

Golkonda Engg. Enterprises Limited Vs Mahanagar Telephone Nigam Limited

Court: Andhra Pradesh High Court

Date of Decision: April 6, 2005

Acts Referred: Arbitration and Conciliation Act, 1996 & Section 11(5)
Constitution of India, 1950 & Article 226(2)

Citation: (2005) 4 ALD 325

Hon'ble Judges: N.V. Ramana, J

Bench: Single Bench

Advocate: B. Chandrasen Reddy, for the Appellant; R.S. Murthy, SC for BSNL, for the Respondent

Final Decision: Dismissed

Judgement

N.V. Ramana, J.

Invoking the jurisdiction of this Court u/s 11(5) of the Arbitration and Conciliation Act, 1996, the applicant, namely M/s.

Golkonda Engg Enterprises Limited, has filed this application praying to appoint a sole Arbitrator for resolution of the disputes, which arose out of

the agreement, between it and the respondent, namely M/s. Mahanagar Telephone Nigam Limited.

2. In response to the Tender Notification No. MTNL/20-80(66)/2003-2004/ 2003-MM/PIJF, dated 21-8-2003, issued by the respondent for

supply of 400 Pair/0.5(a) PIJF Cables for the year 2003-2004, the applicant submitted its tender. The applicant being the successful bidder in

respect of a part of the tendered quantity, was called upon by the respondent to supply PIJF Cables. The Advance Purchase Order followed by

Purchase Order No. AGM(MM-II)/MM-128/PUF CABLE/PO/2003-2004/8, dated 17-12-2003, issued by the respondent were received by

the applicant at their Registered Office at Secunderabad. The applicant states that the contract envisages, manufacture and inspection of PIJF

Cables at the applicant's factory, and that the applicant also supplied part of the tender quantity in terms of the Purchase Order, and that it could

not supply the balance quantity because the Quality Wing of the Department of Telecommunications, Hyderabad, did not accept the material for

testing on the ground that there is no clause in the Purchase Order with respect to Quality Assurance Test. When this fact was brought to the

notice of the respondent, the respondent amended the Purchase Order by incorporating the Quality Assurance Test clause on 22-2-2004, and the

amended Purchase Order sent by the respondent, was received by the applicant on 1-3-2004 at its Registered Office at Secunderabad.

3. In view of the defective Purchase Order, issued by the respondent, which was amended by them subsequently, the applicant states that it sought

for extension of time for supply of the entire quantity from the date of amended Purchase Order, but the respondent by their letter dated 19-3-

2003 extended the time with Liquidated Damages. The applicant states that it addressed several letters between 26-3-2004 and 5-5-2004

requesting the respondent to extend the time without Liquidated Damages in vain as the respondent vide their letter dated 10-6-2004 rejected such

request. The applicant further states that as the respondent failed to extend the time without Liquidated Damages, there arose a dispute between it

and the respondent, and as such, invoking the arbitration clause contained in Clause 20.1 of the General (Commercial) Conditions of Contract,

vide its letter dated 25-6-2004, called upon the Assistant General Manager of the respondent to appoint an Arbitrator, but he having received the

said letter, failed to appoint an Arbitrator though 30 days had elapsed. Hence, the present application for appointment of Arbitrator.

4. On behalf of the respondent, CAO (Legal), has filed counter-affidavit inter alia taking a preliminary objection as to the jurisdiction of this Court

to entertain the application. It is contended that the issuance of Tender Notification, submission of Tender by the applicant, processing and

finalizing of the Tender by the respondent, and entering into correspondence in connection therewith and issuance of Advance Purchase Order

followed by Purchase Order and amended Purchase Order by the respondent to the applicant, all originated from New Delhi, and the location of

the named Arbitrator and the place of arbitration agreed by the parties to the agreement, is at New Delhi, and as such, it is contended that only the

High Court at New Delhi and not this Court has the jurisdiction to entertain the application for appointment of Arbitrator for no cause of action,

either wholly or in part, has arisen within the jurisdiction of this Court. It is further contended that the applicant without invoking the arbitration

clause in terms of Clause 20.1 of the General (Commercial) Conditions of Contract, which provides for reference of the disputes to sole arbitration

of CMD, MTNL or to the sole arbitration by some other person appointed by the CMD, has filed this application seeking appointment of sole

arbitrator, which is premature. The applicant instead of requesting the CMD, has requested the Assistant General Manager, to appoint a sole

Arbitrator, and the Assistant General Manager not being a substitute to CMD nor the CMD having delegated his power to the Assistant General

Manager to be the arbitrator or to appoint an arbitrator, the request for appointment of arbitrator made by the applicant to the Assistant General

Manager, cannot be said to have been made by the applicant in terms of Clause 20.1 of the General (Commercial) Conditions of Contract, and at

any rate, in compliance with the provisions of Section 11(5) of the Arbitration and Conciliation Act, 1996.

5. It is further contended that foreclosure of Purchase Order falls within excepted matters, and as such, are not arbitrable disputes, and they cannot

be referred to Arbitrator for arbitration. The respondent further contends that the application is not maintainable for mis-joinder and non-joinder of

parties, in that the Assistant General Manager, who is not the authority competent, is arrayed as respondent, while the Mahanagar Telephone

Nigam Limited, which is a body corporate and which entered into agreement with the applicant, is not made a party to the application, and

likewise, the CMD, MTNL, who is the authority competent to arbitrate or refer the matter to arbitration, has not been made party to the

application.

6. Apart from the above objections, it is further contended by the respondent that the applicant failed to stick to the supply schedule. As per the

terms and conditions of the Purchase Order, the applicant is supposed to supply 25% of PIJF Cables within one month, and the balance within the

next two months distributed equally, which it did not do. It is contended that no reliance can be placed on the letter dated 27-1-2004, by which

the Quality Assurance Test was refused, as the same is not authentic for it has not emanated from a competent authority. The existence of technical

flaw in the Purchase Order is denied by the respondent, and it is contended that as the applicant failed to supply the PIJF Cables within the time

stipulated in the agreement, on the request made by the applicant, they extended time subject to claiming of Liquidated Damages, which is in

accordance with the General (Commercial) Conditions of Contract. Therefore, the request of the applicant that no Liquidated Damages shall be

claimed by the respondent, during the extended period of contract, was rejected. The applicant is bound to supply PIJF Cables as per the terms

and conditions of the Purchase Order. The dispute raised by the applicant in its letter dated 25-6-2004 is no dispute in the eye of law. It is thus

prayed that the application for appointment of sole Arbitrator, be dismissed.

7. Heard Sri B. Chandrasen Reddy, the learned Counsel for the applicant and Sri Sukumar Pattjashi, representing Sri R.S. Murthy, the learned

Standing Counsel for the respondent.

8. The learned Counsel for the applicant submits that in view of the technical flaw in the Purchase Order issued by the respondent, the Quality

Wing of Department of Telecommunications, refused to conduct the quality test, and therefore, the applicant requested the respondent to extend

the time for supply of the entire quantity from the date of receipt of the amended Purchase Order, but the respondent by their letter dated 19-3-

2004 extended the time with Liquidated Damages, and though the applicant addressed letters between 26-3-2004 and 5-3-2004 requesting the

respondent to extend the time without Liquidated Damages, the respondent rejected the same by their letter dated 10-6-2004. Hence, dispute

arose between the parties. Therefore, the applicant invoking Clause 20.1 of the General (Commercial) Conditions of the Contract, by their letter

dated 25-6-2004, called upon the Assistant General Manager of the respondent to refer the dispute to Arbitrator for resolution. However, the

respondent having received the same, neither replied nor referred the dispute to Arbitrator. Therefore, the applicant filed the present application u/s

11(5) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator, which requires to be allowed.

9. On the contrary, learned Standing Counsel for the respondent contended that this Court has no territorial jurisdiction to entertain the application

for appointment of Arbitrator for the reason that no cause of action, either wholly or in part, has arisen within the territorial jurisdiction of this

Court, and on the other hand, the High Court at New Delhi has jurisdiction to entertain the application for the reasons -that issuance of Tender

Notification, submission of Tender Schedule by the applicant, the processing and finalization of tenders, issuance of Advanced Purchase Order,

Purchase Order and amended Purchase Order, all originated from New Delhi. He submitted that the location of the named Arbitrator and the

place of arbitration agreed by the parties to the agreement, is at New Delhi, and contended that the applicant has not shown the cause of action

that has arisen, either in part or in whole, within the jurisdiction of this Court to entertain the application for appointment of Arbitrator, and

contended that cause of action means bundle of facts which the applicant has to prove, and mere receiving of communication addressed by the

respondent to the applicant at its Registered Office at Secunderabad, does not constitute cause of action. In support of this submission, he placed

reliance on the judgments of the Apex Court in National Textile Corpn. Ltd. and Others Vs. Haribox Swalram and Others, , of a learned Single

Judge of this Court in W.P. No. 19577 of 2004 dated 8-11-2004, which was confirmed by a Division Bench of this Court in W.A. No. 1807 of

2004 dated 24-2-2005, of the Madras High Court in Kamala Solvent Vs. Manipal Finance Corporation Ltd., Manipal and Others, , and of the

Delhi High Court in B.R. Electricals v. The Chairman and Ors. 2003 (1) Arb. LR 375 (Del.) (DB). He submitted that the judgment of this Court in

Bhagyanagar Metals Limited Vs. Bharath Sanchar Nigam Limited, , relied upon by the learned Counsel for the applicant, should be treated as a

judgment given per incurium as it did not consider the ratio laid down by the judgments referred to in W.P. No. 19577 of 2004, dated 8-11-2004,

which was upheld by the Division Bench in writ appeal.

10. At any rate, he submitted that refusal by the respondent to extend time to the applicant for supply of the material without Liquidated Damages,

on the ground that there was technical flaw in the Purchase Order, cannot at all be treated as a dispute which requires to be referred to arbitration.

According to him, as per Clause 20.1 of the General (Commercial) Conditions of Contract, the matter shall be referred to the sole arbitration of

CMD, MTNL, but the applicant instead of approaching the CMD, MTNL, has addressed letters to the Assistant General Manager of the

respondent, who is not the authority competent in terms of Clause 20.1 of the General (Commercial) Conditions of Contract, to whom matters can

be referred to sole arbitration, and the very approach of the applicant being defective, he is not entitled to invoke the jurisdiction of this Court u/s

11(5) of the Arbitration and Conciliation Act, 1996, for there is no request made by the applicant in terms of Clause 20.1 of the General

(Commercial) Conditions of Contract, to the CMD, MTNL for appointment of arbitrator nor any such request was refused by the CMD, MTNL,

and at any rate, the CMD, MTNL having not delegated his power, the request for appointment made by the applicant to the Assignment General

Manager of the respondent, cannot be equated with the one made to the CMD, MTNL, as provided under Clause 20.1 of the General

(Commercial) Conditions of Contract. He, thus submitted that the arbitration application be dismissed.

11. In reply to the preliminary objection taken by the learned Standing Counsel for the respondent that this Court lacks territorial jurisdiction to

entertain the application for appointment of Arbitrator, the learned Counsel for the applicant submitted that this issue is squarely covered by the

judgment of this Court in Bhagyanagar Metals Limited Vs. Bharath Sanchar Nigam Limited, , which was confirmed by a Division Bench of this

Court in W.P. No. 2607 of 2005 by order dated 24-2-2005. He submitted that this Court has territorial jurisdiction to entertain the application for

the reasons - that the Registered Office and manufacturing unit of the applicant is located at Secunderabad, the Advance Purchase Order,

Purchase Order and the amended Purchase Order issued by the respondent were received by the applicant at its Registered Office at

Secunderabad, the Quality Assurance Test is required to be conducted at Secunderabad, and the applicant made supplies to the respondent from

its manufacturing unit at Secunderabad. At any rate, he submitted that since the facts pleaded by the applicant constitute a part of cause of action

having arisen within the jurisdiction of this Court, this Court has jurisdiction to entertain the arbitration application for appointment of Arbitrator,

and in support of this submission, he placed reliance on the judgment of the Full Bench of the Apex Court in Kusum Ingots and Alloys Ltd. Vs.

Union of India (UOI) and Another, .

12. The preliminary objection taken by the respondent that this Court has no territorial jurisdiction to entertain the application for appointment of

Arbitrator, cannot be sustained. Cause of action constitutes a bundle of facts, and while deciding the question as to the jurisdiction of a Court to

entertain an application, what is required to be seen is whether cause of action, either wholly or in part, has arisen within the territorial jurisdiction

of that Court. Though the issuance of Tender Notification, the processing and finalization of tenders, resulting in issuance of Advance Purchase

Order, Purchase Order and amended Purchase Order, all originated from New Delhi, the fact remains that the applicant is having its Registered

Office and manufacturing unit at Secunderabad, and it received the Advance Purchase Order, Purchase Order and amended Purchase Order at

their Registered Office at Secunderabad. Apart from receiving of correspondence by the applicant at its Registered Office at Secunderabad, the

additional facts which create jurisdiction within the jurisdiction of this Court are that the General (Commercial) Conditions of Contract, provide that

the inspection and Quality Assurance Test of the material to be supplied by the applicant are required to be conducted at Secunderabad. This

apart, the applicant states that it had obtained Type approval Certificate from the Telecom Engineering Centre of BSNL, which admittedly is within

the jurisdiction of this Court, and that in pursuance of the Purchase Order, it had even supplied some material to the respondent from its

manufacturing unit at Secunderabad.

13. Once the Purchaser expresses his intention to enter into contract with the bidder by issuing Advance Purchase Order in terms of Clause 27.1

of Section II of the Instructions to Bidders, its acceptance shall be communicated by the bidder to the Purchaser as per Clause 27.2 thereof giving

performance security, and once the Purchaser receives the acceptance from the Bidder and issues Purchase Order, it constitutes the award of

contract. It is the case of the applicant that they received the Advance Purchase Order, Purchase Order and amended Purchase Order at its

Registered Office at Secunderabad, and since the applicant upon receipt of Advance Purchase Order has expressed its acceptance by furnishing

performance security from its Registered Office at Secunderabad, and since upon receipt of acceptance letter, the respondent issued Purchase

Order, which was received by the applicant at its Registered Office at Secunderabad, and the applicant having received the same, manufactured

material in its manufacturing unit at Secunderabad, it can safely be inferred that a part of cause of action has arisen within the territorial jurisdiction

of this Court.

14. Further, as per Clause 5.1 of Section III of the General (Commercial) Conditions of Contract, if the Purchaser decides to conduct tests on the

premises of the supplier or its sub-contractor(s), the supplier shall provide all reasonable facilities and assistance like testing instruments and other

testing gadgets including access to drawings and production data to the inspectors, and as per Clause 7.4 thereof, the training of the purchaser's

personnel shall be at the suppliers plant and/or on-site in assembly start-up operation maintenance and/or repair of the supplied goods. Since these

clauses provide conducting of inspection/test and training at the suppliers premises, obviously before supplies are made, the inspection/test and

training of the personnel of the applicant can be said to have been made at the applicant's manufacturing unit, and since it is the case of the

applicant that its manufacturing unit is located at Secunderabad, a part of cause of action can be said to have arisen within the territorial jurisdiction

of this Court. In this context, it would be appropriate to refer to the judgment of the Apex Court in Kusum Ingots and Alloys Ltd. v. Union of

India, (supra) wherein it was held that indisputably even if a small fraction of the cause of action accrues within the jurisdiction of the Court, the

Court will have jurisdiction, and holding so, it was held thus:

Keeping in view the expressions used in Article 226(2) of the Constitution indisputably even if a small fraction of cause of action accrues within the

jurisdiction of the High Court, the High Court will have jurisdiction in the matter. However, 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

convenience.

15. The Apex Court further observed that when a part of the cause of action arises within one or the other High Court, it will be for the petitioner

to choose his forum. In the instant case, since part of cause of action has arisen within the territorial jurisdiction of both, the High Court at Delhi and

this Court, the applicant has invoked the jurisdiction of this Court, and for the reasons afore-mentioned, it cannot be said that this Court has no

territorial jurisdiction to entertain the application for appointment of Arbitrator.

16. No doubt in *National Textile Corporation Ltd. v. Haribox Swalram*, (supra) upon which the learned Counsel for the respondent placed heavy

reliance, it was held that only those facts give rise to a cause of action within a Court's territorial jurisdiction which have a nexus or relevance with

the lis that is involved in the case, but acceptance of the contract by the applicant from its Registered Office at Secunderabad pursuant to its

receiving the Advance Purchase Order sent by the respondent from New Delhi, and the Clauses in the Instructions to Bidder and the General

(Commercial) Conditions of Contract, referred to above, which provide for inspection/test and training at the premises of the applicant at

Secunderabad, and the manufacture of materials at the premises of the applicant pursuant to the placing of Purchase Order by the respondent,

which is at Secunderabad, are factors, which cannot be said to have no nexus or relevance to the contract in question.

17. Therefore, the judgment of the Apex Court in *National Textile Corporation Ltd. v. Haribox Swalram*, (supra) has no application to the facts of

the present case since the cause of action for invoking the jurisdiction of the Court in that case was only the correspondence between the parties,

and whereas in this case, the facts referred to above are different from that case, and as such, the facts referred to above in the preceding

paragraphs, do constitute cause of action having arisen within the territorial jurisdiction of this Court to entertain the application.

18. A decision is an authority for what it decides and not what can logically be deduced therefrom. In this context, a reference be made to the

judgment of the Apex Court in *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, , wherein it has been held that a little difference

in facts or additional facts would make a lot of difference in the precedential value of a decision. The Apex Court in *Bharat Petroleum Corporation*

Ltd. and Another Vs. N.R. Vairamani and Another, , while cautioning that placing reliance on a decision blindly is not proper, held that

circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Holding so, it quoted

the observations of Lord Denning in the matter of application of precedents to cases, which have become locus classicus, and they read thus:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may

alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by cardozo) by matching the colour of one

case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all

decisive.

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you

will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it.

19. This being the legal position, in the context of application of precedents, and the facts of the present case being different from the facts

appearing in National Textile Corporation Ltd. v. Haribox Swalram, (supra) before the Apex Court and in W.A. No. 1807 of 2004 before the

Division Bench of this Court, the judgments rendered therein, have no application to the present case.

20. Now that this Court has come to the conclusion that a part of cause has arisen within the territorial jurisdiction of this Court, it is required to be

seen whether the applicant has invoked the arbitration clause contained in Clause 20.1 of Section III of the General (Commercial) Conditions of

Contract, properly, enabling it to maintain the application for appointment of Arbitrator u/s 11(5) of the Arbitration and Conciliation Act, 1966.

21. It is the contention of the applicant that as the respondent in spite of repeated requests failed to extend time for supply of material without

Liquidated Damages, there arose a dispute, and as such, it addressed a letter to the Assistant General Manager, to refer the dispute raised by them

to sole arbitration, but the same was rejected. As per Clause 20.1 of Section III of the General (Commercial) Conditions of Contract, in the event

of any question, dispute or difference arising under the agreement or in connection therewith, the same shall be referred to the sole arbitration of the

CMD, MTNL or in case his designation is changed or his office is abolished, then in such case to the sole arbitration of the officer for the time

being entrusted with the functions of the CMD, MTNL or by whatever designation such an officer may be called, and if the CMD, MTNL or the

said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD, MTNL or the said

officer.

22. Under Clause 20.1 of Section III of the General (Commercial) Conditions of Contract, the competent authority to arbitrate the dispute is the

CMD, MTNL, and not the Assistant General Manager. Inasmuch as the applicant had requested the Assistant General Manager of the respondent

to refer the dispute to arbitration, it cannot be said to have made a request for appointment of Arbitrator in terms of Clause 20.1 of Section III of

the General (Commercial) Conditions of Contract to the proper authority, namely the CMD, MTNL. It is not even the case of the applicant that

the designation of the CMD, MTNL has been changed or his office has been abolished or that the matter has been entrusted to or delegated by

the CMD, MTNL to the Assistant General Manager, and that the CMD, MTNL has refused to arbitrate the dispute, and such not being its case,

and the applicant having failed to follow the procedure contemplated in Clause 20.1 of Section III of the General (Commercial) Conditions of

Contract, governing appointment of Arbitrator it cannot be said to have invoked the arbitration clause properly, and since the Assistant General

Manager has no power either to arbitrate or appoint the sole arbitrator, the letter-addressed by him to the applicant, refusing to appoint an

arbitrator, would be of no avail to the applicant enabling it to invoke the jurisdiction of this Court u/s 11(5) of the Arbitration and Conciliation Act,

1996, which can be invoked only if the parties failed to agree on a procedure for appointing the arbitrator within 30 days. Merely because the

Assistant General Manager entered into correspondence with the applicant in relation to the contract, it does not mean that he is the authority

competent to whom request for appointment of Arbitrator can be made. The applicant having not invoked the arbitration clause properly in terms

of Clause 20.1 of the General (Commercial) Conditions of Contract, by making request to the CMD, MTNL, which is the procedure agreed to

between the parties, for appointment of sole arbitrator, it is not entitled to invoke the jurisdiction of this Court u/s 11(5) of the Arbitration and

Conciliation Act, 1996. This apart, the application is not maintainable for non-joinder of parties, in that the respondent being a body corporate,

and the CMD, MTNL, being the authority competent to arbitrate the dispute under the agreement, ought to have been made party-respondents

instead of the Assistant General Manager, who is not the competent authority.

23. In the above view of the matter, it is required to be held that though this Court has jurisdiction to entertain the application, yet the same is liable

to be rejected for the reason that the applicant did not properly invoke the arbitration clause in the agreement, enabling it to invoke the jurisdiction

of this Court u/s 11(5) of the Arbitration and Conciliation Act, 1996.

24. In the result, the Arbitration Application is dismissed. No costs.