

THE HON'BLE SRI JUSTICE A. RAJASHEKAR REDDY

W.P.NO.1352 OF 2019

O R D E R

This writ petition is filed for the following relief:

"To declare the action of the 2<sup>nd</sup> respondent in not adhering to the terms of its letter in Ref.No.BCCL/BAR/2018/562 dated 21.07.2018 by agreeing for deviations to execute the contract dated 10.05.2016 with the re-assessed quantity of coal and Jhama and in insisting the petitioner to execute the work through letter dated 08.01.2019 in Ref.No.BCCL/BAR/2019/31, with the threat of imposing penalties as per the NIT, as illegal arbitrary and unconstitutional and to issue a consequential direction to the 2<sup>nd</sup> respondent not to resort to any coercive measures against the petitioner including invocation and encashment of the bank guarantee bearing No.2102415BG0001092 dated 07.07.2015, issued by the 1<sup>st</sup> respondent, which is valid up to 09.10.2019, and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. In the affidavit filed in support of the writ petition it is stated that in pursuance of the tender notification dated 09.03.2015 issued by the 2<sup>nd</sup> respondent – Bharat Coking Coal Ltd., a Government of India Undertaking and a subsidiary of Coal India Ltd., (for short 'NIT'), for extraction and transportation of coal with fire fighting in Joyrampur Colliery, Lodna Area, the technical specifications for execution of work, which are mentioned in the tender document, the petitioner, which is a company engaged in the business of mining and construction, participated and remained successful, and accordingly, vide letter of the 2<sup>nd</sup> respondent dated 13.06.2015 Letter of Allotment (LOA) was given, and the petitioner complied with all the conditions mentioned in the LOA, and also furnished bank guarantee for Rs.26,21,63,003/- through the 1<sup>st</sup> respondent – Bank bearing No.2102415BG0001092 dated 07.07.2015. The said bank guarantee was valid for a period of three years till 05.10.2018, and it was

later renewed, making it valid up to 09.10.2019. The contract agreement was entered into on 10.05.2016, and thereafter petitioner commenced execution of work.

3. The case of the petitioner is that due to reasons like non-allotment of required extent of land by evacuating the villagers, non-payment of amount towards the work executed, non-obtaining statutory permissions, and due to false information about the extent of reserves of coal available at the site, the execution of work has become difficult for the petitioner, but in spite of the same, the petitioner has been executing the work.

4. The further case of the petitioner is that the 2<sup>nd</sup> respondent vide letter dated 20.07.2017 informed the petitioner that the applications of the 2<sup>nd</sup> respondent for revalidation of permission/relaxation is under process before the Director General of Mines Safety, Dhanbad and it will take some time and hence the petitioner shall not operate the mine till further orders. Thereafter, after obtaining permission by the 2<sup>nd</sup> respondent, petitioner could start execution of work within the limited areas allotted to it. The 2<sup>nd</sup> respondent vide letter dated 21.07.2018 informed the petitioner that though they have estimated the coal reserves to be of 27.403 million tonnes, it is now estimated by the Central Mine Planning and Design Institution (CMPDIL), that the actual reserves are only 12.98 million tones, and similarly the reserves of Jhama were estimated at 3.99 LMT earlier, but

now it is found to be of only 2.6 Lmt. In view of the said variations in the reserves of the coal and Jhama by the CMPDIL, and corresponding increase in overburden, the petitioner was asked to give consent for the deviation within one week, to enable the execution of the contract with the re-assessed quantity, and the petitioner vide its reply dated 26.07.2018 has given its consent for the deviations, subject to certain conditions viz., release of pending bills, discontinuation of linkage between release of payment and stripping ratio, regarding withholding of 20% payment, handing over of entire land for excavation and dump area in order to meet targets and supply of sufficient blast material to enable to meet the targets by obtaining exemption / permission on restriction of blasting from DGMS, and further the petitioner also pointed out the difficulties faced by it, in executing the contract so far, on account of the failure of the 2<sup>nd</sup> respondent to comply with its responsibilities. The case of the petitioner is that the said issues were not addressed, and the Project Officer of the 2<sup>nd</sup> respondent vide letter in Ref.No.BCCL/BAR/2019/31 dated 08.01.2019 informed the petitioner that all statutory requirements are of its concern and the petitioner was never asked to stop working for want of statutory permissions. It is further informed that so far as the deviations are concerned, it is the discretion of the management and merely taking a consent from the petitioner does not make it compulsory to the management to approve / enforce the deviation proposals and

accordingly, the petitioner was advised to start the work at the earliest, failing which, it is informed that the penalties as per the terms of the NIT will be imposed. It is stated that as there is vast variation between the reserves estimated while awarding the contract and the actual reserves available and for other difficulties pleaded above, the execution of work has become difficult for the petitioner. In the writ affidavit, the petitioner has referred to the exchange of correspondent with the 2<sup>nd</sup> respondent to justify the reasons for stopping the execution of work. Aggrieved by the communication dated 08.01.2019, and for a direction to the 2<sup>nd</sup> respondent not to resort to any coercive measures against the petitioner including invocation and encashment of bank guarantee issued by the 1<sup>st</sup> respondent, the present writ petition is filed.

5. This court on 28.01.2019 granted interim direction for a limited period, directing the 2<sup>nd</sup> respondent not to take any coercive measures in pursuance of the impugned letter dated 08.01.2019 including invocation and encashment of bank guarantee and thereafter, the said interim order was extended from time to time.

6. The 2<sup>nd</sup> respondent filed counter affidavit, and while denying the averments made in the writ affidavit, objection is raised with regard to maintainability of the writ petition on the ground that no cause of action arose within the territorial jurisdiction of this court. It is stated that tender was issued from Head Office of the 2<sup>nd</sup> respondent at Dhanbad, Jharkand

and the petitioner also submitted its tender document at Dhanbad only. The terms and conditions of the contract were also settled at Dhanbad, Jharkhand only. Clause 26 of the instructions to bidders, manifest that all the disputes arising out of the bid and subsequent contract awarded based on the bid, shall be subject to jurisdiction of the courts situate at Dhanbad only. Therefore, the petitioner is not entitled to invoke the jurisdiction of this court, and that High Court for the State of Jharkhand at Ranchi alone, has jurisdiction to entertain the dispute of the petitioner. It is stated that earlier when the petitioner was issued with letter dated 17.01.2018, proposing to initiate action against the petitioner for termination of contract, and for invocation of bank guarantee, it filed W.P ( C ) No.423 of 2018 on the file High Court for the State of Jharkhand at Ranchi, and the said writ petition was disposed of directing the 2<sup>nd</sup> respondent herein, to consider the reply of the petitioner and pass appropriate orders in accordance with law, and till then no coercive steps shall be taken. It is stated that till date no orders were passed on the reply of the petitioner, but in spite of the same, petitioner chose to file present writ petition before this court. It is stated that petitioner has not stated in the writ affidavit about filing of writ petition before the High Court for the State of Jharkhand at Ranchi, and on the ground of suppression of material fact, the writ petition is liable to be dismissed.

7. It is further stated that Clause 14 of the General Terms and Conditions of Contract provide for in-house dispute resolution mechanism and without first availing the same, the petitioner has straightaway approached this court and on this ground also, the writ petition is liable to be dismissed.

8. It is stated that the petitioner failed to perform its part of contract as per the terms and condition of agreement, and hence the 2<sup>nd</sup> respondent is entitled to invoke the bank guarantee. It is an established position of law that the respondent No.1 cannot be prevented by the petitioner from performing its part of contract under the bank guarantee, as the 1<sup>st</sup> respondent issued the bank guarantee empowering the beneficiary i.e., the 2<sup>nd</sup> respondent, to invoke the bank guarantee within the validity period and the respondent No.1 is also obligated to make the payment without any demur or objection and the Bank cannot take into consideration the dispute between the petitioner and the 2<sup>nd</sup> respondent.

9. In the counter affidavit, the 2<sup>nd</sup> respondent sought to point out the lapses on the part of the petitioner in executing the work and it is stated that due to said lapses, the 2<sup>nd</sup> respondent resorted to invocation of bank guarantee.

10. As these lapses pointed out by the 2<sup>nd</sup> respondent, are disputed by the petitioner, and they are in the nature of disputed questions of fact,

which cannot be gone into under the writ jurisdiction, the said averments are not being reproduced.

11. With the above averments in the counter affidavit, the writ petition is sought to be dismissed.

12. No counter affidavit is filed on behalf of 1<sup>st</sup> respondent – Bank.

13. Petitioner filed reply affidavit.

14. Sri Vedula Sinivas, learned counsel appearing for the petitioner, while reiterating the averments made in the writ affidavit submits that for the reasons like non-allotment of the required extent of land by evacuating the villagers, non-payment of amount towards the works executed, non-obtaining statutory permissions and misleading the petitioner about the extent of reserves of coal available at the site, the execution of work has become impossible for the petitioner, thus the contract stood frustrated because of the above acts of the 2<sup>nd</sup> respondent, and hence the petitioner cannot be faulted for not executing the contract work. When the contract is frustrated because of the acts on the part of the 2<sup>nd</sup> respondent, the said authority is not entitled to invoke the back guarantee, and if the said authority is allowed to invoke, it amounts to irreparable and irretrievable loss to the petitioner. Learned counsel submits that the 1<sup>st</sup> respondent, which furnished the bank guarantee, is situated at Secunderabad, within the territorial jurisdiction of the High Court of Telangana, and as the 2<sup>nd</sup> respondent is seeking to

invoke the said bank guarantee, it is clear that part of cause action arose within the territorial jurisdiction of this High Court, and in view of provisions under Section 20 of C.P.C. read with Article 226(2) of the Constitution of India, this court has territorial jurisdiction to entertain the writ petition and in view of the arbitrary action of the 2<sup>nd</sup> respondent, the clauses in the agreement cannot curtail the jurisdiction of this court. In support of this contention, learned counsel relied on the judgment of the Apex Court in *CEMENT WORKERS' MANDAL v. GLOBAL CEMENTS LTD*<sup>1</sup> and also the judgment of a learned single Judge of this court in *M/S HES INFRA PVT LTD. vs. THE DEPUTY GENERAL MANAGER, BANK OF INDIA*<sup>2</sup>

15. With regard to filing of writ petition before the High Court of Jharkhand is concerned, learned counsel submits that though the said High Court vide order dated 31.01.2018, directed to consider the representation of the petitioner and pass appropriate orders in accordance with law, and till then not to take any coercive steps; the 2<sup>nd</sup> respondent vide letter dated 08.01.2019 directed the petitioner to commence the work and in case of default, threatened the petitioner with penalties under the agreement, and as the invocation of the bank guarantee would result in irreparable loss to the petitioner, it has filed the present writ petition and hence, in view of the subsequent action of the respondents in issuing letter dated 08.01.2019, it cannot be said that the

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<sup>1</sup> AIR 2019 SC 1163

<sup>2</sup> W.P.NO.35624 OF 2013 DATED 05.06.2014

petitioner has suppressed material facts and moreover, the non-disclosure of the fact with regard to filing of the earlier writ petition would not affect the right of the petitioner in filing the present writ petition, which is for a subsequent cause of action.

16. With the above submissions, learned counsel for the petitioner seeks for a direction to the 2<sup>nd</sup> respondent not to invoke the bank guarantee furnished by the petitioner.

17. On the other hand Si Deepak Bhattacharyajee, learned Senior Counsel appearing for 2<sup>nd</sup> respondent, submits that the dispute with regard to invocation of bank guarantee arises out of the contract entered into between the parties. He submits that as per Clause No.26 of the instructions to bidders, it is clear that all the disputes arising out of the bid and subsequent contract awarded based on such bid, shall be subject to jurisdiction of the courts situated at Dhanbad. Learned Senior Counsel submits that the petitioner, failed to execute the work as per the terms of agreement, therefore, the 2<sup>nd</sup> respondent resorted for invocation of bank guarantee, as per the terms and conditions of agreement. If the petitioner is disputing the same, as per clause No.26, it ought to have invoked the jurisdiction of the courts at Dhanbad, but it cannot file writ petition before this court, because the parties have specifically agreed that the courts at Dhandbad will have jurisdiction to decide the disputes arising out of the contract. In support of the contention that petitioner has to invoke the

jurisdiction of the court at Dhanbad as per the terms of the agreement, learned Senior Counsel relied on the judgment of the Apex Court in *SWASTIK GASES (P) LTD v. INDIAN OIL CORPN. LTD*<sup>3</sup>. Learned Senior Counsel submits that following this judgment (3 supra), the Apex Court in the later decision in *B.E.SIMOESE VON STARABURG NIEDENTHAL v. CHHATTISGARH INVESTMENTS LTD*<sup>4</sup>, also expressed similar view.

18. Learned Senior Counsel submits that in fact, when the 2<sup>nd</sup> respondent sought to terminate the contract and invoke the bank guarantee vide its letter dated 17.01.2018, the petitioner had earlier filed W.P. ( C ).No.423 of 2018 on the file of High Court for the State of Jharkhand at Ranchi and vide order dated 31.01.2018, the said High Court disposed of the writ petition directing the respondents to consider the explanation of the petitioner and pass appropriate orders in accordance with law, and till then, the 2<sup>nd</sup> respondent was directed not to take any coercive steps. He submits that no decision is taken till date and the interest of the writ petitioner is protected, but in spite of the same, petitioner has chosen to file the present writ petition.

19. Learned Senior Counsel submits that the petitioner has not disclosed the fact of filing earlier writ petition before the High Court for the State of Jharkhand in the writ affidavit, and on the ground of suppression of material fact, the writ petition is liable to be dismissed.

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<sup>3</sup> (2013) 9 SCC 32

<sup>4</sup> (2015) 12 SCC 225

20. Learned Senior Counsel submits that bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature and that existence of any dispute between the parties to the contract, is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letter of credit. In support of this contention, learned Senior Counsel relied on the judgments of the Apex Court in *HIMADRI CHEMICALS INDUSTRIES LTD. v. COAL TAR REFINING CO*<sup>5</sup> and *GUJARAT MARITIME BOARD v. LARSEN & TOUBRO INFRASTRUCTURE DEVELOPMENT PROJECTS LTD.*,<sup>6</sup>. With these submissions, learned Senior Counsel sought to dismiss the writ petition.

21. In view of the above rival contentions, the following issues would emerge for consideration:

1. In the light of agreement between the parties that the disputes shall be subject to the jurisdiction of Dhanbad court only, whether this court has territorial jurisdiction to entertain the writ petition with regard to dispute concerning invocation of bank guarantee?
2. Whether the writ petition is liable to be dismissed on the ground of non-closure of filing earlier writ petition before the High Court for the State of Jharkhand at Ranchi for the similar relief?
3. Whether the writ petition against invocation of bank guarantee is maintainable?

22. No doubt, as contended by learned counsel for petitioner, part of cause of action in this writ petition arises within the territorial jurisdiction of this court, as bank guarantee is executed at Secunderabad and

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<sup>5</sup> (2007)8 SCC 110

<sup>6</sup> (2016)10 SCC 46

1<sup>st</sup> respondent – Bank is situated at Secunderabad, but by virtue of clause No.26.1 in the instructions to bidders, and clause in bank guarantee, the parties have agreed for the jurisdiction of court at Dhanbad. The instructions to bidders, were issued in tender notification, and as per Clause 14 of the tender notification, they form part of contract agreement. Clause 26.1 of the instructions to the bidder, is extracted as under for ready reference:

26. Legal jurisdiction:

26.1: Matters relating to any dispute or difference arising out of this bid and subsequent contract awarded based on the bid shall be subject to the jurisdiction of Dhanbad Court only.”

23. Thus, for resolution of any dispute, the parties have agreed to the jurisdiction of the court at Dhanbad.

24. Further in the bank guarantee furnished by the petitioner, also it is specifically mentioned that “*Under jurisdiction of Dhanbad Court only*”.

25. When the intention of the parties is clear that the court at Dhanbad will have jurisdiction to resolve the disputes arising out of the contract, this court lacks territorial jurisdiction to entertain the writ petition.

26. In similar facts and circumstances, the Apex Court in *Swastik Gases case* (3 supra) held as under:

“31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under [Section 11](#). Having regard to [Section 11\(12\)\(b\)](#) and [Section 2\(e\)](#) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The

question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement - is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by [Section 23](#) of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend [Section 28](#) of the Contract Act in any manner."

27. From the above judgment it is clear that when the intention of the parties in a particular clause in the agreement is clear and unambiguous that the courts at a particular place shall have jurisdiction, which means that the courts at that place alone shall have jurisdiction by virtue of the construction of jurisdiction clause, and the maxim *expressio unius est exclusio alterius* comes into play. This maxim means that expression of one, is the exclusion of another. Where the contract specifies the jurisdiction of the courts at a particular place, and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts.

28. Following the above judgment, the Apex Court in the subsequent judgment in *B.E. Smoese Von Staraburg Niedenthal v. Chhattisgarh Investments Ltd.* (4 supra), expressed the very same view.

29. Further, when the 2<sup>nd</sup> respondent sought to revoke the contract and invoke the bank guarantee vide letter dated 17.01.2018, petitioner filed W.P.( C ). No.423 of 2018 on the file of High Court of Jharkhand at Ranchi and the said writ petition was disposed off on 31.01.2018. The relevant portion of the order is extracted as under:

“3. The present writ petition has been filed for quashing the letter dated 17<sup>th</sup> January, 2018 issued under the signature of the respondent No.2 (Annexure-13) to the writ petition) whereby the actions were proposed to be taken against the petitioner, including termination of the contract as well as invocation of bank guarantee submitted by it. Further prayer has been made for restraining the respondents from taking any action as contemplated vide letter dated 17<sup>th</sup> January, 2018.

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7. Since the petitioner has approached this court against issuance of notice, as contained in letter dated 17<sup>th</sup> January, 2018, the writ petition is not maintainable at this stage.

8. However, since the petitioner has already filed its reply in response to the notice dated 17<sup>th</sup> January, 2018, this Court directs the respondent No.2 to consider the said reply submitted by the petitioner and pass appropriate order in accordance with law. Till any final decision is taken by the respondent No.2, no coercive action shall be taken against the petitioner with respect to the contract in question.”

30. When the petitioner, in all its prudence, and in consonance with the terms of the tender document, filed writ petition before the High Court of Jharkhand against revocation of contract and invocation of bank guarantee, it is not justified on its part in filing the present writ petition before this court, when the 2<sup>nd</sup> respondent issued the impugned letter requiring the petitioner to start the work with a default clause. This conduct of the petitioner, in choosing different High Courts for similar cause of action, despite the clause in the agreement with regard to jurisdiction, amounts to forum shopping, and abuse of process of law.

31. In view of the law laid down by Apex Court in the Swastik Gases case (supra) and in view of the Clause 26.1 in the instructions to bidder and clause in bank guarantee with regard to territorial jurisdiction, and the petitioner has already invoked the jurisdiction of the High Court of Jharkhad for the similar relief, this court lacks territorial jurisdiction to entertain the writ petition, and accordingly issue No.1 is answered.

32. Since this court lacks jurisdiction, the second and third issues framed above, are not being dealt with, and they are left open for adjudication in appropriate forum.

33. Coming to the judgment relied on by the learned counsel for the petitioner in Cement Workers case (1 supra), it could be seen that the Apex Court held that when part of cause of action arising within the territorial jurisdiction of a High Court to claim relief pertaining to dispute, the same cannot be dismissed for want of jurisdiction in view of Section 20 of CPC read with Article 226(2) of the Constitution of India. The law laid down by Apex Court is unexceptionable, but cannot be made applicable to the facts of the present case, since in the said judgment, there is no agreement between the parties that a particular court shall have jurisdiction to decide the dispute between them. In the present case, as discussed above, the parties, under the agreement, have agreed for the jurisdiction at Dhanbad Court. Hence, this judgment of Apex Court cannot be made applicable to the facts of the present case in all fours.

34. The facts in M/s HES Infra Pvt. Ltd., (2 supra), disclose that in the agreement entered into between the parties therein, they have agreed that court at Gujarat shall have jurisdiction, but in the bank guarantee furnished by the contractor, there is a specific clause which obligates that the bank guarantee shall be performed and discharged at Hyderabad and the court located there shall have jurisdiction for all the matters covered under and/or arising out of this guarantee. When there is dispute between the parties, and the 4<sup>th</sup> respondent therein, which awarded the contract to the petitioner, revoked the contract and sought to invoke bank guarantee, the petitioner filed writ petition before this court aggrieved by invocation of bank guarantee. The 4<sup>th</sup> respondent raised objection with regard to maintainability of writ petition. The learned single judge relying on the clause in the bank guarantee, held that it cannot be said that jurisdiction of this court is ousted.

35. But the facts of the present case are different. In the contract agreement, the parties herein have agreed for the jurisdiction of the court at Dhanbad and even in the bank guarantee, there is a specific clause which states “under jurisdiction of Dhanbad Court only.”

36. In view of the facts and circumstances of the present case, the above judgment of the learned single Judge of this court (2 supra), relied

on by the learned counsel for the petitioner to contend that this court has jurisdiction, is not applicable.

37. For the foregoing reasons, the writ petition is dismissed only on the ground of lack of territorial jurisdiction, and all other issues are left open for being agitated in appropriate forum.

38. Interlocutory applications pending, if any, shall stand closed.  
No order as to costs.

39. At this stage, learned counsel for the petitioner submits that petitioner intends to approach the High Court for the State of Jharkhand at Ranchi and hence the interim order may be extended.

40. Having regard to the facts and circumstances of the case and the above submission of the learned counsel for the petitioner, interim order granted by this court on 28.01.2019, is extended for a period of four weeks from today, enabling the petitioner to approach the High Court having jurisdiction.

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A.RAJASHEKER REDDY,J

DATE: 08--11—2019

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