



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

Reserved on: 20th July, 2023

Pronounced on: 19th October, 2023

+ **W.P.(C) 9073/2021 & CM APPLs. 28219/2021, 28221/2021, 35990/2021, 43211/2021**

CLOUD WALKER STREAMING TECHNOLOGIES PVT LTD.

..... Petitioner

Through: Mr. Rajiv K. Garg and Mr. Ashish Garg, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Sushil Kumar Pandey with Mr. Kuldeep Singh, Advocates for R-1, 3 and 4.

Mr. Pranjal Kishore, Advocate for R-5.

Mr. Suyash Pande, Advocates for R-6.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

1. The Petitioner, who is ineligible to participate in Tender No. GEM/2021/B/1422612 dated 9th August 2021 (“**Tender**”), raises concerns regarding the tender conditions, alleging that they contravene government policies and through this present writ petition, seeks quashing thereof.

2. Since this judgment is primarily concerned with addressing the preliminary question of territorial jurisdiction, the issue in focus in the last hearing, it becomes imperative to discern the cause of action—an essential



element in establishing the jurisdictional aspect. In order to understand where the cause of action arose, we first identify the various parties involved in the present petition:

Party Name	Array number
Union of India	Respondent No. 1
Government e-Marketplace (“GeM”)	Respondent No. 2
Ministry of Electronics and Information Technology (“MeitY”)	Respondent No. 3
Ministry of Rural Development (New Delhi)	Respondent No. 4
Pradhan Mantri Awaas Yojana Gramin (Odisha)	Respondent No. 5
M/s Power Max (Odisha)	Respondent No. 6

Facts

3. On 11th May, 2021, the Principal Secretary of the School and Mass Education Department, State of Odisha, issued a letter to all Collectors and Chairpersons of District Level Committees concerning the implementation of the High School Transformation Programme. Subsequently, on 5th July, 2021, the District Magistrate of Bargarh, Odisha, issued a letter directing the Project Director of District Rural Development Agency (DRDA) to expedite the program’s implementation.

4. In response, the Project Director of DRDA, Bargarh, issued a Notice Inviting Tender on 8th July, 2021 for the procurement of interactive digital panels intended for installation in classrooms. However, none of the participating bidders were able to meet the technical qualification requirements, leading to the cancellation of this tender notice. Subsequently,



to facilitate the implementation of the school transformation program, a committee sought demonstrations from multiple Original Equipment Manufacturers (OEMs) and ultimately selected the ‘Professional Large Format Displays’ manufactured by ‘LG’ (“**Tender Product**”) for installation in classrooms. To ensure compliance with Rule 166 of the General Finance Rules, 2017 (“**GFR**”), the committee obtained a Proprietary Article Certificate, outlining the rationale behind selection of the specific Tender Product

5. On 09th August, 2021, Respondents No. 4 and Respondent No. 5 floated the Tender on GeM portal, soliciting bids for procurement of 154 units of the Tender Product. Within the ‘Additional Specification Parameters’ section of the Tender, it was explicitly outlined that bidders were required to be based in Odisha and the bidding OEMs must maintain a functional service center within the state. The relevant extracts are as follows:

Additional Specification Parameters- Professional Large Format Display (154 pieces)

<i>Specification Parameter Name</i>	<i>Tender Requirement (Allowed Values)</i>
<i>Intel Core i3 (Minimum) 1.2 Ghz, 8th Gen (In OPS), 8GB, 256 SSD+ 1TB HDD, HD Graphics Input: HDMI.RGB/ VGA. Audio AV.PC slot, RS232 Output: HDMI, Audio USB: 3x USB 2.0 + 3x USB2.0 Communication port: RJ45</i>	<i>OEM should have registration in Odisha for last five years</i>
<i>Tenderer should be from Odisha</i>	<i>OEM should have direct service centre in Odisha</i>

Buyer added Tender Specific Additional Scope of Work

<i>S. No.</i>	<i>Document Title</i>	<i>Description</i>	<i>Applicable</i>
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			<i>i.r.o Items</i>
1	<i>OEM should have registered office in odisha for last five years</i>	<i>Installation and training at specific points</i>	<i>Professional Large Format Display (154)</i>

“Buyer added bid specific additional terms and conditions

1. Availability of Service Centres: Tenderer/OEM must have a Functional Service Centre in the State of each Consignee's Location in case of carry-in warranty. (Not applicable in case of goods having on-site warranty). If service center is not already there at the time of bidding, successful bidder / OEM shall have to establish one within 30 days of award of contract. Payment shall be released only after submission of documentary evidence of having Functional Service Centre.”

6. The Petitioner, an MSME based in Mumbai and registered on GeM as an MII Class-II supplier of interactive flat panels, found themselves ineligible to participate in the Tender. On 14th August, 2021, they submitted a representation to Respondent No. 5, asserting that the Tender contravened the Make-In-India policy, violated provisions safeguarding MSMEs, and ran afoul of Rules 144(xi) and 166 of the GFR. They also cited orders issued by MeitY and the Department of Telecommunications concerning compliance with BIS and WPC ETA certification for all bidders. In their representation, the Petitioner demanded a revision of the tender conditions.

7. It is pertinent to note that the representation was submitted after the two-day deadline stipulated for technical clarifications. Additionally, the Petitioner alleged that the OEM (LG), a company incorporated and headquartered in the Republic of Korea, was actually a ‘Chinese Agent’. Consequently, they contended that the tender also violated the ‘Land Border Policy’. Importantly, the Petitioner raised concerns regarding bid's acceptance price. Despite their representation, Respondent No. 5 did not respond, and on 19th August, 2021, proceeded with the technical evaluation



of the received bids. The Petitioner escalated their concerns by emailing the CEO of GeM on 20th August, 2021, reiterating the points made in their earlier representation. With no resolution in sight, the present petition was filed.

Analysis and Findings

8. The High Courts of India derive their jurisdiction to try writ petitions from Article 226 of the Constitution of India, which provides two kinds of territorial jurisdiction: (a) where the authority in relation to whom the writ is to be issued lies *within* the territory of the High Court [226(1)]; and (b) where a *cause of action* arises within the territory of the High Court [226(2)]. Thus, in order to determine the question of territoriality as per Article 226 of the Constitution of India, we have to necessarily ascertain the cause of action as well as the relevant authority.

9. While addressing objections related to territorial jurisdiction, we have adopted the approach of accepting the averments made in the petition as true and correct. We have proceeded on this basis without delving into an inquiry into the accuracy of these facts. However, it is worth noting that the entire petition suffers from a significant lack of clarity and does not distinctly delineate the cause of action or identify the specific respondent for the relief sought. The prayer clause in the petition also does not provide any information. Nonetheless, let us take note of the relevant portions of the petition that touch upon territorial jurisdiction are extracted below for reference:

“This Hon’ble Court has jurisdiction to entertain and grant relief as prayed for in this petition as the Respondent No. 3, who has placed the bid is located Delhi (sic.) and Respondent No. 2 on whose portal the bid was registered is also located within



the jurisdiction of this Hon'ble Court. Therefore, this Hon'ble Court has jurisdiction."

10. While these statements serve as the basis for asserting jurisdiction, they fall short of providing a comprehensive and unambiguous explanation regarding both the cause of action and the specific respondent for whom relief is sought. Furthermore, it is apparent on the face of these averments that they are incorrect and in direct contradiction to the documents presented as part of the record. Respondent No. 3 (MeitY) neither initiated the tender process nor plays a role in the administration of the GeM Portal.¹ It appears that there is an oversight in the petition, and it is plausible that the Petitioner intended to refer to Respondent No. 4, as the relevant authority responsible for initiating the Tender. We give them benefit of doubt and proceed on that basis to determine the relevance of each authority.

Article 226(1)

Territorial jurisdiction in relation to Respondent No. 4

11. We observe that although the bid document does mention Respondent No. 4 and Respondent No. 5 in the relevant 'Ministry/Organisation Name' fields, yet, the appropriate entity that should have been impleaded is DRDA, Bargarh, Odisha. This observation is substantiated by the following facts: *Firstly*, that the bid form prominently features DRDA, Bargarh, and/or Odisha in various crucial designated fields for providing the office name, address of the reporting officer, buyer details, among others (as reproduced below):

<i>Ministry/ State Name</i>	<i>Ministry of Rural Development</i>
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¹ Ministry of Commerce and Industry (more specifically, Department of Commerce) is the relevant authority for administration of GeM portal. See Notification S.O. 3871 (E) dated 08th December 2017 issued by the President of India.



<i>Department Name</i>	<i>Department of Rural Development (drd)</i>
<i>Organisation Name</i>	<i>Pradhan Mantr Awaas Yojana-gramin</i>
<i>Office Name</i>	<i>Bargarh Odisha</i>

<i>S. No.</i>	<i>Consignee/ Reporting Officer</i>	<i>Address</i>	<i>Quantity</i>	<i>Delivery Days</i>
<i>1</i>	<i>Jagan Das</i>	<i>768028, DRDA Bargarh, AT- Subash Nagar, PO/Dist-Bargarh</i>	<i>154</i>	<i>15</i>

(Extracts from the bid document)

12. Furthermore, the Petitioner, in its representation to the Tendering Authority dated 14th August, 2021, explicitly lists the address of DRDA Bargarh, Odisha.

13. *Secondly*, in order to understand the territoriality of the actions of DRDA, the role assigned to them has to be seen in context of the scheme it is implementing. The nature of DRDA as an institution is beyond the usual federal framework. DRDA is a pre-Panchayati Raj institution, which has undergone several changes in its functioning since its establishment, in keeping with changing constitutional context and administrative needs. It is a district level organization, registered as a society under the Societies Registration Act, 1860. Prior to April 2022, the administration of this organization was governed by the *Guidelines on DRDA Administration, Ministry of Rural Development, Government of India* (2008) [**“Guidelines”**]. The Guidelines provide that the DRDA is not an implementing agency, however, it is a specialized, professional organization overseeing the implementation of various anti-poverty programmes and co-



ordinating with the local, state and central government (as well as non-governmental organisations and private parties such as banks) for implementation of various anti-poverty programmes at the district level. It receives funding from both, the center as well as the state, and implements various national as well as state schemes. Therefore, in order to discern the ultimate answering authority for DRDA (centre or state), the context of the scheme it is implementing must be taken into account.

14. *Thirdly*, and in continuance of the above points, the genesis of entire dispute is the High School Transformation Programme, which is a policy or scheme of the State of Odisha. DRDA had placed orders for the Tender Product for upgradation of teaching aids in the district of Bargarh under the programme. Therefore, the buyer/tenderer was DRDA performing its functions as a department of the State of Odisha, and not as a department of Respondent No. 4. It must also be highlighted that since June 2022, DRDAs in Odisha has been merged with the Zilla Parishads,² and the centrally-sponsored DRDA scheme has been abolished nationally as of 1st April 2022.³

Territorial jurisdiction in relation to Respondent No. 2

15. Independently, we have also examined the role assigned to Respondent No. 2 for the purpose of claiming jurisdiction in Delhi. Respondent No. 2 is a national public procurement portal, incorporated in the form of an SPV, which enables the Central and State governments, local bodies etc. in procurement of goods and services. Respondent No. 2 submits

² Resolution No. 10025-PR-DRDA-MISC-0049-2014/P.R.&D.W dated 09th June, 2022.

³ Communicated by the Ministry of Rural Development *vide* letter no. R.20015/2/2020-DRDA (Comp. No. 372742).



that it performs the function of an intermediary in terms of Section 79 of Information Technology Act, 2000 (*exemption from liability of intermediary in certain cases*), it merely operates, monitors and supervises all the business transactions. The General Terms and Conditions of GeM, which governs the use and resultant contracts, provides that the ‘primary user’ (tenderer authority) shall be responsible for ensuring compliance with GFR and other procurement policies while listing invitations for offer on the portal. Thus, while Respondent No. 2’s office is situated in Delhi, it is not a relevant party to the dispute. There is no cause of action discernible against Respondent No. 2 as they had no role for framing the tender conditions for the invitations to offer uploaded on the GeM portal. Furthermore, under the provisions of the Information Technology Act, 2000, intermediaries are not liable for any third-party information hosted by it. Impleading Respondent No. 2 is inconsequential for invoking jurisdiction in Delhi.⁴

Territorial jurisdiction in relation to Respondent No. 5

16. We must note that the Petitioner has included Pradhan Mantri Awaas Yojana Gramin as Respondent No. 5, with the address for service as that of DRDA in Bargarh, Odisha. Neither the Petition nor the counter-affidavits submitted by the Respondents offer any elaboration regarding the extent of Pradhan Mantri Awaas Yojana Gramin's involvement in the Tender. This becomes particularly noteworthy as Pradhan Mantri Awaas Yojana Gramin is a Central program focused on rural housing. Be that as it may, Pradhan Mantri Awaas Yojana Gramin is not one of the relevant parties to the dispute.

⁴ Section 79 of the Information Technology Act, 2000.



Article 226(2)

Cause of Action

17. The cause of action, in the context of Article 226 of the Constitution of India, has not been explicitly defined. However, cause of action has been judicially interpreted in several precedents to mean ‘facts that would be essential to establish, if disputed, in order to substantiate the Court's jurisdiction and judgment’.⁵ The Supreme Court has observed that in order to constitute cause of action, only material, essential or integral facts would form cause of action.⁶ Pleading facts must have a nexus with the cause of action, and irrelevant facts or those facts which are not germane for the grant of prayer shall not give rise to a cause of action.

18. Although the cause of action does not depend upon the character of the relief prayed for by the plaintiff, yet we consider it appropriate to take note of the relief clauses, which read as under:

“a. issue writ under Article 226 of the Constitution of India of certiorari or any other appropriate writ order of direction directing the respondents to produce the record relating to bid no gem/2021/b/1422612 dated 9.8.2021 issued on the web portal of the Government e-marketplace (GeM) which was issued in direct contravention of the all GeM guidelines, Make in India policy and GFR Rules, 2017, MEITY & DOT rules and Land Border policy issued by the Government of India and to quash the tender being also in violation of natural justice, malafide abuse of process of law and favoritism with ulterior motive with deliberate loss to the ex-chequers and further direct fresh bid and allow all the MSME/MII & MEITY, DOT bidders and thereby save the loss to the ex-chequers.

b. pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the aforesaid circumstance of the case.” (Sic.)

⁵ Para 16, State of Goa v Summit Online Trade Solution, 2023 SCC OnLine SC 254.

⁶ *Supra*



19. To render a decision on jurisdictional aspect, it is essential to take note of pertinent facts involved in the present dispute. The Petitioner is an MSME based in Mumbai. The Tender was initiated by DRDA, an entity responsible for executing a program under the auspices of the State of Odisha. The Tender was published online on the GeM portal, although with an explicit invitation for bids only from entities situated within Odisha. Additionally, the Tender requirements mandated that the OEM must maintain an office in Odisha for a minimum of five years.

20. The effect of the impugned Tender conditions was mainly limited to the State of Odisha, and subscription to these conditions could not be made by an entity which did not have any footprint in Odisha.

Effects Test of Jurisdiction

21. Given that the impugned Tender was released on the GeM portal—an online marketplace—we have also explored whether this fact would be sufficient to invoke our jurisdiction. In this regard, it is pertinent to mention the case of ***Banyan Tree Holding v. A. Murali Krishna Reddy***⁷. In this case a Division Bench of this Court examined the scope jurisdiction under Article 226 of the Constitution of India in respect of a universally accessible website. It observed that the jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state, there must be specific targeting of the forum state. Defendant's actions must result in an injury or harm to Plaintiff within

⁷ 2009 SCC OnLine Del 3780.



the forum state.⁸ As the tenderer clearly sought only suppliers/OEMs situated in the State of Odisha, it cannot be said that any injury/effects were sought to be caused/felt in the NCT of Delhi, where this Court's jurisdiction lies. Thus, no cause of action has arisen within the territorial jurisdiction of this Court.

Forum non conveniens

22. Even if it were to accept the Petitioner's submissions that a miniscule part of the cause of action arose within the territorial jurisdiction of this Court, it would still not serve as the appropriate forum due to the operation of the doctrine of *forum conveniens*. The Supreme Court in ***Kusum Ingots & Alloys Ltd. v. Union of India***⁹ observed as under:

"30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens."

23. A Full Bench of this Court in ***M/s Sterling Agro v. UOI 2011 SCC OnLine Del 3162*** expanded upon the Apex Court's observations as follows:

"31. The concept of forum conveniens fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of. Be it noted, the Apex Court has clearly stated in the cases of Kusum Ingots (supra), Mosaraf Hossain Khan (supra) and Ambica Industries (supra) about the applicability of the doctrine of forum conveniens while opining that arising of a part of cause of action would entitle the High Court to entertain the writ petition as maintainable."

32. The principle of forum conveniens in its ambit and sweep encapsulates the concept that a cause of action arising within the jurisdiction of the Court would not

⁸ *Id* at Paragraph 42.

⁹ (2004) 6 SCC 254



itself constitute to be the determining factor compelling the Court to entertain the matter. While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of forum conveniens... ”

24. Therefore, it clearly emerges that the doctrine of *forum conveniens* entails that the fact that a small cause of action arises in the jurisdiction of a High Court would not be the sole determinative factor. Several other considerations such as relevancy of facts necessary for just adjudication would also be considered while determining jurisdiction.

Conclusion

25. The tenderer is located in Odisha, acting as an agency of the State of Orissa, targeting only those entities which are situated in Odisha, for supply of products for a scheme launched by the State of Odisha, and for ultimate supply to be made to schools within Odisha. The entire pleadings are bereft of disclosing cause of action within that has the territorial jurisdiction of this Court. We are not satisfied that the facts which have been pleaded in support of the cause of action have any bearing with the *lis* or the dispute involved in the case, and do not give rise to any cause of action so as to confer territorial jurisdiction on the Court concerned. Thus, this Court lacks territorial jurisdiction under Article 226 of the Constitution of India.

26. Dismissed. The Petitioner shall be at liberty to the to approach the High Court of Orissa for raising the grievances, if so advised. We have not examined or commented on the merits of the case.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

OCTOBER 19, 2023/nk