IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ARBITRATION APPEAL No. 16 of 2022

Between:-
PARENTERAL DRUGS (INDIA) LIMITED THROUGH SHRI NANALAL JOSHI AUTHORISED SIGNATORY SHREE GANESH CHAMBERS NAVLAKHA CROSSING A.B. ROAD (MADHYA PRADESH)

….APPELLANT

(BY SHRI VIJYESH ATRE, ADVOCATE)

AND

GATI KINTETSU EXPRESS PVT. LTD. REGD. OFFICE 1-7-293 M.G. ROAD (TELANGANA)

….RESPONDENT

This appeal coming on for admission. this day, the court passed the following:

ORDER

(passed on 12/04/2022)

1] Heard on the question of admission. On the last date of hearing Shri Atre, learned counsel for the appellant was asked to address this court only on the question of jurisdiction of Indore District Judge to entertain the application u/s.34 of the Act of 1996 in respect of the award passed by the Arbitrator sitting at Hydrabad.

2] This arbitration appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "the Act of 1996") against the order dated 02/03/2022 passed by the learned Judge of the Commercial Court (District Judge Class), Indore (M.P.) under Section 34 of the Act of 1996 in MJCAV No.175/2019 wherein the award dated 17/05/2014, passed by the Sole Arbitrator Shri M. Chelapati Rao of Hyderabad was challenged.

3] The aforesaid challenge under Section 34 was opposed by the respondent on two counts; firstly that the Court at Indore had no jurisdiction to entertain the appeal under Section 37 of the Act of 1996, and secondly, there was a valid agreement between the parties and no error has been committed by the Arbitrator to pass the award.

4] Shri Vijyesh Atre, learned counsel for the appellant has submitted that there was no agreement between the appellant Parenteral Drugs (India) Limited and the respondent M/s Gati Kintetsu Express Pvt. Ltd. and the Arbitrator has wrongly assumed the jurisdiction to decide the dispute on the basis of an agreement between the appellant and the other similarly named company by the name of M/s Gati Limited whereas the present respondent claim is M/s Gati Kintetsu Express Pvt. Ltd.

5] Counsel has further submitted that both these companies are two different entities and the respondent company cannot claim initiation of arbitration on the basis of an agreement entered into between the appellant and the other company M/s Gati Limited. It is submitted that the Court at Indore would have the jurisdiction to decide the application under Section 34 of the Act as the part of cause of action has arisen at Indore only. It is further submitted that if the Court was of the opinion that it had no territorial jurisdiction over the matter, it ought not to have proceeded on the merits of the case.

6] It is further submitted by Shri Atre that the appellant has rightly invoked the jurisdiction of Indore Court and the award is liable to be set aside only on the ground that there was no arbitration agreement

between the parties which is a valid ground of challenge as provided under Section 34(2)(a)(ii) of the Act of 1996. Counsel has submitted that the transaction between the appellant company and the respondent took place at Indore, hence the part of cause of action has arisen at Indore only and the Court at Indore would have the jurisdiction to decide the same. It is further submitted that the appellant company has its office at Navlakha Indore and was availing the service of M/s Gati Limited for transporting its finished products from its factory premises to different locations in India. In support of his submissions, Shri Atre has also relied upon *paragraph 8 of the judgement of the Hon'ble Supreme Court in the case of Sandeep Kumar and others Vs. Master Ritesh and others reported as (2006) 13 SCC 567* and in the case of *Heavy Engineering Mazdoor Union Vs. State of Bihar and others reported as 1969(1) SCC 765*, in the case of *S.N. Prasad, Hitek Industries (Bihar) Ltd. Vs. Monnet Finance Ltd. and others reported as (2011) 1 SCC 320*, in the case of *Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya and another reported as (2003) 5 SCC 531*, in the case of *Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Pvt. Ltd. and others reported as (2017) 7 SCC 678* and in the case of *M.C. Chacko Vs. The State Bank of Travancore, Trivandrum reported as 1969 (2) SCC 434*.

7] Heard learned counsel for the appellant and perused the record.

8] From the record, it is found that so far as the arbitration agreement is concerned, indeed it is between the appellant and M/s Gati Limited. In the arbitration agreement, in Clause 19, there is a condition regarding governing law and jurisdiction which reads as

under:-

> "19.0 GOVERNING LAW AND JURISDICTION:
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> This Agreement shall be construed in accordance with the laws of India. Any proceeding arising under this agreement including arbitration proceedings shall be subject to the exclusive jurisdiction of Courts of Hyderabad / Secunderabad, Andhra Pradesh, INDIA only and no other court shall have jurisdiction."

9] Admittedly, the appellant chose not to appear before the Arbitrator as no reply was filed on its behalf despite service of notice by the Arbitrator, and the objection regarding jurisdiction of the Arbitrator appears to have been taken for the first time u/s.34 of the Act of 1996. So far as the jurisdiction of arbitral tribunal is concerned, the same is provided under Chapter IV of the Act of 1996. Section 16 of which is relevant, reads as under:-

> "16. Competence of arbitral tribunal to rule on its jurisdiction—(1) The arbitral tribunal may rule on its own jurisdiction, *including ruling on any objections with respect to the existence or validity of the arbitration agreement*, and for that purpose,—
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> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
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> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
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> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
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> (emphasis supplied)

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

(emphasis supplied)

10] A bare perusal of the aforesaid section clearly reveals that as per sub-section (1), the arbitral tribunal may rule on its own jurisdiction, *including ruling on any objections with respect to the existence or validity of the arbitration agreement* which is exactly the case at hand refers to. According to this section, and as per sub-s.(2), a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence and sub-s.(5) also provides that the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. Whereas, sub-section (6) provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

11] In view of the aforesaid legal aspect, this Court is of the considered opinion that even if the appellant company was of the

opinion that it had no arbitration agreement with the respondent M/s Gati Kintetsu Express Pvt. Ltd., it ought to have joined the proceedings of the Arbitrator and ought to have challenged the same as provided under s.16 the Act of 1996. There is no other recourse available to a party to challenge an award except as provided under the Act of 1996. It is an admitted fact that in the alleged arbitration agreement between the parties, on the basis of which arbitration proceedings have commenced, Clause 19 clearly provides that the jurisdiction of the Court would be at Hyderabad/Secunderabad of the State of Andhra Pradesh, and no other Court shall have jurisdiction, in such circumstances, when the award was passed by the Arbitrator at Hyderabad, it cannot be challenged under Section 34 of the Act of 1996 at Indore alleging that as there was no agreement between the parties, hence, the aforesaid award can also be challenged wherever cause of action arose between the parties.

12] In the considered opinion of this Court, if such an interpretation is allowed, then the very purpose, for which Section 16 and Section 34 of the Act have been enacted, would be defeated and would lead to a chaotic situation. In this regard, reference may be had to a decision rendered by the Supreme Court in the case of *Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2020) 5 SCC 462* the relevant paras of which read as under:-

> "15.As per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of parties choosing a court which has jurisdiction out of two or more competent courts having jurisdiction. This has been made clear in the three-Judge Bench decision in *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*

15.1. In the said case, respondent Indian Oil Corporation Ltd. appointed M/s Swastik Gases (P) Ltd. situated at Jaipur, Rajasthan as their consignment agent. The dispute arose between the parties as huge quantity of stock of lubricants could not be sold by the applicant and they could not be resolved amicably. In the said matter, Clause 18 of the agreement between the parties provided that the agreement shall be subject to the jurisdiction of the courts at Kolkata.

15.2. The appellant Swastik invoked Clause 18 — arbitration clause and filed application under Section 11(6) of the Act before the Rajasthan High Court for appointment of arbitrator. The respondent contested the application made by Swastik inter alia by raising the plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter. The plea of Indian Oil Corporation was that the agreement has been made subject to jurisdiction of the courts at Kolkata and the Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11(6) of the Act.

15.3. The Designated Judge held that the Rajasthan High Court did not have territorial jurisdiction to entertain the application under Section 11(6) of the Act and gave liberty to Swastik to file the arbitration application in the Calcutta High Court which order came to be challenged before the Supreme Court.

15.4. Pointing out that the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used in the agreement and use of such words is not decisive and non-use of such words does not make any material difference as to the intention of the parties by having Clause 18 of the agreement that the courts at Kolkata shall have the jurisdiction, the Supreme Court held as under : [*Swastik Gases (P) Ltd. case*, SCC pp. 47-48, paras 31-33]

> "*31*. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What the appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(*b*) and Section 2(*e*) of the 1996 Act read with Section 20(*c*) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. *The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the*

jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. *It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties— by having Clause 18 in the agreement— is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts*. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

33. The above view finds support from the decisions of this Court in *Hakam Singh* v. *Gammon (India) Ltd.*, *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, *R.S.D.V. Finance Co. (P) Ltd.* v. *Shree Vallabh Glass Works Ltd.*, *Angile Insulations* v. *Davy Ashmore (India) Ltd.*, *Shriram City Union Finance Corpn. Ltd.* v. *Rama Mishra*, *Hanil Era Textiles Ltd.* v. *Puromatic Filters (P) Ltd.* and *Balaji Coke Industry (P) Ltd.* v. *Maa Bhagwati Coke Gujarat (P) Ltd.*."

16. In *Swastik*, the Supreme Court held that clause like Clause 18 of the agreement will not be hit by Section 23 of the Contract Act and it is not forbidden by law nor it is against public policy. It was so held that as per Section 20 of the Act, parties are free to choose the place of arbitration. This "party autonomy" has to be construed in the context of choosing a court out of two or more courts having competent jurisdiction under Section 2(1)(*e*) of the Act.

17. The interplay between "seat" and "place of arbitration" came up for consideration in *Indus Mobile Distribution (P) Ltd.* v. *Datawind Innovations (P) Ltd.* After referring to *BALCO*, *Enercon (India) Ltd.* v. *Enercon GmbH* and *Reliance Industries Ltd.* v. *Union of India* and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Nariman, J. held as under : [*Indus Mobile Distribution (P) Ltd. case*, SCC pp. 692-93, paras 18-20]

> "*18*. The amended Act, does not, however, contain the aforesaid amendments, presumably because the *BALCO* judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.
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> *19*. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. *Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings*

arising out of the agreement between the parties.
20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.* This was followed in a recent judgment in *B.E. Simoese Von Staraburg Niedenthal* v. *Chhattisgarh Investment Ltd.* Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside."
18.Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.
19. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside.
20. In the result, the impugned order of the Madras High Court in *Kamchi Industries Ltd.* v. *Brahmin River Pellets Ltd.* dated 2-11-2018 is set aside and this appeal is allowed. The parties are at liberty to approach the Orissa High Court seeking for appointment of the arbitrator.

(emphasis supplied)

13] The aforesaid decision, **B*rahmani River Pellets Ltd.****(supra)*** has also been further clarified in a three judge bench of the Supreme Court in the case of ***BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234****, the relevant paras of the same read as under*:-

> "97. Given the fact that if there were a dispute between NHPC Ltd. and a foreign contractor, Clause 67.3(*vi*) would have to be read as a clause designating the "seat" of arbitration, the same must follow even when sub-clause (*vi*) is to be read with sub-clause (*i*) of Clause 67.3, where the dispute between NHPC Ltd. would be with an Indian contractor. The arbitration clause in the present case states that "*Arbitration proceedings* shall be held at New Delhi/Faridabad, India…", thereby signifying that all the hearings, including the making of the award, are to take place at one of the stated places. Negatively speaking, the clause does not state that the venue is so that some, or all, of the hearings take place at the venue; neither does it use language such as "the Tribunal may meet", or "may hear witnesses, experts or parties". The expression "shall be held" also indicates that the so-called "venue" is really the "seat" of the arbitral proceedings. The dispute is to be settled in accordance with the Arbitration Act, 1996 which, therefore, applies a national body of rules to the arbitration that is to be held either at New Delhi or Faridabad, given the fact that the present arbitration would be Indian and not international. It is clear, therefore, that even in such a scenario, New Delhi/Faridabad, India has been designated as the "seat" of the arbitration proceedings."
> (emphasis supplied)

14] Testing the facts of the case on hand on the anvil of the aforesaid dictum of the Supreme Court, it is clear as noon day that even if the contention of the appellant is that there was no arbitration agreement between the parties, the Court at Indore would still not have jurisdiction to entertain an application filed u/s.34 of the Act of 1996 against an award passed by the arbitrator sitting at Hyderabad invoking an arbitration agreement which provides that arbitration proceedings shall be *subject to the exclusive jurisdiction* of Courts of Hyderabad / Secunderabad, Andhra Pradesh, INDIA only and no other court shall have jurisdiction.

15] Having said so, this Court is also of the considered opinion that while passing the impugned order, the learned Judge of the District

Court, after coming to the conclusion that it has no territorial jurisdiction to decide the case under Section 34 of the Act of 1996, ought not to have proceeded to decide the matter on merits. In such circumstances, the impugned award cannot be sustained in the eyes of law so far as its dismissal on merits is concerned. However, since the impugned award was passed on **17/05/2014**, and application u/s.34 of the Act of 1996 was filed on **25.06.2014** i.e. within the prescribed period of limitation which is 90 days, the appellant cannot be rendered remediless and thus, it is directed that if the appellant submits an appropriate application under Section 34 of the Act of 1996 before the Court of competent jurisdiction, *within such period of time which was still available to the appellant over and above 25.06.2014*, the same shall be decided by the court concerned, in accordance with law without going into the question of limitation. Needless to say, the time spent by the appellant in prosecuting s.34 before the District Court and s.37 of the Act of 1996 shall stand excluded from the period of limitation.

With the aforesaid observations, the appeal stands ***partly allowed.***

(Subodh Abhyankar)
Judge

Krjoshi

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

S.B. HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ARBITRATION APPEAL No. 16 of 2022

1	Case No.	Arbitration Appeal No.16/2022
2	Parties Name	PARENTERAL DRUGS (INDIA) LIMITED Vs. GATI KINTETSU EXPRESS PVT. LTD.
3	Date of Order	12/04/2022
4	Bench constituted of Hon'ble Justice	Single Bench - Hon'ble Shri Justice Subodh Abhyankar
5	Order passed by	Hon'ble Shri Justice Subodh Abhyankar
6	**Whether approved for reporting**	**Yes**
7	Name of counsel	Shri Vijyesh Atre, learned counsel for the appellant.
	Law laid down	10. A bare perusal of the section 16 of Arbitration and Conciliation Act, clearly reveals that as per sub-section (1), the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement which is exactly the case at hand refers to. According to this section, and as per sub-s.(2), a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence and sub-s.(5) also provides that the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. Whereas, sub-section (6) provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34. 11. In the present case even if the appellant company was of the opinion that it had no arbitration agreement with the respondent M/s Gati Kintetsu Express Pvt. Ltd., it ought to have joined the proceedings of the Arbitrator and ought to have challenged the same as provided under s.16 the Act of 1996. There is no other recourse available to a party to challenge an award except as provided under the Act of 1996. It is an admitted fact that in the alleged arbitration agreement between the parties, on the basis of which arbitration proceedings have commenced, Clause 19 clearly provides that the jurisdiction of the Court would be at Hyderabad/Secunderabad of the State of Andhra Pradesh, and no other Court shall have jurisdiction, in such circumstances, when the award was passed by the Arbitrator at Hyderabad, it cannot be challenged under Section 34 of the Act of 1996 at Indore alleging that as there was no agreement between the parties, hence, the aforesaid award can also be challenged wherever cause of action arose between the parties. 12. In the considered opinion of this Court, if such an interpretation is allowed, then the very purpose, for which Section 16 and Section 34 of the Act have been enacted, would be defeated and would lead to a chaotic situation. 14. Even if the contention of the appellant is that there was no arbitration agreement between the parties, the Court at Indore would still not have jurisdiction to entertain an application filed u/s.34 of the Act of 1996 against an award passed by the arbitrator sitting at Hyderabad invoking an arbitration agreement which provides that arbitration proceedings shall be subject to the exclusive jurisdiction of Courts of Hyderabad / Secunderabad, Andhra Pradesh, INDIA only and no other court shall have jurisdiction. Judgement relied upon: Brahmani River Pellets Ltd. v. Kamachi Industries Ltd., (2020) 5 SCC 462, BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234,S
	Significant para	10 to 14

(Subodh Abhyankar)
Judge