

M/S KBM Enterprise And Anr Vs National Highways And Infrastructure Development Corporation Limited And 5 Ors

Court: Gauhati High Court

Date of Decision: July 2, 2021

Acts Referred: Constitution Of India, 1950 " Article 32, 226, 227, 323A, 323A(2)(d), 323B, 323B(3)(d)

Code Of Civil Procedure, 1908 " Section 20, 20(a), 20(b), 20(c), Order 29 Rule 2

Indian Contract Act, 1872 " Section 23, 28

Arbitration and Conciliation Act, 1996 " Section 2(e), 11, 11(12)(b)

Information Technology Act, 2000 " Section 13, 13(1), 13(5)

Hon'ble Judges: Kalyan Rai Surana, J

Bench: Single Bench

Advocate: P.J. Saikia, A.K. Gupta, K.J. Saikia, D.K. Banerji, R. Bora

Judgement

”

1) Heard Mr. P.J. Saikia, learned counsel for the petitioner and Mr. D.K. Banerji, learned senior counsel, assisted by Mrs. R. Bora, learned standing”,,

counsel for the respondents.,,

2) By this writ petition filed under Article 226 of the Constitution of India, the petitioner has assailed the legality of (i) the letter no. NHIDCL/Civil”,,

Work/Peren Dimapur/Pkg2/2021/889 dated 08.06.2021 issued by the Executive Director, NHIDCL, Kohima (respondent no.5), thereby rejecting the”,,

prayer made by the petitioner in his representation dated 02.06.2021, seeking extension of time for submission of Performance Security and Additional”,,

Performance Bank Guarantee; (ii) letter no. NHIDCL/Nagaland/ PD/2/2021/SPL-I dated 04.05.2021 issued by the General Manager, NHIDCL, New”,,

Delhi (respondent no.4); (iii) for setting aside notice inviting bids no. Bid/Package No. NHIDCL/Civil Work/Peren Dimapur/Pkg2 dated 12.03.2020,,

reissued on 08.06.2021 (3rd Call) by the respondent no. 4 for Construction of 2 Laning with Hard Shoulder of Peren-Dimapur Section on NH-129A,,

from design Km 126.775 to KM 146.208 (Length- 19.433) in the State of Nagaland; (iv) to direct the respondent nos. 1, 2 and 3 to consider the”,,

request of the petitioner made vide representation dated 02.06.2021 for extension of time for submission of Performance Security and Additional,,

Performance Bank Guarantee afresh taking note of the prevailing situation in the State of Arunachal Pradesh, Assam and Nagaland as well as benefit”,,

granted to the similarly situated bidders vide letter dated 17.05.2021. The petitioner has also prayed for granting interim relief to the petitioner by,,

staying notice inviting bids no. Bid/Package No. NHIDCL/Civil Work/Peren Dimapur/Pkg2 dated 12.03.2020 reissued on 08.06.2021 (3rd Call) by the,,

respondent no. 4 for Construction of 2 Laning with Hard Shoulder of Peren-Dimapur Section on NH-129A from design Km 126.775 to KM 146.208,,

(Length- 19.433) in the State of Nagaland.,,

3) The learned senior counsel for the respondent has raised two preliminary issue and accordingly, both sides were extensively heard (i) on the",,,

preliminary issue of lack of territorial jurisdiction at Guwahati and/or alternatively of forum convenience at New Delhi, and (ii) on the prayer for",,,

interim relief.,,

FACTUAL MATRIX RELEVANT FOR THIS ORDER:,,

4) The non disputed factual matrix is that in the tendering process, the petitioner was adjudged as the successful bidder and a Letter of Acceptance",,,

dated 04.05.2021 (hereinafter referred as 'LoA', for short) was issued by the General Manager (T) of the respondent no. 1. On 12.05.2021, the",,,

Assam State Disaster Management Authority (hereinafter referred to as 'ASDM Authority', for brevity) had issued order (which is popularly,,

called SoP), inter alia, shutting down both Government and Non-Government offices for 15 days and ban was imposed on movement of individuals",,,

from 2 PM to 5 AM. This was followed by another order dated 17.05.2021 by ASDM Authority, thereby banning inter-district movement. In the",,,

meanwhile on 17.05.2021, the Deputy General Manager (HR) of respondent no.1 had issued an office order to relax the submission of Performance",,,

Bank Guarantee and Additional Performance Bank Guarantee to the EPC (i.e. Engineering, Procurement and Construction) contractors. Thereafter, "",

by order dated 04.06.2021 issued by the ASDM Authority had, inter alia, imposed total ban in the movement of individuals from 1 PM to 5 AM daily",,,

and it was ordered that both Government and Non-Government offices shall remain closed till 15.06.2021, and the inter-district travel also remained",,,

banned. Similar Covid-19 protocols were also issued by the District Magistrate-cum- Deputy Commissioner, Itanagar Capital Region on 17.05.2021, "",

06.06.2021. Similar Covid-19 protocols were also issued by the Nagaland State Disaster Management Authority on 11.05.2021, 09.06.2021. The",,,

petitioner being unable to submit Performance Bank Guarantee, submitted a representation dated 02.06.2021 before the General Manager (Tech), "",

New Delhi to allow them additional 30 to 45 days in view of present Covid-19 pandemic situation and lock down operating in the States of Arunachal,,

Pradesh, Assam and Nagaland as the Bank Guarantees could not be submitted due to Covid impact which is not attributable to the petitioner and it",,,

was beyond the control of the petitioner. However, the Executive Director (T) of the respondent no.1 at New Delhi, by the letter no. NHIDCL Civil",,,

Work/Peren Dimapur/Pkg 2/2021/889 dated 08.06.2021, impugned herein, expressed the inability of the NHDCL to agree to give extension of 30 days",,,

time vide letter dated 02.06.2021 and further took action against the petitioner under Clause 2.21.5 of Request for Proposal (RFP for short),,,

and withdrew the herein before referred LoA dated 04.05.2021 without prejudice to their right under the relevant provisions of the RFP as well as,,

applicable laws.,,,

DISCUSSION ON THE POINT OF TERRITORIAL JURISDICTION:,,

5) In this case, it would be appropriate to discuss the cases cited at the Bar at the outset. The learned counsel for the petitioner had cited the case of",,,

(i) Patel Roadways Vs. Prasad Trading Company, AIR 1992 SC 1514; (ii) L. Chandra Kumar Vs. Union of India, AIR 1997 SC 1125: (1999) 3 SCC",,,

261 and (iii) ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd., (2004) 3 SCC 553. The same is countered by the learned",,,

senior counsel for the respondents by citing the case of Swastik Gasses Pvt. Ltd. Vs. Indian Oil Corporation, (2013) 9 SCC 32.",,,

a. In the case of L. Chandra Kumar (supra), the Supreme Court of India was deciding whether Central Administrative Tribunal would cause ouster of",,,

jurisdiction of High Court and the issue of power of judicial review under Article 226/227 of the Constitution of India. It is in the said context that it,,

was held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot be excluded. It was further",,,

held that "Clause 2(d) of Article 323A and Clause 3 (d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the",,,

Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses",,,

in all other legislations enacted under the aegis of Article 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred",,,

upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure,,

of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers",,,

conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are,,

possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however be",,,

subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, ,,

continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for",,,

litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except where the legislation which,,

creates the particular Tribunal is challenged)by overlooking the jurisdiction of the concerned Tribunal. Section 5(6)of the Act is valid and constitutional,,

and is to be interpreted in the manner we have indicated.Ã¢â¬ Therefore, the said decision cannot be invoked to confer jurisdiction before any High",,,

Court where cause of action for the lis has not arisen.,,

b.Ã¢ In the case of ABL International Ltd. (supra), the issue which was being decided was that whether a writ would be entertainable when",,,

alternative remedy to file a suit was available. In the said context, it was observed by the Supreme Court of India that the learned Single Judge having",,,

perused the various correspondence between the parties and noticing the fact that the Kazakhstan Government also admitted its failure to comply with,,

its guarantee came to the conclusion that there was nothing on record to show that the appellants under the contract of insurance was liable to consult,,

the first respondent as regards its right to reject the payment by barter for any reason whatsoever. On such interpretation of the clauses of the,,

contracts, the learned Judge felt that it was an appropriate case in which a writ should be issued as prayed for by the petitioner and accordingly",,,

allowed the petition. In appeal, the Appellate Bench took somewhat a restricted view of the power of the High Court to entertain a writ petition under",,,

Article 226 of the Constitution of India and came to the conclusion that the petition involved disputed questions of fact, hence, there being an alternate",,,

remedy by way of a suit allowed the appeal setting aside the judgment as also the relief granted by the trial court. In that context, the Supreme Court",,,

of India had held that Ã¢â¬ in our opinion, it does not require any external aid much less any oral evidence to interpret the above clause. Merely",,,

because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or",,,

interpretations are raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same",,,

as in this case.Ã¢â¬ Therefore, on facts, the present case in hand is distinguishable.",,,

c. The relevant paragraphs of the case of Patel Roadways Ltd. (supra) are quoted below:-,,

9. Clauses (a) and (b) of S. 20 inter alia refer to a court within the local limits of whose jurisdiction the defendant inter alia ""carries on",,,

business"". Clause (c) on the other hand refers to a court within the local limits of whose jurisdiction the cause of action wholly or in part",,

arises. It has not been urged before us on behalf of the appellant that the cause of action wholly or in part arose in Bombay. Consequently,,

clause (c) is not attracted to the facts of these cases. What has been urged with the aid of the Explanation to S. 20 of the Code is that since,,

the appellant has its principal office in Bombay it shall be deemed to carry on business at Bombay and consequently the courts at Bombay,,

will also have jurisdiction. On a plain reading, of the Explanation to S. 20 of the Code we find an apparent fallacy in the aforesaid",,

argument. The Explanation is in two parts, one before the word ""or"" occurring between the words ""office in India"" and the word ""in",,

respect of"" and the other thereafter. The Explanation applies to a defendant which is a corporation, which term, as seen above, would",,

include even a company such as the appellant in the instant case. The First part of the Explanation applies only to such a corporation which,,

has its sole or principal office at a particular place. In that event the courts within whose jurisdiction the sole or principal office of the,,

defendant is situate will also have jurisdiction inasmuch as even if the defendant may not be actually carrying on business at that place, it",,

will ""be deemed to carry on business"" at that place because of the fiction created by the Explanation. The latter part of the Explanation",,

takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate,,

office at another place. the words ""at such place"" occurring at the end of the Explanation and the word ""or"" referred to above which is",,

disjunctive clearly suggest that if the case falls within the latter part of the Explanation it is not the court within whose jurisdiction the,,

principal office of the defendant is situate but the court within whose jurisdiction it has a subordinate office which alone shall have,,

jurisdiction ""in respect of any cause of action arising at any place where it has also a subordinate office"". ",,

10. Here we may point out that the view which we take Finds support from a circumstance which, in our opinion, is relevant. S. 20 of the Code before",,

its amendment by the Code of Civil Procedure (Amendment) Act, 1976 had two Explanations being Explanations 1 and II. By the Amendment Act",,

Explanation I was omitted and Explanation II was renumbered as the present Explanation. Explanation I so omitted read as hereunder:,,

Explanation-I. Where a person has a permanent dwelling at one place and also temporary residence at another place; he shall be deemed to reside at",,

both places in respect of any cause of action arising at the place where he has such temporary residence. """,,

In light of above, in respect of any action relating to furnishing of performance security and additional performance guarantee, it is seen that no cause",,,

of action has arisen had arisen in any three States of Assam, Nagaland and Arunachal Pradesh. The receipt of the performance security and",,,

additional performance guarantee was to be effected at New Delhi. Only thereafter, contract agreement could have been signed.",,,

d. The relevant paragraphs of the case of P.R. Transport Agency (supra), as decided by the Allahabad High Court are quoted below:-",,,

7. According to Halsbury's Laws of England 4th Edition Reissue Vol. 9(1) Paragraph 683 Page-434, 435 it has been said in reference to contracts",,,

made orally as by telephone, or in writing as by telex or fax, that the contract is complete when and where the acceptance is received.",,,

18. But, there is one vital difference, namely that while the jurisdiction to pass a decree accrues to the Civil Court only upon institution of",,,

suit filing of a plaint and the Civil Court cannot act suo motu, but under Article 226 of the Constitution of India the power to issue writs",,,

orders or directions is not necessarily dependent upon filing of a writ petition. The High Court has the power to act suo motu if an",,,

appropriate matter comes to its knowledge may be received by the High Court by means of a writ petition or otherwise.,,,

19. When the parties enter into an agreement confining themselves to the jurisdiction of one of the several Civil Courts having territorial,,,

jurisdiction in respect of a suit, basically the parties are placing a restraint upon themselves from approaching the other Civil Courts whose",,,

jurisdiction has been excluded by the agreement. In this manner the jurisdiction of the other Civil Courts gets ousted, subject only to one",,,

restriction which is provided in Section 28 of the Contract Act. However, the power of judicial review given to the High Courts by Article",,,

226 of the Constitution of India, and being a basic feature of the Constitution, cannot be curtailed even by statute, as held by the Supreme",,,

Court in the case of L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, (AIR 1997 SC 1125). Therefore, it is not possible to accept the",,,

contention that the said constitutional power of the High Court to issue a writ suo motu can be curtailed by an agreement between litigants.,,,

20. We, therefore, hold that the ouster clauses can oust a territorial jurisdiction only of Civil Courts and not of the High Court in respect of",,,

the power under Article 226 of the Constitution of India, provided such power exists in the High Court on account of part of cause of action",,,

having arisen within its territorial jurisdiction.,,,

In light of above, as already discussed herein before, it is reiterated that no cause of action has arisen had arisen in any three States of Assam",,,

Nagaland and Arunachal Pradesh. The receipt of the performance security and additional performance guarantee was to be effected at New Delhi.,,

Only thereafter, contract agreement could have been signed.",,

e. The relevant paragraphs of the case of Swastik Gasses Pvt. Ltd. (supra) are quoted below from 2013 STPL 16437 (All):-,,

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" is clear and,,,

Sl.No.,Event description,Date

, *, **

14,"Submission of Performance

Security (PS) and Additional

Performance Security (APS)

if any", "Within 30 days of receipt of LoA. (The bidder has the option to provide 50% of PS

and APS, if any within 30 days of receipt of LoA and the remaining PS and APS, i

,any to be provided within 30 days of signing of agreement.

(i) Receipt occurs at the time when the electronic record enters the designated computer resource; or,,

(ii) If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at",,,

the time when the electronic record is retrieved by the addressee;,,

(b) If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record",,,

enters the computer resource of the addressee.,,

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place",,,

where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.",,,

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different,,,

from the place where the electronic record is deemed to have been received under sub-section (3).,,

(5) For the purposes of this section, -" ,,,

(a) If the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;" ,,,

(b) If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of" ,,,

business;,,

(c) "Usual place of residence", in relation to a body corporate, means the place where it is registered.",,,

12) The reliance of the learned counsel for the petitioner on Section 13 of Information Technology Act, 2000 appears to be misapplied because in the",,,

present case the receipt of electronic record and/or any other correspondence exchanged between the parties would not create any cause of action,,

for the petitioner. It is reiterated at the cost of repetition that the mere receipt of LoA by the petitioner by itself does not create any contract between,,

the parties because the said LoA is conditional and subject to submission of Performance Security and Additional Performance Guarantee, if any," ,,,

which was to be received by the respondent no.1, i.e. NHIDCL at New Delhi. Moreover, there is no pleading to the effect that the parties had made",,,

any agreement in terms of Sub-Section (1) of Section 13 of the Information Technology Act, 2000. Moreover, there is nothing on record to indicate",,,

that the place where the electronic record is received by the addressee would be the place where cause of action has arisen. It is also seen from Sub-,,,

Section (5) of Section 13 of the said Act that the place of business would be where the originator of electronic data has its place of business. The,,

petitioner has not been able to show that in tender matters, the Courts within whose jurisdiction the petitioner resides or carries on business has the",,,

jurisdiction to entertain writ petition, though the major part of the cause of action arises outside the jurisdiction of this Court.",,,

13) The learned counsel for the petitioner has heavily relied upon the fact that the respondent no.1 had one of its offices in the State of Nagaland," ,,,

where the contract work was to be executed. In the said context, it would be relevant to refer to the provisions of Order XXIX, Rule 2 CPC, which is",,

extracted below:-,,

2. Service on corporation. - Subject to any statutory provision regulating service of process, where the suit is against a corporation, the",,

summons may be served",,

(a) on the secretary, or on any director, or other principal officer of the corporation, or",,

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the",,

place where the corporation carries on business.,,

14) Therefore, it is seen that both under Section 13(5) of the Information Technology Act, 2000 and Order XXIX, Rule 2 CPC, the principal place of",,

business of a corporation/ company is its Registered Office.,,

15) Therefore, notwithstanding the provisions of Section 20(c) CPC, the cause of action for the petitioner arose in New Delhi. Therefore, even if",,

miniscule portion of cause of action is deemed to have arisen at Itanagar and/or Kohima, under the jurisdiction of this Court, the Court is of the",,

considered opinion that the forum convenience would be at New Delhi as major portion of cause of action has arisen in New Delhi and the authorities,,

who had issued the letters impugned by the petitioner have their place of office at New Delhi. Moreover, as per Clause 6.1 of Section 6 of the RoP, it",,

is provided that Courts at New Delhi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the",,

"bidding process",,

16) In view of the discussions above, the cases cited by the learned counsel for the petitioner on the issue of territorial jurisdiction and cause of action",,

are found to be distinguishable on facts, because none of the cited case are authority on the point that in tender matters which High Court would have",,

territorial jurisdiction if the successful bidder is unable to provide performance security as per the terms and conditions of the LoA. Therefore, the",,

forum convenience would be at the High Court of judicature at New Delhi.,,

ON PRAYER FOR INTERIM STAY:,,

17) The Court has already held that forum convenience would be at New Delhi. Under such circumstances, the Court declines to consider the prayer",,

for interim relief at this stage.,,

EXCEPT FOR TERRITORIAL JURISDICTION AND/OR FORUM CONVENIENCE, OTHER POINTS NOT GONE INTO:,,

18) It is hereby clarified that save and except for the issue of territorial jurisdiction and/or forum convenience, the Court has not gone into merit of the",,

writ petition or merit of the argument advanced by the learned counsel for the petitioner or the learned senior counsel for the respondent in the matter,,

of prayer for interim relief.,,

RETURN OF WRIT PETITION:,,

19) Therefore, having held that the forum convenience would be at High Court having judicature at New Delhi, the writ petition stands returned to the",,,

petitioner.,,

DIRECTION TO THE REGISTRY:,,

20) The Registry shall return the writ petition with all enclosures as well as cancelled Court fees with endorsement in the first back-page regarding the,,

date of filing and date of return. While returning the writ petition, the Registry shall provide a true copy of all orders passed by this Court. The",,,

Registry shall retain for the record (i) a copy of the writ petition, (ii) the original order sheet, and (iii) vakalatnama.".,,