

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT JAMMU**

**Reserved on : 06.08.2021
Pronounced on : 20.08.2021**

AA No. 5/2020
CM No. 1835/2020

Supinder KourAppellant(s)

Through: Mr. Vikram Sharma, Sr. Advocate with
Mr. Sachin Dev Singh, Advocate

Vs.

MDN Edify Education Pvt. Ltd. and others Respondent(s)

Through: Mr. Rajesh Ranjan, Advocate

Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

JUDGMENT

1. The instant appeal has been preferred by the petitioner under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the Act*') against the order dated 29.02.2020 passed by the learned 2nd Additional District Judge, Jammu, whereby the court below without touching the merits of the case dismissed the petition of appellant herein filed under Section 9 of the Act on the ground that it lacked jurisdiction to adjudicate upon the matter. Before the court below, the petitioner-appellant herein was seeking to grant temporary prohibitory injunction restraining the respondents from appointing a new Master Franchisee of DRS-Kids for the UT of J&K in place of petitioner-appellant herein as well as from interfering in petitioner's functioning as Master Franchisee of DRS-Kids for whole of erstwhile State of J&K.

2. The facts-in-brief are that an agreement of franchisee dated 06.12.2007 was entered into between the petitioner and the DRS Vidya Samiti, a society incorporated under the Society Act, whereby, the appellant agreed to be appointed as franchisee of the DRS Vidya Samiti to establish and operate pre-school under the brand name "DRS Kids" within 3 kms radius of Trikuta Nagar, Jammu. Thereafter, the petitioner-appellant was appointed as the Master Franchisee by DRS Education Pvt. Ltd. vide contract dated 13.12.2008 vesting in petitioner the rights to identify potential areas for establishing new DRS Kids pre-schools within the whole erstwhile State of J&K. As per the agreement, the life of the master franchisee was fixed for 10 years from the date of agreement which was extendable for a further period on mutually agreed terms and conditions.

3. It is submitted that as a consequence of the efforts, money and goodwill so invested by the petitioner-appellant over the years, she was able to get as many as 14 franchisees in Jammu alone, thus generated a considerable amount of regular income in the shape of royalty for respondent No.1, inasmuch as the respondent No.2 would take home 50% of the franchisee fee collected from the schools, as also a royalty from the tuition fees collected from all the schools as per the Master Franchisee Agreement. It is also submitted that petitioner also paid an amount of rupees five lacs as one time Master Franchisee fee.

4. It is submitted that on realizing that the appellant was able to open up 14 franchisee schools in Jammu alone, respondent No.2 turned greedy and started devising ways to oust the appellant from the aforesaid agreement by replacing her. In anticipation of that, the appellant secured an interim relief vide order

dated 01.02.2016 from the court of learned 3rd Additional Munsiff, Jammu in suit titled “Supinder Kour vs MDN Edify Education Pvt. Ltd. and ors.”, whereby the respondents were restrained from advertising, admitting children/students, opening and operating a pre-school in six km area from the border of Trikuta Nagar, Jammu . The suit was subsequently withdrawn by the appellant pursuant to a compromise arrived at between the parties.

5. Second round of litigation started between the parties when the appellant filed a civil suit in the Court of Special Mobile Magistrate, 13 FC (Sub Judge), Jammu seeking permanent prohibitory injunction restraining the respondents from appointing any new master franchisee in place of appellant for the whole erstwhile State of J&K in place of appellant as allegedly attempted by respondent No. 2 by publishing an advertisement in edition dated 04.04.2019 of the Daily Excelsior newspaper thereby inviting persons interested for master franchisee and for opening DRS Kids school. An interim order dated 06.06.2019 was passed by the aforesaid court protecting the status and rights of the appellant as master franchisee. After that, an application under Section 8 of the Act was filed by the respondents herein before court of learned Sub-Judge/13th Finance Commission, Jammu and vide order dated 05.09.2019 the same came to be allowed, thereby referring the parties to arbitration in view of arbitration clause 13 of the agreement dated 13.12.2008 read with relevant provisions of the Arbitration and Conciliation Act, 1997.

6. Feeling aggrieved, the appellant filed an appeal before the Court of 1st Additional District Judge, Jammu against the order dated 05.09.2019 and the same came to be stayed vide order dated 06.09.2019. Before the final orders of

the appeal were pronounced, appellant herein filed an application under Section 9 of the Act before the 2nd Additional District Judge, Jammu seeking to restrain the respondents from appointing a new Master Franchisee for the UT of J&K in place of the petitioner, which was finally heard and dismissed vide order dated 29.02.2020 thereby refusing the appellant herein the interim measure of protection on the ground of lack of jurisdiction. The aforesaid order dated 29.02.2020 passed by learned 2nd Additional District Judge, Jammu is impugned in this appeal.

7. Learned counsel appearing for appellant argued that the dismissal of the application under Section 9 of the Act vide impugned order dated 29.02.2020 on the point of jurisdiction is not sustainable and is liable to be set aside on the ground that the Master Franchisee Agreement was executed in Jammu; the appellant's area to act as Master Franchisee is in Jammu; the franchisee schools are operating in Jammu; the dispute with respect to the Master Franchisee agreement arose in Jammu; the post-dispute reconciliation proceedings/meetings were conducted in Jammu; the earlier litigation between the parties was in Jammu Court; the cause of action accrued to the appellant at Jammu and the subject-matter situate within the jurisdiction of the principal civil court of original jurisdiction.

8. Learned counsel further argued that section 20 of the Act classifies two places viz., 'seat of arbitration' and 'venue of arbitration', whereas the arbitration clause only refers the venue of arbitration to be at Hyderabad. He, thus, argued that where only the venue has been specified and seat of arbitration not determined, it is indisputably the cause of action/subject matter

which will determine the jurisdiction of the courts as referred to in section 9 of the Act. He, thus, argued that the respondents cannot oust the jurisdiction of the courts at Jammu with respect to cause of action and the situation of the subject matter. In support of his contention, he has relied upon *Mankastu Impex Pvt. Ltd. Vs Airvisual Ltd.*, 2020 (5) SCC 399; *Cobra CIPL vs Chief Project Manager*, (2019) AIR (MP) 174; *Aarka Sports Management Pvt. Ltd. Vs Kalsi Buildcon Pvt. Ltd.*; (2020) 0 Supreme (Del) 689; *Indus Mobile Distribution Private Limited vs Datawind Innovations Private Limited & ors.*, (2017) 7 SCC 678 and *Union of India vs Hardy Exploration and Production (India) INC*, (2018) 7 SCC 374.

9. Learned counsel appearing for respondents while controverting the pleas taken by the learned counsel for appellant argued that in terms of Clause-27 of the agreement dated 06.12.2007, any dispute or differences arising out of or in connection with this agreement shall be finally settled in arbitration proceedings to be conducted at Hyderabad in accordance with the Arbitration and Conciliation Act, 1996. Further, in the said clause it has been specifically provided that the Courts at Hyderabad in Andhra Pradesh shall have exclusive jurisdiction under this agreement. He further argued that under Clause-13 of Master Franchise Agreement dated 13.12.2008, it has been specifically provided that in case of any dispute arising out of or in connection with this agreement shall be finally settled in arbitration and the venue of arbitration shall be at Hyderabad. He, thus, argued that 'seat of arbitration' and 'venue of arbitration' have been referred to in both the agreements. To substantiate his arguments, learned counsel for respondents has also referred to the judgment

delivered by the Supreme Court on 25.07.2019 in Civil Appeal No.5850/2019, AIR 2019 SC 3658 in case, titled as, Brahmani River Pellets Limited vs Kamachi Industries Limited.

10. I have heard learned counsel appearing for the parties, considered their rival contentions and also gone through the file.

11. Before proceedings further, it will be appropriate to reproduce hereunder Clause 13 of Master Franchise Agreement dated 13.12.2008:

“13. GOVERNING LAW AND DISPUTE RESOLUTION

13.1 This agreement is made under and shall be governed by and construed for all purposes in accordance with the laws of India and subject to arbitration. However, the courts at Hyderabad shall have exclusive jurisdiction.

13.2 Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity hereof, shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 (or any statutory amendment thereof) as in force as at that date before a sole arbitrator appointed by the Franchisor. The venue of arbitration shall be Hyderabad.”

12. Admittedly, a perusal of Clause-27 of the agreement dated 06.12.2007 and clauses 13.1 and 13.2 of Master Franchise Agreement dated 13.12.2008 specifically provided that the courts at Hyderabad shall have exclusive jurisdiction for all purposes in accordance with the laws of India and subject to arbitration, which belies the claim of learned counsel for appellant that the court’s jurisdiction has not been determined in the agreement. Not only this, the arbitration clause also refers the venue of arbitration proceedings to be at Hyderabad.

13. Further, I deem it proper to reproduce hereunder paragraphs 4, 5, 15, 16, 17 & 18 of the judgment delivered by the Supreme Court in Civil Appeal No.5850/2019 decided on 25.07.2019 (supra):

“4. Clause 18 of the agreement between the parties contains an arbitration clause which reads as under:-

“18. Arbitration shall be under Indian Arbitration and Conciliation Law 1996 and the Venue of Arbitration shall be Bhubaneswar.”

5. The respondent on 07.10.2016 invoked arbitration clause. The appellant did not agree for the appointment of the arbitrator. Hence, the respondent filed petition being OP No.398 of 2018 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short ‘the Act’) before the Madras High Court on 24.01.2018 for appointment of sole arbitrator. The appellant contested the petition challenging the jurisdiction of the Madras High Court on the ground that the parties have agreed that Seat of arbitration be Bhubaneswar and therefore, only the Orissa High Court has exclusive jurisdiction to appoint the arbitrator. The Madras High Court vide impugned order appointed a former judge of the Madras High Court as the sole arbitrator by holding that mere designation of “Seat” by parties does not oust the jurisdiction of other courts other than at the Seat of arbitration. The High Court held that in absence of any express clause excluding jurisdiction of other courts, both the Madras High Court and the Orissa High Court will have jurisdiction over the arbitration proceedings. Challenging the impugned order, the appellant has preferred this appeal.”

“15. The inter-play between “Seat” and “place of arbitration” came up for consideration in the case of Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others (2017) 7 SCC 678: (AIR 2017 SC 2105, Paras 19, 20 and 21). After referring to BALCO, Enercon (India) Limited and others v. Enercon GMBH and another (2014) 5 SCC 1 and Reliance Industries Limited and another v. Union of India (2014) 7 SCC 603 and also amendment to the Act pursuant to the Law Commission Report, speaking for the Bench Justice Nariman held as under:-

“18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO (2012) 9 SCC 552 judgment in no uncertain terms has referred to “place” as “juridical seat” for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word “place” is used, refers to “juridical seat”, whereas in Section 20(3), the word “place” is equivalent to “venue”. This

being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* (2013) 9 SCC 32. This was followed in a recent judgment in *B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* (2015) 12 SCC 225. Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment is set aside.”
[underlining added]

16. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the “venue” of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in *Swastik*, non-use of words like “exclusive jurisdiction”, “only”, “exclusive”, “alone” is not decisive and does not make any material difference.

17. When the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside.

18. In the result, the impugned order of the Madras High Court in OP No.398 of 2018 dated 02.11.2018 is set aside and this appeal is allowed. The parties are at liberty to approach the Orissa High Court seeking for appointment of the arbitrator.”

14. Thus, the judgment of Apex Court clearly clinches the issue. As such, looking to the facts and circumstances of the present case and the case law on the subject, the judgments cited by learned senior counsel for appellant are of no help to the appellant.

15. Therefore, in view of what has been discussed above, the order impugned passed by the learned 2nd Additional District Judge, Jammu does not require any interference. Accordingly, the appeal fails and the same is hereby dismissed along with connected CM. Interim direction shall stand vacated forthwith.

Jammu:
20.08.2021
(Anil Sanhotra)



(Tashi Rabstan)
Judge

Whether the order is reportable ?
Whether the order is speaking ?

Yes/No
Yes/No