

MANU/UP/2463/2005

**Equivalent/Neutral Citation:** AIR2006All23, AIR2006All23, 2005 (61) ALR 408, 2006 1 AWC504All

**IN THE HIGH COURT OF ALLAHABAD**

C.M.W.P. No. 58468 of 2005

**Decided On:** 24.09.2005

P.R. Transport Agency **Vs.** Union of India (UOI) and Ors.

**Hon'ble Judges/Coram:**

*Sushil Harkauli and Umeshwar Pandey, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Manish Goyal, Adv.*

*For Respondents/Defendant: K.C. Sinha and Madhur Prakash, Advs.*

**JUDGMENT**

**Sushil Harkauli and Umeshwar Pandey, JJ.**

**1 .** We have heard Sri Manish Goyal for the Petitioner and Sri Madhur Prakash representing Respondents No. 2 and 3 at length.

**2 .** During the course of hearing Sri Madhur Prakash raised a preliminary objection regarding want of territorial jurisdiction on part of this Court to entertain and hear this writ petition. The objection of Sri Madhur Prakash can be divided into three parts:

(1) No part of cause of action has arisen within the territory of U.P.

(2) No facts have been pleaded in the writ petition on the basis of which it can be said that any part of cause of action has arisen within the territory of U.P.

(3) The jurisdiction of this Court under Article 226 of the Constitution of India stands ousted in favour of the Jharkhand High Court under Clause 10.5 of the Tender Agreement, the relevant part of which reads that (any) dispute arising out of this scheme shall be subject to the jurisdiction of the Jharkhand High Court'.

**3 .** On this objection, both the sides were granted time to examine the matter. From the Petitioner's side, a (second) supplementary-affidavit has been filed stating that district Chandauli (in U. P.) is the principal place of business of the Petitioner. This averment in para 2 of the second supplementary'-affidavit of Rakesh Kumar Srivastava is sought to be corroborated by the copy of the registered partnership deed of the Petitioner which has been enclosed as 1st Annexure to that affidavit. The said deed is dated 7.7.2000, and in it the principal place of business is at Chandauli and the only other place where the Petitioner carries on business is Varanasi, which is also in the State of U. P.

**4 .** Sri Madhur Prakash raised an objection that this second supplementary-affidavit, from the side of the Petitioner, should not be entertained or accepted by this Court because all the facts mentioned in this affidavit were within the knowledge of the Petitioner at the time when the writ petition was filed and there is no explanation from

the Petitioner's side why these facts were not mentioned in the writ petition as originally filed.

**5.** Having considered the matter, we are unable to sustain this objection. This kind of objection is available either in cases of review under Order XLVII, Rule 1 (a) or in cases of additional evidence in appeal under Order XLI, Rule 27 (1) (aa) of the Code of Civil Procedure or in suits for specific performance of contracts where the pleadings of 'readiness and willingness' required under Section 16(1)(c) of the Specific Relief Act has not been made originally in the plaint and is sought to be added by amendment of the plaint. Apart from the above three cases, we are not aware of any other principle of law which permits exception to be taken to narration of additional facts by way of amendment application or by way of supplementary-affidavit in a writ petition.

**6.** The contention of the Petitioner with regard to territorial jurisdiction is that because the communication of the acceptance of the tender was received by the Petitioner by e-mail at Chandauli (U. P.), therefore, the contract from which this dispute arises was completed at Chandauli and in a case seeking performance of the contract or alleging breach of the contract by the Respondents, the completion of the contract is a part of the 'cause of action'. There the place where the contract was completed by receipt of communication of acceptance is a place where 'part of cause of action' arises.

**7.** According to Halsbury's laws of England 4th Edition Reissue Vol. 9 (1) Paragraph 683 Pages 434, 435 it has been said in reference to contracts made orally as by telephone, or in writing as by telex or fax, that the contract is complete when and where the acceptance is received. However, those principles can apply only where the transmitting terminal and the receiving terminal are at fixed points. In case of e-mail, the data (in this case acceptance) can be transmitted from any where by the e-mail account holder, it goes to the memory of a 'server' which may be located anywhere and can be retrieved by the addressee account holder from anywhere in the world and, therefore, there is no fixed point either of transmission or of receipt.

**8.** Anticipating the difficulties likely to arise from this, the Information Technology Act, 2000 in Section 13(3) provides as follows:

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

**9.** Thus, the acceptance of the tender, communicated by the Respondents to the Petitioner by e-mail, will be deemed to be received by the Petitioner at Varanasi/Chandauli, which are the only two places where the Petitioner has his place of business.

**10.** In view of the facts mentioned in the supplementary-affidavit, read with Information Technology Act, the acceptance having been received by the Petitioner at Chandauli/Varanasi, the contract became complete by receipt of such acceptance at Varanasi/Chandauli, both of which places are within the territorial jurisdiction of this Court. Therefore, a part of the cause of action having arisen in U. P., this Court has territorial jurisdiction to entertain the writ petition. However, it has to be examined whether the 'ouster' Clause (No. 10.5) of the tender agreement has the effect of excluding the writ jurisdiction of this Court.

**11.** Jurisdiction of civil courts is created by statute and cannot be created or conferred

by the consent of the parties upon a Court which has not been granted territorial or pecuniary or other (subject matter related) jurisdiction by statute.

**12.** Under Section 28 of the Indian Contract Act, 1872, the parties by their agreement are not permitted to totally exclude the jurisdiction of civil courts which has been created by statute. However, where several civil courts have territorial jurisdiction in respect of a suit, parties may by agreement confine themselves to any one or more of such civil courts and such an agreement would not be violative of Section 28 of the Contract Act.

The above principles apply to civil suits and civil courts.

**13.** Generally, the Courts are reluctant to accept ouster of the jurisdiction of the civil courts and, therefore, ouster clauses in agreement are construed strictly and jurisdiction is held to be excluded only when it is inevitable result of the agreement. In this light the Supreme Court in the case of A. B. C. Laminart Pvt. Ltd. and Anr. v. A. P. Agencies, MANU/SC/0001/1989 : AIR 1989 SC 1239, laid down that either the agreement ousting jurisdiction of some courts and confining the jurisdiction to one or more courts should use the words like 'alone', 'only', 'exclusive' etc. in the ouster clause with regard to the courts to which jurisdiction has been confined ; or in the alternative where such isolating words have not been used, the maxim 'expressio unius est exclusio alterius' meaning 'expression of one is the exclusion of another' may be applied in appropriate cases where the facts so demand.

**14.** After considering the facts of the said case as well as the alleged ouster clause which said "any dispute arising out of this sale shall be subject to Kaira jurisdiction", the Supreme Court held that it would not oust the jurisdiction of other courts which had territorial jurisdiction under Section 20(c) of the Code of Civil Procedure.

**15.** But, a more fundamental question needs to be examined, viz. whether the ouster clauses can exclude the jurisdiction of civil courts only or whether such clause can exclude the jurisdiction under Article 226 of the Constitution of India also.

**16.** Section 20, Code of Civil Procedure for the civil court and Article 226 of the Constitution of India for the High Courts permit the exercise of territorial jurisdiction where the cause of action wholly or in part arises within their territories. To that extent, the words used in the two provisions are similar.

**17.** But, there is one vital difference, namely, that while the jurisdiction to pass a decree accrues to the civil court only upon institution of suit by filing of a plaint and the civil court cannot act suo motu, but under Article 226 of the Constitution of India the power to issue writs, orders or directions is not necessarily dependant upon filing of a writ petition. The High Court has the power to act suo motu if an appropriate matter comes to its knowledge calling for intervention by it. Such knowledge may be received by the High Court by means of a writ petition or otherwise.

**18.** When the parties enter into an agreement confining themselves to the jurisdiction of one of the several civil courts having territorial jurisdiction in respect of a suit, basically the parties are placing a restraint upon themselves from approaching the other civil courts whose jurisdiction has been excluded by the agreement. In this manner the jurisdiction of the other civil courts gets ousted, subject only to one restriction which is provided in Section 28 of the Contract Act. However, the power of judicial review given to the High Courts by Article 226 of the Constitution of India, and being a basic feature of the Constitution cannot be curtailed even by statute, as held by the Supreme Court in

the case of L. Chandra Kumar v. Union of India and Ors. MANU/SC/0261/1997 : (1997) 3 SCC 261. Therefore, it is not possible to accept the contention that the said constitutional power of the High Court to issue a writ suo motu can be curtailed by an agreement between litigants.

**19.** We, therefore, hold that the ouster clauses can oust a territorial jurisdiction only of civil courts and not of the High Court in respect of the power under Article 226 of the Constitution of India, provided such power exists in the High Court on account of part of cause of action having arisen within its territorial jurisdiction.

**20.** Coming to the merits of the matter, the case of the Petitioner is that Respondents No. 2 and 3 held an e-auction for certain coal in different lots. The Petitioner submitted its tender or bid in the said auction and the Petitioner's bid was accepted for 4000 metric tons of coal from Dohari Colliery at the price of Rs. 1,625 per metric tons. The acceptance letter was issued on 19.7.2005 by e-mail at the Petitioner's e-mail address. Acting upon the said acceptance, the Petitioner deposited the full amount of Rs. 81,12,000 through cheque in favour of Respondent No. 3 on 28.7.2005. The cheque was accepted and encashed by Respondent No. 3.

**21.** Subsequently, instead of delivering the coal to the Petitioner, Respondent No. 4 sent an e-mail dated 10.8.2005 to the Petitioner saying that the sale as well as the e-auction in favour of the Petitioner stands cancelled "due to some technical and unavoidable reasons". This communication has been challenged in this writ petition and a copy of the same has been enclosed as Annexure-1 to this writ petition.

**22.** On 13.9.2005, the following interim order was passed in this case:

In the meantime, if 4000 metric ton of coal, for which the Petitioner had submitted his bid at the e-auction, has not been given to any body else, it will not be transferred to any other person so that if the writ petition succeeds that coal may be directed to be delivered to the Petitioner.

**23.** Sri Madhur Prakash, who had received copy of this writ petition on 29.8.2005 (i.e., almost a month ago) on behalf of Respondents No. 2 and 3, has stated on instructions, that the only reason for this cancellation is that there was some other person whose bid for the same coal was slightly higher than the Petitioner, but due to some flaw in the computer or its programme or feeding of data the said bid could not be considered.

**24.** We have considered this defence. That third party is not before us and there is no averment from the side of the Petitioner or the Respondents that the said third party has so far challenged the acceptance of the bid of the Petitioner. In absence of such challenge, Respondents No. 2, 3 and 4 are firstly bound by their concluded contract and thereafter they are further bound by the principle of promissory estoppel, inasmuch as the Petitioner has altered its legal position to its disadvantage, acting upon the communication of acceptance sent to it by these Respondents, by depositing large amount of money, viz. Rs. 81,12,000 by cheque which has also been encashed by the Respondents.

**25.** There can be no doubt that the Respondents are 'State' within the meaning of Article 12 of the Constitution of India and the cancellation of the auction and the contract of sale in favour of the Petitioner at such a highly belated stage, without giving any opportunity of hearing to the Petitioner, is violative of the principles of natural justice and on that ground also it cannot be sustained.

**26.** In view of what has been stated above, we allow the writ petition; set aside the communication dated 10.8.2005 (Annexure-1 to the writ petition) as well as the decision contained in that communication, and direct Respondents No. 2 and 3 to handover the coal, covered by the Petitioner's accepted bid, to the Petitioner without further delay.

**27.** As requested, certified copies of this order may be issued to the parties, on payment of requisite charges, within a week.

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