once again arose in *A.B.C. Laminart (P) Ltd.* [(1989) 2 SCC 163], wherein following the decision in *Hakam Singh*, but relying on the maxim *ex dolo malo non oritur actio*, this Court held that by an agreement which absolutely ousted the jurisdiction of a court having the jurisdiction to decide the matter, would be unlawful and void, being contrary to public policy under Section 28 of the Contract Act. But so long as the parties to a contract do not oust the jurisdiction of all the courts, which would otherwise have the jurisdiction to decide the cause of action under the law, it could not be said that the parties had by their contract ousted the jurisdiction of the court.

28. This Court in *A.B.C. Laminart case* went on to observe that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise between them, the agreement would be valid.

29. The question also arose in *R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd.* [(1993) 2 SCC 130], where an endorsement “subject to Anand (Gujarat) jurisdiction”, was relied upon to contend that only the courts in Anand would have the jurisdiction to entertain any dispute relating to such jurisdiction and the suit filed in Bombay on the ground that the cause of action arose in Bombay was not maintainable. In the said case, this Court held that since apart from the

endorsement on the deposit receipt, there was no formal agreement between the parties, the said endorsement would not divest the courts in Bombay of their jurisdiction to entertain the suit. As will be evident from the facts of the suit, the same stood on a different footing and does not advance the case of the respondent in any way.

30. In the instant case, the parties had knowingly and voluntarily agreed that the contract arising out of the high-seas sale agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had the jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided in Kolkata by an arbitrator in Kolkata, West Bengal, was valid and the respondent Company had wrongly chosen to file its application under Section 9 of the Arbitration and Conciliation Act before the Bhavnagar Court (Gujarat) in violation of such agreement. The decisions of this Court in *A.B.C. Laminart (P) Ltd.* as also *Hakam Singh* are very clear on the point.”

(ii) ***Swastik Gases Private Limited v. Indian Oil Corporation Limited***, (2013) 9 SCC 32, paras 7, 28 and 57 reads as under:-

“7. We have heard Mr Uday Gupta, learned counsel for the appellant and Mr Sidharth Luthra, learned Additional Solicitor General for the Company. The learned Additional Solicitor General and the learned counsel for the appellant have cited many decisions of this Court in support of their respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:

17. Arbitration

If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/ difference(s) shall be referred to 2 (two) arbitrators, appointed one each by the parties and the arbitrators, so appointed shall be entitled to appoint a third arbitrator who shall act as a presiding arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof in force. The existence of any dispute(s)/ difference(s) or initiation/continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this agreement.

X X X X X

28. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub-section (1) of Section 2 defines “court” which means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary civil 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, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes.

X X X X X

Conclusion

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like “alone”, “only”, “exclusive” or “exclusive jurisdiction” is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the courts in Kolkata had jurisdiction to entertain the disputes between the parties.”

(iii) ***Jyothi Turbopower Services Pvt. Ltd., General Manager, Biswajit Nath v. Shenzhen Shandong Nuclear Power Construction Company Ltd., Deputy Project Manager, Liu Yan Zheng and Syndicate Bank, Branch Manager***, (2011) 3 Arb. LR 442 (AP), paras 17, 18, 30 and 31 reads as under:-

“17. Having regard to the contentions of the respective counsel, the points that arise for consideration in the present appeal are:

- 1) Whether the Court below has jurisdiction to entertain the present application filed by the appellant under Section 9 of the Act, for an interim measure, when the parties have designated the State of Orissa, as the place of arbitration?

2) Whether the Court below is justified in going into the merits of the matter and giving a finding that there is no prima facie case in favour the appellant, having held that it has no jurisdiction to entertain the present petition?

18. The learned counsel for the appellant submits that even a fraction of cause of action is enough and sufficient to decide the territorial jurisdiction of a Court for entertaining the petition under Section 9 of the Act. According to him, the registered office of the appellant company is situated at Hyderabad, the tender documents under Ex.A11 have been submitted from Hyderabad, agreement works are being monitored from Hyderabad and the bank guarantees have been drawn at the banks at Hyderabad, and thus cause of action having arisen within the jurisdiction of the Court below, in view of the provisions of Section 20 C.P.C., the Court below had the jurisdiction to entertain application under Section 9 of the Act. In support of this contention, he relied upon the decision of a Division Bench of this Court in *INCOMM Tele Ltd. v. Bharat Sanchar Nigam Ltd* (1 supra).

x x x x x

30. Though the learned counsel for the appellant contended that decisions of this Court in *Salarjung Museum* case and *Paramita Constructions* case, cannot be made applicable to the facts of the case on hand because the former dealt with an application filed under Section 34 of the Act, for setting aside the award passed by the Arbitrator, and the latter dealt with an application filed under Section 11 of the Act for appointment of Arbitrator, and not an application under Section 9 of the Act, but the fact remains, in the said two decisions, the Courts, though not directly, but incidentally, while considering the provisions of the law, held that when the parties have chosen a particular State/City, as the place of arbitration, the “Court” appearing in Sections 9 and 34

shall be the Courts situated in the said State/City alone, and not any other.

31. In the case on hand, as noted supra, the parties have specifically, in Article 10 of the agreement, have agreed to the place of arbitration as the State of Orissa. That being so, we are of the considered opinion that the appellant cannot be permitted to invoke the theory of cause of action by application of the provisions of the Code of Civil Procedure, so as to confer jurisdiction upon the Court at Hyderabad, for entertaining application under Section 9 of the Act, and if such argument of the appellant is accepted, then the very purpose of the parties agreeing to the place of arbitration as State of Orissa in Article 10 of the agreement, would be defeated.”

(iv) ***DLF Industries Ltd. v. ABN Amro Bank and Ors.***, 2000(55)

DRJ 470, para 19, which reads as under:-

“19. It is a fundamental principle well established and as held in *Karon Singh and Others v. Chaman Paswan and Others*, (1955) 1 SCR 117 that a decree passed by a Court without jurisdiction is a nullity. Its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. It was further held that a defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and as such a defect cannot be cured even by consent of parties. We may also refer to a few decision of High Courts that in such circumstances it will not be permissible to extend the order of injunction even for a moment, while ordering return of petitions with liberty to the petitioner to file, the same in appropriate Court of competent jurisdiction, after this Court has come to the conclusion that the petitions are not entertainable. The decisions are *In Re Chunduru*

Venkata Subrahmanvam, AIR 1955 AP 74; *Raunaq Int. Ltd. v. Mini Sea Foods*, 1983 RLR 202; *R. Venkataswami Naidu v. M/s. South India Viscose Ltd., Coimbatore*, AIR 1985 Madras 257 And *M/s. Subbhash Chander Kamlesh Kumar v. State Of Punjab And Others*, AIR 1990 P&H 259.”

(v) ***State of West Bengal and Ors. v. Associated Contractors.,***

(2015) 1 SCC 32, para 22 and 25 reads as under:-

“22. One more question that may arise under Section 42 is whether Section 42 would apply in cases where an application made in a court is found to be without jurisdiction. Under Section 31(4) of the old Act, it has been held in *F.C.I. v. A.M. Ahmed & Co.* [(2001) 10 SCC 532] , SCC at p. 532, para 6 and *Neycer India Ltd. v. GMB Ceramics Ltd.* [(2002) 9 SCC 489] , SCC at pp. 490-91, para 3 that Section 31(4) of the 1940 Act would not be applicable if it were found that an application was to be made before a court which had no jurisdiction. In *Jatinder Nath v. Chopra Land Developers (P) Ltd.* [(2007) 11 SCC 453] , SCC at p. 460, para 9 and *Rajasthan SEB v. Universal Petro Chemicals Ltd.* [(2009) 3 SCC 107 : (2009) 1 SCC (Civ) 770] , SCC at p. 116, paras 33 to 36 and *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [(2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , SCC at pp. 47-48, para 32, it was held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction as neither Section 31(4) nor Section 42 contains a non obstante clause wiping out a contrary agreement between the parties. It has thus been held that applications preferred to courts outside the exclusive court agreed to by parties would also be without jurisdiction.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in

a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly.”

28. It is also pertinent to mention that on one hand, it is the case of the petitioners that the proposed Settlement Agreement is a concluded and enforceable agreement on the basis of exchange of communications however, on the other hand it is admitted by the petitioners that the said alleged settlement agreement does not contain any arbitration clause and the petitioners also argued that the draft Settlement Agreement supersedes all previous agreements between the parties. Once the said stand is taken by the petitioners that it does not contain any arbitration clause how the petitioners can invoke the arbitration. Under those circumstances, only civil remedy is available to the petitioners in order to enforce the terms of alleged settlement agreement.

29. It is a matter of fact that for the sake of arguments assuming the stand taken by the petitioners is taken to be correct to the extent that the said settlement agreement constitutes a binding effect, still it shows that the said agreement does not contain an arbitration clause. Therefore, the petitioners cannot justify, how they seek to invoke the jurisdiction of this Court under Section 9 of the Act.

30. It is well settled that orders passed by a Court without jurisdiction are a nullity, and cannot be permitted to continue in law, as lack of jurisdiction strikes at the very authority of the court, and "it will not be permissible to extend the order of injunction even for a moment, while ordering return of

the petitions with liberty to the petitioner to file the same in the appropriate court of competent jurisdiction...". Reliance is placed on *DLF Industries* (supra).

31. Under these circumstances, this Court has no territorial jurisdiction to entertain the present petition. The petition is returned to the petitioners, to be presented before the appropriate Court which is competent and has jurisdiction. They are also at liberty to file the fresh petition, if necessary, in order to avoid any delay in the matter as nothing has been decided on merits. The Registry is directed to do the needful in this regard as per Rules. Pending applications also stand disposed of.

The contempt petition being CCP (O) 103/2015 is also disposed of in view of the fact that when the interim order was passed, this Court did not have the jurisdiction.

32. No costs.

33. Copy of the order be given *dasti* to both the parties under the signatures of Court Master.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 22, 2016