

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO.35 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO.125 OF 2021
WITH
INTERIM APPLICATION (L) NO.7243 OF 2021**

Atlas Shipping Services Pvt. Ltd. ... Plaintiff
versus
Repro India Limited ... Defendant

Mr. Amrut Joshi with Ms. Smita Durve i/by Mr. Arshil Shah, for Plaintiff.
Mr. Gauraj Shah with Mr. Nishant Chothani, Mr. Shlok Parekh i/by Ms. Sakshi Bhalla, for defendant.

CORAM : N.J.JAMADAR, J.
RESERVED ON : 12th SEPTEMBER, 2022
PRONOUNCED ON : 9th NOVEMBER, 2022

P.C.:

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.1,83,93,284/- along with further interest @ 18% p.a. from the date of institution till payment and/or realization on the basis of the invoices raised by the Plaintiff.

2. The material averments in the plaint can be summarized as under :

2.1 The Plaintiff is a company incorporated under the Companies Act, 1956. It is engaged in the business of transportation of goods. The Defendant is also a company incorporated under the Companies Act, 1956. It provides a print, content

and fulfillment solutions. The Defendant was to provide educational material to the Government of Afghanistan. The Defendant approached the Plaintiff to render services to transport 43 container containing educational material from Nhava Sheva Port, India to Kabul, Afghanistan, via Kasim Port, Karachi.

2.2 The terms and conditions of the contract were incorporated in the emails exchanged between the parties on 26th August, 2015 and 28th August, 2015. In accordance with the agreed terms and conditions, the Defendant was to provide duty exemption letter from Government of Afghanistan before the ships sailed. The Defendant could not procure the exemption letter as agreed and instead assured to make the exemption letter available with Kabul Consulate at Karachi, by the time the containers reached Kasim Port at Karachi.

2.3 Based on the assurances of the Defendant, the Plaintiff shipped the first lot of 14 containers on 23rd August, 2015, 2nd lot of 14 containers on 22nd September, 2022 and 3rd lot of 15 containers on 10th May, 2015. The Plaintiff raised 5 invoices on 26th August, 2015, 26th September, 2015 and 16th October, 2015 for an aggregate amount of Rs.1,46,22,041/-. No dispute was raised by the Defendant about the contents of the invoices or the services rendered by the Plaintiff. In fact, the Defendant made part payment towards the said invoices.

2.4 Despite the goods having reached Kasim Port at Karachi, the Defendant failed to procure duty exemption letter from the Government of Afghanistan.

Resultantly, beyond the first 14 days period, the port levied storage charges. Pursuant to the negotiations, it was agreed between the parties that the costs and charges attributable on account of delay on the part of the defendant in procuring the exemption letter would be payable by the Defendant.

2.5 At the request of the Defendant, the Plaintiff defrayed the charges for storage and insurance etc. Thus, invoices were raised by the Plaintiff between 8th December, 2015 to 22nd December, 2015 to the tune of Rs.26,75,563/-. Eventually, the goods reached destination i.e. Ministry of Education, Islamic, Republic of Afghanistan, Mohammad Jan Khan Watt Kabul Afghanistan under the 1st shipment on 3rd February, 2016, 2nd shipment on 30th January, 2016 and the 3rd shipment on 28th January, 2016.

2.6 The failure on the part of the Defendant to pay the duty caused further delay and levy of truck detention charges. The Plaintiff was made to pay those charges as well. Thus, the Plaintiff raised invoices towards detention and storage charges on 10th February, 2016 and 26th February, 2016 for the sum of Rs.73,75,994/-. The Defendant did make payment in part discharge of the liability. The last payment of Rs.10 Lakhs was made on 18th May, 2016. A sum of Rs.96,52,066/- remained outstanding.

2.7. As the Defendant committed default in payment of the outstanding amount, a legal notice was addressed on 4th August, 2018 calling upon the Defendant

to pay the outstanding amount of Rs.96,52,066/- along with interest thereon. Eventually, the Plaintiff invoked arbitration by notice dated 25th October, 2018 as the invoices provided for dispute resolution through arbitration. In response, the Defendant contested the invocation of arbitration. The Plaintiff appointed an Arbitrator and the arbitration proceedings commenced. By an order dated 15th August, 2020, the learned Arbitrator rescinded from the arbitration as the proceedings before the learned Arbitrator were without jurisdiction since the arbitrator was appointed by the Managing Director of the Plaintiff, in teeth of the provisions contained in Section 12(5) of the Arbitration and Conciliation Act, 1996. The Plaintiff, thus, asserts that the said period commencing from 25th October, 2018 to 15th August, 2020 deserves to be excluded while computing the period of limitation under Section 14 of the Limitation Act.

3. Upon being served with the Writ of Summons, the Defendant appeared. Thereupon, the Plaintiff took out the Summons for Judgment.

4. An Affidavit in Reply is filed on behalf of the Defendant seeking an unconditional leave to defend the Suit. At the threshold, the Defendant contends that the present suit involves several complicated questions of facts raising various triable issues and, therefore, is not amenable to summary procedure. Secondly, the suit is stated to be clearly barred by limitation as the last of the invoices was raised on 26th February, 2016 and the suit came to be instituted on 20th January, 2021. The claim of

exclusion of the period spent in prosecuting the arbitration proceedings is stated to be unsustainable. Thirdly, the Defendant contends the invoices which constitute the basis of the summary suit confer exclusive jurisdiction on the Courts at Delhi. Therefore, this Court has no territorial jurisdiction to entertain, try and determine this Suit. Fourthly, since the challenge to the invocation of the arbitration by the Defendant is subjudice before the Delhi High Court in O.M.P. (T) Comm. 113 of 2019, the Plaintiff cannot resort to forum shopping by instituting the summary suit.

5. On merits, the Defendant contends that the Plaintiff was guilty of manhandling and mismanaging the delivery of the consignment. The delayed delivery of the goods at Kabul entailed huge loss to the Plaintiff as the consignee refused to part with the payment of USD 5,25,000. In fact, the Plaintiff's claim is inflated and not supported by the original documents evidencing the payment of the alleged storage and detention charges. The Defendant contends despite having been repeatedly called upon to furnish the original documents, to vouch for the expenses, sought to be saddled upon the Defendant, the Plaintiff failed and neglected to furnish those documents. In contrast, the documents which are relied upon by the Plaintiff are false and fabricated. In any event, the question as to who was at fault for the delayed delivery of the consignment, raises a triable issue. Therefore, the Defendant is entitled to an unconditional leave to defend the Suit.

6. In the wake of the aforesaid pleadings, I have heard the Mr Joshi, learned

Counsel for the Plaintiff and Mr. Shah, learned Counsel for the Defendant at some length. With the assistance of the learned counsel for the parties, I have perused the material on record.

7. Mr. Joshi, learned Counsel for the Plaintiff would urge that the defences sought to be raised by the Defendant, can only be termed as sham and illusory. On the one hand, the Defendant resisted the invocation of the arbitration resulting in rescual by the named arbitrator, after the parties led evidence, on the ground that the appointment of the said arbitrator was in teeth of the provisions contained in Section 12(5) of the Arbitration and Conciliation Act, 1996. On the other hand, in the instant case, an endeavour is made on behalf of the Defendant to assail the tenability of the suit on the premise that there is an arbitration clause in the invoices and the parties agreed that the Courts at Delhi only would have jurisdiction. Mr. Joshi further submitted that the challenge to the jurisdiction of this court is totally misconceived as no part of cause of action arose within the local limits of the Courts at Delhi and, therefore, according to Mr. Joshi, even by consent the parties cannot confer jurisdiction on the Court which is not otherwise competent to entertain the lis.

8. On the aspect of limitation, Mr. Joshi submitted that the invocation of the arbitration on 25th October, 2018 and termination of the said proceedings on 15th August, 2020 are indubitable and, therefore, the provisions contained in Section 14 of the Limitation Act are clearly attracted as the Plaintiff bonafide prosecuted the said

proceedings. Taking the Court through the clauses of the agreement between the parties, Mr. Joshi would submit that the delay in delivery of the consignment is wholly attributed to the omissions on the part of the Defendant in procuring the exemption letter. In any event, according to Mr. Joshi, the liability for the transportation charges to the tune of Rs.60,71,771.80 is an admitted liability. Therefore, if the Court is persuaded to grant leave to defend, the Defendant must be directed to deposit the amount to the extent of the admitted liability.

9. In opposition to this, Mr. Shah, learned Counsel for the Defendant, would urge that the suit does not conform to the requirements envisaged by Order XXXVII Rule 2(1) of the Code of Civil Procedure, 1908. Secondly, the Plaintiff has not pleaded particulars of the contract between the parties. Thirdly, the suit is clearly barred by the limitation as the institution of the suit in the year 2021 when the last of the invoices was raised on 26th February, 2016, according to Mr. Shah, is plainly beyond the statutory period of limitation. If the plaintiff professes to claim exclusion of the period spent in prosecuting the arbitration proceedings that itself gives rise to a triable issue, urged Mr. Shah

10. Mr. Shah further submitted that the defence of this Court lacking territorial jurisdiction cannot be said to be sham and illusory as under the very terms of the invoices, the exclusive jurisdiction was conferred on the Courts at Delhi. Lastly, according to Mr. Shah, whether the delay was occasioned on account of acts or

omissions attributable to the Plaintiff or Defendant, inexorably raises a triable issue. Moreover, the invoices relied upon by the Plaintiff annexed to the Plaint, are unsigned. The Plaintiff has not taken care to produce the original documents. Therefore, on these counts, the Defendant deserves an unconditional leave to defend the Suit.

11. The aforesaid submissions now fall for consideration. By and large, there is not much controversy over the following facts. Firstly, the Defendant had availed services of the Plaintiff for transporting the goods from Nhava Sheva to Kabul Via Kasim Port, Karachi. The terms and conditions of the said contract were purportedly incorporated in the communications dated 26th August, 2015 and 28th August, 2015. Secondly, the parties are not at issue over the fact that the goods were shipped in three lots on 23rd August, 2015, 22nd September, 2015 and 10th October, 2015. Nor there is much controversy over the fact that the said consignments reached Karachi Port on 25th August, 2015, 26th September, 2015 and 13th October, 2015 respectively. Thirdly, the delivery of the consignment at the destination i.e. Kabul on 28th January, 2016 (3rd shipment), 30th January, 2016 (2nd Shipment) and 3rd February, 2016 (first shipment) is also not much in contest. Evidently, there was considerable time lag between the dates of shipment and the delivery of the respective consignments at destination.

12. The delayed delivery of the consignments entailed costs. First, the storage costs at Port Karachi, beyond the permissible period of 14 days. Second, the

detention charges of the trucks at Afghanistan border, after the consignments were cleared at Port Karachi. Who was at fault for the delayed delivery and the resultant costs, is the core question is controversy.

13. The Plaintiff asserts that under the terms of the contract between the parties, it was the obligation of the Defendant to procure duty exemption letter prior to the sailing of the ships laden with subject containers. The Defendant failed and neglected to procure the same within time, resulting in payment of storage charges at port Karachi. The Defendant, in contrast, alleges manhandling and mismanagement of the consignments at the hands of the Plaintiff, which resulted in delayed delivery of the consignment to the prejudice of the Defendant.

14. Before advertizing to consider the aforesaid contentious issues, it may be advantageous to deal with the challenge to the tenability of the suit on the count of bar of limitation and lack of territorial jurisdiction. Evidently, the last of the invoices was raised on 16th October, 2015. Though an endeavour was made on behalf of the Plaintiff to demonstrate that the cause of action is continuing one, yet in para No.27 of the Complaint, the Plaintiff expressly seeks to exclude the period commencing from 25th October, 2018 to 15th August, 2020 spent in prosecuting the arbitration proceedings for the purpose of computation of the period of limitation under Section 14 of the Limitation Act.

15. It is true there is material to show that the invoices contain dispute

resolution mechanism in the form of arbitration to be presided over by an arbitrator to be appointed by the Managing Director of the Plaintiff and that on 25th October, 2018, the Plaintiff invoked the arbitration under Section 21 of the Arbitration and Conciliation Act, 1996. Indisputedly, the arbitration proceedings terminated as the learned Arbitrator passed an order on 15th August, 2020 in view of the law enunciated by the Supreme Court in the cases of **TRF Ltd. V/s. Energo Engineering Projects Ltd.**¹ and **Bharat Broadband Network Ltd. V/s. United Telecoms Ltd.**² for the appointment of the learned Arbitrator by the Managing Director of the Plaintiff rendered the arbitrator ineligible.

16. Mr. Joshi, learned Counsel for the Plaintiff would urge that Section 14 is elastic enough to cover in its fold the proceedings before the arbitrator. Since the Defendant challenged the validity of the proceedings before the learned Arbitrator, in this Suit the Defendant cannot be permitted to contest the exclusion sought by the Plaintiff under Section 14 of the Limitation Act. To bolster up this submission, Mr. Joshi placed a strong reliance on the judgment of the Supreme Court in the case of **P. Sarathy V/s. State Bank of India**³ wherein after advertng to the text of Section 14(1) of the Limitation Act, the Supreme Court expounded its scope in the following words :

“12. It will be noticed that Section 14 of the Limitation Act does not speak of a ‘civil court’ but speaks only of a “court”. It is not necessary that the court spoken of in Section 14 should be a “civil court”.

1 (2017) 8 SCC 377

2 (2019) 5 SCC 755

3 (2000) 5 SCC 355

Any authority or tribunal having the trappings of a court would be a “court” within the meaning of this section.

13. In **Thakur Jugal Kishore Sinha V. Sitamarhi Central Coop. Bank Ltd.**⁴ this Court, while considering the question under the Contempt of Courts Act, held that the Registrar under the Bihar and Orissa Cooperative Societies Act was a Court. It was held that the Registrar had not merely the trappings of a court but in any respects he was given the same powers as was given to an ordinary civil court by the Code of Civil Procedure including the powers to summon and examine witnesses on oath, the power to order inspection of documents and to hear the parties. The Court referred to the earlier decisions in **Bharat Bank Ltd. V/s. Employees**⁵, **Maqbool Hussain V. State of Bombay**⁶ and **Brajnandan Sinha V. Jyoti Narain**⁷. The court approved the rule laid down in these cases that in order to constitute a court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has FINALITY and AUTHORITATIVENESS which are the essential tests of a judicial pronouncement.

15. Applying the above principles in the instant case, we are of the opinion that the Deputy Commissioner of Labour (Appeals), which was an authority constituted under Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947 to hear and decide appeals, was a “court” within the meaning of Section 14 of the Limitation Act and the proceedings pending before him were civil proceedings. It is not disputed that the appellant could file an appeal before the Local Board of the Bank, which was purely a departmental appeal. In this view of the matter, the entire period of time from the date of institution of the departmental appeal as also the period from the date of institution of the

4 AIR 1967 SC 1494

5 AIR 1950 SC 188

6 AIR 1953 SC 325

7 AIR 1956 SC 66

appeal under Section 41(2) before the Deputy Commissioner of Labour (Appeals) till it was dismissed will, therefore, have to be excluded for computing the period of limitation for filing the suit in question. If the entire period is excluded, the suit, it is not disputed, would be within time.”

17. There can be no quarrel with the aforesaid proposition of law. Even if it is assumed that the proceedings before the Arbitrator have all the trappings of the proceedings before the Court, the question is whether all the essential pre-requisites for claiming exclusion of the period spent in prosecuting the said arbitration proceedings have been fulfilled, would warrant consideration. Whether proceedings were prosecuted in good faith and the proceedings would have failed for defect of jurisdiction or other cases of like nature, are the questions which would essentially crop up for consideration.

18. The questions as to whether post recusal by the learned Arbitrator and termination of arbitration proceedings, could the Plaintiff have approached the High Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator or the Plaintiff is justified in abandoning the arbitration and resorting to adjudication through civil court are also germane.

19. It is pertinent to note that both Mr. Joshi and Mr. Shah were in unison on the point that the question of limitation is invariably a mixed issue of law and facts. Mr. Joshi placed reliance on a recent pronouncement of the Supreme Court in the

case of **Saranpal Kaur Anand V/s. Praduman Singh Chandhok and Ors.**⁸ wherein after referring to the previous pronouncements including a three Judge Bench judgment of the Supreme Court in the case of **Nusli Neville Wadia V. Ivory Properties**⁹, the Supreme Court enunciated that ‘there remains no shadow of doubt that a plea of limitation cannot be decided as an abstract principle of law divorced from the facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation being mixed question of law and fact cannot be decided as a preliminary issue under Order XIV, Rule 2(2)’.

20. Mr. Shah, on the other hand, banked upon the judgment of the Supreme Court in the case of **Babulal Vardharji Gurjar V. Veer Gurjar Aluminium Industries Pvt. Ltd. and Anr.**¹⁰ wherein it was reiterated that ‘it remains trite that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced.’

21. In view of the aforesaid well settled position in law that the issue of limitation is a mixed question of facts and law, whether in the facts of the case, the period spent in prosecuting the arbitration proceedings deserves to be excluded while computing the period of limitation for the instant suit under Section 14 of the

8 2022 SCC Online SC 379

9 (2020) 6 SCC 557

10 (2020) 15 SCC 1

Limitation Act, raises a triable issue. I am, therefore, persuaded to hold that the bar of limitation, urged on behalf of the Defendant, cannot be brushed aside as sham and illusory defence. The onus would lay on the Plaintiff to establish that the Plaintiff is entitled to the exclusion of the period spent in prosecuting the arbitration proceedings and, resultantly, the suit is not barred by the law of limitation.

22. The challenge to the jurisdiction was rested on the following clause in the invoices : “The Courts at Delhi only shall have jurisdiction over the matters.” Mr. Joshi, learned Counsel for the Plaintiff, canvassed a two-pronged submission. First, the aforesaid clause cannot be read torn out of context. It must be read in conjunction with clause 1 which provided for arbitration, with its seat at Delhi. Secondly, the mere fact that the parties by contract provided that the Courts at Delhi would have the jurisdiction, by itself, is not decisive as the parties cannot confer jurisdiction on the Court which is otherwise not competent to entertain and try the suit. Since no part of cause of action, according Mr. Joshi, arose within the local limits of the Court at Delhi, the aforesaid clause does not oust the jurisdiction of this Court.

23. To lend support to the aforesaid submission, Mr. Joshi placed reliance on the judgment of the Supreme Court in the case of **ABC Laminart Pvt. Ltd. V/s. A.P.Agencies**¹¹ wherein the Supreme Court expounded the legal position 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

¹¹ (1989) 2 SCC 163

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 ?

18. In **Hakam Singh V. M/s. Gammon (India) Ltd.**¹² the appellant agreed to do certain construction work for the respondent who had its principal place of business at Bombay on the terms and conditions of a written tender. Clause 12 of the tender provided for arbitration in case of dispute. Clause 13 provided that notwithstanding the place where the work under the contract was to be executed the contract shall be deemed to have been entered into by the parties at Bombay, and the Court in Bombay alone shall have jurisdiction to adjudicate upon. On dispute arising between the parties the appellant submitted a petition to the Court at Varanasi for an order under Section 20 of the Arbitration Act, 1940 that the agreement be filed and an order of reference be made to an arbitrator or arbitrators appointed by the Court. The respondent contended that in view of the Clause 13 of the arbitration agreement only the Courts at Bombay had jurisdiction. The Trial Court also held that the entire cause of action had arisen at Varanasi and the parties could not by agreement confer jurisdiction on the Courts at Bombay which they did not otherwise possess. The High Court in revision held that the Courts at Bombay had jurisdiction under the general law and hence could entertain the petition and that in view of Clause of the arbitration agreement the petition could not be entertained at Varanasi

¹² (1971) 1 SCC 286

and directed the petition to be returned for presentation to the proper Court. On appeal therefrom one of the questions that fell for consideration of this Court was whether the Courts at Bombay alone had jurisdiction over the dispute. It was held that the Code of Civil Procedure in its entirety applied to proceedings under the Arbitration Act by virtue of Section 41 of that Act. The jurisdiction of the Court under the Arbitration Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code of Civil Procedure. By the terms of section 20(a) of the Code of Civil Procedure read with explanation 11 thereto the respondent company which had its principal place of business at Bombay was liable to be sued at Bombay. It was held that it was not open to the parties to agreement to confer by their agreement jurisdiction on a Court which did not possess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try the suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts was not contrary to public policy and such an agreement did not contravene Section 28 of the Contract Act. Though this case arose out of an arbitration agreement there is no reason why the same rule should not apply to other agreements in so far as jurisdiction is concerned. Without referring to this decision a Division Bench of the Madras High Court in *Nanak Chand Shadurain V T.T.Elect. Supply Co.*¹³ observed that competency of a Court to try an action goes to the root of the matter and when such competency is not found, it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercised by Courts it does not go to the core of it so as to make the resultant judgment a nullity. Thus it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not

13 AIR 1975 Mad 103

vague it is not hit by Sections 23 and 28 of the Contract Act. This can not be understood as parties contracting against the Statute. Mercantile Law and Practice permit such agreements.”

24. Mr. Shah, learned Counsel for the Defendant, would urge that, on facts, it cannot be said that the Courts at Delhi have no territorial jurisdiction. In law, according to Mr. Shah, the Judgment of the Supreme Court in the case of **Swastik Gases Pvt. Ltd. V/s. Indian Oil Corporation Ltd.**¹⁴ sets the controversy at rest. Attention of the Court was invited to the observations in para 32 and 45, which read 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

14 (2013) 9 SCC 32

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.

45. The civil Appeal filed by the appellant in **A.B.C. Laminart Case**¹⁵ challenging the decision of the Madras High Court was dismissed by this Court thereby affirming the jurisdiction of the Court in Salem notwithstanding the exclusion clause. While doing so, this Court held that when a certain jurisdiction is specified in a contract, an intention to exclude all others from its operation may be inferred; the exclusion clause has to be properly construed and the maxim *expressio unius est exclusio alterius* (expression of one is the exclusion of another) may be applied. Looking then to the facts and circumstances of the case, this Court held that the jurisdiction of courts other than in Kaira were not clearly, unambiguously and explicitly excluded and therefore, the Court at Salem had jurisdiction to entertain the proceedings.”

25. I am afraid to accede to the submission of Mr. Shah that the pronouncement in **Swastik Gases Pvt. Ltd.** (supra) takes a view different from the one expounded in the case of **A.B.C. Laminart** (supra). In fact, in paragraph Nos.13, 14 and 45, the Supreme Court referred with approval the dictum in **A.B.C. Laminart (supra)**.

26. If no part of cause of action arose within the local limits of the Courts at Delhi, the parties by contract cannot confer jurisdiction on the Courts at Delhi. In the facts of the case, however, the question as to whether apart from this Court, the Courts at Delhi, would also have jurisdiction to entertain and try the suit, would again

¹⁵ (1989) 2 SCC 163

be a question rooted in facts.

27. On the merits of the matter, the submission on behalf of the Defendant that the invoices raised and relied upon by the Plaintiff in support of the claim are unsigned, appears to be borne out by the record. Invoices annexed to the Plaint (Exhibits D-1 to D-5) , (F-1 to F-6), and (G-1 to G-4), are all unsigned. Even the copies of the invoices tendered by Mr. Joshi, in a compilation of documents, do not bear any signature.

28. Mr. Joshi attempted to wriggle out of the situation by placing reliance on a judgment of this Court in the case of **Jatin Koticha V/s. VFC Industries Pvt. Ltd.**¹⁶ wherein it was, inter alia, observed that “it is not the requirement of law that it should be written contract signed by both the parties. What is necessary is that the suit should be based on a written contract. That one can find in this case, in the form of invoices which were raised on the defendants along with delivery of the goods in pursuance of each purchase order. The invoices, as stated above, contained the terms and conditions.”

29. The aforesaid pronouncement may not advance the cause of the submission to the extent desired by Mr. Joshi. The challenge is not on the count that the invoices are not signed by both the parties. The challenge is on the ground that the invoices pressed into service are not at all signed even by the party who has raised

¹⁶ (2008) 2 Bom C.R 155

those invoices.

30. Lastly, in the totality of the circumstances, the question as to who was at fault for the delayed delivery of the consignments at destination, which, in turn, undoubtedly enhanced the costs and charges, is by its very nature, rooted in facts. The determination would require interpretation of the terms and conditions of the contract. For instance, under clause 2 of the terms and conditions, (Scope of Work in India) the defendant was to organize Mafinama (Exemption Letter) prior to sailing of containers. In addition, clause 1 (Scope of Work in Karachi) provided that the Plaintiff would be responsible to do the liaisoning with Afghan consulate in Karachi for securing the exemption letter from consulate addressed to the Karachi Port Trust. This implies that there were reciprocal obligations. Likewise, the party who was at fault for the detention of the trucks at Afghanistan border, is again a matter for trial. Can detention of the trucks be solely attributed to the acts or omissions on the part of the defendant, would surely warrant an adjudication.

31. At this stage, it would suffice to refer to paragraph 33.3 of a recent pronouncement of the Supreme Court in the case of **B.L. Kashyap and Sons Limited vs. JMS Steel and Power Corporation and Anr.**¹⁷ wherein the principles which should govern the exercise of discretion to grant leave to defend the suit were succinctly postulated. It reads as under :

33.3 Therefore, while dealing with an application seeking leave to defend, it

¹⁷ (2022) 3 SCC 294

would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.”

32. If the facts of the case at hand and issues which may arise for consideration (indicated above) are appraised on the aforesaid touchstone, in my view, the Defendant deserves an unconditional leave to defend the Suit.

33. Hence, the following order :

ORDER

- (i) The Defendant is granted an unconditional leave to defend the Suit.
- (ii) The Defendant shall file written statement within a period of 30 days from today.
- (iii) Summons for Judgment stands disposed.
- (iv) Interim Application (L) No.7243 of 2021 also stands disposed.

(N.J.JAMADAR, J.)