

(2003) 01 DEL CK 0101
In the Delhi High Court
Case No : FAO. (OS) . 531 of 2001

B.R. Electricals

APPELLANT

Vs

The Chairman and Others

RESPONDENT

Date of Decision : 03-01-2003

Acts Referred:

Citation : (2003) 1 AD 536 : (2003) 1 ARBLR 375 : (2003) 102 DLT 493 :
(2003) 66 DRJ 426 : (2003) 1 RAJ 374

Hon'ble Judges : Devinder Gupta, Acting C.J.;B.N. Chaturvedi, J

Bench : Division Bench

Advocate : Rajiv Datta and Kapil Sharma, for the Appellant; V.P. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Chaturvedi, J.—The solitary issue of territorial jurisdiction circumscribes the scope of instant appeal, which aims at assailing an order dated 12.9.2001, passed by the learned Single Judge, rejecting a petition u/s 8 of the Arbitration Act, 1940(for short, `the Act") of the appellant, for lack of territorial jurisdiction and, thus, declining appointment of an arbitrator to adjudicate upon the alleged disputes between the parties, arising out of various contracts.

2. The relevant factual background giving rise to the question of territorial jurisdiction may be noticed briefly.

On 21st August, 1991, the General Manager, Telecommunications(for short, `GMT"), Srinagar, Kashmir, floated a tender for supply of PVC insulated twin galvanised wires. M/s.B.R.Electricals, appellant, made an offer/bid in response thereto by submitting its tender which was eventually accepted. An agreement dated 8.10.1991 was executed between the appellant and the GMT, which was followed by supply of goods as per specification. Later, similar or identical orders were placed with the appellant by various circle offices of the respondent No.1 from different parts of the country for supply of the said goods and the appellant,

accordingly, made supplies of the aforesaid goods. The respondents, however, failed to make the payments therefore. Consequently, an amount aggregating Rs.1,46,10,04,850.78 is claimed outstanding against them. Letters of request demanding payment of the said amount failed to evoke any response from the respondents. On the contrary, it is pleaded, a letter dated 22.12.1992 from the Divisional Engineer, Telecommunications at Kumbakanam dealt a rude shock to the appellant, whereby it was informed that in view of instructions from the Directorate, Department of Telecommunications(for short, `DOT'), New Delhi, the payment of the outstanding amount of the bills raised by the appellant, could not be made.

3. A legal notice dated 1.2.1995 addressed to the respondents went abegging. The appellant sought to invoke writ jurisdiction of this Court by making a petition under Article 226 of the Constitution of India, but the same was dismissed by an order dated 5.10.1994 holding that proper remedy for redressal of appellant's grievance lay in bringing a suit. It was in this situation that a petition u/s 8 of the Act was filed.

4. An arbitration agreement is said to be embodied in clause 8 of the agreement dated 8.10.1991, which reads in the following terms:-

"In case of any disputes touching the effect of this agreement, decision of the General Manager, Telecommunications, Srinagar, Kashmir, on behalf of the President of India, shall be final and legally binding on the supplier."

5. Questioning the maintainability of the petition on various counts, the respondents in their written statement, inter alia, pleaded lack of jurisdiction on the part of this Court to entertain and deal with the petition on the ground that no part of cause of action arose in Delhi. It is further pleaded that there being no written agreement, none of the alleged contracts entered into by the appellant, contains arbitration clause. The supplies under the agreement dated 8.10.1991 are said to have been completed and payment of the entire amount on account of such supplies already made. It is asserted that no part of the amount claimed as outstanding relates to the contract under the aforesaid agreement and, Therefore, it is of no relevance to refer to the alleged arbitration clause forming part of agreement dated 8.10.1991.

6. In the present context, the appellant's petition for appointment of an arbitrator having been declined solely on the ground of want of territorial jurisdiction, respondents' pleas on other counts need not be adverted to.

7. The nucleus of the appellant's response to the respondents' plea against territorial jurisdiction of this court lies in the argument that since various circle offices of the respondents are subject to the administrative jurisdiction of the DOT and the stop payment instructions emanated there from only, part of cause of action accrued at New Delhi and no objection against maintainability of the petition in question before this Court on jurisdiction point could, thus, justifiably be raised. Further, the appellant seeks to counter the respondents' objection

against the territorial jurisdiction of this Court by asserting that the DOT with its Head office at New Delhi functions under the direct control of the Ministry of Telecommunications, which also has its seat at Delhi, and Therefore this Court is vested with territorial jurisdiction to entertain and decide the petition.

8. Aforesaid arguments, however, failed to impress the learned Single Judge, despite the appellant summoning to its aid the decisions of the Apex Court in Union of India (UOI) and Others Vs. Oswal Woollen Mills Ltd. and Others, and M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, . Duly noticing the ratio of both these decisions in reference to the case on hand, the learned Single Judge held against applying the same to the advantage of the appellant. Observing that no part of cause of action arose at Delhi for the reason that the goods were supplied to and the payments Therefore were to be made by various circle offices of the respondents situate in different States of the Union, the learned Single Judge concluded against territorial jurisdiction being vested with this Court. Clearly, the principle of law enunciated by the Apex Court in Bakhtawar Singh Bal Kishan Vs. Union of India (UOI) and Ors, and Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, , brought forth by the learned counsel, representing the respondent appeared to the wisdom of the learned Single Judge supplying a correct answer to the controversy relating to territorial jurisdiction and, accordingly, gave the finding in the shape of the impugned judgment.

9. We have heard the learned counsel for the respective parties. The arguments advanced from either side represent more or less repeat of address before the learned Single Judge.

10. Sections 2(c) and 31(1) of the Act provide that jurisdiction in arbitration cases is to be determined in the same manner as in a suit if the subject matter of the reference had been the subject matter of the suit.

11. Section 20 of the Code of the Civil Procedure lays down:

"Other suits to be instituted where defendants reside or cause of action arises.-- Subject to the limitation aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction--

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or;

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institutions; or

(c) the cause of action, wholly or in part, arises."

12. Thus, the enacted rule as to forum where the plaintiff can sue are the place(s) (1) where the defendant at the commencement of the suit "actually and voluntarily resides, or carries on business, or personally works for gain" or (2) where the cause of action wholly or in part arises. The settled legal position is that the expression "actually and voluntarily resides" and "personally works for gain" apply to natural persons and not to legal entities. This excludes the application of these two expressions, in the present case, for determination of the question of territorial jurisdiction. One is, thus, left only with third expression "carries on business", apart from the accrual of cause of action, to find place(s) where the suit could be instituted. Way back in early Sixties, in *Union of India (UOI) and Another Vs. Ladu Lal Jain*, , the Supreme Court said:

"The expressions 'voluntarily resides' or 'personally works for gain' cannot be appropriately applied to the case of the Government. The Government can, however, carry on business. The mere fact that the expression 'carries on business' is used along with other expressions, does not mean that it would apply only to such persons to whom the other two expressions regarding residence or of personally working for gain would apply..... The provisions of Articles 298 and 19(6) of the Constitution clearly indicate that the State can carry on business and can even exclude citizens completely or partially from carrying on that business.....

Running of railways is such an activity which comes within the expression 'business'..... The Union of India, thus, carries on the business of running railways and the Union Government can be sued in a Court within whose territorial jurisdiction the headquarters of the Railways run by the Union is situated."

13. The Supreme Court in *Ladulal Jain*(supra) premise their decision on the salutary principle underlying Section 20, when their Lordships say:

"The principle behind the provision of cls.(a) & (b) of Section 20 is that the suit be instituted at a place where the defendant be able to defend the suit without undue trouble.(p.1683)"

14. The essential notion of a business, as contemplated by Section 20 is that it is commercial in character. The expression 'carries on business' has a commercial flavour and envisages a commercial enterprise.

15. The fact that the Government of India does business can no longer be doubted. In view of the decision in *Ladulal Jain*(supra), the Government of India can be sued at its principal place of business or headquarters if it is engaged in a commercial venture. All that has to be kept in mind is the purpose of the activity in question and if it is a commercial activity, the Government can be sued at the place of central management and control of that business.

16. In *Gupta Sanitary Stores Vs. Union of India and Another*, , noticing the gamut of law on the point, *Avadh Bihari Rohatgi, J.*, as his Lordship then was,

speaking for self and for S.S.Chadha and G.C.Jain, JJ. of this Court, while interpreting the expression `carries on business' summed up the legal position in the following terms:-

"(8). I take the test to be this: What is the nature and purpose of the activity in question? If it is commercial in character, the suit can be filed at the principal place of business or principal office. And also at the place where the cause of action arises wholly or in part.(Ram Rattan Bhartia Vs. Food Corporation of India and Others, .

(9) In most cases where the business is not of a commercial nature the suit must be filed against the Government at the place where the cause of action arises wholly or in part.. For example, if the contract is entered into at Calcutta, the courts at Calcutta will have jurisdiction. (Nalanda Ceramic and Industries Ltd. Vs. N.S. Choudhury and Co. (P) Ltd.,)

(10) Cases show that rail transport is a business. Rationing, collection of revenue, modernisation of ordnance factory and construction of dam are not businesses. Contracts for the purchase and sale of goods required for public purpose are contracts which the State makes in exercise of sovereign authority. They are not commercial transactions. These are but few examples of multitudinous ramifications of human activity in which the Government holds absolute sway."

17. Issue of territorial jurisdiction had earlier cropped up before a Division Bench of this Court in " Binani Brothers (P) Limited Vs. Union of India", (1975) 2 Delhi 196, and the principle of law laid down therein was not only endorsed later by the Full Bench of this Court in Gupta Sanitary(supra), but the same also received a seal of approval by a two-Judges Bench of the Supreme Court in Bakhtawar Singh Bal Kishan Vs. Union of India (UOI) and Ors, . In Binani Brothers, a contract was entered into between Binani Brothers and the Director of Supplies and Disposals, Bombay for supply of 780 cwts of pig-lead for a public purpose. An application u/s 33 of the Act was made before Delhi Courts on the plea that the Union of India was carrying on business through the Director of Supplies and Disposals at New Delhi and, Therefore, the Delhi Courts have jurisdiction. On facts, it was held that the Director of Supplies and Disposals was the principal purchase organisation of the Government of India and was not carrying on business and the plea that the Delhi Courts had jurisdiction in the matter was negated as the Government of India had contracted in its executive or sovereign capacity.

18. In M/s.Bakhtawar Singh Balkrishan(supra) where the contract between the appellant, M/s.Bakhtawar Singh Balkrishan and MES(Military Engineering Services) executed at Bareilly, related to some additional construction in the ordnance factory at Muradnagar in the State of Uttar Pradesh and disputes arose in regard to the execution of the contract, which were referred to arbitration and award was eventually rendered in favor of the contractor, instead of instituting

the proceedings at Bareilly where the contract was executed or the place where the work was carried out, an application under Sections 14 & 17 of the Act was filed at Delhi, praying for making the award rule of the Court and on respondents' plea questioning territorial jurisdiction of the Delhi High Court in the matter, being negatived by the learned Single Judge, but the plea being upheld by a Division Bench of this Court in appeal resulting into reversal of the decision of the learned Single Judge, on an appeal against the Division Bench decision, the Supreme Court, while dismissing the same, observed that distinction between the commercial activities of the State on the one hand and the discharge of its sovereign functions on the other was to be kept in view in adjudging the issue of territorial jurisdiction. On facts, it was held that subject matter of the contract was connected with maintenance of the Armed Forces and was, thus, part of the sovereign activity of the State and did not amount to carrying on a business in Delhi so as to attract Section 20 of the Code of Civil Procedure.

19. According to the appellant, the PVC insulated twin galvanised wire which was to be supplied, is not a rate listed item and the same was specially developed and designed by them for the respondent-DOT for being used in tough terrain like coastal, hilly, snowbound and desert areas. There appears nothing on record to indicate that supply of goods in question to various circle offices of the respondents were connected with activities of the respondents of a commercial nature and in that sense the respondents could be taken to be carrying on business activity. In the absence of any material suggestive of supplies in question being for augmentation of commercial activities of the respondent in the field of telecommunications, the same appear to be part of its executive activity aimed at establishing telecommunication links with far-flung and remote areas across difficult terrains, unguided by and bereft of considerations accompanying commercial ventures. Thus, the activities in question being not of a commercial nature, proceedings must have been instituted at the place(s) where the cause of action arose, wholly or in part.

20. In the instant case, admittedly, various contracts for supply of goods in question were entered into and the supplies were made at places other than Delhi. That way, no part of cause of action arose in Delhi. The plea of the appellant that since the various circle offices of the respondents concerned with supplies are subject to administrative control of respondent No.1 or that as payments of the bills raised by the appellant against supplies to different circle offices of the respondent No.1 were stopped under instructions in that respect from respondent No.1, part of cause of action arose in Delhi, sounds nothing but as unsuccessfully venturing to overstretch the arena of factual content Constituting cause of action.

21. The expression 'cause of action' signifies that bundle of facts which the petitioner must prove, if traversed, to entitle it to a judgment in its favor by the Court. One can find a better answer to aforesaid plea in relation to 'cause of

action" by referring to a decision of the Apex Court in the case of Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, . It was a case where the petitioner learnt about tenders being invited for a particular project at Hazira in Gujarat from advertisements appearing in the Times of India in circulation in West Bengal by reading it at Calcutta, submitted its offer from Calcutta, made representations and also sent fax messages from Calcutta and received reply thereto at Calcutta, a writ petition was filed before the Calcutta High Court on the plea of part of cause of action having arisen at Calcutta. In view of the aforesaid facts, holding lack of jurisdiction on the part of the Calcutta High Court, which it had assumed by passing the impugned order, while allowing the appeal, the Supreme Court laid down in the following terms:-

"8..merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not, in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of the cause of action....."

22. In the case on hand, it were circle offices of the respondents in different states which received supplies in terms of their orders and were to make payments to the appellant Therefore and further it were, those respective circle offices, which denied payment of the bill amounts. It is not material that such payments were stopped under instructions from the respondent No.1 or that the administrative control of the circle offices vests with the respondent No.1. There is a hierarchy of administrative set-up in Government departments through which administrative control and supervision is exercised over the official activities of the subordinate local/regional offices. Moving up the ladder, ultimate administrative supervision and control culminates into the authority positioned at the pinnacle of the set-up. That way, irrespective of the place(s) where the cause of action arises, if the argument of the appellant is accepted, it would be left to the convenience of the party concerned bringing action against the Government of India, to choose the forum where it decides to seek redressal of its grievance against any governmental action as the Government of India can be said to be holding its sway all over the country through its office network. Thus, Government of India would be liable to be sued in any part of the country irrespective of its activity being in exercise of its executive/sovereign function or in connection with a commercial venture. Such a plea being in conflict with the principle of law laid down in Binani Brothers, Gupta Sanitary and M/s.Bakhtawar Singh Balkrishan(supra) cannot be allowed to succeed. Clearly, thus, vesting of ultimate administrative control with DOT cannot be a basis to find that in spite of appellant's failure to show that the transactions in question were of a commercial nature, this Court will have jurisdiction to entertain and decide the petition simply because the respondents seat of power is located at New Delhi. Similarly, issue of stop payment instructions from the office of respondent No.1 cannot be held to give rise to a part of cause of action at new Delhi. Issue of

such an instruction does not constitute an integral part of cause of action as this fact need not be proved to entitle the appellant to succeed in its claim and the same is, Therefore, inconsequential and, accordingly, incapable of providing any sustenance to the appellant's plea in regard to part of cause of action arising at new Delhi.

23. In the ultimate analysis, thus, no fault can be found with the finding of the learned Single Judge concluding that this Court lacks territorial jurisdiction in the matter. The appeal is, Therefore, liable to be dismissed and the same is dismissed accordingly. No costs.