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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision:- 9th March, 2017

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CS(COMM) No.713/2016, IA No.2902/2017 (under Section 151 CPC), IA No.2903/2017 (for extension of time) and IA No.2904/2017 (of the defendant for condonation of delay).

SARENS HEAVY LIFT INDIA PVT LTD

..... Plaintiff

Through: Mr. Kunal Madan, Adv.

Versus

SUNIL HITECH ENGINEERS LTD & ORS

..... Defendants

Through: Mr. Ankur Mittal and Mr. Abhay Gupta, Advs. for D-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.2477/2017 (of defendant no.1 u/O VII R-10 CPC)

1. Today also none has appeared for the plaintiff.
2. Considering the past conduct of the plaintiff as recorded in the orders dated 27th February, 2017 and 2nd March, 2017, it is quite evident that the plaintiff/its counsel is not interested in pursuing the suit.
3. Though the learned Joint Registrar has vide order dated 6th March, 2017 posted certain applications also filed by the defendant no.1 on 12th April, 2017 but the same does not come in the way of dismissal of the suit with all pending applications in default of appearance of the plaintiff.
4. The suit as well as all pending applications are dismissed in default.
5. The dates of 12th April, 2017 and 11th July, 2017 before the Joint Registrar are cancelled.

RAJIV SAHAI ENDLAW, J.

MARCH 09, 2017

6. Subsequently, Mr. Kunal Madan, Advocate for the plaintiff has

mentioned the matter and was asked to call the Advocate for the defendant no.1 as well and the counsels have been heard on the application.

7. The plaintiff, with office at New Delhi, has instituted this suit against defendant No.1 Sunil Hi-tech Engineers Limited (SHEL) having its registered office at District Beed, Maharashtra and office at Nagpur, Maharashtra and against defendants No.2 to 13 namely (i) Sunil Ratnakar Gutte, (ii) Ratnakar Manikrao Gutte, (iii) Sodhamati Ratnakar Gutte, (iv) Vijay Ratnakar Gutte, (v) Dilip Yeshwant Ghanekar, (vi) Sonyabapu Shankar Waghmare, (vii) Parag Ashok Sakalikar, (viii) Sajid Imran Ali, (ix) Venkataramana Condoor, (x) Siddharth Ratilal Mehta, (xi) Anil Ramchandra Aurangabadkar and; (xii) Anupam Dhiman, all Directors of defendant No.1 SHEL and all at Mumbai or Nagpur or Pune or Bhopal or at Faridabad, for recover of Rs.2,66,84,382/- with *pendente lite* and future interest *inter alia* pleading:

- (i) that the plaintiff has been provided Crane, Heavy Lift, Trailers, Self-Propelled Modular Transporter (SPMT) and other equipments on rental basis as per orders placed by the defendant No.1 SHEL for the project “Abir Singhitarai (C.G.) Site” and the defendants were fully satisfied with the services of the plaintiff and placed more work orders on the plaintiff;
- (ii) that the defendants No.2 to 13 had also taken personal guarantee and undertaken that all bills / invoices shall be cleared within fifteen days of submission of bills / invoices;
- (iii) however, “the defendant company” has failed to clear outstanding dues and as per the running account maintained by the

plaintiff, a sum of Rs.2,21,32,820/- is overdue;

(iv) that log sheets were prepared which were duly signed and certified by the authorised representative of the defendant No.1 SHEL after completion of work from time to time and wherein the defendant No.1 SHEL had admitted the liability;

(v) that the amounts were not paid despite legal notices served before the institution of the suit.

8. The pleas relating to the territorial jurisdiction as contained in paras 21 & 22 of the plaint are as under:

“21. That the cause of action in favour of the Plaintiff and against the Defendant arose when the Defendant approached the plaintiff and subsequently Cranes were supplied to the Defendant by the Plaintiff from the office of the Plaintiff at Delhi. The cause of action in favour of the Plaintiff and against the Defendant further arose when defendant placed work order in Delhi. The cause of action in favour of the Plaintiff and against the Defendant further arose on each and every date when invoices were raised by the Plaintiff at its office in Delhi and the same were not paid by the Defendant. The cause of action in favour of the plaintiff further arose when the Defendant promised to clear all the outstanding dues but failed to make the payment. The cause of action in favour of the plaintiff further arose when the plaintiff issued legal notice dated 15/06/2015, 22/02/2016 & 17/03/2013. The cause of action is still subsisting and is continuing one.

22. That this Hon'ble Court has the jurisdiction to try and entertain the present suit as work order was placed by the defendant in Delhi. That the invoices was also raised in Delhi. That part payment has been received by the Plaintiff at Delhi and balance outstanding amount was also to be paid by the Defendant to the Plaintiff at Delhi. That the office of the Plaintiff is situated at Delhi. That the legal notices were issued by the Plaintiff to the Defendant at Delhi. Therefore, part of the

cause of action has arisen within the territorial jurisdiction of this Hon'ble Court, hence this Hon'ble Court has the territorial jurisdiction to entertain and try the present suit."

9. The suit, vide order dated 2nd June, 2016, was entertained qua defendant no.1 only and summons thereof ordered to be issued to defendant no.1 only. It was held that defendants no.2 to 13 as directors of defendant no.1 are not personally liable and hence no summons could be issued to them. The plaintiff has allowed the said order to attain finality. The defendant no.1 filed a written statement and this application for return of the plaint to the plaintiff for filing in the Court of appropriate territorial jurisdiction and alternatively for rejection of the plaint, pleading:

- (a) that from the perusal of the plaint and documents filed therewith, it is evident that the claims pertain to work sites of defendants located at Abir Singhitarai in Chhattisgarh and Kudgi in Karnataka;
- (b) that this Court has no jurisdiction to entertain the suit in view of the exclusion clause incorporated in all the work contracts between the parties which confer exclusive jurisdiction upon the Courts at Nagpur;
- (c) that no part of the alleged cause of action has arisen within the territorial jurisdiction of this Court;
- (d) that continuation of the proceedings in this Court may amount to severe injustice to the defendants;
- (e) that the plaintiff was aware of the aforesaid position and despite that has chosen to invoke the forum of this Court which shows that

the plaintiff's attempt is to vex the defendants and to abuse the machinery of this Court;

(f) that exclusion clause has been incorporated in all the four work orders that the defendant No.1 SHEL placed upon the plaintiff and which clause reads as under:

“Any disputes arising out of this contract shall be in Nagpur jurisdiction”

(g) reliance in the application itself is placed on ***Swastik Gases Private Limited Vs. Indian Oil Corporation Limited*** (2013) 9 SCC 32;

(h) that the plaintiff has agreed to this clause without any demur and has acted on the work orders by executing the same;

(i) that in view of this binding exclusion clause, the jurisdiction of any of this Court to entertain the suit stands ousted;

(j) that the parties have to be bound by the contract and all its terms agreed and accepted by them;

(k) that the plaintiff cannot be permitted to accept only such terms of the contract as it wishes and disregard the terms that it considers detrimental to its interest.

10. The contents of paras 21&22 of the plaint are denied *in toto* by the defendant no.1 in its written statement and it is expressly denied that the Cranes were supplied to the defendant no.1 by the plaintiff from the office of the plaintiff at Delhi or that the work order was placed in Delhi or that the invoices were raised in Delhi or that part payments were received by the

plaintiff at Delhi or that the alleged balance outstanding is payable by the defendant no.1 to the plaintiff at Delhi.

11. The aforesaid application came up before this Court first on 27th February, 2017 when inspite of advance copy stated to have been served, the counsel for the plaintiff did not appear. The counsel for the plaintiff did not appear thereafter on 2nd March, 2017 also and on being telephonically reminded, appeared and again sought adjournment, when the matter was adjourned to today.

12. As aforesaid, the counsels have been heard.

13. The arguments of the counsels revolved around the exclusion clause aforesaid in the work orders placed by the defendant No.1 SHEL on the plaintiff and outstanding dues whereagainst are claimed in this suit. It is thus not necessary to go into the fact whether any part of the cause of action accrued within the territorial jurisdiction of this Court. Even otherwise, in the light of the pleadings aforesaid, the question whether any part of cause of action accrued within the jurisdiction of this Court would be a disputed question of fact and law and will require evidence. I thus proceed to decide qua the exclusion clause aforesaid and the other arguments urged by the counsel for the plaintiff.

14. The counsel for the defendant no.1 drew attention to the four work orders placed by the defendant No.1 SHEL on the plaintiff at pages 6, 8, 10 & 12 of the plaintiff's documents.

15. The said work orders, on the letterhead of the defendant No.1 SHEL bearing the address of the registered office of the defendant No.1 SHEL at District Beed, Maharashtra and of the office of the defendant No.1 SHEL at

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Nagpur are placed on the plaintiff at its office address at Delhi. Each of the work orders is with reference to the quotation of the plaintiff and the subsequent discussions and for supply on hire basis of the equipment for the sites aforesaid at Chhattisgarh or Karnataka and mention the terms and conditions of hire. The said terms and conditions, besides the jurisdiction clause set out hereinabove, *inter alia* provide for (i) repair by the plaintiff “on job” in case of breakdown of equipment and hire charges to be paid for working period only; (ii) monthly payment to be released within fifteen days after submission of bill along with log sheet duly certified by the Site In-Charge of the defendant No.1 SHEL; (iii) hiring charges to commence from the time the equipment is assembled and ready for operation; (iv) the defendant No.1 SHEL providing the necessary documents / Way Bill to enable the equipment to enter Chhattisgarh; (v) the work order being issued by the defendant No.1 SHEL in duplicate with a request to the plaintiff to sign the duplicate copy as a token of its acceptance and send it back to the Head Office of the defendant No.1 SHEL at Nagpur; (vi) the address of the contact person of the defendant No.1 SHEL being of the site; (vii) staff and crews for operation of the equipment to be provided by the plaintiff and the accommodation and conveyance of such staffs and crew to be provided by the defendant No.1 SHEL; (viii) diesel for running the equipment to be provided by the defendant No.1 SHEL; (ix) the plaintiff to either replace the equipment supplied by it and not working properly or to suffer the costs incurred by the defendant No.1 SHEL for hiring other equipment.

16. It is not the case of the plaintiff that the aforesaid work orders were not accepted by the plaintiff or that there were any other terms and

conditions. Though the work orders refer to the quotation of the plaintiff but the plaintiff has not filed copy of quotation submitted by it. On the contrary, the plaintiff in the plaint has categorically pleaded having accepted the work orders and having performed the work thereunder.

17. The counsel for the defendants referred to ***Swastik Gases Private Limited*** supra laying down that the use of words ‘only’, ‘alone’, ‘exclusive’ or ‘exclusive jurisdiction’ is not necessary for exclusion clause to exclude jurisdiction of the Court and what is essential is the intention of the parties to the agreement.

18. Per contra, the counsel for the plaintiff referred to ***New Moga Transport Co. Vs. United India Insurance Co. Ltd.*** (2004) 4 SCC 677 laying down that the intention to exclude a Court’s jurisdiction should be reflected in clear, unambiguous, explicit and specific terms.

19. As far as the respective judgments cited by the counsels are concerned, it is not as if they contradict each other. Rather, ***New Moga Transport Co.*** supra cited by the counsel for the plaintiff was considered and applied in ***Swastik Gases Private Limited*** supra. Further, the concurring judgment of Hon’ble Justice **Madan B. Lokur** in ***Swastik Gases Private Limited*** supra records that except in ***A.B.C. Laminart (P) Ltd. Vs. A.P. Agencies*** (1989) 2 SCC 163 where the Supreme Court declined to exclude the jurisdiction of the Courts in Salem, in all other similar cases an inference was drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words “only”, “alone” or “exclusively” and the like. The reason therefor was held to be that the parties would not have included the

jurisdiction clause in their agreement were it not to carry any meaning at all and that the very fact that the jurisdiction clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the clause concerned. It was further held that if the parties had intended that all Courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the jurisdiction clause would not have found a place in the agreement between the parties.

20. Thus, the absence of the words “only”, “alone”, “exclusive jurisdiction” or “exclusively” in the clause “Any disputes arising out of this contract shall be in Nagpur jurisdiction” in the work orders placed by the defendant No.1 SHEL on the plaintiff is not indicative of the parties having not agreed to the exclusive jurisdiction of the courts in Nagpur. It is not argued by the counsel for the plaintiff that courts at Nagpur do not have jurisdiction and jurisdiction thereon cannot be conferred by agreement. Even otherwise, as aforesaid, the work orders duly accepted were to be returned by the plaintiff to defendant no.1 at Nagpur and Nagpur courts would have jurisdiction for this reason alone. Supreme Court, in ***Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas*** AIR 1966 SC 543 applied in ***Pacific Refractories Ltd. Vs. Stein Heurtey India Projects Pvt. Ltd.*** AIR 2006 Bom 231 held that even where the acceptance of an offer by post is authorised, the acceptance would be complete at the place where the communication of the acceptance is received, if the parties required the communication of acceptance to be intimated. The plaintiff also in the plaint, besides the address of registered office of the defendant no.1 at Beed,

Maharashtra, has also given the address of the defendant no.1 of Nagpur. The letterhead of the defendant no.1 in the reply dated 21st August, 2015 to the legal notice preceding the suit also describes the Nagpur office of defendant no.1 as “Head Office”. The courts at Nagpur would thus have jurisdiction under Section 20(a) of Code of Civil Procedure, 1908 (CPC) as well.

21. The only other argument raised by the counsel for the plaintiff is that the invoices raised by the plaintiff on the defendant No.1 SHEL and copies whereof have been filed by the plaintiff along with the plaint, carry amongst other notes, a note “all disputes will be subject to Delhi jurisdiction”.

22. Needless to state, the said invoices are of dates after the date of the work orders placed by the defendant No.1 SHEL on the plaintiff.

23. The question which arises for consideration is the effect of the clause aforesaid on invoices raised by the plaintiff on the defendant No.1 SHEL and part payment whereunder, according to the plaintiff has been made by the defendant No.1 SHEL.

24. In my view, the only effect of the clause aforesaid on the invoices claimed to have been raised by the plaintiff on the defendant No.1 SHEL can be of novation of the contract as to jurisdiction of Nagpur Court contained in the work orders.

25. However, for the plaintiff to succeed on novation, there has to be a plea of novation in the plaint and which does not exist. The plaintiff, though pleaded the work orders and filed copies thereof before this Court but neither highlighted in the plaint the clause therein of the jurisdiction of the Nagpur Court nor has pleaded that the said clause stood novated by a subsequent contract contained in the invoices raised by the plaintiff on the

defendant No.1 SHEL of the jurisdiction of Delhi Courts. The plaintiff, while pleading as to how this Court has territorial jurisdiction also has not pleaded that the parties in supersession of the agreement contained in the work orders, of the jurisdiction of the Courts at Nagpur, had agreed to the jurisdiction of Courts at Delhi.

26. I may incidentally also notice that even the clause on the invoices does not contain the words “only”, “alone”, “exclusive jurisdiction” or “exclusively”.

27. In the absence of any plea of the plaintiff of novation, the plaintiff cannot be heard to contend that the agreement between the parties as contained in the work orders was varied or modified or changed. Supreme Court, in ***Babu Ram Alias Durga Prasad Vs. Indra Pal Singh*** (1998) 6 SCC 358 held that Novation under Section 62 of the Contract Act, 1872, requires a clear plea. Similarly in ***Shakti Tubes Ltd. Vs. State of Bihar*** (2009) 7 SCC 673 it was held that a factual foundation has to be laid for a plea of novation.

28. In the absence of any such variation / change, a printed clause on the invoices of the plaintiff raised in pursuance to a work order containing the terms and conditions, cannot change the express agreement arrived at after negotiation between the parties as to the Court which will have jurisdiction in the event of disputes. Such a printed standard form clause on the invoices of the plaintiff even otherwise is a unilateral act of the plaintiff and does not constitute an agreement.

29. Thus, notwithstanding the clause aforesaid on the invoices raised by the plaintiff on the defendant No.1 SHEL, the plaintiff remains bound with

the agreement as to jurisdiction of Nagpur Courts contained in the work orders.

30. The application thus succeeds and is allowed and disposed of.

CS(COMM) No.713/2016, IA No.2902/2017 (under Section 151 CPC), IA No.2903/2017 (for extension of time) and IA No.2904/2017 (of the defendant for condonation of delay)

31. As a consequence of IA No.2477/2017 succeeding, this Court has no territorial jurisdiction to entertain the suit. The plaint be returned to the plaintiff for filing in the Court of appropriate territorial jurisdiction.

32. The plaintiff is also found to have instituted the suit in this Court concealing the agreement of jurisdiction of the Courts at Nagpur and with full knowledge of this Court not having territorial jurisdiction and in abuse of the process of the Court and is burdened with costs of Rs.25,000/- payable to the defendant No.1 SHEL within four weeks hereof and whereafter the costs imposed shall incur interest @ 9% per annum.

RAJIV SAHAI ENDLAW, J.

MARCH 09, 2017

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(corrected and released on 3rd May, 2017).