
(2005) 10 DEL CK 0063

In the Delhi High Court

Case No : OMP 251 of 2005 and IAs 6341 and 6875 of 2005

Jaisu Shipping Co. Pvt. Ltd.

APPELLANT

Vs

Iranian Offshore Engg. and Const. Co.

RESPONDENT

Date of Decision : 21-10-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 39 Rule 4, 20

Citation : (2006) 1 BC 136

Hon'ble Judges : Om Prakash Dwivedi, J

Bench : Single Bench

Advocate : A.S. Chandhiok and Chetan Sharma, Rishi Aggarwal, Mahesh Chhibber, Mohit Joly, Neha T. Fukan and B.S. Shukla, for the Appellant; H.L. Tikku Kamal Nijhawan and Yashmeet Advs., for the Respondent

Final Decision : Disposed Off

Judgement

O.P. Dwivedi, J.—By this order I propose to dispose of two connected petitions being OMP Nos. 251/2005 and 320/2005. Parties in both the petitions are same. Dispute relates to a sub-contract agreement dated 5.2.2005 entered into between the parties under which the petitioner undertook to carry out "trenching and burial activities, laying of 48" 14" pipe line from refinery end up to shore and to maximum of 1000 meters trenching depth of approximate 4.5 meters and width as required by client up to maximum bottom width of 25 meter of two sections of not exceeding 15 meter for each pipe including hydrographic survey, shore trenching, intertribal zone trenching including waiting charges of dredger "Kamal-XXX" for burial activities beyond total deployment of 40 days for all equipment as specified in letter No. JS-ML-2005 dated 11th January 2005. The main contract between the respondent and IOCL was entered into on 16.12.2004 at New Delhi where the respondent had undertaken to execute the work of Engineering, construction and laying of 48 dia. 19.75 km long crude oil submarine and onshore pipeline from shore to SPM location, installation of pipeline end manifold (PLEM) and CALM type single point mooring system (SPM),

testing and commissioning of the complete system and design, supply, construction, installation, testing of 14 dia. 5.70 km long effluent disposal pipeline system including diffuser at Paradip (Orissa). The said sub-contract dated 5.2.2005 between the parties was part of prime contract entered into between the IOCL and respondent on 16.12.2004. Respondent is an Iranian company. Vide letter dated 3.1.2004 (Annexure-A page 10 of the paper book) one M/s. Mokul International Limited stating to be the Indian associate of respondent invited offer from the petitioner to carry out the said job. The total value of the work to be done was US \$ 25 lakh (Annexure-B page 11 of the paper book). In reply thereto the petitioner sent their proposal dated 11.1.2005. The proposal was accepted by the respondent vide their letter dated 12.1.2005 (Annexure-C page 15 of the paper book) wherein a payment schedule was also given. The petitioner then sent a signed and stamped memo of agreement dated 14.1.2005 (Annexure-D, E page 17 & 18 of the paper book) which was duly signed between the parties on 5.2.2005. On 22.2.2005 petitioner informed the respondent about the arrival of dredger/associated crafts at Paradip port (Annexure F page 24 of the paper book). This was acknowledged by the respondent vide its letter dated 9.3.2005 (Annexure-G page 25) which contains a request to start the job immediately. On 15.3.2005 the petitioner sent its invoice (Annexure-H page 27 of the paper book) for transfer of US \$ 7 lakh to the petitioner's account in Punjab National Bank (PNB), Kandla Free Trade Zone Branch. On 4.4.2005 petitioner sent its another invoice for US \$ 9 lakh (Annexure-I page 28 of the paper book). These invoices were sent as per the payment schedule agreed upon between the parties. On 12.4.2005 parties signed statement of facts regarding work done (Annexure-J page 29 of the paper book). Item No. 12 of this document specifically mentions that dredging of trench has been completed on 11th April 2005 as per dredging plan profile. This document is signed by both the parties. On receipt of two invoices, one for US \$ 7 lakh and another for US \$ 9 lakh, respondent wrote a letter dated 13.4.2005 (Annexure-K page 30 of the paper book) informing the petitioner that their invoices have been accepted and are under process for payment. It was further assured to the petitioner that the payment will be released by the end of month. This was repeated in the respondent's another letter dated 13.4.2005 (Annexure-K page 31 of the paper book). Through this letter the respondent informed the petitioner that due to some unexpected situation in the project there is delay in payment by IOCL and the invoices will be paid by the next week. Petitioner sent its third invoice for US\$ 5,50,000/- dated 1.5.2005 (Annexure-M page 33 of the paper book) and last invoice dated 1.5.2005 for US \$ 1,37,925 (Annexure-M (colly) page 34 of the paper book). When no payment was forth coming, a notice dated 6.7.2005 (Annexure-N page 35 of the paper book) was sent by the petitioner to the respondent reminding that balance payment of US\$ 18,87,825 is still outstanding against the respondent and called upon them to clear the same in terms of letter of intent dated 11.1.2005 and subcontract dated 5.2.2005 failing which petitioner will take appropriate legal action. Respondent then wrote a letter dated 12.7.2005 reiterating that they are facing difficulty in

getting the payments from IOCL. The petitioner did not receive any payment despite legal notice hence this petition.

2. It is alleged in the petition that huge expenditure has been incurred by the petitioner in executing the work under the sub-contract and the petitioner would suffer irreparable losses if respondent did not pay its dues. The respondent is an Iranian company. It may take money out of the country on receiving it from IOCL and in that case it will not be possible for the petitioner to recover its dues from the respondent. The agreement contains an arbitration clause. Therefore, in this petition u/s 9 of the Arbitration and Conciliation Act 1996 (for short the "Act") the petitioner is seeking following reliefs:

(a) (i) the respondent its servants and agents be restrained by an order and injunction of this Hon''ble Court from receiving any money from Indian Oil Corporation Limited.

(ii) the respondent its servants and agents be restrained by an order and injunction of this Hon''ble Court from repatriating any money received/receivable from Indian Oil Corporation Limited to outside India.

(iii) to order the attachment of the monies receivable by the respondent from Indian Oil Corporation Limited in the hands of Indian Oil Corporation Limited which are in the nature of consideration for the work done by the respondent for IOCL at Paradip.

3. The petitioner had also furnished a bank guarantee for US \$ 2,50,000/- for the performance of the sub contract. When OMP 251/2005 was taken up for hearing on 22.7.2005 this Court, as an interim measure, had issued an ad interim injunction restraining respondent from receiving any money from IOCL and also ordered attachment of the dues of the respondent in the hands of IOCL. Later on, on the application of the respondent this order was modified vide order dated 5.9.2005 the restraint/attachment order was confined to the amount claimed to be due by the petitioner, i.e. US\$ 18,87,825/-. On the very next day i.e on 6.9.2005 the respondent invoked the bank guarantee furnished by the petitioner and asked the bankers to encash the said bank guarantee. Therefore, petitioner filed another OMP 320/2005 dated 6.9.2005 seeking restraint order against the respondent from encashing the said bank guarantee. When this second petition was taken up for hearing on 7.9.2005, a Status Quo order was passed regarding the bank guarantee in the presence of Counsel for the parties. It may be pointed out here that initially the petitioner's bank viz. PNB had submitted the requisite bank guarantee to respondent's bank namely Tijarat Bank, Tehran, but the said bank did not agree to accept the bank guarantee at the instance of the petitioner because Tijarat Bank, Iran, had no direct dealings with the Punjab National Bank (PNB). The petitioner then wrote to Societe Generate, Paris and furnished a bank guarantee to them. Ultimately, at the request of Societe Generate, Paris, the Tijarat Bank, Iran, agreed to issue a bank guarantee in favor of the respondent. Thus, these various bank guarantees namely (i) bank guarantee executed by

petitioner's bank PNB in favor of Societe Generale, Paris, (ii) bank guarantee executed by Societe Generale, Paris, in favor of Tjjarat Bank, Tehran and (iii) the bank guarantee executed by Tjjarat Bank, Tehran in favor of the respondent are in ter linked and are the part of the same transaction. In banking circles they are known as counter/back to back guarantees. Technically these bank guarantees are different but in substance they are as inseparable as cause and effect. They have an organic link in as much as the invocation of one automatically leads to the invocation of connecting/counter bank guarantees by the respective beneficiaries/banks.

4 The respondent contested both these petitions but reply has been filed only in OMP No. 251/2005. In their reply respondent has taken a preliminary objection regarding the territorial jurisdiction of the Court. According to the respondent the sub-contract was not entered into at Delhi nor sub-contract was to be performed at Delhi nor any part of cause of action arose in Delhi. Therefore, according to the respondent Delhi Courts will have no territorial jurisdiction to entertain these petitions. Respondent further pleaded that the IOCL had inspected the work done by the petitioner and had submitted a report in june 2005 to the effect that the work done by the petitioner is incomplete and is only to the extent of 36% of the work assigned to them. The petitioner had already been paid US\$ 7 lakh and Therefore, nothing more remains payable to them. Respondent also filed an application under Order 39 Rule 4 CPC being is No. 6341/2005 in OMP No. 251/2005 for vacation of the interim, order. It is further contended that since various banks namely PNB, Societe Generale of Paris and Tjjarat Bank of Tehran have not been made parties to the petition OMP No. 320/2005, this petition u/s 9 of the Act is not maintainable in their absence. In order to over come such a lacuna the petitioner filed an application being is No. 7118/2005 under Order 1 Rule 10 CPC in OMP No. 320/2005 while maintaining that the presence of the bankers is not necessary before the Court.

5. I have heard learned Counsel for the parties and perused the record.

6. On the point of territorial jurisdiction, learned Counsel for the respondent strenuously urged that making an offer does not form part of the cause of action, Therefore, the fact that the petitioner's offer to sub-contract was invited from the petitioner's New Delhi office or the fact that the petitioner sent its offer from the New Delhi office would not confer jurisdiction on the Delhi Courts. Reference in this connection may be had to:

1. Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others,
2. Cummins Diesel Sales Service (India) Ltd. Vs. The Director General of Supplies and Disposals, New Delhi,
3. AIR 1983 Cal. 186, American Pipe v. State of U.P.
4. AIR 1943 Mad. 471, Mani Lal v. Venkatachalapathi

5. M/s. Progressive Constructions Ltd. Vs. Bharat Hydro Power Corporation,

7. There is no dispute with proposition of law that mere inviting or making offer does not become part of cause of action and Therefore the places where offer is made does not confer jurisdiction on the local Courts to try a dispute regarding the contract. Contract which is arrived at by exchange of letters will be deemed to have been completed at a place where acceptance was made/communicated. It is also a settled proposition of law that if a company/corporation has a principal office at one place and branch office at another place where a part of cause of action has arisen, the local Courts having jurisdiction over the place where branch office is located and where the cause of action has arisen will have jurisdiction to entertain the suit regarding the contract and not the Courts within whose jurisdiction the principal office of company/corporation is located. Reference in this connection may be had to:

1. Jaspal Singh Sahni Vs. Kuwait International Finance Co. S.A.K.,
2. B.B. Verma Vs. National Projects Construction Corporation Limited,
3. Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Others,
4. 37 (2000) DLT 693, DLF Industries v. ABN Amro Bank.

8. In order to decide the question of territorial jurisdiction, the following admitted fact? may be taken note of:

(1) The prime contract between the respondent and IOCL of which the sub-contract dated 5.2.2005 between the parties to this petition admittedly forms a part, was executed at Delhi on 16.12.2004 (page 39 of the paper book)

(2) The respondent has only one subordinate/transit office in India and it is located at Vasant Vihar, New Delhi as per address given in the memo of parties.

(3) Vide their letter dated 14.1.2005 (Annexure D page 17 of the paper book) petitioner had asked the respondent to issue a cheque in their name which was collected by the petitioner's representative from respondent's Delhi office.

9. According to respondent's own reply in para 1 of the preliminary objections in OMP 251/2005, the sub-contract dated 5.2.2005 executed between the parties was back to back contract and part of the prime contract between the respondent and IOCL. The IOCL has been referred to as "client" in the subcontract. In all the letters written by the respondent right up to July 2005, the respondent was accepting its liability to pay the invoices raised by the petitioner but expressed its inability to clear the dues as there was some problem with IOCL. The funds of the respondent of which the petitioner seeks attachment are with the IOCL in Delhi. Besides part payment was collected by the petitioner from the respondent's New Delhi office as is clear from its letter dated 14.1.1005 (Annexure D page 17 of the paper book). The question as to whether a part of cause of action has arisen in Delhi will have to be answered with reference to the events relating to the contract which have occurred in Delhi and

the reliefs sought in the petition. As already stated in petition OMP No. 251/2005, the main relief sought by the petitioner is attachment of respondent's funds lying with the IOCL at Delhi and a restraint order against it from receiving any money from IOCL. The fact that prime contract between the IOCL and respondent of which the sub-contract between the parties forms a part, was executed at New Delhi and some payments were received by the petitioner from the respondent's New Delhi office as also the fact that the sole branch/subordinate office of respondent in India is located in Delhi are sufficient to hold that a part of cause of action arose in Delhi and Delhi Courts will have jurisdiction to entertain this petition u/s 20(a) and (c) of the Code of Civil Procedure. Learned Counsel for the respondent relied upon a decision of the Supreme Court in the case of ABC Laminart v. A.P. Agencies, AIR 1989 SC 1239, wherein in para 11 it was observed that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors". No doubt the place where contract was signed and the place where work was to be carried out or the place where breach of contract took place will be the places where any suit/ proceedings regarding the contract can be filed but there may be other connecting factors which also give rise to the cause of action. Local Courts at such places also will have jurisdiction to entertain such suits in view of Section 20, CPC. In this very case the Supreme Court has specifically observed that part of cause of action arises where money expressly or impliedly is payable. In the present case, admittedly part payment was collected through a cheque from respondent's transit office at New Delhi as is clear from the letter dated 14.1.2005. It is nobody's case that respondent has any branch at Paradip where the work was to be carried out and where alleged breach occurred. The sole branch/subordinate office of the respondent is located at New Delhi. In the case of A.B.C Laminart Pvt. Ltd. (supra), the Supreme Court was dealing with the case of ouster clause whereas there is no such clause in sub-contract between the parties.

10. From the admitted facts between the parties, it is clearly borne out that the prime contract of which sub-contract forms part was executed in Delhi and part payments were also made in New Delhi. Besides, the restrain/attachment order is being sought in respect of respondent's money lying in the IOCL in Delhi. These are the connecting factors which show that cause of action arose in Delhi. Besides, the sole associate office of the respondent in India is located in Delhi. Therefore, in view of Section 20 of the Code of Civil Procedure, Delhi Courts will have jurisdiction in the matter.

11. Coming to the merits of the case, the petitioner claims to have completed the work as per sub-contract dated 5.2.2005 whereas according to the respondent only 36% work assigned to the petitioner was carried out. The respondent relied on IOCL's report dated 14.6.2005 for this purpose. It is the contention of the learned Counsel for the respondent that the petitioner has trenched only off shore area but has not dredged on shore area which is approx. 700 meter long and no back filling has been done. On the other hand, learned Counsel for the

petitioner relied upon document dated 12.4.2005 (Annexure-J page 29 of the paper book) which is signed by both the parties. This document contains statement of facts regarding the trenching/dredging work done by the petitioner at Paradip IOCL SPM line project. At item 12 it clearly mentions completed dredging of trench on 11th April 2005 as per dredging plan profile. Vide this document which is signed by the respondent's representative, the respondent admits the fact that the petitioner has completed the dredging of trench as per dredging plan profile. This inference is further re-enforced from respondent's letter dated 13.4.2005. Even in their letter dated 12.7.2005 in response to the petitioner's legal notice, the respondent did not dispute the extent of work done by the petitioner. They only pleaded helplessness in the matter because they were having some problems with IOCL in the matter of payment of invoices. Thus the petitioner's version that he has completed the dredging of trench as per dredging plan profile stands admitted by the respondent vide letter dated 12.4.2005. It is contended on behalf of the respondent that the document dated 12.4.2005 relates only to the work done in the off shore area but the petitioner has not dredged on shore area which is approx. 700 meters. This is not borne out of from the document itself. It no where shown that it relates only to off shore area. At this stage when this Court has to take only a prima facie view of material on record, I think, that the writing dated 12.4.2005 signed between the parties, is sufficient to hold prima facie that the work has been completed as per dredging plan profile.