

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 30th January, 2019

Date of decision : 22nd February, 2019

+

O.M.P. (COMM) 174/2017

SPENTEX INDUSTRIES LTD.

..... Petitioner

Through: Mr. Ramesh Singh, Mr. Arun Arora
and Ms. Preeti Thakur, Advocates.
(M:9810166612)

versus

LOUIS DREYFUS COMMODITIES INDIA
PVT. LTD.

..... Respondent

Through: Mr. Sanat Kumar, Senior Advocate
with Mr. Virendra Rawat, Mr.
Ramesh, Mr. Kamal Kapoor and Mr.
Vinayak Bhatta, Advocates.
(M:9810127729)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present Section 34 petition arises out of the impugned award dated 21st December, 2012 passed by the Arbitral Tribunal constituted by the Cotton Association of India (*hereinafter the 'CAI'*), by a 2:1 majority, as also order dated 23rd September, 2013 passed by the Board of Directors of the CAI, dismissing the appeal filed by of the Petitioner, with costs. A preliminary issue as to the maintainability of the present petition has been raised by the Respondent. The present judgment deals with the said preliminary objection.

2. It is submitted on behalf of M/s Louis Dreyfus Commodities India Pvt. Ltd. - Respondent (*hereinafter, 'Respondent'*) that the arbitration was

conducted under the Rules and Bye-laws of the CAI and proceedings were held in CAI's office in Mumbai. Hence, only Courts in Mumbai can entertain a challenge to the said award. The case of M/s Spentex Industries Ltd. – Petitioner (*hereinafter, 'Petitioner'*), on the other hand, is that the contract has an exclusive jurisdiction clause, which vests jurisdiction in the Courts in Delhi and the present petition is, thus, maintainable before this Court.

3. Brief background of the case is that Respondent/Claimant entered into three agreements for sale of Indian raw cotton with the Petitioner. A total of 50,000 bales of cotton were to be sold under the three contracts.

4. However, disputes arose between the parties. Both were members of CAI and were bound by the Rules and By-laws governing the said association. The contract, between the parties, contained the following clauses.

“ARBITRATION

All disputes will be resolved through arbitration in accordance with the rules and by laws of the Cotton Association of India, Mumbai.

.....

JURISDICTION

The Court in New Delhi alone will have the exclusive jurisdiction to deal with any matter arising out of arbitration proceedings or the award. This contract incorporates all terms printed overleaf.”

5. The Arbitral Tribunal was constituted as per the Rules and By-laws of the CAI and the impugned award was rendered by a 2:1 majority in favour

of the Respondent. A sum of Rs.15,07,11,688/- together with interest @ 15% per annum was awarded. An appeal was filed against this award by the Petitioner, before the Board of Directors, CAI, which was also dismissed, vide order dated 23rd September, 2013. The Petitioner has challenged the said award and order before this Court.

6. Mr. Sanat Kumar, Ld. Senior counsel raises the issue of maintainability and relies on clause 38 and clause 44A of the By-laws of the CAI. The same read as under:

“Arbitration and Conciliation other than regarding quality

38.- (A) All unpaid claims whether admitted or not, and all disputes and differences (other than those relating to quality) arising out of or in relation to –

(a) cotton transactions between members including any dispute as to the existence of such transactions; or

(b) cotton contracts (whether forward or ready and whether between members or between a- member and a non-member) made subject to these By-laws or subject to C.A.I. arbitration, or containing words or abbreviations to a similar effect including any dispute as to the existence of such transaction provided in the latter case the parties had agreed in writing before entering into business relation that any dispute arising between them out of that agreement or any such transactions that may be entered into including any dispute as to the existence of such transaction shall be referred to arbitration under the By-laws of the Association; or

(c) the rights and/or responsibilities of commission agents, and or brokers not parties to such transactions or contracts; or

(d) commission agency agreement entered into subject to these By-laws or subject to C.A.I. arbitration or containing words or abbreviations to a similar effect;
or

(e) Cotton contracts covered by any such arbitration, agreement;
shall be referred to the arbitration as per provisions contained in the Rules of Arbitration of the Association as approved by Board from time to time.

(f) Before making reference to Arbitration provided in sub-clause (a) to (e) above, parties may agree to refer the dispute or differences for Conciliation as per the Rules of Conciliation of the Association as approved by Board from time to time and the settlement arrived at the Conciliation proceedings shall have a force of award as per Arbitration and Conciliation Act 1996. The arbitrator(s) shall make their award expeditiously in accordance with Rules of Arbitration of Association and provisions of Arbitration and Conciliation Act 1996. The conciliator(s) shall dispose off the conciliation proceedings expeditiously.

.....
Operation of contracts

44A.- Every cotton transaction entered into between Members and every contract made subject to these By-laws or subject to C.A.I. arbitration, conciliation or containing words or abbreviations to a similar effect and every arbitration agreement to which these By-laws apply, shall be deemed in all respect to be subject to these By-laws and the parties to such transactions, contracts or agreements shall be deemed to have submitted to the jurisdiction of the Courts in Bombay for the purpose of giving effect to the provisions of these By-laws.”

7. On the basis of above two clauses, read with the arbitration clause in the contract, it is submitted that only Courts in Mumbai have jurisdiction to

entertain a challenge to the award. It is submitted that Mumbai is the seat of arbitration and hence this case is covered by the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors.*, 2017 (3) RAJ 682 (SC) (hereinafter, '*Indus Mobile Distribution*'), which has recently been followed by a Ld. Single Judge of this Court in *Mr. Raman Deep Singh Taneja v. Crown Realtech Private Limited*, [ARB.P.444/2017 decided on 23rd November, 2017] (hereinafter, '*Raman Deep Taneja*').

8. Mr. Ramesh Singh, Ld. Counsel appearing for the Petitioner submits that the jurisdiction clause is very clear in the contract. It vests exclusive jurisdiction in the Courts in Delhi to deal with any dispute *arising out of the arbitration proceedings or the award*. This, according to him, is a wide clause which vests jurisdiction in this Court. He further submitted that Delhi has the "*closest and most intimate connection*" with the dispute. The orders were placed from Delhi, the payments were received in Delhi and various other such elements show the cause of action, in fact, arose in Delhi.

9. Mr. Ramesh Singh further urged that the offices of the CAI were merely the venue for the arbitration proceedings. The Rules and By-laws of the CAI were the curial law of the contract i.e. law governing the procedure and nothing more. He submits that Mumbai was only the venue and not the seat of the arbitration. He relies on *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.* 2018 (4) Arb. LR 66 (Del) (hereinafter, '*Antrix Corporation*'), in support of his submissions.

Analysis and Findings

10. The question of maintainability is a short issue. The clauses in the present case are not similar to the clauses in the judgments relied on by

either party. Usually there are two clauses in a contract – (i) Arbitration clause and (ii) Court jurisdiction clause. The former is independent of the latter. The former relates to adjudication of disputes through arbitration and the latter clause deals with courts which generally have jurisdiction under the contract.

11. However, the clauses in this contract are worded very interestingly. The jurisdiction clause is not a clause which vests the Courts in Delhi with jurisdiction to deal with matters in respect of general disputes which arise out of the contract, as is usually the case with a Court jurisdiction clause. The jurisdiction clause here uses the words “*alone*” and “*exclusive jurisdiction*” for Courts in Delhi, “*to deal with any matter arising out of arbitration proceedings or the award*”. This is clear and categorical that Courts in Delhi alone will have jurisdiction, not in respect of general disputes arising out of the contract, but in respect of the arbitration proceedings and the award. To this extent, the clause is unusual, but reflects the intention of the parties, at the time of execution of contract.

12. A perusal of *Indus Mobile Distribution (supra)*, which is relied upon by the Respondent, shows that the clauses in the said case were as under:

“ ***Dispute Resolution Mechanism:***

Arbitration: In case of any dispute or differences arising between parties out of or in relation to the construction, meaning, scope, operation or effect of this Agreement or breach of this Agreement, parties shall make efforts in good faith to amicably resolve such dispute.

If such dispute or difference cannot be amicably resolved by the parties (Dispute) within thirty days of its occurrence, or such longer time as mutually agreed,

either party may refer the dispute to the designated senior officers of the parties.

If the Dispute cannot be amicably resolved by such officers within thirty (30) days from the date of referral, or within such longer time as mutually agreed, such Dispute shall be finally settled by arbitration conducted under the provisions of the Arbitration & Conciliation Act 1996 by reference to a sole Arbitrator which shall be mutually agreed by the parties. Such arbitration shall be conducted at Mumbai, in English language.

The arbitration award shall be final and the judgment thereupon may be entered in any court having jurisdiction over the parties hereto or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. The Arbitrator shall have the power to order specific performance of the Agreement. Each Party shall bear its own costs of the Arbitration.

It is hereby 'agreed between the Parties that they will continue to perform their respective obligations under this Agreement during the pendency of the Dispute.

19. All disputes & differences of any kind whatever arising out of or in connection with this Agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only."

13. The above clauses show that there are two clearly delineated provisions. For the arbitration award, "*any Court having jurisdiction could be approached*" but for other disputes and differences only Courts in Mumbai had jurisdiction. Thus, the jurisdiction qua arbitration vested in any Court having jurisdiction and the Court jurisdiction clause was exclusively

in Mumbai. Further, at the time of reference to disputes, the Court had fixed the seat of arbitration as Mumbai. In this context, the Supreme Court held that since, at the time of reference, the conduct of arbitration proceedings was directed to be held in Mumbai and the seat having, therefore, been fixed, the clause was in the nature of an exclusive jurisdiction clause. The observations of the Supreme Court are set out herein below:

“14. This Court reiterated that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. (See: paragraph 138).

.....
20. 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 Section 16 to 21 of the 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.”

14. Thus, while various Courts would have jurisdiction prior to the seat being determined, once the seat was fixed, Mumbai Courts were held to

have exclusive jurisdiction.

15. In the case of **Raman Deep Tanjea** (*supra*), the clause reads as under:

“In the event of any dispute/differences between the Company and/or the intending Allottee(s)/buyer in respect of any of the terms and or interpretation thereof or otherwise the same shall be referred to for adjudication to the sole arbitrator to be appointed by the Company. The said arbitrator shall decide the issue(s) as per the Arbitration and Conciliation Act, 1996 or any amendments thereto. The venue of the arbitration for the convenience shall be the office of the Company. The decision of the Arbitrator shall be final and binding on the parties to the arbitration. The jurisdiction of all disputes will be Delhi only. The venue for arbitration proceedings will be at Faridabad, Haryana.”

16. The above clause shows that the Court jurisdiction clause vested jurisdiction in Delhi, but arbitration was to be held in Faridabad, Haryana.

Thus, the Ld. Single Judge observed in paragraph 9 as under:

“9. In the present case we are faced with the situation where one part of the agreement provides for exclusive jurisdiction to Courts of Delhi, while the other, due to the venue of arbitral proceedings, vests exclusive jurisdiction in Courts in Faridabad, State of Haryana. As was held by the Supreme Court in the judgment of Bharat Aluminium Company (Supra), a distinction is to be drawn between “Subject-Matter of the Arbitration” and “Subject-Matter of the Suit”. For the purposes of identifying the Court, which shall have supervisory control over the arbitral proceedings, it would be the Court where the ‘Subject-Matter of Arbitration’ is situated that would have precedence over the Court where the “Subject-Matter of the Suit” is situated. In this case, therefore, the exclusive jurisdiction conferred

due to venue of arbitration would take precedence over the exclusive jurisdiction vested over the Subject-Matter of the suit in the Courts at Delhi. There are various provisions in the Act where the Court has to exercise supervisory jurisdiction over the arbitration proceedings. These include not only Section 11 of the Act but also Sections 14, 27, 29A, 34 and 37 of the Act. It is, therefore, evident that the Court having jurisdiction over the arbitration proceedings would have precedence over the Court which has jurisdiction over the Subject-Matter of the suit or where the cause of action has arisen. The purported conflict between the two parts of Clause 24 quoted above can be resolved by holding that where the disputes are to be adjudicated without reference to the arbitration, Courts at Delhi would have exclusive jurisdiction, however, where they have to be resolved through arbitration, venue being at Faridabad, Haryana, the Courts at Faridabad, State of Haryana, would have exclusive jurisdiction.”

17. A perusal of the above extract shows that there was a conflict between two parts of clause 24, which was resolved by holding that where the disputes were to be adjudicated without reference to arbitration, Delhi Courts would have exclusive jurisdiction, however in respect of arbitration proceedings courts in Delhi did not have jurisdiction as the arbitration was to be held in Faridabad, Haryana.

18. In ***N. J. Construction v. Ayursundra Health Care Pvt. Ltd. & Ors., 2018 (168) DRJ 274***, in terms of the clauses of the agreement therein, a Ld. Single Judge of this Court held as under:

“3. It is not in dispute the proposed hospital was constructed at Guwahati. It is alleged by the respondent the payment were to be made at Guwahati. The services were provided at Guwahati and contract

was terminated at Guwahati. The respondent relied on clause 8 of the agreement dated 05.07.2013 to say only the courts at Guwahati shall have jurisdiction to determine the dispute between the parties. Clause – 8 of the agreement dated 05.07.20103 read as under:

8. “This Agreement and Contract shall be deemed to have been made in Guwahati and any questions or dispute arising out of or in any way connected with this Agreement and Contract shall be deemed to have arisen in Guwahati and only the court in Guwahati shall have jurisdiction to determine the same.”

4. However, the respondent refers to addendum to the agreement dated 05.07.2013 which contain clause – 21.1 as under:

21.1 In case any dispute or difference shall arise between the OWNER or the ARCHITECT on his behalf and the CONTRACTOR touching or concerning this contract or the construction, meaning, operation or effect thereof or of any clause herein contained or as to the rights, duties or liabilities of the parties hereto respectively arising out of or in relation thereto (except as to matters left to the sole discretion of the ARCHITECT) the same shall be referred to the arbitration shall of a sole arbitrator who shall be Shri The seat of arbitration shall be at New Delhi and shall be final and binding on the parties.

Work under ‘the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payments due or payable by the OWNER shall be with-held on account of such proceedings & payment due to the CONTRACTOR will be made by the OWNER under the advice from ARCHITECT in writing.”

19. In the context of the above clauses, the Ld. Single Judge held that since the seat of arbitration is New Delhi, this Court shall have jurisdiction. In this case, the question was whether in the contract, the jurisdiction clause

would oust the jurisdiction of Delhi Courts. The Court held in the negative and appointed the Ld. Arbitrator.

20. It is now settled that the venue of arbitration is different from seat of arbitration. Under Rule 32 of the Rules of Arbitration of the CAI, the proceedings have to be held in the offices of the CAI. Rule 32 of the Rules of Arbitration of the CAI reads as under:

“PLACE OF ARBITRATION

Rule 32 : *The place or venue of arbitration shall be India. The arbitration proceedings shall be held at Cotton Association of India, Cotton Exchange Building, Cotton Green, Sewri, Mumbai 400 033 or at such place in Mumbai determined by the Arbitrator(s), taking into considerations the convenience of all concerned. The decision of the Arbitrator(s) will be final and binding on all the parties concerned.”*

21. A perusal of the above rule shows that the place or venue “*shall be India*” i.e. any place in India could be the seat. However, for convenience the venue where arbitration was to be held was the office of the CAI. While the Rules and the By-laws of the CAI are applicable for the purpose of appointing of the tribunal, for holding of the proceedings and other procedural matters, the contract clearly expresses the intention of the parties to vest exclusive jurisdiction in Delhi Courts, for any issues *arising out of the arbitration proceedings or the award*. This clause brooks no ambiguity or vagueness. Thus, unlike a court jurisdiction clause, the parties clearly vested the Courts in Delhi with supervisory jurisdiction over the arbitral proceedings. The venue cannot change the intention of the parties to vest the Courts in Delhi with exclusive jurisdiction.

22. When words such as “*alone*” and “*exclusive*” are used, they express a

clear and unambiguous intention between the parties, which cannot be overlooked by considering the By-laws and Rules of the CAI. Even in Rule 32 of the Rules of Arbitration of CAI, the place or venue of arbitration shall be India. Thus, the arbitration proceedings could be held anywhere all across India, however, for convenience it was held at the CAI's premises. In ***Swastik Gases Private Limited v. Indian Oil Corporation Limited, (2013) 9 SCC 32***, the Supreme Court observed as under:

*“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.....36.....

37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like “only”, “exclusively”, “alone” and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject matter of the proceedings vested, by agreement, only in the Courts in Kolkata.”

23. Thus, the intention of the parties being clearly decipherable from the jurisdiction clause in the contract, the preliminary objection as to the jurisdiction of this Court is rejected. It is held that this Court has jurisdiction to entertain the present petition under Section 34 of the Arbitration and Conciliation Act, 1996.

24. List for hearing on 9th April, 2019.

**PRATHIBA M. SINGH, J.
JUDGE**

FEBRUARY 22, 2019/dk