
(2009) 02 AP CK 0031

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 53 of 2007

Alaknanda Hydro Power Company Ltd.

APPELLANT

Vs

Shring Construction Company Pvt. Ltd.

RESPONDENT

Date of Decision : 25-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 11, 16, 2
Contract Act, 1872 — Section 28

Citation : (2009) 3 ALT 485

Hon'ble Judges : Nooty Ramamohana Rao, J

Bench : Single Bench

Advocate : S.R. Ashok on behalf of V. Akshaya Babu, for the Appellant; S. Rajan, for the Respondent

Final Decision : Allowed

Judgement

Nooty Ramamohana Rao, J.—This application has been moved seeking intervention for constitution of the Arbitral Tribunal and for referring the disputes that have cropped up between the parties for resolution to the said Arbitral Tribunal.

2. The applicant Company is engaged in implementing a 330 MW Hydro Electric Power Project located on the river Alaknanda, at a distance of about 110 kilometers from Rishikesh Rail Head, along with Rishikesh ? Badrinath National Highway No. 58. The Project aims to utilize a head of around 66m for power generation. The profile of the Project has been described in the bid document in the following manner:

330 MW Shrinagar Hydro Electric Project consists of a main Dam with Diversion Tunnel on the left flank of the river Alaknanda and Intake Tunnels on right flank connected to the 2 Nos. Head Race Tunnels leading to the Supana Aqueduct discharging into Desilting Basin. The Power Channel takes off from the desilting basin which discharges into the Forebay which has a provision of Surplus arrangement. The Forebay is duly connected to the Penstocks leading into the

Power House and water gets released into the river through Tail Race Channel with Switch Yard at an elevated place on the right flank of the power house.

Accordingly, Bids have been invited for construction of Diversion Tunnel on the left flank of the river. The respondent submitted its bid and after a series of negotiations, through a communicated dated 26-04-2006, it has agreed to construct the Diversion Tunnel for Rs. 7.75 crores. Thus an agreement has been entered into by and between the parties under the terms of which, the work has to be executed by 15-12-2006. It is the assertion of the applicant that the respondent did not complete the work by 15-12-2006, but sought for extension of time and time was granted up to 15-04-2007. It was further submitted that when the respondent has sought for further time up to 15-12-2007, the applicant realized the inability of the respondent to complete the Project and in view of the serious implications of the over run due to delay in execution of construction of Diversion Tunnel, which will have an adverse affect on the other works of the Project, as well as the Project costs, the Applicant has terminated the agreement on 08-05-2007. It is further asserted that conciliation meetings were undertaken by top Executives of the Applicant Company at which, the Director-in-charge of the Project and the Chairman and Managing Director of the respondent Company have participated and that as a goodwill measure, certain important decisions were taken thereat to hold back immediate invocation of the bank guarantee furnished by the respondent and also to permit the officials of the respondent Company to take full and complete measurements of the works executed till then. However, it is pointed out that the respondent has improperly converted the period of conciliation to his advantage by rushing to the local civil court and instituted proceedings for restraining the applicant Company from encashing the bank guarantee as well as proceeding further with the execution of the Project work. Therefore, the applicant has put the respondent on notice on 04-06-2007 invoking Clause-3.31 of the General Terms and Conditions of the contract for securing resolution of the disputes by way of reference to arbitration proceedings. The applicant has laid a claim for little more than Rs. 373 crores against the respondent. It has also nominated a former Chief Justice of the Chattisgarh High Court as its nominee Arbitrator and called upon the respondent to nominate an Arbitrator on its behalf. In response to this notice, the respondent through its reply dated 19-06-2007 resisted the attempt of the applicant on the ground that subclauses i & ii of Clause 3.3.1 of the contract, have not been complied with by undertaking resolution of the disputes through conciliation and hence, disputed the right of the parties to nominate Arbitrators for constituting the Arbitral Tribunal. The applicant has sent up its reply on 26-06-2007 by pointing out that the applicant Company has tried to conciliate with the respondent in the post-termination of contract period and that two of its top Executives were, in fact, present and carried on discussions, which were fruitless and hence, asserted its right to invoke the arbitration clause. Since, the respondent had failed to nominate an Arbitrator on its behalf, the present Application has been moved before this Court on 18-07-2007, seeking

constitution of the Arbitral Tribunal and for referring the disputes for resolution thereto.

3. When notice was ordered by this Court on 03-08-2007 in this Application, the respondent has entered appearance and contested the matter. At the outset, It is pointed out that there is no territorial jurisdiction to entertain the present Application as no part of cause of action has arisen within the jurisdiction of "court" as defined u/s 2(e) of the Arbitration and Conciliation Act, 1996 (henceforth referred to as "the Act"), over which this High Court could exercise jurisdiction. It is asserted that the contract in question was concluded at Dehradun when the counter offer made by the applicant has been accepted by the respondent. Further, the disputes are related to and have intricate connection with the works executed in Uttaranchal State and that all payments have also been made at Dehradun situated in Uttaranchal State and hence, there is no territorial jurisdiction for this Court to entertain this Application. It is further asserted that arbitration proceedings have already been initiated by way of instituting O.P. No. 42 of 2007 u/s 9 of the Act in the Courts at Dehradun and hence, the Application u/s 11 of the Act, can only be entertained by the High Court of Uttarakhand at Nainital. Further, O.P. No. 42 of 2007 was contested by the applicant raising a specific issue that there is no jurisdiction for the Dehradun Courts to entertain the said O.P. and that it was pleaded by the applicant that Courts at Hyderabad alone shall have jurisdiction and that such a plea was negated by the judgment rendered by that Court on 27-07-2007 and in view of the same, Courts at Hyderabad do not have exclusive jurisdiction in the matter.

4. It was further asserted that the present Application is misconceived, premature and hence, is not maintainable, inasmuch as, the first step required prior to taking steps for constituting the Arbitral Tribunal, having not been initiated the applicant has not adhered to the procedure prescribed under the contract and hence, the jurisdiction u/s 11 of the Act, cannot be exercised in favour of the party, who failed to adhere to the procedure provided for in the contract.

5. On merits, it was contended that it is the applicant, who breached the terms of the contract all through and at every stage and that taking undue advantage of its superior bargaining position has acted in a most brazen and arbitrary manner by unilaterally terminating the contract through its letter dated 26-04-2007. It has not even considered it appropriate to adopt or follow such measures, which are very familiar to the civilized society and in particular to those who deal with execution of highly skillful and complicated civil engineering contracts and hence,- no indulgence should be shown in favour of a party, who acts in such a brazen manner. It was further pleaded that claims have all been hopelessly inflated and, to put up very mildly, seeking damages to the order of Rs. 373 crores from a contract worth Rs. 7.75 crores, is an act of unimaginable inflation and hence, the attempt on the part of the applicant should be construed as an act to render the arbitration proceedings a mockery and expose them to

criticism and thus, the applicant laid bare it's unfair conduct. For this reason also the present Application should be dismissed.

6. I have heard Sri S.R. Ashok, learned Senior Counsel on behalf of Sri V. Akshaya Babu for the applicant and Sri S. Rajan, learned Counsel for the respondent.

At the very outset, the first and foremost question, which requires to be considered is about the maintainability of this Application.

7. Some of the important facts, which are not in dispute, are required to be reiterated. The applicant Company has floated tenders inviting bids for construction of Diversion Tunnel for its 330 MW Hydro Electric Project of the River Alaknanda, located at District Pauri in the State of Uttaranchal. The bid documents contained several Sections. Section I dealt with the Project details. Section II of the bid documents dealt with the instructions to the bidders. It will be important to notice Clauses 2.01 and 2.02 thereof, which read as under:

2.01 The Tender offer shall be submitted in sealed cover addressed to:

Mr. V. Rama Rao Director - Technical Alaknanda Hydro Power Company Limited, "Paigah House", 156-159, Sardar Petal Road, Secunderabad - 500003.

Tel Nos : 040-27902663 Fax No : 040-27902665 2.02 The Tender offer shall reach at the above address on or before 22nd March, 2006 before 05.00 P.M. Tenders received after this deadline shall be summarily rejected.

Similarly, Clause-2.04.3, which dealt with the Earnest Money Deposit reads as under:

2.04.3 Earnest Money Deposit:

Earnest Money amounting to Rs. 15,00,000/- (Rupees Fifteen Lakhs only) must be submitted along with the bid, valid for 90 days from the date of submission of the bid. This shall be submitted in two parts as follows:

? Rs. 5,00,000/- (Rs. Five Lakhs only) in the form of Cheque/DD in favour of the "alaknanda Hydro Power Company Ltd.", payable at Hyderabad.

? Rs. 10,00,000/- (Rs. Ten Lakhs only) in the form of Bank Guarantee as per the format provided elsewhere in the document.

The Tender is liable to be rejected if the requisite Earnest Money is not furnished with the Tender. The Earnest Money Deposit shall be returned to the unsuccessful tenderers and in case of successful tenderer, the same shall be converted as a part of the Performance security.

8. From the above, the bidders are required to submit their tenders receivable at the office of the applicant at Secunderabad and that the EMD is payable at Hyderabad. Section 3 of the bid documents dealt with the General Conditions of the Contract; Clause 3 dealt with the scope of work. Clause 3.01 has specifically

provided for the Project duration and it has been specified therein that the period of contract is for six months. Clause-3.02 has provided for imposition of penalty liable to be levied at the end of each week for the work not completed and for slow-progress of work. Clause3.20 has also provided for compensation and penalty for the loss suffered on account of the default of the contractor. Clause-3.21 specifically dealt with jurisdiction. Since, it will have a bearing on the controversy involved in the instant case, it is appropriate to notice it, which is as under:

3.21 Jurisdiction

For the purpose of this agreement, all the transactions shall be deemed to have taken place within the State of Andhra Pradesh and the courts in Hyderabad, Andhra Pradesh shall have jurisdiction over the matters arising under or out of this agreement.

Clause-3.31 dealt with the dispute resolution and it reads as under:

3.31 Disputes and Arbitration:

3.31.1 If any dispute arises between parties touching on the contract/agreement or the construction or operation thereof, or the rights, duties or liabilities under these aspect as to any matters, the decision of which is specifically provided for by the General or Special Conditions, such dispute shall be dealt in the following manner:

- i. Efforts shall be made to resolve the dispute at the Project site by the Project Managers of the Owner and the Contractor.
- ii. To be resolved at the level of Project Directors of the Owner and the Contractor.
- iii. In the event of the above two efforts failing, the dispute may be referred to two arbitrators, one to be appointed by each party, and the said arbitrators shall together appoint an Umpire in writing before entering on the reference and the award of the arbitrators or the Umpire as the case may be, may with the consent of the parties, enlarge the time from time to time for making and publishing the award. Such arbitration shall be governed in all respects by the provisions of the Indian Arbitration & Conciliation Act, 1996 and the Rules framed there under and any statutory modification or re-enactment thereof. The arbitration proceedings shall be held in Hyderabad.

9. A careful analysis of the terms and conditions spelt out in the bid documents, which were subsequently made part of the agreement, would disclose that the bidders are required to submit their bids/offers at Secunderabad located in the State of Andhra Pradesh. The security deposit is payable at Hyderabad in Andhra Pradesh. The works are to be executed on the River Alaknanda at District Pauri in Uttaranchal State. The Project is a time-bound Project and the time provided for completion is only six months. But, nonetheless, in terms of Clause3.21, a fiction has been incorporated to treat all the transactions to have taken place within the

State of Andhra Pradesh and the courts in Hyderabad, Andhra Pradesh, shall have jurisdiction over the matters arising under or out of the agreement. Clause-3.31 has provided for a structured form for securing resolution of the disputes. The first step contemplated is to have disputes resolved at the Project site situated at Uttaranchal. The next step is to attempt resolution at the level of the Project Directors of the owner and the contractor and in the event of failure of the above two measures, by referring the disputes for resolution to Arbitral Tribunal comprising of one Arbitrator to be named by each of the parties and the two Arbitrators, in turn, choosing the third and Presiding Arbitrator. It was further a term of the contract that the arbitration proceedings shall be held in Hyderabad within Andhra Pradesh.

10. The pleadings set forth by the applicant - which to a large extent, have also been supported by the material papers supplied by the respondent - would disclose that the Director (Project Development) of the applicant has invited the respondent to attend their office on Monday the 17th day of April 2006 for discussions in response to the bid submitted by the applicant. Accordingly, the respondent held discussions at the Secunderabad office of the applicant with their Director (Project Development) as well as the Director-Technical and thereafter, the respondent had submitted its amended rates for four items effecting reduction of a total of Rs. 100.00 lakhs of its bid, through its communication dated 17-04-2006, which was again submitted at Secunderabad. This communication was followed up by another communication dated 20-04-2006 by the respondent further revising its rates and confining the total cost of the project to Rs. 7,97,65,000/-. This offer was also made to the Director (Project Development) of the applicant at Secunderabad. Initially, through its offer dated 11-04-2006, the respondent had quoted Rs. 9,99,80,000/-. In furtherance of the correspondence, the respondent again made a revised offer to the Director-Project Development of the applicant through its communication dated 22-04-2006 proposing to reduce its rates by a further 2.8%, provided the respondent is assured of some other works also. It is further clear that the applicant has been offered the LOI dated 26-04-2006 from the Secunderabad and that the respondent unconditionally accepted the LOI along with its terms, conditions and bill of quantities mentioned therein, and communicated the same from Dehradun through fax. Later on it has also signed the agreement and faxed it back to Secunderabad. It will also be appropriate to notice that through communication dated 9.5.2006 the Chairman-cum-Managing Director of the respondent addressed the Director - Project Development of the applicant company at Secunderabad, duly enclosing the Letter of Intent (LOI) signed by the authorized signatory of the respondent company and several other documents, as required by Clause 17 of the Letter of Intent. It will be important to notice Clause 17 of the LOI faxed by the applicant company, which reads as under:

17. The tender document provided to you shall be signed on each page by the Company's Authorised Signatory with Company's Seal and returned along with

the second copy of the Letter of Intent duly signed as a token of your acceptance. All the correspondence cited above, the Tender Document, LOI and the enclosures to this letter also form part of the Agreement.

11. Thus, in compliance with the above requirement, the respondent company communicated its acceptance to the Director - Project Development of the applicant company at Secunderabad. During the course of the currency of the contract, the bank guarantee initially furnished by the respondent company on 9.5.2006, drawn in a sum of Rs. 38.75 lakhs was required to be extended upto 15.8.2007 and the extended bank guarantee was also furnished to the applicant company at Secunderabad.

12. On 14.9.2006, an important decision on a technical aspect of the contract was asked by the respondent company to be confirmed by the applicant company. It has addressed this communication to the applicant company at Secunderabad, Andhra Pradesh. During the course of the exploration of the tunnel work by the respondent, they have encountered certain technical difficulties and therefore suggested to the applicant company that they may have to resort to "steel ribs and backfill concrete" which is passive (External) support system and is only resorted to when active (internal) supports are not possible/feasible. It was felt by the respondent company that the same will also effect the progress of the work in a big way. The respondent company, therefore, suggested that new method is required to be put in place in view of the "New Austrian Tunneling Method" and hence they have enclosed revised, updated and feasible construction programme as Annexure 2 to the said letter. Thus, important decisions relating to the execution of the contract have all been made constant bilateral consultation mechanism between the respondent company at Dehradun and the applicant's company at Secunderabad, Andhra Pradesh. It will also be important to notice that through their communication dated 13.11.2006, the respondent company has drawn a further revised construction programme for the balance reach of the diversion tunnel and furnished it to the Deputy General Manager at the project site and copied the same to the Director - Project at Secunderabad. Similarly, the construction programme for the balance work which has been drawn as lately as on 10.2.2007, which was furnished to the General Manager of the applicant company at site was also copied to the Director - Project Development at Secunderabad of the applicant company. On 3.4.2007, the respondent company while furnishing the revised construction programme for the balance work, specifically invited the attention of the Director - Project Development of the applicant company at Secunderabad, as the date of completion was pushed up to 31.10.2007. From the above, it is clear that in the post contract period all important decisions relating to technical and other matters concerning the works are being discussed and decisions were also called upon to be taken by the applicant company at Secunderabad. The ultimate decision to terminate the contract also emanated from Secunderabad, Andhra Pradesh. Hence, it will be difficult to describe that no part of cause of action has arisen in Andhra Pradesh.

13. There is nothing uncommon for the parties who are situated in two different states to enter into a contract for execution of works in one of these two states or even in any other third state. Cause of action can broadly be described as a bundle of events strung together in the same fashion, as several beads or flowers are strung together to bring about a composite and compact form. Therefore, apart from the pre-contract negotiations taking place at Secunderabad and the contract having been signed at Dehradun by the respondent company was delivered at Secunderabad, subsequently important decisions, which have technical and legal ramifications and thus forming integral components of the said contract, have also been decided at Secunderabad situated in Andhra Pradesh. Hence, to my mind, a decisive part of the cause of action has also taken place within the limits of the State of Andhra Pradesh.

14. This apart, an arbitration agreement is an agreement worked out consciously by and between the parties. It is a process or mechanism through which the disputes that might crop up between two parties to a commercial transaction are provided to be resolved. It is not only a common feature but also a very crucial feature of contracts, these days. Therefore, it is construed as an independent contract by itself. Every commercial transaction resulting into a contract need not necessarily provide for such an agreement. That was a choice left to the parties. It is open to them to choose to agree for resolution of the disputes by way of a reference to the mechanism of arbitration. Hence, even if it is provided as a term of the contract, the same is construed as a separate agreement or integral part of the main contract itself. It is a choice of the parties. Similarly, it is also left to the parties to choose any one place where the cause of action arises to be the situs of arbitration. In the instant case, the parties have consciously agreed to subject themselves to the jurisdiction of the courts in Hyderabad, Andhra Pradesh. When Clauses 3.2(i) and Clause 3.3(i) are read together, it emerges that the parties have agreed to treat all transactions to have taken place within the State of Andhra Pradesh and subject themselves to the jurisdiction of the courts at Hyderabad in Andhra Pradesh and that the arbitration proceedings shall also be held in Hyderabad. It is crystal clear that they have mutually agreed for such a term to form integral part of the agreement itself. Hence, this is not a case of seeking to confer jurisdiction on a court where no part of cause of action has arisen. On the other hand, it is one of the three places where the cause of action has arisen and hence choosing one of them thereby creating exclusion of the other two places.

5. In commercial transactions, particularly, when parties are located at two different far off places, it is not uncommon for them to choose a place of convenience for the purpose of regulating their future course of action. Hence, the courts at Hyderabad cannot be termed as having no jurisdiction whatsoever to entertain any dispute between the parties.

16. Learned Counsel for the respondents has placed reliance upon the judgment rendered by this court in V.K. Engg. Constructions Vs. The Managing Director,

IRCON International Ltd., The Zonal General Manager, IRCON International Ltd. and The Dy. General Manager, IRCON International Ltd., , Municipal Corporation, Jabalpur and Others Vs. Rajesh Construction Co., ;Maghendra Pal Tyagi v. Jayant Davar 2008 (5) Scale 425, Shiva Carriers v. Royal Projects Ltd. AIR 2000 Cal 138, Pratap Electrical and Co. v. Asea Brown Boveri (ABB) 2006 (4) A.LR 426 (Jhar), Apparel Export Promotion Council v. Prabhati Patni, Proprietor Comfort Furnishers and Anr. 2005 (3) A.LR 518 (Delhi), A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, in support of his contention.

17. It will be appropriate at this stage to notice the principles enunciated by the Supreme Court in Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others,

13. In Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc., , it was emphasized that the legislative intent underlying the 1996 Act is to minimize the supervisory roles of Courts in the arbitral process and nominate/appoint the arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the arbitral tribunal itself. It was further held that even in the old law, common sense approach alone was commended for being adopted in construing an arbitration Clause more to perpetuate the intention of the parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation. Food Corporation of India Vs. Indian Council of Arbitration and Others etc. etc.,

14. The consistent view taken by this Court, therefore, is that contentious issues should not be gone into or decided at the" stage of appointment of an arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise an objection before the arbitral tribunal as u/s 16 of the Act it is empowered to Rule about its own jurisdiction. It is, therefore, open to the plaintiff to raise all the pleas before defendant No. 2 including a plea that there is no arbitration agreement between the parties for referring any dispute for arbitration before the Hindustan Chamber of Commerce, Mumbai. It is also important to note that in response to the notice issued by defendant No. 2 the plaintiff had sent a communication raising certain pleas and had also remitted an amount of Rs. 200/- as fee for arbitration. In such circumstances we are of the opinion that the view taken by the City Civil Court was just and proper and the High Court erred in granting an injunction in favour of the plaintiff and staying the proceedings before defendant No. 2.

15. xxxxx

16. xxxxx

17. .In Hakam Sing Vs. Gammon (India) Ltd., , it has been held that it is not open to the parties to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two Courts or more have under the CPC jurisdiction to try a suit or a proceeding, an agreement between the parties

that the disputes between them shall be tried in one of such Courts is not contrary to public policy and that such an agreement does not contravene Section 28 of the Contract Act. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , it was held as under:

When the Court has to decide the question of jurisdiction pursuant to an ouster Clause it is necessary to construe the ousting expression or Clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Where an ouster Clause occurs, @page-SC2168 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 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 exclusion 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.

18. This view has been reiterated in M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another, .

[emphasis is mine]

18. It is appropriate to point out that the Jharkhand High Court in its judgment rendered in Pratap Electrical and Co. (supra 5) while considering Section 42 of the Act held that where an application has been made in a court with respect to an arbitration agreement, that court alone shall have jurisdiction over the rest of the arbitral proceedings. As was already pointed out supra, the OP No. 42 of 2007 moved by the applicant has changed its characteristics pursuant to deletion of Clause (c) of its relief and consequently it has been confined to encashment of bank guarantee and the right of the respondent to retrieve its material and machinery from the project site. Both these aspects have no bearing on the disputes, which are sought to be arbitrated by the applicant. Hence, Section 42 of the Act is not attracted in the instant case. Similarly, the Delhi High Court in Apparel Export Promotion Council (supra 6) has held that the jurisdiction of a court has got to be determined with a look at the subject matter of arbitration and not with reference to the situs of the arbitration. It is already pointed out supra that apart from the parties agreeing to subject themselves to the jurisdiction of Hyderabad, it is a case of election of the jurisdiction of Hyderabad to that of Dehradun and consequently it is a case of exclusion of the jurisdiction of

other courts. The subject matter of the disputes which are sought to be arbitrated are not the same as are covered by the reliefs prayed for in OP No. 42 of 2007 moved by the respondent.

19. Similarly, the ratio of the judgment rendered by this court in K. Engg. Constructions, Hyderabad (supra 1), is also distinguishable for, a part of the cause of action has been held to have arisen at Secunderabad in Andhra Pradesh in the instant case, not merely because of the negotiations that were held at Secunderabad which ultimately led to the concluded contract, but because a signed copy of the contract executed at Dehradun has been delivered at Secunderabad, but in the post contract period, important and integral matters relating to the decisions touching upon the scope of execution of the contract and the extension of the currency of the contract have also been dealt with solicitously at Secunderabad. Therefore, even in the post contract period, part of cause of action has arisen at Secunderabad. For these reasons, the ratio rendered in A.B.C. Laminart Pvt. Ltd.'s case (supra 7) as explained in Subhlaxmi Fabrics Pvt. Ltd. case (supra 8) will hold the key to understand as to whether the courts at Hyderabad, Andhra Pradesh have jurisdiction or not.

20. The next contention of Sri Raj an that the arbitration proceedings are deemed to have commenced at Dehradun in the State of Uttaranchal, where OP No. 42 of 2007 has been instituted by it and hence it is the Chief Justice of Uttaranchal High Court who should be moved in the matter needs to be examined.

21. It is a fact that the respondent has moved the District Court at Dehradun and instituted OP No. 42 of 2007 essentially seeking three reliefs:

(a) to restrain applicant herein from realising a sum of Rs. 38.75 lakhs from Punjab National Bank, Race Course Branch, Dehradun and or from encashing any cheque/draft which they may succeed in securing in pursuance of the bank guarantee dated 9.5.2006 which is subsequently extended on 26.12.2006.

(b) To restrain the applicant herein from in any manner using the goods, material, stock, plant, machineries, equipment, vehicles described in Annexure X to the application.

(c) To restrain the opposite party from getting the balance work completed through any third party and in breach of the agreement.

Therefore, it is the third relief which has a subsisting bearing upon the main contract as the first two reliefs are purely incidentally connected to the main contract. In other words, the 1st relief solicited in OP No. 42 of 2007 relates to the dispute concerning the encashment of the bank guarantee furnished by the respondent company and the 2nd relief relates to restraining the applicant herein from using the material and machinery belonging to the applicant in furtherance of the agreement or in other words, relates to it's right to retrieve the same from the site. Thus, the first two items are independent of the contract and they

do not raise any disputes concerning any breach of the contract. When the applicant herein carried the matter by way of an appeal No. 191 of 2007 before Uttaranchal High Court at Nainital, on behalf of the respondent herein, it is prayed that Relief (c) in OP No. 42 of 2007 be permitted to be deleted from the relief portion. Thus, relief (c) as originally prayed for has been deleted as not pressed from the OP. What remains therefore in the OP relates to disputes concerning the encashment of the bank guarantee as well as the right of the respondent to retrieve its material and machinery from the execution site. Hence, initiation of the OP by the applicant does not deal with the disputes which have cropped up between the parties in the matter of execution of the work or the breach of the terms of the contract per se.

22. This apart, in principle bank guarantees furnished are construed and considered as independent agreements between the banker and the party in whose favour the guarantee is held out by the bank.

23. For these reasons, OP No. 42 of 2007 cannot be construed as initiation of arbitration proceedings and the same would not be coming in the way of entertaining the present application by this court.

The respondent has raised an objection that arbitration proceedings cannot be initiated without taking recourse to the conciliation steps provided in Sub-clauses (i) and (ii) of Clause 3.31 of the contract. Contract has been terminated with effect from 8.5.2007 and OP No. 42 of 2007 has been instituted in the District Judge's Court at Dehradun on 9.5.2007. Therefore, between 8.5.2007 and 9.5.2007, no steps of conciliation have taken place, at the instance of the respondent, at any rate, and hence by its own showing, no measures for arbitration could have been initiated by 9.5.2007. For this reason also, OP No. 42 of 2007 cannot be construed as a measure of initiation of arbitration proceedings.

24. In contrast, it is the applicant who pleaded that conciliation measures have been initiated by deputing two of its top executives for holding discussions with the respondent company on 9th and 10th May and pursuant to the discussions, it is agreed that the respondent and its official should be permitted to undertake measurements and record all the works executed till then, which would help in determining the amounts payable by and between the respective parties. Those follow up measures have also taken place between 11th to 13th May, 2007. Prima facie, therefore, I am satisfied that steps have been taken by the applicant to conciliate in accordance with the Clause 3.31. However, the respondent has disputed and denied this fact. The disputes raised in this regard therefore need certainly collection of evidence. The executives deputed by the applicant company need to be examined and the meetings they held with the respondents and its officials, if at all were recorded and reduced to writing, the same will have to be brought on record. Thus, until and unless evidence is collected, with any sense of firmness one cannot say that negotiations/conciliation measures have not taken place between the parties. Where a firm opinion cannot be expressed by the court at this stage, it is appropriate to leave such a question for

adjudication by the Arbitral Tribunal. It is open to the Arbitral Tribunal to collect such evidence as is necessary on every aspect, which is put in issue, and pronounce its opinion. I, therefore consider it appropriate to leave the decision in this regard to the Arbitral Tribunal.

25. For the reasons stated supra, I consider it appropriate to constitute an Arbitral Tribunal so as to refer to the same the disputes that have cropped up amongst the parties.

26. Clause 3.31 of the General Conditions of the Contract specifically provided that the Arbitral Tribunal shall comprise of one member to be chosen by either party and the two learned Arbitrators in turn will choose a presiding arbitrator. Section 10 of the Act also provides for constitution of multi member Arbitral Tribunal, so long as it is not in even number. Sub-section (1) granted freedom to the parties to determine the number of arbitrators and so long as such number is not an even number, the constitution of such a tribunal becomes legitimate. In the instant case, the parties have proposed to constitute an Arbitral Tribunal comprising of three men. It is appropriate for the designate of the Chief Justice, to the extent possible and feasible, to comply with the same procedure and give weight to the wishes of the parties. This apart, claims running into more than 373 (Three Hundred and seventy three) crores of rupees have been made by the applicant herein. I am conscious of the criticism mounted by the respondent that these claims are all hopelessly inflated and such gross inflations themselves deserve outright condemnation. However, it would be more appropriate for the Arbitral Tribunal to examine the tenability of these claims. One has to be alive to the prospect that when a claim statement is actually submitted to the Arbitral Tribunal, a realistic assessment would be undertaken. Therefore, keeping all these factors in mind, I consider it appropriate to constitute the Arbitral Tribunal comprising of three members.

27. A Hence, I constitute the Arbitral Tribunal to be presided over by Hon'ble Sri Justice Syed Shah Mohammed Quadiri, a former Judge of the Supreme Court of India, and comprising of Hon'ble Sri Justice Y. Bhaskar Rao, Former Chief Justice of Karnataka High Court and Hon'ble Sri Justice C.Y. Somayajulu, a former Judge of this court. The Arbitral Tribunal is at liberty to regulate its procedure including the fee chargeable.

28. The Registry is directed to communicate a copy of this order to the Hon'ble Judges who are now constituted as the Arbitral Tribunal.