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IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION

G.A. (Com) No. 2 of 2024

In

C.S. (COM) No. 714 of 2024

TITAGARH RAIL SYSTEMS LIMITED

-VS-

YES BANK LIMITED & ANR.

BEFORE:
The Hon'ble JUSTICE KRISHNA RAO
Hearing Concluded On : 06.12.2024
Order On : 13.12.2024

Appearance:

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Sayantan Bose, Adv.
Mr. Aman Agarwal, Adv.
Mr. Shounak Mukhopadhyay, Adv.
Ms. Iram Hassan, Adv.
Mr. Himanshu Bhawsingka, Ad.
Mr. Deepak Verma, Adv.
... For the plaintiff.

Mr. Avik Ghatak, Adv.
Mrs. Afreen Begum, Adv.
Mr. A. Ghosh, Adv.
... For the defendant no. 1.

Mr. L.K. Gupta, Sr. Adv.
Mr. Chayan Gupta, Adv.
Mr. Dwip Raj Basu, Adv.

Mr. L.K. Pal, Adv.
... For the defendant no. 2.

ORDER

1. The defendant no. 2 has filed the present application being G.A. (COM) No. 2 of 2024 in C.S. (Com) No. 714 of 2024 under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to the Arbitration in terms of Clause 23 of the General Terms and Conditions of the purchase order or in the alternative, an order be passed directing return of the plaint filed in the suit because this Court is not having territorial jurisdiction to try, entertain and determine the present suit in terms of Clause 11 of the Special Terms and Conditions of the purchase order.

2. The plaintiff has filed the suit for decree for a sum of Rs. 20,00,00,000/-, in the alternative, an enquiry into damages, mandatory injunction, perpetual injunction and other reliefs.

3. Mr. L.K. Gupta, Learned Senior Advocate, representing the defendant no. 2 submits that Clause 22 of the General Condition of Contract provides that all questions, claims, disputes and/or differences of any kind whatsoever arising out of or in connection with or concerning the contract at any time, whether before or after determination of the contract shall be referred by the parties for conciliation before conciliatory forum/ body. He submits that on failure of the conciliation, the questions, claims, disputes and/or differences shall be referred by

the parties for the decision by the Arbitrator to be appointed as per Clause 23 of the terms of Contract.

4. Mr. Gupta submits that in the suit, the plaintiff is seeking to implement the Circular issued by the Central Government in respect of the Contract between the parties, thus the subject-matter of the suit is duly covered by the Arbitration Clause.

5. Mr. Gupta submits that the plaintiff has sought to take shelter under the Circular issued by the Government of India proposing reduction of performance securities by way of bank guarantees in the subsisting government contracts in view of the COVID-19 pandemic. He submits that the plaintiff has made the Yes Bank a party as defendant no.1 in the suit though no letter of invocation of the Bank Guarantee having been issued.

6. Mr. Gupta submits that the plaintiff has made the defendant no.1, Yes Bank as party to the suit despite having knowledge that there is no cause of action arose against the Bank. He submits that the plaintiff has made the Yes Bank as the defendant no.1 in the suit only with the intention of attempting to take the suit out of the purview of the Arbitration Clause.

7. Mr. Gupta submits that the plaintiff has filed the suit in violation of a specific agreed Forum Selection Clause. He submits that Clause 11 of the Special Terms and Conditions of Contract specifically incorporates the jurisdiction clause. He submits that as per Clause 11 of this Court

is not having territorial jurisdiction to entertain the suit filed by the plaintiff.

8. Mr. Gupta relied upon the judgment in the case of ***State of Chhattisgarh and Another vs. SAL Udyog Private Limited*** reported in ***(2022) 2 SCC 275*** wherein the Hon'ble Supreme Court held that this is patent illegality that is manifest on the face of the arbitral award inasmuch as the express terms and conditions of the agreement governing the parties as also the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh have been completely ignored.

9. Mr. Gupta relied upon the judgment in the case of ***National Highways Authority of India vs. ITD Cementation India Limited*** reported in ***(2015) 14 SCC 21*** wherein the Hon'ble Supreme Court held that the award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that WPI is an index applicable uniformly in all States while the increase in seigniorage fee would vary from State to State. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 3-9-2003 to the Economic Advisor.

10. Mr. Gupta relied upon the judgment in the case of ***Utkarsh Tubes and Pipes Limited vs. Simplex Infrastructure Limited*** reported in ***2014 SCC OnLine Cal 19727,*** this Court held that no party can say he will

be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and is severable from the remaining part of the agreement.

11. Mr. Gupta relied upon the judgment in the case of ***Suresh Dhanuka vs. Shahnaz Husain*** reported in ***2024 SCC OnLine Cal 643*** wherein this Court held that objections will nevertheless be raised both on Section 8 and Section 11 applications. These objections can be genuine, such as where there is no arbitration clause or where the matter is itself is non-arbitrable, but often these objections could be only to wriggle out of the statutory commitment of parties to a defined process of redressal mechanism.

12. Mr. Gupta Relied upon the judgment in the case of ***Sundaram Finance Limited and Another vs. T. Thankam*** reported in ***(2015) 14 SCC 444*** wherein the Hon'ble Supreme Court held that once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, moves the Court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the Court to refer the parties to arbitration in terms of agreement.

13. *Per contra,* Mr. Abhrajit Mitra, Learned Senior Advocate representing the plaintiff submits that the Steel Authority of India being the defendant no. 2 herein issued a Request for Quotation (RFQ), calling upon the eligible bidders to submit their bids for supply of freight rakes for the use of the defendant no. 2. The plaintiff submitted its bid for the said work and by a Letter of Acceptance dated 17th October, 2020 and the bid of the plaintiff was accepted. Accordingly, a purchase order was issued to the plaintiff for supply of 3 rakes of 141 BOSTHSM2 wagons along with 3 brake vans of total value of Rs. 42,99,99,192/-.

14. In terms of Clause 7 of the purchase order read with Clause 6 of the Special Conditions, the plaintiff was required to submit a Performance Bank Guarantee of 10% of the total order value within 30 days from the issuance of Purchase Order. Due to the pandemic Covid-19, the Government of India by a Memorandum dated 12th November, 2020 reduced the Performance Bank Guarantee from 5-10 % to 3% of the value of the contract for all existing contracts.

15. Mr. Mitra submits that when the plaintiff came to know about the said Memorandum dated 12th November, 2020, the plaintiff requested the defendant no.2 to reduce the Performance Bank Guarantee to 3% but the defendant no.2 failed to reduce the same and the plaintiff was compelled to furnish the Bank Guarantees for a sum of Rs. 4,29,99,920/- being 10% of the value of the Purchase Order.

16. Mr. Mitra submits that the cause of action for filing of the present suit arose out of the Memorandum dated 12th November, 2020 which is beyond the jurisdiction of the Arbitrator. He submits that these are in the sphere of Public law and can be adjudicated upon only by a Court of law.

17. In support of his submissions, Mr. Mitra relied upon the judgment in the case of ***Chairman, Board of Trustees for Shyama Prasad Mookherjee Port vs. Universal Sea Port Private Limited*** reported in ***2022 SCC OnLine Cal 4477*** wherein the Coordinate Bench of this Court held that a writ court may well hold against a public body on a public law principle or by invoking Article 14 of the Constitution of India but an arbitrator, constrained as he or she is by the contract, has no such power.

18. Mr. Mitra relied upon the judgment in the case of ***Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd.*** reported in ***MANU/ MH/1437/ 2021,*** the Hon'ble Bombay High Court held that there is no quarrel with the proposition that a Court, especially a Constitutional court, is not constrained in the same way as an Arbitrator. Public law actions demand Public law remedies. The suggestion is not that a public authority can play Jekyll and Hyde or that it is required to demonstrate fairness only in a public law action. The question is what is that the decision making body is empowered in law to do. A writ court may well hold against a public body on a public

law principle or by invoking Article 14, but an arbitrator, constrained as he or she is by the contract, has no such power.

19. Mr. Mitra relied upon the judgment in the case of ***Raj Chowdhury vs. Union of India and Others*** reported in ***2000 SCC OnLine Cal 259*** and held that the question of frustrating of legitimate expectation cannot be decided by the arbitration. The question absolutely remains within public law field.

20. Mr. Mitra relied upon the judgment in the case of ***National Highways Authority of India vs. ITD Cementation India Limited*** reported in ***(2015) 14 SCC 21*** wherein the Hon'ble Supreme Court held that the Arbitral Tribunal ought to have confined itself to the terms of the contract and see if, there was any variation for the purposes of Clause 70.8 of COPA. It went beyond its powers in holding that the existing levy as on the date the contract was entered into was without any authority in law and as such the imposition by Notification dated 20-3-2001 created liability for the first time.

21. Mr. Mitra submits that the defendant no. 2 is carrying on business from Ispat Bhawan, 6th Floor, 40, J.L. Nehru Road, Kolkata- 700 071. The defendant no.1 is also within the jurisdiction. He submits that the Bank Guarantees were issued by the defendant no.1 from its Dalhousie Branch, within the jurisdiction and all the extensions have also been made from the said office only.

22. Mr. Mitra submits that Forum Selection Clause will not factually apply since the plaintiff did not supply any rakes covered by the purchase order.

23. Mr. Mitra relied upon the judgment in the case of ***Steel Authority of India Ltd. vs. Dinesh Kumar Jaiswal*** reported in ***2001 SCC OnLine Cal 508*** wherein the Division Bench of this Court held that however, under Section 120 of the Code of Civil Procedure, 1908, provisions contained in Sections 16, 17 and 20 of the Code of Civil Procedure, 1908 do not apply to a High Court in exercise of its Ordinary Original Civil Jurisdiction.

24. Heard the Learned Counsel for the respective parties, perused the materials on record and the judgments relied by the parties. Two issues have been raised in the present application. The first issue whether the parties are required to be referred to the arbitration in terms of Clause 23 of the General Condition of Contract and the second issue whether the suit is maintainable before this Court in view of the Forum selection Clause -11 of the Special Condition of Contract.

25. As regard to referring the parties to the Arbitration Clause -23 of the General Condition of Contract reads as follows:

> *"**23. Arbitration:** Matters in question, claims, dispute and or difference in respect of the contract to be submitted to arbitration as aforesaid. The arbitration shall be governed in accordance with The Arbitration and Conciliation Act 1996 (hereinafter referred to as the "Act") of India. The language of Arbitration shall be English. Arbitration*

shall be governed by the Rules of "SCOPE Forum of Conciliation and Arbitration" (SCFA). The venue shall be New Delhi. During the pendency of the Conciliation or Arbitration proceedings both the parties (i.e. the Contractor and the Employer) shall continue to perform their contractual obligations. The arbitral tribunal shall give reasons for its award. The tribunal shall apportion the cost of arbitration between the parties, the award rendered in any arbitration hereunder shall be final and binding upon the parties. The parties agree that neither party shall have any right to commence or maintain any suit or legal proceeding concerning any dispute under this agreement until the dispute has been determined in accordance with the arbitration proceeding provided for herein and then only to enforce or facilitate the execution of an award rendered in such arbitration.

Arbitration between a Central Public Sector Undertaking of the Government of India (not under the Ministry of Steel) and the Employer shall be as per the guidelines of Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises (DPE) Government of India. Arbitration between a Central Public Sector undertaking of the Government of India under the Ministry of Steel, Government of India and the Employer, shall be as per the guidelines of the Ministry of Steel.

The provision of the Arbitration and Conciliation Act, 1996 and the rules framed there under, if any and all modifications/amendments thereto shall deem to apply and/or be incorporated in this contract and when such modifications/amendments to the Act/Rules are carried out.

Work/supply under the contract shall be continued by the contractor/supplier, under the contract, during the arbitration proceedings and recourse to arbitration shall not be a bar to continuance for the work or supply unless otherwise directed in writing by the Plant/Unit."

26. The plaintiff has not denied with regard the validity of Clause 23 of the General Condition of Contract. The only objection raised by the plaintiff

that the plaintiff is claiming the benefit of the Memorandum dated 12th November, 2020 wherein the Government of India taking into consideration of period of Pandemic Covid-19 reduced the rate of Performance Bank Guarantee from 5-10% to 3% of the value of the contract of all existing contracts. The bid submitted by the plaintiff was accepted by the defendant no. 2 on 17th October, 2020 and on 23rd October, 2020, the defendant no.2 issued purchase order to the plaintiff for a total value of Rs. 42,99,99,192/- i.e. prior to issuance of Memorandum dated 12th November, 2020. As per the purchase order, the plaintiff has to submit Performance Bank Guarantee of the 10% of the total value of the purchase order and accordingly, the plaintiff requested the defendant no. 2 for reducing the value of performance guarantees from 10% to 3% as per the Memorandum dated 12th November, 2020 but the defendant no.2 has not considered the request of the plaintiff and the plaintiff has submitted Performance Guarantees for a sum of Rs. 4,29,99,920/- with the defendant no.1.

27. The plaintiff raised objection for referring the parties to the arbitration on the ground that the Arbitrator is a creature of a contract. The cause of action for filing the suit arose out of a statutory/ non statutory action of the State i.e. the Memorandum dated 12th November, 2020 and is beyond the jurisdiction of the Arbitrator. The Office Memorandum dated 12th November, 2020 issued by the Government of India, Ministry of Finance as per Rule 171 of the General Financial Rules (GFRs) 2017, Performance Security is to be obtained from the

successful bidder awarded the contract for an amount of five to ten percent of the value of the contract to ensure due performance of the contract. Clauses 2, 3, 4 and 5 of the Office Memorandum reads as follows:

> *"**2.** The Government is in receipt of many representations that on account of slowdown in economy due to the pandemic, there is acute financial crunch among many commercial entities and contractors, which in turn is affecting timely execution of the contracts. It has also been represented that this may affect the ability of contractors to bid in tenders and hence reduce competition. Requests are being received for reduction in quantum of Security Deposits in the Government contracts.*
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> ***3.** In view of all above, it is decided to reduce Performance Security from existing 5-10% to 3% of the Value of the Contract for all existing contracts. However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/court proceedings have been already started or are contemplated.*
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> ***4.** Further, all tenders/contracts issued/concluded till 31.12.2021 should also have the provision of reduced Performance Security.*
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> ***5.** In all contractors where Performance Security has been reduced to 3% in view of above stipulations, the reduced percentage of Performance Security shall continue for the entire duration of the contract and there should be no subsequent increase of Performance Security even beyond 31.12.2021."*

28. Admittedly, the Memorandum is not the part of the contract. Both Learned Senior Advocates relied upon the judgment in the case of ***National Highways Authority of India (Supra).*** Mr. Gupta relied upon paragraphs 26 and 27 of the said report which reads as follows:

*“**26.** We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact of sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one footing, while the additional cost resulting from the impact of any statute, decree, ordinance, law, etc. as referred to in Clause 70.8 stands on the other. Resultantly, the governing clauses in the instant case were held not to be sub-clauses 70.1 to 70.7 but the substantive part of Clause 70.8. The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that WPI is an index applicable uniformly in all States while the increase in seigniorage fee would vary from State to State. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the Letter dated 3-9-2003 to the Economic Advisor.*

***27.** In the backdrop of the law laid down by this Court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this Court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge.”*

Mr. Mitra relied upon paragraphs 39 to 42 which read as follows:

> ***"39.*** *The disputes between the parties were referred to the Arbitral Tribunal. We are concerned in the present appeal with Claim 8 which was for refund of royalty on ordinary earth amounting to Rs. 70,65,039 which was claimed on the ground that it was covered by Clause 70.8 COPA. It was observed by the Arbitral Tribunal that after the commencement of the 1957 Act it was not within the powers of the U.P. State Government to have framed the U.P. State Rules of 1963 and consequently such Rules were not binding on the contractor. In its view, the imposition of royalty by the Government of U.P. vide Notification dated 20-3-2001, being after the Central Government's Notification dated 3-2-2000, for the first time validly created a liability to pay royalty. Any levy and collection prior to 3-2-2000 was without any legal sanction and therefore liable to be disregarded and since the liability was validly created after the contract was entered into, the matter was covered under Clause 70.8 of COPA.*
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> ***40.*** *The award dated 9-1-2012 thus accepted Claim 8 in its entirety. This award was challenged by the appellant by filing OMP No. 480 of 2012 in the High Court of Delhi, which was dismissed by a Single Judge of the High Court vide his order dated 18-5-2012. The matter was carried in appeal by the appellant by filing FAO (OS) No. 302 of 2012 before the Division Bench which was dismissed vide judgment and order dated 13-2-2013. While granting special leave to appeal this Court confined the matter to claim 8 alone and directed the appellant to furnish bank guarantee in the sum of Rs. 70,65,039/-. The bank guarantee was accordingly furnished and is kept alive.*
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> ***41.*** *In support of the appeal, Ms Indu Malhotra, learned Senior Advocate submitted that the royalty, at the time the contract was entered into, was payable @ Rs 4% and the Notification dated 20-3-2001 of the Government of U.P. maintained the same rate. The reasoning that prior to 3-2-2000 the State Government lacked competence and as such valid impact occurred for the first time vide Notification dated 20-3-2001, in*

her submission was flawed and beyond the scope of the jurisdiction of the Arbitral Tribunal. On the other hand, it was submitted by the respondent that a demand letter from the District Collector was without the support of law and that the impost pursuant to the Notification of 20-3-2001 alone was valid and legal and as such it being after the contract was entered into, must qualify to be "subsequent legislation".

42. *The question, therefore, is whether Claim 8 is covered by Clause 70.8 of COPA. In Clause 13.4 of the invitation to tender it was clearly stipulated in the contract that all duties, taxes and other levies payable by the contractor under the contract as of the date 28 days prior to the deadline for submission of bid shall be included in the rates and prices and the total bid price submitted by the bidder. The State Government, as a matter of fact, was levying royalty on ordinary earth and this situation was obtaining on such date. If the State Government lacked power to levy and collect such royalty prior to the Notification dated 3-2-2000 whereby ordinary earth was brought under the definition of minor mineral, such ground may certainly entitle a party to lay requisite challenge before an appropriate forum. However, for the purposes of the contract such levy being an existing levy must be deemed to have been part of the rates or prices quoted. By the Notification dated 20-3-2001, the same rate was maintained and as such there was no change arising due to any subsequent legislation. In our view the matter was therefore completely outside the scope of Clause 70.8 of COPA. The Arbitral Tribunal ought to have confined itself to the terms of the contract and see if there was any variation for the purposes of Clause 70.8 of COPA. It went beyond its powers in holding that the existing levy as on the date the contract was entered into was without any authority in law and as such the imposition by Notification dated 20-3-2001 created liability for the first time."*

29. In the case of ***SAL Udyog Private Limited (Supra),*** the Hon'ble Supreme Court held that:

***"23.** On a conspectus of the facts of the case, it remains undisputed that though the appellant State did raise an objection before the Arbitral Tribunal on the claim of the respondent Company seeking deduction of supervision charges, for which it relied on Clause 6(b) of the agreement and the Circular dated 27-7-1987 to assert that recovery of supervision charges along with expenses was a part and parcel of the contract executed with the respondent Company, the said objection was turned down by the learned sole arbitrator by giving a complete go-by to the terms and conditions of the agreement governing the parties and observing that there is no basis to admit any such "indirect expenses". The Circular dated 27-7-1987 issued by the Government of Madhya Pradesh that provides for imposition of 10% supervision charges on the amounts calculated towards the cost of the Sal seeds in the expenditure incurred, was also ignored. Pertinently, the respondent Company has not denied the fact that supervision charges were being levied by the appellant State and being paid by it without any demur as a part of the advance payment made on an annual basis, right from the date the parties had entered into the first agreement i.e. from 30-8-1979. This fact is also borne out from the specimen copies of the orders filed by the appellant State with the appeal that amply demonstrate that the cost of the Sal seeds required to be paid by the respondent Company included "supervision charges" described as "Paryavekshan vyay" in vernacular language. It was only after the appellant State had terminated the second contract on 21-12-1998, that the respondent Company raised a dispute and for the first time, claimed refund of the excess amount purportedly paid by it to the appellant State towards supervision charges incurred for supply of Sal seeds. In our opinion, this is the patent illegality that is manifest on the face of the arbitral award inasmuch as the express terms and conditions of the agreement governing the parties as also the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh have been completely ignored.*

***26.** To sum up, existence of Clause 6(b) in the agreement governing the parties, has not been disputed, nor has the application of the Circular*

> *dated 27-7-1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent Company. We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said "patent illegality" is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned award, insofar as it has permitted deduction of "supervision charges" recovered from the respondent Company by the appellant State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant circular. The impugned judgment dated 21-10-2009 is modified to the aforesaid extent."*

30. In the present case, the bid submitted by the plaintiff was accepted by the defendant no. 2 on 17th October, 2020 and on 23rd October, 2020, the purchase order was issued to the plaintiff. After issuance of purchase order, the Government of India, Ministry of Finance, Department of Expenditure, Procurement Policy Division issued Memorandum dated 12th November, 2020 by reducing the existing Performance Security from 5-10% to 3% of the value of the contract for all existing contracts. In the said Memorandum, it is also clarified that all tenders/contracts issued/concluded till 31st December, 2021 should also have the provision of reduced Performance Security. The

Government has reduced the Performance Security on account of slowdown in economy due to the pandemic as there was acute financial crunch amongst many of the entities and contractors.

31. The contract between the plaintiff and the defendant no. 2 was also the existing contract on the date of issuance of the Memorandum dated 12th November, 2020. Clause 7 of the Memorandum also clarified that the instructions will be applicable for all kinds of procurements viz Goods, Consultancy, Works, non-consulting Services etc. are issued under Rule 6(1) of the GFRs, 2017.

32. Clause 6 of the Special Condition of Contract in the purchase order dated 23rd October, 2020, reads as follows:

> *"**6. <u>Performance Bank Guarantee:</u>** The successful bidder shall submit Performance Bank Guarantee as per given format within 30 days of issue of Purchase Order by the concerned SAIL Steel Plant for 10% of the total order value (total order value including GST) for a period valid till end of Guarantee period (as given in the CET's Ordering Specification) plus three months claim period.*
>
> *PBG is to be submitted to the concerned SAIL Steel Plant in the form of Bank Guarantee issued by Scheduled Bank (as listed at Annexure – 4) having branch at the place of individual SAIL Plant, drawn in favour of SAIL/concerned SAIL Plant and as per proforma given in Annexure – 3. The stamp paper used for the Bank Guarantee(s) shall be of the appropriate value and should be purchased in the name of the issuing bank and issuance of amendment/extension of Bank Guarantee(s) should also be made on stamp paper of appropriate value purchased in the name of the bank. The non-judicial stamp paper should be of appropriate value and it should be purchased by the issuing bank from plant location i.e. Jharkhand/ Chhattisgarh/ West Bengal.*

> *Non-submission of PBG within 30 days of Purchase Order may result in any one or more of the following"*
>
> *a. Encashment of EMD bid*
>
> *b. Risk Purchase Action*
>
> *c. Banning or suspension of business."*

33. The Office Memorandum issued only for the purpose of existing contracts and the defendant no. 2 not denied with regard to the existence of the Memorandum dated 12th November, 2020. If Clause 6 of the Special Condition of Contract is read with the Memorandum dated 12th November, 2020, there will be no difficulty to hold that the Memorandum can be treated as part of the contract entered between the plaintiff and the defendant no.2 and is amendment to Clause -6 of the Special Terms and Conditions of Contract.

34. Clause - 11 of the Special Terms and Conditions of the Contract reads as follows:

> *"**11. Jurisdiction of Courts:** The courts at the place of ownership of rakes by the respective SAIL Plant only shall have exclusive jurisdiction over any dispute arising out in respect of this contract, i.e. Supply of Bogie Open wagon type – BOBSNM1 for BSP at Durg, Chhattisgarh, Supply of Bogie Open wagon type-BOXNHL for BSL at Bokaro, Jharkhand and supply of Bogie Open wagon type – BOSTHSM2 for DSP at Durgapur, West Bengal."*

35. The registered offices of the plaintiff and the defendants are situated within the jurisdiction of this Court. The Bank guarantees were issued by the defendant no.1 within the jurisdiction of this Court. As per

Section 120 of the Code of Civil Procedure, 1908, provisions of Sections 16, 17 and 20 of the Code of Civil Procedure, 1908 shall not apply to the High Court in the exercise of its Original Civil Jurisdiction.

36. In the case of ***Steel Authority of India Ltd. (Supra),*** the Hon'ble Division Bench of this Court held that:

> ***"7.*** *If the plaintiff can show that the defendant carries on business within the jurisdiction of this Court, then where did the cause of action arise is wholly besides the point. In this respect a recent judgment of the Supreme Court in the case of (4) Food Corporation of India v. Evdomen Corporation reported in (1999) 2 SCC 446 may be referred to where Their Lordships were concerned with Clause 12 of the Letters Patent of the Bombay High Court which is the same as that of this Court. An identical question was raised in that case which Their Lordships negative on the ground that the defendant was carrying on business within the jurisdiction of the Bombay High Court. The relevant portion of the judgment may be quoted which is as follows:—*
>
> > *"However, under Section 120 of the Civil Procedure Code, Sections 16, 17 and 20 of the Civil Procedure Code do not apply to a High Court in the exercise of its original civil jurisdiction. Jurisdiction of the Bombay High Court to entertain a suit under its ordinary original civil jurisdiction is determined by Clause 12 of the Letters Patent of the Bombay High Court. Under Clause 12 of the Letters Patent, a place where the defendant, or each of the defendants where there are more than one, at the commencement of the suit, carry on business would be a place where the Court would have jurisdiction. Therefore, under Clause 12 of the Letters Patent of the Bombay High Court, the Bombay High Court would have jurisdiction over the subject-matter of the dispute in the present case because the appellant does carry on business in Bombay."*

37. There are a number of decisions of the Hon'ble Supreme Court wherein it was held that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise as between themselves, such agreement would be valid and binding.

38. In ***A.B.C. Laminart (P) Ltd. v. A.P. Agencies [(1989) 2 SCC 163]***, the Hon'ble Supreme Court stated thus:

> *"21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' — expression of one is the exclusion of another—may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."*

39. ***A.B.C. Laminart case (supra)*** also referred to and relied upon an earlier decision of the Hon'ble Supreme Court in ***Hakam Singh v. Gammon (India) Ltd. [(1971) 1 SCC 286].*** The said decision was rendered in the light of facts of a similar contract where Clause 12 of the tender provided for arbitration whereas Clause 13 provided:

> *"… 13. Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this contract shall be deemed to have been entered into by the parties concerned in the city of Bombay and the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereon."*

40. The question which fell for consideration of the Hon'ble Court in ***Hakam Singh case (supra)*** was whether the court at Bombay alone had jurisdiction over the dispute. In that context, it was held that the Code in its entirety applied to proceedings under the Arbitration Act by virtue of Section 41 of that Act and that the jurisdiction of the Court under the Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code. Reference was made to the provisions of Section 20 of the Code, with all the terms of Section 20(*a*) of the Code read with the Explanation thereto; the respondent Company which had its principal place of business at Bombay was liable to be sued at Bombay. It was further held in ***Hakam Singh case*** **(supra)** that:

> *"where two or more courts have jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts was not contrary to public policy and that such an agreement did not contravene the provisions of Section 28 of the Contract Act."*

41. In ***Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd. [(2004) 4 SCC 671]*** it was held by the Hon'ble Supreme Court that where two or more courts have jurisdiction under the Code, it is permissible to have

an agreement between the parties restricting the place of suing to any one of them and if such restriction is placed in the agreement, the same cannot be said to be contrary to public policy and does not contravene Section 28 of the Contract Act. It was, however, made clear that such restriction cannot be made and the parties cannot by agreement confer jurisdiction on a court which otherwise it does not possess under the Code. This Court also considered the scope of Section 20 of the Code in the said case and by referring to the said provision it was held that:

> *"… when ouster clause is clear, unambiguous and specific, accepted notions of contract would bind parties, and unless absence of ad idem can be shown courts should avoid exercising jurisdiction".*

42. The aforesaid legal proposition settled by the Hon'ble Supreme Court in respect of the territorial jurisdiction and applicability of Section 20 of the Code to the Arbitration Act is clear, unambiguous and explicit. The said position binding on both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into the purchase order which categorically provides that the courts at the place of ownership of rakes by the respective SAIL Plant only shall have the exclusive jurisdiction over any dispute arising out in respect of this contract.

43. In the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. There is indeed an ouster clause used in the aforesaid stipulation stating that the court at the place of ownership of rakes by

the respective SAIL Plant only shall have exclusive jurisdiction over any dispute arising out in respect of this contract i.e. supply of Bogie Open Wagon type – BOBSNM1 for BSP Durg, Chhattisgarh, supply of Bogie Open Wagon Type – BOXNHL for BSL at Bokaro, Jharkhand and supply of Bogie Open Wagon type – BOSTHSM2 for DSP at Durgapur, West Bengal. In the case in hand jurisdiction is of the Court at Durgapur, West Bengal.

44. In view of the above finding and conclusion arrived at by this Court holding that it is only the Court at Durgapur, West Bengal will have the jurisdiction to try and decide the Arbitration proceeding between the parties. The Department is directed to return the plaint with the liberty to the plaintiff to file before the appropriate court having jurisdiction.

45. **G.A. (COM) No. 2 of 2024** is **allowed**. **C.S. (COM) No. 714 of 2024** shall be treated as **disposed of**.

(Krishna Rao, J.)