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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1457 OF 2015

Unitech Texmech Private Limited, )  
a company incorporation under the )  
Companies Act, 1956, having its )  
registered office at W-28, MIDC )  
Bhosari, Pune – 411 026. ) ...Petitioner

....Versus....

ATE Enterprises Private Limited, )  
a company incorporation under the )  
Companies Act, 1956, having its )  
registered office at 43, Dr.V.B. Gandhi )  
Marg, Fort, Mumbai - 400 023. ) ...Respondents

Mr.Nikhil Patil for the Petitioner.

Ms.Prachi Manekar for the Respondent.

**CORAM : R.D. DHANUKA, J.**  
**RESERVED ON : 31ST MARCH, 2016**  
**PRONOUNCED ON : 7TH APRIL, 2016**

**JUDGMENT :-**

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the said Act”) the petitioner has impugned an arbitral award dated 7<sup>th</sup> May, 2015 made by the learned arbitrator allowing some of the claims made by the respondent and rejecting the counter claims made by the petitioner.

2. Learned counsel appearing for the respondent has raised a preliminary issue of territorial jurisdiction of this Court and to entertain, try and dispose of the present petition filed by the petitioner on the ground that the parties have agreed to the jurisdiction of the Court of law at Pune under clause 8 of the Selling Agency Agreement entered into between the parties on 22<sup>nd</sup> January, 2010. In view of the preliminary objection raised by the respondent both the parties have addressed this Court on the issue as to whether this Court has territorial jurisdiction to entertain, try and dispose of the present petition.

3. Some of the relevant facts for the purpose of deciding this issue are as under :-

The respondent herein was the original claimant in the arbitral proceedings whereas the petitioner herein was the original respondent. On 22<sup>nd</sup> January, 2010 the parties entered into a Selling Agency Agreement wherein the respondent granted to the petitioner herein exclusive agency for certain territories specified in the said agreement. The said contract commenced from 1<sup>st</sup> April, 2009 and was valid until three years unless it was mutually terminated earlier. The petitioner herein has its registered office at Pune, whereas the respondent herein has its registered office at Mumbai.

4. The dispute arose between the parties. It was the case of the respondent herein that since the petitioner has neglected to make payment, the respondent vide its letter dated 14<sup>th</sup> October, 2013 sought to initiate the arbitral proceedings and gave final opportunity to

the petitioner to make payment however, the petitioner failed and neglected to make any payments. The respondent accordingly invoked arbitration agreement and applied for appointment of a sole arbitrator under rules of Indian Merchants' Chamber. The Indian Merchants' Chamber appointed Mr.Dilip Udeshi, advocate as a sole arbitrator.

5. The Indian Merchants' Chamber addressed a letter to both the parties through their advocates on 6<sup>th</sup> May, 2014. The Indian Merchants' Chamber suggested that both the parties at this stage may also agree if they want to have the arbitral proceedings in Mumbai instead in Pune. The learned advocate representing the petitioner herein on phone informed the Indian Merchants' Chamber that he would send a consenting later confirming that the arbitral proceedings may be held in Mumbai. The Indian Merchants' Chamber suggested if the arbitral proceedings were to be held in Mumbai, then both the parties will have to agree and modify clause 8.3 of the Selling Agency Agreement dated 22<sup>nd</sup> January, 2010 to the effect that "all proceedings in such arbitration shall be held in Mumbai instead in Pune". Both the parties were requested to inform the Indian Merchants' Chamber if any agreement had been reached in respect thereof without any further delay. The said letter dated 6<sup>th</sup> May, 2014 was addressed by the Indian Merchants' Chamber in continuation of their earlier letter dated 8<sup>th</sup> April, 2014.

6. Learned advocate for the petitioner herein addressed a letter to the Indian Merchants' Chamber on 18<sup>th</sup> June, 2014 informing that the parties had agreed that the location of arbitration would be Pune however, the parties wish to mutually modify the place of

arbitration clause in the arbitral agreement and the petitioner herein gave the consent to change the location of the arbitration to Mumbai. By a letter dated 7<sup>th</sup> July, 2014, the learned advocate representing the respondent herein informed the Indian Merchants' Chamber that the parties have given the consent to change venue from Pune to Mumbai as the same was convenient to both the parties. She informed that in the circumstances, the provision of paragraph 8.3 of the Selling Agency Agreement dated 22<sup>nd</sup> January, 2010 in regard to the venue be recorded as null and void. In the said letter the learned advocate for the respondent herein requested the Indian Merchants' Chamber to take the said letter on record in regard to change of venue of the arbitration from Pune to Mumbai and appoint an arbitrator accordingly. The learned arbitrator had held the arbitral meetings at Mumbai and made the award on 7<sup>th</sup> May, 2015 in Mumbai.

7. It is submitted by the learned counsel for the petitioner that the Selling Agency Agreement entered into between the parties was stamped in Mumbai and was sent by the respondent to the petitioner in Pune for signature. The petitioner had signed the said Selling Agency Agreement at Pune. He submits that under the said agreement, the petitioner accepted to take over exclusive agency of the principal for the States of Tamil Nadu, Andhra Pradesh, Kerala, Karnataka, Madhya Pradesh, Maharashtra, Gujarat, NTC Mills and UPST Mills. The learned counsel for the petitioner invited my attention to clause 7.2 of the said agreement which provided that the parties shall be entitled to seek demand and obtain specific performance of the said agreement from and against each other by due process of law subject to Pune jurisdiction. He submits that in

this case none of the parties had sought or demanded specific performance of the said agreement from and against each other and thus the said clause which provided for the dispute being subject to Pune jurisdiction did not apply to the subject matter of the dispute between the parties.

8. Learned counsel for the petitioner invited my attention to clause 8.2 and would submit that under the said clause, the dispute was referred to arbitration in accordance with the Rules of Arbitration of the Indian Merchants' Chamber. Insofar as clause 8.3 of the said agreement is concerned which provided that all the proceedings in such arbitration shall be held in Pune, Maharashtra and not elsewhere is concerned, he submits that the said clause was admittedly amended by the parties and the place of arbitration was shifted from Pune to Mumbai. He submits that since the seat / place of arbitration was shifted from Pune to Mumbai, the Court at Mumbai will have supervisory jurisdiction over the arbitral proceedings, thus this Court only will have jurisdiction to entertain, try and dispose of the present petition.

9. Learned counsel for the petitioner also invited my attention to clause 8.6 of the said agreement which provided that the said agreement shall be subject to Court of law at Pune and all the disputes shall be dealt with by amicable settlement or arbitration of due process of law. He submits that this clause would not apply in view of the later agreement between the parties to have the proceedings to be held at Mumbai. He submits that the respondent also admittedly has its registered office at Mumbai. In support of the aforesaid submission, the learned counsel for the petitioner also

invited my attention to Rule 64 of “Rules Of The Court Of Arbitration Of The Indian Merchants' Chamber” and would submit that under the said Rule 64, the arbitral award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place.

10. Learned counsel for the petitioner invited my attention to the impugned award and would submit that admittedly the impugned award has been made by the learned arbitrator at Mumbai. He submits that since the impugned award is made by the learned arbitrator in Mumbai, that also would give territorial jurisdiction to this Court to entertain, try and dispose of the present petition. Learned counsel for the petitioner placed reliance on the judgment of the Division Bench in case of **Vachaspati Sharma vs. India Cements – Capital & Finance Ltd., 2013(6) Mh.L.J. 342** and in particular paragraphs 9 and 10 and would submit that the Courts having jurisdiction over the place where the arbitration takes place would have supervisory jurisdiction. He submits that the Division Bench of this Court in the said judgment has applied the principles of law laid down by the Supreme Court in case of **Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., 2012(9) SCC 552.** Learned counsel appearing for the petitioner submits that this Court has thus exclusive jurisdiction to entertain, try and dispose of the present petition and not the Court in Pune, as canvassed by the learned counsel for the respondent.

11. Learned counsel for the respondent on the other hand submits that the petitioner had admittedly signed the agreement at Pune. The petitioner also had its registered office at Pune. Under the

said agreement, the petitioner was granted exclusive agency by the respondent in respect of various territories of several States, including Maharashtra. She submits that the goods were sold by the petitioner in various parts of Maharashtra and other States. She submits that though clause 8.3 of the said agreement was amended in view of the suggestion made by the Indian Merchants' Chamber, the respondent had categorically agreed that the venue of the arbitration was amended from Pune to Mumbai, as provided in clause 8.3 of the Selling Agency Agreement dated 22<sup>nd</sup> January, 2010.

12. It is submitted that there was no other amendment to the said agreement as canvassed by the learned counsel for the petitioner. She submits that the parties had agreed for change of venue under section 20 of the said Act and not the change of seat or place of arbitration. She submits that even if the venue of the arbitration was shifted from Pune to Mumbai, it would not have any bearing on clause 8.6 of the said agreement which categorically provided that the dispute between the parties would be subject to the jurisdiction of the Courts in Pune. She submits that the petitioner could not produce any agreement before this Court to demonstrate that the said clause bearing clause 8.6 was amended by the parties.

13. Learned counsel appearing for the respondent invited my attention to the letters addressed by the Indian Merchants' Chamber and would submit that in view of specific suggestion made by the Indian Merchants' Chamber to consider whether the venue of the arbitration proceedings could be shifted from Pune to Mumbai and whether an amendment to clause 8.3 of the Selling Agency Agreement would be agreed by the parties, the respondent had

specifically informed that the parties had agreed to have the venue of arbitration in Mumbai instead of Pune and to that effect the provision of paragraph 8.3 of the Selling Agency Agreement be regarded as null and void. She also invited my attention to the first paragraph of the impugned award in which the learned arbitrator has recorded that the parties had communicated to the office of the Indian Merchants' Chamber that notwithstanding the provisions in the arbitration clause to the effect that the venue of the arbitration shall be at Pune, the parties had agreed to Mumbai being the venue and accordingly the learned arbitrator had entered upon the reference on 14<sup>th</sup> August, 2014. She submits that it is thus clear that both the parties had agreed to change the venue from Pune to Mumbai and accordingly clause 8.3 of the Selling Agency Agreement only stood amended and not other provisions in the Selling Agency Agreement and more particularly clause 8.6 thereof.

14. It is submitted by the learned counsel appearing for the respondent that since substantial part of cause of action has arisen at Pune and some part of cause of action had arisen at Mumbai, the parties had mutually agreed and more particularly in clause 8.6 that the said agreement shall be subject to Court of law at Pune and all disputes shall be dealt with by amicable settlement or arbitration or due process of law and thus Court of law at Pune only has exclusive jurisdiction to entertain, try and dispose of the present proceedings and not this Court.

15. Learned counsel for the respondent placed reliance on the judgment of this Court in case of **Chandrakant P. Sanghvi & Ors. vs. Anilkumar Phoolchand Sanghvi & Ors.** delivered on 22<sup>nd</sup>

December, 2015 in Chamber Summons No.905 of 2013 and more particularly paragraphs 59, 60, 65, 66 and 88 and would submit that merely because some of the meetings were held at Mumbai, by consent of parties, it would not confer jurisdiction on this Court in view of the specific agreement otherwise between the parties to confer jurisdiction on the Court of law at Pune. She submits that this Court has adverted to the judgment of the Supreme Court in case of **Bharat Aluminium Company** (supra), **Enercon (India) Ltd. & Ors. vs. Enercon GMBH & Anr. (2014) 5 SCC 1, Harmony Innovation Shipping Limited vs. Gupta Coal India Limited & Anr., 2015 SCC Online SC 190** and the judgment of the Division Bench of this Court in case of **Konkola Copper Mines (PLC) vs. Stewarts & Lloyds of India Ltd.,** delivered on 9<sup>th</sup> July, 2013 in Appeal (Lodging) No.199 of 2013. She submits that the said judgment of this Court in case of **Chandrakant P. Sanghvi & Ors.** (supra) is upheld by the Division Bench of this Court and squarely applies to the facts of this case.

16. Learned counsel appearing for the respondent invited my attention to paragraph 20 of the arbitration petition and would submit that only averment in the arbitration petition regarding the jurisdiction of this Court is that the petitioner carries on business and the respondent's registered address is within the jurisdiction of this Court. The impugned award was passed in Mumbai and therefore, this Court will have jurisdiction to entertain, try and dispose of the present petition. She submits that it is not the case of the petitioner in the petition that the seat / place of arbitration is shifted from Pune to Mumbai and this Court has supervisory jurisdiction over the arbitral proceedings.

17. Learned counsel for the respondent distinguished the judgment of the Division Bench of this Court in **Vachaspati Sharma** (supra) on the ground that the facts before the Division Bench of this Court in the said judgment were totally different. She also placed reliance on paragraph 9 of the said judgment of the Division Bench and would submit that the said paragraph would assist the case of the respondent and not the petitioner.

18. Mr. Patil, learned counsel appearing for the petitioner in re-joinder tried to distinguish the judgment of this Court in case of **Chandrakant P. Sanghvi & Ors.** (supra) on the ground that the subject matter of dispute in the said matter was in Pune and the parties were also staying at Pune. The petitioner in that matter had also filed the proceedings at Pune. He also made an attempt to distinguish the judgment of the Supreme Court in case of **Enercon (India) Ltd. & Ors.** (supra). He submits that in the case of **Enercon (India) Ltd. & Ors.** (supra) the Supreme Court had considered the venue in an international commercial arbitration which does not apply to the facts of this case. The Supreme Court had considered as to what would be curial law in the facts of that case which would not apply to the facts of this case.

### **REASONS AND CONCLUSIONS :**

19. It is not in dispute that Selling Agency Agreement was stamped at Mumbai and was signed by the petitioner at Pune. The petitioner has its registered office at Pune, whereas the respondent herein has its registered office at Mumbai. Under the said Selling Agency Agreement, the petitioner was granted exclusive agency by

the respondent for various States, including Maharashtra. The petitioner has not disputed that under the said Selling Agency Agreement, the petitioner had carried out various transactions outside the territorial jurisdiction of this Court and in different parts of Maharashtra. It is thus clear that part of cause of action had arisen at Pune and part of cause of action had arisen at Mumbai. Clause 8 of the said Selling Agency Agreement provides for an arbitration agreement. Clause 8.3 of the arbitration Selling Agency Agreement provides that all proceedings in such arbitration shall be held in Pune, Maharashtra and not elsewhere.

20. A perusal of the correspondence exchanged between the Indian Merchant's Chamber and the parties thereto clearly indicates that the Indian Merchants' Chamber vide their letter dated 8<sup>th</sup> April, 2014 had invited the attention of the parties to clause 8.3 of the Selling Agency Agreement which provided that all the proceedings in arbitration shall be held in Pune. The attention of the parties were also invited to clauses 31 and 32 of the Rules of the Court of Arbitration of Indian Merchants' Chamber which provided that any travelling and other expenses incurred by the arbitrator and Registrar for attending the arbitration hearing in a city other than the place of residence shall have to be reimbursed to them.

21. The parties were conveyed that in that situation if the arbitrator has to travel, he shall be paid travelling expenses by air or rail or car at actuals and also out of pocket expenses at actuals for boarding, lodging and local transport subject to a maximum of Rs.12,000/- in Pune. The venue charges to be paid in Pune will also have to be shared equally by both the parties. The parties were

informed that Indian Merchants' Chamber did not have any facilities of venue at Pune and parties will have to mutually select the venue at Pune for arbitration proceedings. The parties were accordingly informed that both the parties at this stage may agree if they wish to have the arbitration proceedings in Mumbai and in that event the venue for arbitration proceedings will be made available by Indian Merchants' Chamber at Churchgate, Mumbai.

22. A perusal of the letter dated 6<sup>th</sup> May, 2014 addressed by the Indian Merchants' Chamber to both the parties indicates that by the said letter the Indian Merchants' Chamber had invited the attention of both the parties to the letter dated 8<sup>th</sup> April, 2014 in which it was mentioned that both the parties at that stage may agree if they want to have the arbitration proceedings in Mumbai instead at Pune and if the arbitration proceedings were to be held in Mumbai, both the parties will have to agree and modify clause 8.3 of the Selling Agency Agreement dated 22<sup>nd</sup> January, 2010 to the effect that "all proceedings in such arbitration shall be held in Mumbai instead in Pune."

23. The petitioner through its advocate's letter dated 18<sup>th</sup> June, 2014 to the Indian Merchants' Chamber informed the Indian Merchants' Chamber that the parties had agreed that the location of the arbitration would be Pune however, the parties wish to mutually modify the place of arbitration clause in the arbitration agreement and gives consent to change the location of arbitration to Mumbai. By their advocate's letter dated 7<sup>th</sup> July, 2014 the respondent to the Indian Merchants' Chamber informed that the parties in the above matter have consented to change the venue from Pune to Mumbai

as the same was convenient to both the parties and accordingly the provision of paragraph 8.3 of Selling Agency Agreement dated 22<sup>nd</sup> January, 2010 in regard to the venue of arbitration be regarded as null and void. By the said letter, the respondent had specifically requested the Indian Merchants' Chamber to take the said letter on record in regard to the change of venue of arbitration from Pune to Mumbai and appoint an arbitrator accordingly. There is no dispute that the Indian Merchants' Chamber accordingly appointed the learned sole arbitrator from Mumbai who held various meetings at Mumbai.

24. A perusal of the arbitral award and particularly paragraph 1 thereof clearly indicates that the learned arbitrator had clearly recorded about the communication of the parties to the office of the Indian Merchants' Chamber that notwithstanding the provision in arbitration clause to the effect that the venue of the arbitration shall be at Pune, the parties had agreed to Mumbai, being the venue and accordingly the learned arbitrator had entered upon a reference on 14<sup>th</sup> August, 2014.

25. A conjoint reading of all the correspondence referred to above, indicates that both the parties had agreed to change the venue from Pune to Mumbai being convenient to both the parties in view of various suggestions given by the Indian Merchants' Chamber. A perusal of the correspondence addressed by the Indian Merchants' Chamber clearly indicates that the suggestion of the Indian Merchants' Chamber was only to change the venue from Pune to Mumbai and to modify clause 8.3 of the Selling Agency Agreement which specifically provided that all proceedings in such arbitration

shall be held in Pune, Maharashtra and not elsewhere. Both the parties were thus ad-idem that the venue of the arbitral proceedings which was fixed under clause 8.3 of the Selling Agency Agreement in Pune was changed to Mumbai. There was neither any suggestion by the Indian Merchants' Chamber to modify any other sub-clause of clause 8 of the Selling Agency Agreement nor the parties entered into any other writing thereof amending other sub-clause of clause 8 and more particularly clause 8.6. I am thus not inclined to accept the submission of the learned counsel for the petitioner that the parties had changed the seat / place of arbitration from Pune to Mumbai and thus this Court had supervisory jurisdiction to entertain, try and dispose of the arbitral proceedings conducted at Mumbai. The petitioner could not produce any other agreement before this Court in support of the contention that clause 8.6 of the Selling Agency Agreement was amended by the parties.

26. Insofar as the judgment of the Division Bench of this Court in case of **Vachaspati Sharma** (supra) relied upon by the learned counsel for the petitioner is concerned, the Division Bench in the said judgment has held that exclusive jurisdiction must be strictly construed. A clause of such a nature at the highest can apply where two or more Courts have jurisdiction or subject matter of the suit in which case it is open for the parties to confer exclusive jurisdiction on any one of Courts. The Division Bench thereafter, interpreted clause 34 of the agreement in that matter and held that the said clause did not apply to the arbitration petition under section 34 for setting aside the arbitral award. In my view, the judgment of the Division Bench of this Court in the case of **Vachaspati Sharma** (supra) would not assist the case of the petitioner but assist the case of the respondent.

27. Admittedly in this case, it is not the case of the petitioner that the entire cause of action had arisen at Mumbai. The petitioner has also not disputed that part of cause of action had arisen at Pune. Since two Courts had concurrent jurisdiction to entertain, try and dispose of the arbitration proceedings, parties by consent can confer the jurisdiction on one of such two Courts which in this case the parties agreed to confer jurisdiction in Courts in Pune.

28. A perusal of the correspondence referred to aforesaid and the award rendered by the learned arbitrator clearly indicates that the parties in this case had decided to change the venue from Pune to Mumbai and the same could not be considered as the seat or place of arbitration. Since the parties had agreed to change the venue from Pune to Mumbai except clause 8.3 of the Selling Agency Agreement, there was no other change in the provisions of the said agreement conferring jurisdiction on Courts at Mumbai. This Court has considered this aspect in detail in the judgment of this Court in case of **Chandrakant P. Sanghvi & Ors.** (supra) delivered on 22<sup>nd</sup> December, 2015 which, in my view applies to the facts of this case.

29. Insofar as the judgment of this Court in case of **Konkola Copper Mines (PLC)** (supra) relied upon by the learned counsel for the petitioner is concerned. A perusal of the said judgment indicates that the parties had agreed in the arbitration agreement that the place of arbitration would be in Mumbai, whereas in this case the parties have not agreed that the place of arbitration shall be at Mumbai, but had agreed that the venue of arbitration was shifted from Pune to Mumbai. The judgment of the Division Bench of this Court in case of

**Konkola Copper Mines (PLC)** (supra) in my view, does not apply to the facts of this case and would not assist the case of the petitioner.

30. Insofar as the judgment of the Supreme Court in case of **Bharat Aluminium Company** (supra) relied upon by the petitioner is concerned, the Supreme Court in case of **Harmony Innovation Shipping Limited** (supra) after adverting to the judgment in case of **Bhatia International vs. Bulk Trading S.A. (2002) 4 SCC 105** and the judgment of the Supreme Court in case of **Bharat Aluminium Company** (supra) has held that the principles laid down by the Supreme Court in case of **Bharat Aluminium Company** (supra) applied with prospective effect and not retrospective effect.

31. A perusal of the record further indicates that the petitioner had not controverted the contents of the letter dated 7<sup>th</sup> July, 2014 addressed by the respondent to the Indian Merchant's Chamber that the parties had given a consent to change the venue from Pune to Mumbai, as the same was convenient to both the parties and accordingly the provision of paragraph 8.3 of the Selling Agency Agreement dated 22<sup>nd</sup> January, 2010 in regard to the venue was recorded as null and void. The said letter addressed by the respondent in my view was in consonance with the suggestion made by the Indian Merchant's Chamber. Both the parties had accordingly accepted the said suggestion made by the Indian Merchant's Chamber and had changed the venue from Pune to Mumbai. This fact is also clear from the arbitral award made by the learned arbitrator and more particularly in paragraph 1 recording communication received by the Indian Merchant's Chamber from the

parties that notwithstanding a provision in the arbitration clause to the effect that the venue of arbitration shall be Pune, the parties had agreed to Mumbai being the venue.

32. A perusal of this arbitration petition filed by the petitioner and more particularly paragraph 17 clearly indicates that it is the case of the petitioner itself that the venue of the arbitral proceedings was Mumbai. In the entire petition, the petitioner has not challenged the award on the ground that the learned arbitrator had wrongly recorded that the parties had communicated to the office of the Indian Merchant's Chamber that notwithstanding a provision in the arbitration clause to the effect that the venue of arbitration shall be Pune, the parties had agreed to Mumbai being the venue. In my view, the petitioner therefore, cannot be allowed to urge now that what was agreed between the parties in the correspondence exchanged between the parties *inter-se* and with the Indian Merchant's Chamber that the suit / place of arbitration was changed from Pune to Mumbai and not the venue of arbitration from Pune to Mumbai. In my view, this submission of the petitioner is contrary to the agreement arrived at between the parties by correspondence for change of venue from Pune to Mumbai and also contrary to their own submission made in paragraph 17 of the arbitration petition. The submission of the learned counsel for the petitioner is thus devoid of merits and is accordingly rejected. In my view, this Court has thus no territorial jurisdiction to entertain, try and dispose of the present arbitration petition. In my view, the only appropriate Court in Pune will have jurisdiction to entertain, try and dispose of the present petition.

33. I therefore, pass the following order :-

a). Arbitration Petition No.1457 of 2015 is dismissed as without jurisdiction. No order as to costs.

***(R.D. DHANUKA, J.)***