

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : May 24, 2016*
Judgment pronounced on : June 03, 2016

+ **ARB.P. 592/2015 & I.A. No.2689/2016**

DATAWIND INNOVATIONS PRIVATE LIMITED Petitioner
Through Mr.Mohit Chaudhary, Adv. with
Ms.Damini Chawla & Mr.Kunal
Sachdeva, Advs.

versus

INDUS MOBILE DISTRIBUTION PRIVATE LIMITED & ORS.
..... Respondents
Through Mr.Amit Chadha, Sr. Adv. with
Mr.K.S. Mahadevan,
Mr.Krishnakumar R.S., Mr.Vijay
Anand & Mr.Dilpreet Singh, Advs.

+ **O.M.P.(I) 531/2015 & I.A. No.2690/2016**

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CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Datawind Innovations Pvt. Ltd., the petitioner has filed two petitions, one being Arb.P.No. 592/2015 under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of sole Arbitrator and another being O.M.P. (I) No. 531/2015 under Section 9 of the Arbitration and Conciliation Act, 1996 seeking various reliefs.

In O.M.P. (I) No. 531/2015 on 22nd September, 2015 the interim protection was granted restraining the respondent transferring, alienating or creating any third party interest in respect of property No.281, TTK Road, Alwarpet, Chennai-600018 till the next date of hearing.

2. The brief facts as per petition are that the petitioner is engaged in the manufacture, marketing and distribution of Tablets, Mobile phones and accessories. The petitioner has its registered office at J-8/1457, Opposite New Amritsar, GT Road, Amritsar, Punjab. As per the petitioner, it has a branch office which is located at 292, Jood Bagh, Kotla, Mubarakpur, New Delhi and Khasra No. 605, Near Tata Telco service station, A-block, Village Rangpuri, New Delhi-110037. The petitioner was admittedly supplying the goods to the respondents at Chennai from New Delhi.

2.1 The respondent No.1 and respondent No. 2-4 in June, 2014 approached the petitioner and had expressed earnest desire to do business with the petitioner as its 'Retail chain Partner'.

2.2 The petitioner started supplying the manufactured products to respondent No.1 from 26th June, 2014. The petitioner was a firm believer of non-credit business but respondents No.2-4 along with

one Mr. Ashok Gupta allured the petitioner by painting a rosy picture of respondent-Company's financial health and started the business on credit.

- 2.3 In the month of July, petitioner provided several goods to the respondents on credit basis. The respondents did not adhere to the due date with regards to the payments. Vide several emails dated 21st August, 2014, 1st September, 2014, 3rd September, 2014 and 12th September, 2014. The petitioner reminded the respondents of the payments to be made, whereby the liability to pay the said amount.
- 2.4 In September, the total amount due was Rs. 4.86 crores, of which Rs. 3.75 crores was due on 3rd September. Till 11th September, respondents paid only Rs. 80 lacs out of the due amount of Rs. 3.75 crores. In order to secure its interest, petitioner suggested to enter into a written Retail Chain Partner Agreement with respondent No.1 enumerating the mode, time of payment and also for mechanism for settlement of disputes. Thus an Agreement dated 25th October, 2014 was signed by the parties.
- 2.5 The model of business as agreed between the parties was that first a purchase order was to be issued by the respondent No.1 to petitioner seeking delivery of items; thereafter the items were dispatched by the petitioner from Delhi using services of FEDEX courier. The products delivered against a Proof of Delivery receipt. As provided in Clause 5(d) of the Agreement, the respondent No.1 had to make payments through banking channels within 45 days from receipt on the invoice from the client.

2.6 But the respondents again defaulted in making the payments despite the aforesaid Agreement. Respondents never made payment on time and repeated extensions were sought by them. Vide email dated 13th November, 2014, the petitioner intimated the respondents about the outstanding due at the cost of repetition but it was of no avail. On 8th January, 2015, another reminder was sent by the petitioner, with total outstanding of Rs. 5.5 crores and after various communications and repeated reminders, respondents made a payment to the tune of Rs. 40 lacs approx to the petitioner in the month of January, 2015 despite the outstanding due being above Rs. 5 crore.

3. It has come on record that the respondents agreed to settle the entire account by virtue of payment vide cheque dated 27th February, 2015, bearing No. 007315, drawn on HDFC Bank payable at par at all the branches. The said cheque was for Rs. 4 Crores. However, upon the presentation of the cheque, it was informed by the concerned Bank that the said cheque given by the respondents bore forged signatures and was dishonoured as per the version of the petitioner.

4. It is not in dispute that the petitioner filed a complaint bearing DD No. 51B against the respondents for an act of dishonest inducement, cheating, forgery and criminal breach of trust. However, police refused to take any action and the petitioner was constrained to file a complaint under Section 156(3) Cr.P.C.

On 31st March, 2015, on respondent's request the cheque bearing No. 7315 was again presented to the Bank. However, the said cheque was dishonoured again, with the following reason: "Payment was stopped by the Drawer". It is pertinent to note here, that vide

order dated 27th May, 2015, complaint bearing CC No. 30/1/2015 was allowed by the learned MM, Saket, New Delhi whereby the concerned DHO was directed to register a case against the respondents treating the contents of the complaint as FIR and investigate into the matter.

5. As the petitioner came to know that the respondents are selling their property bearing No. 281, TTK Road, Alwarpet, Chennai – 600018 to third parties, in order to restrain the respondents from doing so, petitioner filed a petition under Section 9 of Arbitration and Conciliation Act, 1996 being OMP (I) No. 531/2015 before the High Court of Delhi at New Delhi. Vide Order dated 22nd September, 2015 of Delhi High Court respondents were restrained from creating any third party rights in the said property.

6. It is alleged by the petitioner that, till date the respondents have been in default of the admitted outstanding dues of Rs. 5 crores with the due interest and no effort in any way has been made by the respondents to pay the said amount. Thus petitioner vide legal notice dated 25th September, 2015 invoked the Arbitration Clause in terms of the Clause 18 of the Contract Agreement dated 25th October, 2014, and suggested the name of Retd. Justice H.R. Malhotra as the sole Arbitrator. But by letter dated 15th October, 2015, the said appointment of the learned Arbitrator was opposed by the counsel for respondents.

7. As the main plea of the respondent was that the petitioner supplied defective products which were lying at Chennai, with the consent of the parties, an order was passed by this Court directing the petitioner to visit Chennai and find out the quantum of defective material if any with the respondent. Counsel for the petitioner has

informed that the settlement could not be arrived as approximately only six hundred defective mobiles were found at the premises of the respondent at Chennai. As the respondent failed to pay the outstanding amount which is more than five crores, both the petitions be decided on merit.

8. At the time of hearing, both the parties have made their submissions on the issue of territorial jurisdiction which is main plea of the respondents. The jurisdiction is invoked by the petitioner by stating that all the necessary bundle of facts forming 'cause of action' in the present matter arose in the jurisdiction of this Court i.e. New Delhi.

9. The contention of the respondents on merit is that the products supplied by the petitioner to the respondents under Agreement were defective. The respondents committed several other breaches and is therefore not entitled to the reliefs sought. The reasons are mentioned in the grounds (a) to (i) of the reply. Many pleas were taken however it is not denied by the respondents having issued the cheques by the respondents which were dishonoured. One fails to understand, if the entire stock was defective, where was the occasion for the respondents to issue the cheque in view of meeting between the parties. In any case, these are the issues which will ultimately have to be decided by the Arbitral Tribunal.

10. One of the main preliminary objections of the respondents is that this Court does not have the territorial jurisdiction to entertain and hear the present petition.

11. Mr. Mohit Chaudhary learned counsel for the petitioner submits that part of cause of action has arisen in New Delhi. At best it can be

concluded by this Court that Courts in New Delhi and Chennai have the territorial jurisdiction in view of the material placed on record. As far as exclusive jurisdiction of Mumbai is concerned, it is submitted by him that any cause of action has ever arisen in any part of Maharashtra. Mere selling of goods by the respondents as alleged would not give the benefit of jurisdiction in the absence of any part of cause of action which is only has arisen at New Delhi and Chennai.

12. Mr. Chaudhary submits that the nature of business between the parties included shipping of mobile phones, tablets etc. from New Delhi to Chennai which were received by respondent and were to be sold in retail. After collecting the amount, the same was required to be remitted back to the petitioner, less the profit accruing to respondents as the petitioner is invoking the territorial jurisdiction on the following reasons:

- a) The regional office of Petitioner Company is in New Delhi
- b) All sale transactions took place from New Delhi
- c) All purchase orders were raised to Delhi office of Petitioner Company viz. property bearing Khasra No.605, Near Tata Telco Service Station, A-Block, Village Rangpuri, New Delhi – 110037.
- d) Goods were dispatched from New Delhi office.
- e) Meetings between the representatives of parties was conducted in New Delhi
- f) Godown, showroom and office of Petitioner is in New Delhi
- g) Disputes arose in New Delhi.

13. Mr. Amit Chadha, learned senior counsel has on the said issue of territorial jurisdiction made the submission that the Agreement for Retail Chain Partner dated 25th October, 2014 between the parties was entered into in Chennai. It was to be performed in Chennai and Maharashtra since the goods (under the Agreement) were sold by the petitioner at these two places. All payments under the Agreement were made by the respondent at Amritsar and lastly the Registered Office of the respondent is located at Chennai from where they are only carrying on business. in Delhi this is not denied by the petitioner anywhere in the petition. Even as per clause 19 of the Agreement also stipulates that all disputes arising out of, or in connection with the Agreement shall be subject to the **exclusive** jurisdiction of the Courts in Mumbai **only**.

14. In view of these reasons, Mr. Chadha, learned senior counsel submits that Courts in Delhi would have no jurisdiction to entertain and try the present petition as parties have agreed to confer jurisdiction upon a particular place, the injunction of other Courts is excluded. He referred the following decisions in support of his submission:-

- a) In ***B.E. Simoese Von Staraburg Niedenthal & Another v. Chhattisgarh Investment Limited***, (2015) 12 SCC 225 has dealt with all the earlier decisions and has held that where the agreement between the parties restricted jurisdiction to only one particular court, that court alone would have jurisdiction. Any petition preferred to courts outside the exclusive court agreed to by the parties would also be without jurisdiction.
- b) ***Swastik Gases Private Limited v. Indian Oil Corporation Limited***, (2013) 9 SCC 32, paras 7, 28 and 57, where the same view was taken.

15. It is a private contract, clause 18 of the agreement reads as under:-

18. 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 (30) 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 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 and 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.

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 and an order of enforcement as the case may be. The Arbitrator shall have the power of order specific performance of the Agreement.

Each party shall bear its own costs of the Arbitration."

16. As far as conducting of arbitration in Mumbai is concerned, the petitioner has no objection to the same. It is submitted that any retired Hon'ble Judge of this Court be appointed who may conduct the proceedings in Mumbai.

17. The main issue before the Court is as to whether in view of existence of clause 19 of the agreement this Court has got the territorial jurisdiction to entertain the petition under Section 9 of the Act.

18. Clause 19 of the agreement reads as under:

"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."

19. It appears from the said clause that the exclusive jurisdiction is stipulated in case of any dispute and difference at Mumbai.

20. Mr. Chaudhary argues that it is a private contract between the parties, the same cannot confer jurisdiction to a Court at Mumbai which otherwise has no jurisdiction to entertain the matter and is in contravention of Section 28 of the Indian Contract Act. The cause of action or even part of cause of action has not arisen in Mumbai. It is private contract. Parties themselves select the jurisdiction of the Court which otherwise as per settled law would not have the jurisdiction.

21. It is also case of the petitioner that the purchase orders were issued by the respondent company to petitioner upon New Delhi address. Reference is drawn to tax invoices which clearly show that the goods are sent by petitioner from Delhi to Chennai. Even the purchase orders are issued by respondents at the Delhi address of the petitioner. Further, the deliveries which are made by the petitioner using services

of Fedex, indicates that the shipper namely petitioner is situated at Rangpuri, Delhi and all the shipments are booked at Delhi. Even the credit note filed by the respondents indicates that the respondent is dealing with New Delhi address of the petitioner.

The above said facts and material placed on record, Mr. Chaudhary submits that the same indicates that part of cause of action has arisen at New Delhi thus, in terms of Section 20 CPC, courts at New Delhi do have jurisdiction to entertain the present petition as both the conditions of exclusive and alone would not be applicable as in the facts of present case, only Chennai or Delhi Court, would have the jurisdiction to entertain the present petitions.

22. With regard to the cause of action for filing the present proceedings are concerned, it is settled law that in private contract, parties cannot confer jurisdiction by themselves to a Court which otherwise as per law has no jurisdiction or any cause of action to entertain the case. As per facts and material placed on record, it is evident that in Maharashtra, no cause of action has arisen. In case entire gamut of the disputes is examined, it appears that three courts i.e. Chennai Court, Delhi Court or Amritsar have cause of action to entertain the present petition. The only hurdle in the matter is coming in the way of petitioner is pertaining to clause 19 of the agreement. From the material placed on record, I do not find any material to show that Mumbai Courts have any cause of action with regard to the disputes and differences. It is settled law that in case more than one Court has jurisdiction, it is for the petitioner's prerogative to file the petition. No doubt, if prima facie the cause of action would have been in Mumbai only then Mumbai Court would have jurisdiction because of exclusive jurisdiction. But there is no cause of action.

23. The Supreme Court in the case of **A.B.C. Laminart (P) Ltd. v. A.P. Agencies** wherein it was held as under:-

"16. So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the court. If under the law several courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy. Would this be the position in the instant case?"

24. Para 96 of **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services & ors.**, reported in (2012) 9 SCC 552 also helps the case of the petitioner in view of the peculiar facts and circumstances to some extent wherein it is held:

"In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place."

The Supreme Court in case of **Balco** (supra) thus was of the view that in a situation like present both the Courts would have jurisdiction

i.e. the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

25. Under these circumstances, the restriction of exclusive jurisdiction would not apply in the present case despite clause 19 of the Agreement as no actual cause of action or part of cause of action has arisen in Mumbai. At the best three other courts as mentioned earlier would have territorial jurisdiction. As the cause of action has also arisen in New Delhi. The prayer made in the petition is liable to be allowed.

26. Accordingly, Justice S.N. Variava, Retired Judge of Supreme Court (Phone 022-22835970 & 22836958) is appointed as sole Arbitrator to adjudicate the disputes between the parties. The parties are allowed to file the claim(s) and counter claim(s) before the Arbitral Tribunal. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the schedule of the Amended Act. The venue of the arbitration proceedings would be Mumbai.

27. As far as the prayer made in the petition under Section 9 of the Act is concerned, the interim order passed on 22nd September, 2015 is made absolute during the pendency of arbitration proceedings because of the reasons that the despite of receiving the goods from the petitioner and no payment against the bills was made. The only plea of the respondents is that the goods were defective. If all the goods supplied by the petitioner were defective, where are those goods? It was verified as per two orders passed by this court. Only six hundred defective pieces are available with the respondents. The petitioner time

and again agreed to replace them but the respondents are bent upon not to make the payment. The respondents have not denied the fact that the cheque of Rs.4 crores issued by them was dishonoured. As of today more than Rs.5 crores are due. The liberty is granted to the petitioner to move any fresh application for recovery of the said amount, however, when it is moved, the same would be decided as per merit.

28. It is clarified that prima facie view is taken. No final opinion is expressed by this Court. Both the parties would be entitled to raise their claims and counter-claims before Arbitral Tribunal who would decide the matter without the influence of this order.

29. Both the petitions are disposed of accordingly. Dasti.

JUNE 03, 2016

**(MANMOHAN SINGH)
JUDGE**