HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through video conferencing)

CR No.8/2020
CM No.297/2020

Reserved on : 25.09.2020
Pronounced on:28.09.2020

IRCON International Limited ...Petitioner(s)

Through:- Mr. Harshwardhan Gupta, Advocate

V/s

Beigh Construction Company Private Limited ...Respondent(s)

Through:- Mr. Kaushil Laik, Advocate with
Mr. Bari Abdullah, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The instant revision petition by the IRCON International Limited [**"the petitioner"**] is directed against the order dated 30.11.2019 passed by the Court of learned 2nd Additional District Judge, Jammu [**"the appellate Court"**] in case No.83/Appeal entitled Beigh Construction Company Pvt. Limited v. IRCON International Limited, whereby the appellate Court has reversed the order of learned 1st Civil Subordinate Judge (Municipal Magistrate), Jammu [**"the trial Court"**] dated 16.09.2019, whereby the plaint of the respondent has been returned in terms of Order-7 Rule 10 of the Code of Civil Procedure.

2. Before adverting to the grounds of challenge urged in this petition, it would be necessary to allude to few facts relevant for the resolution of the controversy involved in this petition.

3. The petitioner is a public sector undertaking, working under the aegis of the Ministry of Railways, Government of India, New Delhi and has its registered office at Plot No.C-4 District Centre, Saket, New Delhi. The petitioner is carrying out various developmental activities, more specifically, pertaining to the laying of new railway lines. In the course of its working, the petitioner, with a view to carrying on the construction of Tunnel- 77D (KM 146.60 to 148.3 approx) on Katra-Banihal Section of Udhampur-Srinagar-Baramulla New BG Railway Line Project in the Union Territory of Jammu & Kashmir for the Ministry of Railways, invited tenders vide NIT No. IRCON/J&K CELL/JAT/1014/K-B/T77D/341 dated 18-02-2016. The tender notice clearly delineated detailed terms and conditions subject to which the contract was to be awarded. The respondent, being one of the participants in the tendering process, was found to be the successful bidder and was awarded contract on 25.07.2016. The Letter of Intent issued to the respondent was thereafter followed by execution of documents including formal contract agreement dated 17.04.2017. As is apparent from the documents, the NIT was issued, the tendering process was completed and the contract agreement was signed by both the parties at New Delhi.

4. As is gatherable from the record, a complaint was received by the petitioner from one Sh. Sudhanshu Aggarwal alleging therein that while bidding for the contract, the respondent had submitted forged balance sheet of “AIMPL BCC JV”. The said complaint after being duly notified to the respondent and seeking his explanation to the allegations raised against him was subjected to a thorough investigation by the vigilance department of the petitioner. During investigation, it was found that the turnover figures of

AIMPL BCC JV for the financial years 2013-14 and 2014-15 were forged. Similarly, with regard to the respondent, the turnover figures reflected for the financial year 2015-16 were also found to have been forged by the respondent. There was forgery detected even with regard to some other documents uploaded by the respondents at the time of submission of its bid. The findings of the vigilance department of the petitioner were notified to the respondent and it was called upon to submit its explanation making it clear that in case of its failure to submit proper explanation, an action, as envisaged under Clause 26.1 of the Instructions to Tenderer of Contract agreement i.e. termination of contract and forfeiture of EMD, PBG and security deposit made against the contract, shall be taken and the respondent shall be further disqualified from participation in future tenders of the petitioner for a period of two years. It further comes out from the record that the respondents instead of tendering explanation to the aforesaid notice dated 02.04.2019 filed a civil suit against the petitioner before the trial Court on 09.04.2019 praying, *inter alia*, for a decree of declaration to the effect that the financial statements/balance sheets submitted and relied upon by the respondent during the bidding process were genuine and dully authenticated by the certified Charted Accountant. A further decree was prayed for restraining the petitioner from terminating the contract or forfeiting its EMD, PBG and security deposit etc.

5. The trial Court, while entertaining the suit and issuing notice to the petitioner, passed an ad interim ex-parte order on 09.04.2019 keeping the impugned notice dated 02.04.2019 in abeyance and temporarily restraining the petitioner from taking any coercive step against the

respondent including debarring it from participating in future tenders floated by the petitioner. On receipt of notice, the petitioner through its counsel caused appearance before the trial Court and filed an application purportedly under Section 8 of the J&K Arbitration and Conciliation Act seeking dismissal of the suit, *inter alia*, on the ground that in view of the exclusion clause contained in the contract agreement, jurisdiction of all Courts except the Courts at New Delhi was ousted. Alternatively, the petitioner also sought the return of the plaint to the respondent under Order-7 Rule 10 CPC. Reliance was placed on Clause 60.13 of Special Conditions of contract and Clause 7 of the Integrity Pact etc to substantiate the plea raised in the application.

6. The trial Court, as it appears from its order, agreed with the submission of the learned counsel for the petitioner and returned the plaint to the respondent for its presentation before the proper Court in terms of Order-7 Rule 10 CPC. Feeling dissatisfied and aggrieved, the respondent preferred an appeal before the appellate Court. The appellate Court vide order impugned reversed the order of the trial Court and held that with respect to the excepted matters in the contract, jurisdiction of the trial Court was not ousted and the respondent was free to file suit in any Court within whose jurisdiction cause of action or part of cause of action had accrued. The order of the trial Court was, thus, set aside and the trial Court was directed to proceed in the matter.

7. The petitioner is aggrieved and has assailed the impugned order by way of this revision petition on the ground that the appellate Court has totally misconstrued the terms and conditions of the contract. It is submitted

that the trial Court failed to take note of Clause 19.0 of the notice inviting tenders (NIT) whereby the jurisdiction of all Courts except the Courts in Delhi has been specifically ousted in relation to all disputes arising out of the contract. It is argued that the interpretation of the appellate Court of Clause 19.0 of the NIT is totally perverse, in that, it interprets Clause 19.0 of the NIT to mean that the jurisdiction of all the Courts except the Courts in Delhi has been ousted only with respect to the disputes which would arise after the issuance of NIT and before signing of the contract agreement.

8. Mr. Harshwardhn Gupta, learned counsel appearing for the petitioner, relying upon several judgments of the Supreme Court argues that it is well settled in law that, if in a given case more than one Court has the jurisdiction to entertain a suit pertaining to contract, it is always open to the parties to contract that jurisdiction of all Courts except one shall be ousted. He, however, submits that in the instant case the cause of action shall be deemed to have accrued both within the jurisdiction of the Courts at Delhi where the contract agreement was executed and also where the contract work is being executed. And, therefore, by operation of exclusion Clause, jurisdiction of all other Courts except the Courts in Delhi shall be deemed to have been ousted by a contract between the parties. The suit filed before the trial Court was, thus, without jurisdiction and rightly returned by the trial Court. He attacks the judgment of the appellate Court on the ground that the appellate Court has totally misconstrued and mis-understood the relevant clauses of the NIT, the special conditions of the contract and formal contract agreement signed by the parties and has upset the order of the trial Court erroneously.

9. *Per contra*, Mr. Kaushik Laik, along with Mr. Bari Abdullah, learned counsel appearing for the respondent, opposes the revision petition, *inter alia*, on the ground that the order impugned does not suffer from any patent illegality nor does it result in any miscarriage of justice, as such, same is not amenable to challenge in the revisional jurisdiction of this Court.

10. On merits, it is contended that Clause 19.0 of the NIT cannot be pressed into service to oust the jurisdiction of the Courts in Jammu for the reason that the same was intended for and pertained to the resolution of disputes that would arise between the parties with respect to the tender notice. It is urged that Clause 19.0 came to be effaced with the signing of the formal contract agreement between the parties and it was Clause 60.13 of the Special Conditions of the Contract, which was the only exclusion clause contained in the contract agreement and binding on both the parties.

11. Buying into the reasoning of the appellate Court, learned counsel for the respondent submits that Clause 60.13 is species and Clause 60.0 is its genus and, therefore, Clause 60.13 is to be construed as such. He argues that it is true that jurisdiction of the Courts other than the Courts at New Delhi with respect to the disputes resolution has been ousted in terms of Clause 60.13 but said Clause would operate and would be applicable only with respect to the disputes which are arbitrable under Clause 60 of the Special Terms and Conditions of the contract. Termination of contract being an excepted matter cannot be made subject matter of arbitration and, therefore, the ouster of jurisdiction clause which, on the face of it, applies to arbitrable disputes would not be attracted and this way the respondent would be free to sue the petitioner either in the Court of competent jurisdiction at

Delhi or in the Court of competent jurisdiction in Jammu. He, therefore, submits that the suit filed by the respondent before the trial Court at Jammu is within jurisdiction and the trial Court was not correct in returning the plaint under Orer-7 Rule 10 CPC.

12. Having heard learned counsel for the parties and perused the record, I find enough substance in the arguments of learned counsel for the petitioner.

13. The short question which arises for determination in this revision petition is; ***"whether in view of various clauses of contract entered into between the parties, the jurisdiction of all Courts except the Courts at Delhi is ousted over the respect to 'excepted matters' in the contract?"***

14. If answer to this question is in the affirmative, then the trial Court is absolutely correct in taking the view, it has taken, and returning the plaint to the respondent in terms of Order-7 Rule 10 CPC. However, if answer to the question is in the negative, then the view taken by the appellate Court deserves to be upheld and the suit is to be held within jurisdiction of the trial Court.

15. With a view to appreciate the question aforesaid in the light of the rival contentions of the parties, it is necessary to refer to and set out, wherever necessary, relevant clauses of the contract governing the parties.

16. The process for awarding of contract for the above noted work was set in motion by the petitioner by issuing NIT dated 18.02.2016. Apart from laying down the estimated cost of the project, earnest money and completion period etc., it also laid down the eligibility criteria for

participating in the tendering process. Clauses 10.0, 16.0 and 19.0 are relevant and are reproduced hereunder:-

> "10.0. Tenderer/s may note that they are liable to be disqualified **at any time during tendering process** in case any of the information furnished by them is not found to be true. EMD of such tenderer/s shall be forfeited. The decision of IRCON in this regard shall be final and binding on tenderer/s."
>
> ……
>
> ……
>
> 16.0. If the documents/information submitted are found to be wrong/fraudulent **at any stage after award of work**, the contract may be terminated and performance deposit and security deposit will be forfeited.
>
> …….
>
> …….
>
> 19.0. **In case of any disputes/differences, the jurisdiction shall be in Delhi courts only.**"

17. Aside the aforesaid clauses in the contract, which I shall advert to a little later, Clause 3.0 of the NIT mandated the intending bidder to obtain tender documents on payment of non-refundable sum of Rs.54,600/- in cash or by way of demand draft or pay order drawn in favour of the IRCON. The tender documents to be obtained or downloaded by the bidder on payment consist of three Volumes; Volume-1 and Volume-II were with respect to the documents pertaining to the technical bids, whereas Volume-III was dedicated to the documents pertaining to the financial bids. These tender documents, *inter alia*, included the proforma of Integrity Pact, Performance Bank Guarantee and also the Instructions to Tenderer(s) etc. The tender documents were not only pertaining to the stage prior to the formalisation of the contract but were also the documents containing terms and conditions agreed to by the parties for the execution of the whole

contract. This is amply clear from the formal agreement executed between the parties at New Delhi on 17.04.2017. Clause 2 of the agreement removes all doubts, if any, that letter of acceptance, NIT with annexures, Form of Bid, Special Conditions of Contract, General Conditions of Contract etc etc contained in the tender documents shall be deemed to form and be read and construed as part of the agreement.

18. It may be noted that the contract between the parties had come into existence with the petitioner signifying its acceptance to the proposal made by the respondent by way of its bid (technical and financial) subject to the terms and conditions contained in the tender documents running into in as many as three volumes. The agreement executed on 17.04.2017 was only to formalise the contract. Construed thus, it is very difficult to concur with the view of the appellate Court that Clause 19.0 provides for ouster of jurisdiction of all Courts other than the Courts at Delhi only with respect to the disputes and differences that may arise or may have arisen between the parties prior to the formalisation of the contract. This understanding of Clause 19.0 even belies logic and common sense. Once NIT along with tender documents, which include instructions to the tenderer(s) and special conditions of contract etc becomes a part of formal agreement, there is no warrant for the proposition that exclusion clause 19.0 will get effaced with the signing of the formal agreement between the parties. Even a conjoint reading of Clause 10.0 and 16.0 clearly reveals that Clause 19.0 will have relevance post award of contract/work. Clause 16.0 clearly provides that in case information submitted by the bidder is found to be wrong/fraudulent at

any stage after award of contract, contract would be terminated and the performance deposit and security deposit forfeited.

19. Essentially and as a matter of fact, the contract awarded to the respondent is liable to be terminated in terms of Clause 16.0 of the NIT. As is the case set up by the petitioner against the respondent, the respondent has been found guilty of submitting forged and false financial statements so as to assert its eligibility at the time of submission of bids. That being the position, the petitioner would be well within its right to act under Clause 16.0 of the NIT and terminate the contract and any dispute raised by the aggrieved party would be subject to the jurisdiction of Delhi Courts only (see Clause 19.0).

20. This simple understanding of the terms and conditions of the NIT would have made the things very easy for the appellate Court and could have avoided the error of judgment made. The appellate Court landed in serious error by assuming that Clause 19.0 had ceased to operate with the execution of the formal contract agreement without realising that the contract agreement relied upon by the appellate Court itself specifically provided that NIT and the tender documents contained in three volumes would form part of the formal agreement. Legal position, however, will not change, even if the dispute raised by the respondent has arisen out of Clause 26.1 of the Instructions to Tenderer/s (ITT). To repeat, both the NIT and Instructions to Tenderer(s) contained in Section-III of Volume-I are part and parcel of the contract agreement and binding on both the parties.

21. I am, however, in agreement with the appellate Court that exclusion clause i.e. Clause 60.13, which ousts the jurisdiction of all Courts

except the Courts in New Delhi pertains only to the disputes which are arbitrable under Clause-60 of the Special Conditions of Contract Section-I and is not applicable to the excepted matters. As is vividly clear from a bare reading of Clause 61.1, right of IRCON to determine the contract is "excepted matter" specifically excluded from the purview of conciliation/arbitration clause i.e. Clause 60. For facility of reference, Clause 61.1 of Special Conditions of Contract is reproduced hereunder:-

> "61.1 Following Items shall be considered as excepted matters and decision of engineer-in-charge thereon shall be final and binding on the contractor. The excepted matters shall stand specifically excluded from the preview (sick) of conciliation / arbitration clause and shall not be referred to conciliation / arbitration.
>
> i. Section type selection;
> ii. Measurement of work,
> iii. Interpretation & meaning and intent of specification & drawings,
> iv. Rates for extra items of work.
> V. Right of IRCON to determine the contract."

22. There was some debate on the expression "determine the contract" but I don't think that the expression is subject to more than one interpretation. Determination of contract would mean cancellation of the contract. This is the plain dictionary meaning of the word "determine" when used in the context of a contract. Clause 60.13, which deals with the jurisdiction, for facility of reference, is also reproduced hereunder:-

> "60.13 JURISDICTION OF COURTS
>
> **Jurisdiction of courts for dispute resolution shall be New Delhi.**"

23. The exclusion clause aforesaid is part of the main clause i.e. Clause 60, which forms genus whereas the exclusion clause is its species. That being so, exclusion of jurisdiction of all Courts except the Courts at

New Delhi is necessarily with respect to the disputes which are subject to conciliation and arbitration in terms of Clause 60 of the Special Conditions of the Contract. To this extent, learned counsel for the respondent as also the appellate Court is correct in its view. To say that there is no exclusion clause of jurisdiction with respect to the excepted matters, provided in the contract, is palpably wrong and cannot be accepted in the face of discussion made above with reference to Clause 19.0 of the NIT.

24. From the aforesaid discussion, it clearly emerges that both for the matters which are arbitrable under the contract and also the expected matters which are specifically excluded from the purview of the arbitration/conciliation Clause, the jurisdiction of all Courts except the Courts in Delhi is ousted. Although, it is not disputed by the parties, that a part of cause of action has accrued at Delhi, yet for removal of doubt, if any, it is pointed out that a part of cause of action to sue on a contract also arises at a place where contract agreement is made and executed. In the instant case, admittedly, the NIT was issued from Delhi office of the petitioner and even the contract agreement was signed and made at New Delhi and, therefore, for any dispute including dispute with regard to the termination of contract, a part of cause of action would be deemed to have been accrued at New Delhi also. The Courts in Jammu or even the Courts within whose jurisdiction the work in question has been executed by the respondent may also have jurisdiction to entertain the suit pertaining to the disputes arising out of the excepted matters detailed in the contract but the parties by agreement shall be deemed to have restricted and vested the exclusive jurisdiction in the Courts at New Delhi.

25. It is axiomatic that when there are two or more competent Courts, which can entertain a suit with respect to a contract on a part of cause of action having accrued within the jurisdiction of those Courts, the parties to the concerned transaction can contract to vest the jurisdiction in one such Courts to try disputes and that such an agreement to oust the jurisdiction of Courts is not hit by Section 28 of the Contract Act, as being opposed to public policy. It is equally well established that such an agreement excluding jurisdiction of one Court and conferring exclusive jurisdiction on another Court, which, otherwise, does not possess is not permissible in law. The parties by contract cannot confer jurisdiction on a Court, which it, otherwise, does not possess. As is seen, in the instant case, the Courts at Delhi have jurisdiction, for, a part of cause of action has arisen at Delhi and, therefore, the agreement between the parties to vest exclusive jurisdiction in Delhi Courts to the exclusion of the jurisdiction of all other competent Courts is legally permissible.

26. Learned counsel for the parties placed reliance upon several judgments to hammer their respective point of view on the interpretation of the terms “to determine contract”, “scope of exercise of revisional jurisdiction under Section 115 CPC”, “excepted matters” and “arbitrable disputes” etc. I have deliberately not adverted to the case law cited, as the various issues raised by the learned counsel appearing for the parties were found not open to debate because of beaten legal position.

27. Mr. Harshwardhan Gupta, learned counsel for the petitioner, places reliance on following judgments:-

(i) 2013(9) SCC 32; Swastic Gases Pvt. Ltd. v. Indian Oil Corporation

(ii) AIR 2017 SC 2105; Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.

(iii) 2004(4) SCC 677; New Moga Transport Co. v. United India Insurance

(iv) AIR 2019 SC 3658; Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.

28. On the other hand, Mr. Kaushil Laik, learned counsel for the respondent, referred to following precedents:-

(i) 1985 AWC 357 All; Radha Krishan v. Dy. Director of Consolidation

(ii) AIR 2015 SC 270; Harsha Construction v. Union of India

(iii) (2020) 3 SCC 222; Mitra Guha Builders (India) Co. v. ONGC

(iv) (2017) 14 SCC 132; Ambadar Khanduji Shinde v. Ashok Sadashiv

(v) (1972) 2 SCC 427, M.L.Sethi v. R.P.Kapoor.

29. Since the instant case fundamentally turns on factual aspects involving interpretation of various clauses of the contract and, therefore, I see no scope for debate on the issues that do not arise for consideration in the facts and circumstances of this case. While I accept the legal position put forth by the learned counsel for the parties and acknowledge the assistance rendered, I regret my inability to persuade myself to agree with the interpretation made and the view taken by the learned appellate Court. The order impugned, if allowed to sustain, would allow the prosecution of the suit before a Court lacking jurisdiction and, therefore, would result in

serious miscarriage of justice. The order impugned is, thus, fundamentally flawed and has thwarted the course of justice and, therefore, cannot be allowed to sustain.

30. This petition is, therefore, accepted and the impugned order is set aside. The respondent, who has been returned the plaint by the trial Court shall be at liberty to file the suit, if so advised, before the competent Court of jurisdiction. However, in the interest of justice, it is provided that for two weeks from the date of the judgment, the interim direction passed by the trial Court shall remain in operation and the performance bank guarantee, if encashed by the petitioner, shall not be appropriated. This has been ordered to provide the respondent a reasonable time to approach the competent Court of jurisdiction.

(Sanjeev Kumar)
Judge

JAMMU
28.09.2020
Vinod.

Whether the order is speaking :Yes
Whether the order is reportable: Yes

SANJEEV KUMAR UPPAL
2020.09.28 13:46
I attest to the accuracy and
integrity of this document