M/S. Marubeni Corporation vs M/S. Sundeep Polymers Pvt. Ltd on 8 September, 2008

Author: B.P. Dharmadhikari

Bench: B.P. Dharmadhikari

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH

CIVIL REVISION APPLICATION NO. 576 OF 2001

1. M/s. Marubeni Corporation,

A Corporation duly organised and
existing under the Laws of Japan

and having its Principal Office at
4-2, Ohtemachi I-Chome,
Chiyoda-ku, TOKYO (JAPAN).

2. M/s. Marubeni India Ltd.,
A Company incorporated under

the provisions of the Companies

Act, 1956 and having its office
at Mittal Chambers, Nariman
Point, Mumbai 400 021 (INDIA). ... APPLICANTS

Versus

M/s. Sundeep Polymers Pvt. Ltd.,
A Company incorporated under the
provisions of the Companies Act, 1956

& having its Registered Office at 52,
Mamta, "A", New Prabhadevi Road,
MUMBAI 400 025 (INDIA). ... RESPONDENT

Shri S.P. Purohit, Advocate for the applicants.

Shri Shri R.P. Joshi, Advocate for the respondent.

.....

CORAM : B.P. DHARMADHIKARI, J.
SEPTEMBER 08 & 09, 2008.

ORAL JUDGMENT :

By this Revision Application filed under Section 115 of Civil Procedure Code, the original defendants in Regular Civil Suit No. 1715 of 2000, challenged the order dated 13.3.2001 passed below Exh. 13 by 5th Joint Civil Judge, Junior Division, Nagpur. By said order, the Court below has rejected the

application at Exh. 13 which was filed under Section 9A of the Civil Procedure Code by the present applicant.

2. It is not in dispute that in said Regular Civil Suit, by very same order dated 13.3.2001, the trial Court has decided total three applications i.e. Exh. 5, Exh. 13 and Exh. 15. Exh. 5 was the application under Order 39, Rule 1 & 2 of Civil Procedure Code moved by present respondent (original plaintiff) seeking prohibitory temporary injunction restraining the present revision applicants from invoking the arbitration clause. That temporary injunction came to be granted. Exh. 15 was another application moved by present revision applicants under Order 7, Rule 11 of Civil Procedure Code read with Section 45 of the Arbitration & Conciliation Act, 1994, for rejection of plaint on more or less same grounds i.e. those grounds which are enumerated in Exh. 13. The said application has been rejected by the trial Court by very same order. Against the rejection of Exh. 15, the present revision applicants filed Misc. Civil Application No. 213 of 2001 and it was rejected by the Additional District Judge on 07.03.2002. This rejection of Exh.

15 has not been challenged thereafter.

3. Regular Civil Suit No. 1715 of 2000 came to be filed by present respondent with following reliefs :

"(a) that this Hon'ble Court be pleased to pass a judgment and decree declaring that the notice/ communication issued by the Defendant No.1 dated 15/6/2000 (Doc. No. 21 hereto) impugned herein is bad and illegal and unenforceable against the Plaintiff, including the arbitration clauses invoked by the Defendant No.1;

(b) that this Hon'ble Court further be pleased to declare and pass a judgment and decree that no liability can be ascertained and fastened against the Plaintiff by the Defendants upon the subject matters referred to in the said notice/ hereto) impugned herein until and unless the claim of the Plaintiff is decided in Special Civil Suit No. 881 of 1999 pending before the Joint Civil Judge, Senior Division, Nagpur, in which questions even of fraud on the Plaintiff are are also party Defendants;

(c) that this Hon'ble Court be pleased to permanently restrain the Defendants by way of permanent mandatory injunction from raising any claim which is mentioned and raised in their notice/ communication dated 15/6/2000 (Doc.

No. 21 hereto) against the Plaintiff, it's agents, etc.

(d) For costs of this suit;

(e) For such further and other reliefs as the

nature and circumstances of the case may require."

In short, he contended that communication dated 15.6.2000 sent by defendants in that suit i.e. present applicants was enforceable against him and according to him, the arrangement / contract between parties to the suit was dependent upon performance of its obligations by a third company viz., Bajaj Auto Limited. He contended that Bajaj Auto Limited was, therefore, an integral part of agreement between plaintiff and defendant and as Bajaj Auto Limited did not honour its commitment, plaintiff was required to file Special Civil Suit No. 881 of 1999 against Bajaj Auto Limited and though present applicants are joined as party defendants in that suit, it is not in dispute that no relief has been expressly claimed against them. Defendant No.1 in that suit is company i.e. Bajaj Auto Limited itself, defendants No. 3 & 4 are its Directors. The present revision applicants are defendants No. 5 & 6 in that suit.

Defendant No.2 is another company i.e. Bajaj Auto Finance, subsidiary of Bajaj Auto Limited. All these details are given by present respondent in his plaint in Regular Civil Suit No. 1715 of 2000 in an attempt to show that there was tripartite agreement and commitment of respondent to present applicants could have been fulfilled only if third party i.e. Bajaj Auto Limited had performed its part. The suit was opposed by present revision applicants, who pointed out that there was no such tripartite agreement and the liability of present respondent was directly arising and it was, therefore, legally entitled to take recourse to arbitration. With these pleas, the applicants filed two applications i.e. Exh. 13 and Exh. 15 as mentioned above.

4. It is not in dispute that the Arbitration clause is contained in an agreement to which parties have referred as Deferred Payment Sales Agreement (hereinafter referred to as DPSA in short). Article 17 i.e. clause 17 of this agreement is the Arbitration clause which contemplates settlement of dispute by Arbitration in London, UK by three Arbitrators appointed as per existing Rules of Conciliation and Arbitration of International Chamber of Commerce. It is also to be noted that along with this DPSA dated 9.10.1998, there are two more agreements.

The first is Personal Guarantee executed by present respondent in favour of applicants in 1998 itself. The other agreement is a Deed of Hypothecation of Assets executed by present respondent in favour of present applicant No.1. Both these agreements also have a Arbitration clause which stipulates that the place of Arbitration shall be Mumbai and the Arbitration shall be governed by the Indian Arbitration and Conciliation Act, 1996.

5. There is one more important document styled as Memorandum of Understanding dated 6.11.1996 in which Bajaj Auto Limited has been shown as Purchaser and present applicant No.1 has been shown as Seller with one Mould Engineering and Manufacturing Company Limited, a Vehicle Designing Company by name TOKYO R & D Company Limited, along with applicant No.1. Name of present respondent is also shown as the Seller.

6. It is in this background, I have heard Shri Purohit, learned counsel for the applicants and Shri Joshi, learned counsel for the respondent.

7. Shri Purohit, learned counsel has contended that the suit itself was not maintainable because of existence of Arbitration clause in agreement between the parties. He states that as per said Arbitration clause, the applicants have taken recourse to Arbitration by issuing notice dated 15.6.2000 and all objections in relation to said notice need to be raised only before the Arbitrators and the same cannot be raised in Civil Suit. He further states that the suit could not have been filed at Nagpur because no cause of action has arisen thereof at Nagpur. Lastly, he argues that the claim of suit is defective inasmuch as it has been under valued and proper Court fee has not been paid. He points out that the Arbitration proceedings are going on for recovery of Rs.4,63,81,542/- and purpose of filing present suit by the respondent is to save himself from that liability. He, therefore, contends that suit also deserves to be dismissed even on that ground. In support of this contention, he invites attention to Article 7 of Bombay Court Fees Act and judgments in the case of Mohan Maekin Breweries Ltd. vs. Oceanic Imports & Exports Corporation, reported at 1980 Mh. L.J. 803 and in State vs. Shankerlal, reported at AIR 1979 Guj. 166.

8. By inviting attention to the plaint in Regular Civil Suit No. 1715 of 2000, Shri Purohit, learned counsel states that said plaint nowhere establishes that there is any contractual obligation undertaken by M/s. Bajaj Auto Limited insofar as DPSA between present applicants and respondent is concerned.

He further points out that effect of earlier Special Civil Suit No.881 of 1999 filed by present respondent against M/s. Bajaj Auto Limited and others has not been properly appreciated by the trial Court while rejecting applicants application at Exh. 13.

He points out that in that suit, no prayer has been made for any relief against present applicants and in fact at one point of time, i.e. on 16.5.2000, the present respondent had agreed to consider deletion of present applicants from array of defendants in S.C.S. No.881 of 1999. S.C.S. No. 881 of 1999 has been filed by present respondent claiming decree of Rs. 79 Crores because of breach of contract. During hearing, it was pointed out by Shri Joshi, learned counsel that this claim has been later on increased to Rs.110 Crores and the suit is now being prosecuted for recovering those damages.

9. Shri Purohit, learned counsel invites attention to contentions raised in paras 28 & 29 of plaint in Regular Civil Suit No. 1715 of 2000 and urges that at the most those grievances can be looked into by Arbitrators at London, but Civil Suit on that count is not maintainable. By inviting attention to various clauses of DPSA, he points out that a Deferred Payment facility has been made available to

present respondent and Bajaj Auto Limited has got nothing to do with that facility. He points out that property in the goods i.e. machineries to be delivered by the applicants to respondent passes to the respondent at the port of loading itself i.e. in Japan. He also invites attention to Article 15 of DPSA to contend that the agreement and contract between the parties is being regulated in accordance with laws of Japan.

He further invites attention to Article 19 thereof to show that terms and conditions of DPSA have overriding effect and all earlier deals are superseded and cancelled automatically. It is his argument that therefore the relationship between the applicants and respondent needs to be looked into only in the light of terms and conditions of DPSA.

10. Insofar as order under Exh. 5 restraining the applicants from invoking the notice of arbitration/ arbitration clause is concerned, the learned counsel for the applicants points out that said order was also challenged in MCA No. 212 of 2001 and 4th Additional District Judge on 4.3.2002 has allowed that appeal and vacated the temporary injunction. The said order of learned Additional District Judge was challenged in Revision by present respondent before this Court but then that revision was subsequently withdrawn as not maintainable and though liberty was sought to apply for temporary injunction again, the liberty has not been exercised so far.

11. By placing reliance upon Sections 5, 14, 34 and 37 of Arbitration & Conciliation Act, 1994 (hereinafter referred to as Arbitration Act), the learned counsel states that these provisions are exhaustive of circumstances in which Civil Court can interfere in arbitration proceedings or in such agreement between parties and present suit was, therefore, not maintainable. He points out that DPSA gives liberty to the applicants to invoke either DPSA or then personal guarantee or Hypothecation Deed and in exercise of that right, the applicants have chose to invoke the Arbitration clause in DPSA only. He argues that all these aspects are not considered by the trial Court while arriving at the conclusions recorded by it in impugned order. He argues that it is the contract between parties which is supreme in such matters and in support of his contentions, he places reliance upon the judgment of the Hon'ble Apex Court in the case of National Thermal Power Corporation vs. Singer Company, reported at AIR 1993 SC 998, Sumitomo Heavy Industries Ltd. vs. ONGC Ltd., reported at AIR 1998 SC 825 and latest judgment of the Hon'ble Apex Court in Aurohill Global Commodities Ltd. vs. Maharashtra STC Ltd., reported at 2007 (6) Mh. L.J. 690. He, therefore, states that the impugned order needs to be quashed and set aside and application at Exh. 13 filed by present applicants under Section 9A of Civil Procedure Code needs to be allowed. He, therefore, prays for dismissal of Regular Civil Suit No. 1715 of 2000.

12. In reply, Shri Joshi, learned counsel states that though the order dated 07.03.2002 in MCA No. 212 of 2002 was challenged in revision before this Court, due to subsequent amendment in Civil Procedure Code, the Revision was found to be not maintainable and, therefore, it was allowed to be withdrawn with liberty as mentioned above. He further points out that because of interim orders passed in present proceedings, further proceedings in RCA No.1715 of 2000 have been stayed and, therefore, the respondent could not exercise that liberty at all. He further points out that the present applicants have suffered an adverse order dated 07.03.2002 in MCA No.213 of 2001 and they have not challenged that order further. He argues that thus, a contention that suit was not maintainable

because of Section 45 and Section 8 of Arbitration Act, has been negatived and that order has attained finality.

13. He also invites attention to various clauses of Memorandum of Understanding and to correspondence between parties. He points out that the Memorandum of Understanding has been entered into in 1996 i.e. two years before DPSA and because of this Memorandum of Understanding only, the DPSA and arrangement between applicants on one hand and the respondent on the other hand could materialise. It is his stand that the applicants are huge giants in international market and their turn over is 2000 times more than Bajaj Auto Limited and 20000 times of present respondent. He states that DPSA of such a nature has become possible only because of intervention of Bajaj Auto Limited and because of guarantee of Bajaj Auto Limited that final product of present respondent shall be taken up by it for utilisation in its new sectors to be launched in market. According to him, the facility of deferred payment of such huge amount was extended by applicant No.1 to present respondent only because of presence of Bajaj Auto Limited in the matter. He argues that though DPSA does not expressly mention this, still the presence of importance of Bajaj Auto Limited is apparent from previous correspondence between the parties on this subject and also from later correspondence between the parties. He has taken the Court extensively through the correspondence which has been filed on record as part of paper book.

14. He points out that applicant No.1 wanted to enter Automobile market in India, which is very huge market and for that purpose they wanted to make use of present respondent and hence because of mutual interest of applicant No.1 and Bajaj Auto Limited, the arrangement could work out. He points out that new sectors were required several plastic moulded components and moulds thereof were to be supplied by the applicants. He points out that the ownership of moulds was to be of Bajaj Auto Limited while the moulds were to be used by present respondent in his factory at Nagpur to manufacture those components. He points out that machinery on which those moulds put were mounted and used, known as plastic injection moulding machines, were to be supplied by applicant No.1 to present respondent at Nagpur and machinery was to be put to use at Nagpur. He states that though technically, the property in the machinery was to pass to present respondent at the port of loading, it was only upon payment of 5% of the total cost and balance 95% was to be paid back at Nagpur only. He states that for inspecting the worth of present respondent and also the facilities available in his factory, the representatives of applicant No.1 had come to Nagpur and in these circumstances, when suddenly arbitration clause was invoked and amount was sought to be recovered prematurely, suddenly, the impact thereof is upon the establishment of respondent at Nagpur and also personally upon him at Nagpur. He, therefore, states that Civil Court at Nagpur has got jurisdiction to take cognizance of the matter. In support, he places reliance upon the judgment of the Hon'ble Apex Court in the case of A.B.C. Laminart Pvt. Ltd.

vs. A.P. Agencies, Salem, reported at AIR 1989 SC 1239.

15. Shri Joshi, learned counsel argues that DPSA or liability incurred thereby by present respondent is not being disputed and denied by him. The seven moulds which should have come to Nagpur for utilisation by present respondent by mounting them on injection moulding machines, never reached Nagpur and Bajaj Auto Limited diverted those moulds directly to the factory of their close relative.

He states that because of this, the applicant could not have used injection moulding machines and the machinery became useless for him. He points out that this act of Bajaj Auto Limited was in fact dishonest which exposed the respondent to huge financial liability, which he otherwise would have never accepted. He states that because of this wrongful act on the part of the management of M/s/ Bajaj Auto Limited only, RCS No. 881 of 1999 has been filed by present respondent against the said company and its management to recover all damages worth Rs.110 Crores. He states that until and unless said damages are recovered, the present respondent is not in a position to pay any amount to applicant No.1 and in these circumstances, his contention in RCS No. 1715 of 2000 that Bajaj Auto Limited is the root because for this dispute, needs to be appreciated. He points out that it has been accordingly so looked into and appreciated by the trial Court. The finding reached is based upon material available on record and hence this Court should not interfere in Civil Revision Application.

16. In the above background, he points out the Arbitration clause as contained in the Deed of Hypothecation and Bond of Personal Guarantee to show that law applicable as mentioned therein is Indian Law and place of Arbitration has been agreed to be Mumbai. He states that Section 45 of Arbitration Act confers discretion upon this Court to refuse to accept the Arbitration clause Article 17 as according to him, said clause constitute an unconstitutional and uncalled bargain. It would be inferred by applicant No.1 to invoke such clause against a small entity like present respondent. In support of his contention, he has placed reliance upon the judgment of the Hon'ble Apex Court in the case of Michael Golodetz vs. Serajuddin & Co., reported at AIR 1963 SC 1044 and judgment of Madras High Court in M/s. B.S.S.S. Line vs. M. & M. Trading Corpn., reported at 1970 Madras Law Journal Reports 548. In order to show how such unconscionable bargain are approached by the Courts of law, he relies upon the judgment of the Hon'ble Apex Court in the case of LIC of India vs. Consumer Education & Research Centre, reported at AIR 1995 SC 1811 = (1995) 5 SCC

482.

17. Shri Joshi, learned counsel, therefore, concludes his arguments by urging that Arbitration proceedings have been rightly withheld and until and unless Special Civil Suit No. 881 of 1999 is decided, the said proceedings cannot be permitted to go on.

18. In his brief reply arguments, Shri Purohit, learned counsel states that in exercise of option available to applicant No.1, the arbitration clause Article 17 in DPSA has been invoked and it is as per contract between the parties. He further states that Article 227 of Constitution of India confers even powers on the Courts to act suo motu in such circumstances and the suit RCS No. 1715 of 2000 which constitutes abuse of process of law, therefore, needs to be dismissed. He relies upon the judgment of the Hon'ble Apex Court in the case of Surya Dev Rai vs. Ram Chander Rai, reported at AIR 2003 SC 3044, in support of his contention. He further states that order dated 07.03.2002 in MCA No. 213 of 2001, does not attain finality and in any case it is not precluded this Court from examining the controversy fresh on merits. He states that purpose of Exh. 15 and Exh. 13 filed by revision applicants was same and on the date on which MCA 213 of 2001 came to be decided, the instant revision was already pending. He states that in revision from same issues which were raised in MCA No. 212 of 2001 were already raised and the issues were already being considered by a superior Court, challenging said order dated 07.03.2002 again would have been an empty formality.

He, therefore, argues that the present revision needs to be decided on merits.

19. After hearing respective counsel, it is apparent that purpose of filing Exh. 15 and Exh. 13 in Regular Civil Suit No.1715 of 2001 was identical. Exh. 13 has been moved under Section 9-A of Civil Procedure Code pointing out that Civil Court does not possess jurisdiction and Exh. 15 was factually under Order 7, Rule 11 of CPC for same purpose only. These two applications have been heard and decided along with Exh. 5 by the trial Court. Its order dated 13.3.2001 is common on all these three exhibits. The present revision challenging said order passed below Exh. 13 has been filed on 14.6.2001 and Misc.

Civil Application No. 213 of 2001 came to be rejected on 07.03.2002. It is, therefore, clear that the issues sought to be urged in Misc. Civil Application No. 213 of 2001 were already under consideration of this Court in the instant Civil Revision Application in which rule was issued on 04.07.2001 itself. I, therefore, find that the objection raised by Shri Joshi, learned counsel to the consideration of present Revision Application on merits, does not hold any water.

20. Coming to the contention of Shri Purohit, learned counsel, about absence of cause of action at Nagpur, in A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem, (supra), the Hon'ble Apex Court has considered provisions of Section 20(c) of Civil Procedure Code, which states that every suit shall be instituted in a court within local limits of whose jurisdiction the cause of action wholly or in part arises. Explanation (iii) [now omitted] which existed to similar provision in Act No. 7 of 1888, has been reproduced by the Hon'ble Apex Court to point out that in suits arising out of contract, the cause of action may arise at a place where the contract was made, the place where contract was to be performed or performance thereof is completed and the place where in performance of contract any money to which the suit related was expressly or implied payable. In para 12 of the judgment, the Hon'ble Apex Court has stated that a cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. It is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. Similar view is reiterated by the Hon'ble Apex Court in the case of Rajasthan High Court Advocates Association vs. Union of India, reported at AIR 2001 SC 416, in paragraphs 17 & 18.

21. In the facts before me, the copy of DPSA placed on record does not show the place at which the agreement was signed. The plaintiff in Regular Civil Suit No. 1715 of 2000 also does not disclose that place. Said plaint in its para 34 mentions that the cause of action has arisen on 15.6.2000 within the territorial jurisdiction of the Court of Civil Judge, Senior Division, Nagpur. It further states that the machinery and equipment was supplied to the plaintiff (present respondent) and installed by him at Nagpur and incidence of all the transactions is being fell at Nagpur as respondent has no other factory anywhere else. It is mentioned that incidence of termination of the contract by Bajaj Auto Limited is also at Nagpur and the defendant companies i.e. present applicants had inspected the factory and other installations at Nagpur. The supply of machinery in question was only to be supplied at Nagpur for installation in the factory at Nagpur and were accordingly installed and are still there even today i.e. on the date of filing of plaint, where the factory of respondent is situated. It

is, therefore, stated that the Court has jurisdiction to entertain, try and dispose of the matter. Though, as yet, the present applicants have not filed any written statement, they have in their detailed reply filed on affidavit to oppose the prayer for grant of interim relief in para 46 denied these contentions and have stated that as per DPSA, the equipment was deemed to be delivered to original plaintiff when it passed the ship's rail at the loading port. They have further mentioned that DPSA was signed on behalf of present respondent in Mumbai and on behalf of defendant No.1 (present applicant No.1) in Tokyo. They have contended that mere location of plaintiff's factory at Nagpur in absence of cause of action arising at Nagpur does not confer territorial jurisdiction upon Nagpur Court. The perusal of plaint allegations in para 34, when coupled with prayer "A" in the plaint, clearly shows that receipt of notice at Nagpur invoking arbitration proceedings is treated by present respondent as cause of action. That has not been denied at least in reply mentioned above. In these circumstances, I find that the question whether cause of action accrued at Nagpur or not and whether such a suit could have been filed at Nagpur or not, cannot be answered at this stage has pleadings are still not complete. Not only this, but prima facie it appears to me a disputed question of law and fact.

Hence, I am not in a position to accept contention that the suit at Nagpur is not maintainable at this stage. The contention is, therefore, kept open for consideration in future at appropriate stage.

22. The other objection to the suit is in relation to its valuation. In Mohan Maekin Breweries Ltd. vs. Oceanic Imports & Exports Corporation, (supra), this Court was required to consider the provisions of Section 6(iv)(j) and Schedule I, item No. 7 of Bombay Court Fees Act, 1959. There, the suit filed for declaration that defendant No.2 had no right to demand payment and defendant No.1 Bank had no right to make payment and an injunction was sought restraining defendant No.2 from demanding such payment and defendant No.1 from making payment and from selling property of which charge was created by the plaintiff in favour of defendant No.1. The plaintiff had agreed to deliver certain goods to defendant No.2 and through his Banker, defendant No.1 executed Bank guarantee as a security. It is apparent that the fact of above prayer was to stop encashment of Bank guarantee and, therefore, to prevent loss of amount represented thereby. This Court, therefore, held that the suit filed under Item 7 of Schedule I and not under Section 6(j) of Bombay Court Fees Act.

23. In State vs. Shankerlal (supra), the facts disclose that suit filed against State of Gujarat and Ors. was for a declaration that the order made by the Mamlatdar on 17.5.1977 demanding from the plaintiff amount of Rs.50,000/- was illegal and void. A permanent injunction restraining defendants from recovering that amount was also sought. The Gujarat High Court found that suit was one to avoid mandatory liability and therefore susceptible to monetary evaluation. Again the view taken is on the facts before it.

24. In the facts of present matter, it cannot be right now to predict that arbitration proceedings undertaken by the applicants before the Arbitrators at London would certainly result in their favour and the defence, if any, of present respondent would not be accepted. Such a prediction is in fact not possible and also permissible. The respondent - plaintiff has only tried to stop those proceedings by pointing out that in view of his grievances, the proceedings cannot continue. The correctness or otherwise of his claim cannot be the relevant issue in considering the question of valuation of suit.

As the outcome of arbitration proceedings is uncertain, at this stage it cannot be said that by valuing his suit under Section 6(iv)(j) of Bombay Court Fees Act, 1959, the plaintiff has committed any error. The said objection, therefore, also needs to be overruled.

25. Coming to the main controversy between the parties, the DPSA nowhere shows that it was preceded by any Memorandum of Understanding. The parties to DPSA are only applicant No.1 and present respondent. Bajaj Auto Limited is not signatory to this DPSA at all. In these circumstances, the question is whether terms and conditions of this DPSA to which applicants and respondent agreed, can be said to be different or modified because of Memorandum of Understanding already mentioned above. The said Memorandum of Understanding is dated 06.11.1996 and it is apparent that the parties have styled it only as Memorandum of Understanding and not as an agreement. The legal effect of this Memorandum of Understanding cannot be looked into in these proceedings. It appears to be basically Memorandum between purchaser and seller. It does not contain any provision for arbitration also The DPSA is entered into about two years thereafter and Article 19 thereof specifically mentions that DPSA itself constitutes entire agreement between the parties regarding sale and purchase of product. The said article unequivocally mentions that DPSA only cancels, terminates and supersedes all prior negotiations, agreements and commitments whether oral or written, express of implied, with respect to the subject matter hereof. These parties have deliberately put Article 19 in this DPSA and this Article 19 overrides the Memorandum of Understanding mentioned above. If this fact of Article 19 is seen, it is clear that no terms and conditions can be read along with said Memorandum of Understanding.

26. During arguments, Shri Joshi, learned counsel has invited attention of this Court to page No. 248 of the paper book of this Revision Application. It is list of documents filed by the respondent - plaintiff before the trial Court and total 43 documents produced before the trial Court are also filed in the compilation along with this list. The purpose is to show to this Court that DPSA cannot be construed in isolation. Shri Joshi, learned counsel has urged that exact implication of said DPSA needs to be comprehended by considering the communications/ correspondence between the parties before DPSA and even after DPSA. In view of Article 19 mentioned above, it is apparent that previous correspondence, if any, fells into insignificance. The future correspondence does not expressly contain anything which would show that any term and condition of DPSA has been amended. In fact, the modification or amendment to DPSA is agreed to be regulated by Article 20 by the parties and said Article 20 of DPSA stipulates that DPSA shall not be amended, changed or modified in any manner except by an instrument in writing signed by a duly authorized representative of the party against whom enforcement is sought. It is, therefore, apparent that the respondent/ plaintiff is not in a position to point out any such amendment to DPSA in pursuance of Article 20.

27. In order to show that Arbitration clause in DPSA could not have been invoked because of other arbitration clauses, again one has to look at said DPSA only. The other two arbitration clauses existed in Deed of Hypothecation and deed of personal guarantee. These two documents are annexures along with DPSA and are mentioned as Exh. II and III therewith.

Hypothecation is as per article 6 of this DPSA and said article 6 expressly mentions that hypothecation shall be as per Exh. II.

The personal guarantee is as per article 6.2 thereof and it again mentions that it has to be in form at Article III. Article 6.3 stipulates that buyer i.e. respondent waives any right which requires present applicants to proceed against any security, indemnity or guarantee at any time. This article 6.3 with article 11.2 enable applicants to take recourse to any one of the remedies available to it in view of agreements between parties.

In exercise of that option, the applicants have invoked clause No. 17 of DPSA and issued notice accordingly. The parties have agreed to this arrangement and there is no dispute about it even before me except for the contention that said article 17 is unconscionable.

SEPTEMBER 09, 2008.

28. The judgment of Hon'ble Apex Court in the case of National Thermal Power Corporation vs. Singer Company (supra), as also the subsequent judgment reported in the case of Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. (supra) and Aurohill Global Commodities Ltd. vs. Maharashtra STC Ltd.,(supra) show that in Arbitration matters it is the choice and desire expressed and agreed to between the parties which is supreme. In the case of National Thermal Power Corporation (supra), in paragraph no.19 the Hon'ble Apex Court has held that proper law is the law which the parties have expressly or impliedly chosen, and in facts before it the Hon'ble Apex Court has observed that there was no question of drawing any inference in that respect because of express term appearing in the contract and reproduced in paragraph no.3 of the judgment.

The observations in paragraph no.23 shows that proper law of Arbitration agreement is normally the same as proper law of contract. It is only in exceptional cases that it is not so even where the proper law of contract is expressly chosen by the parties. Where, however, there is no express law governing the contract as a whole or the arbitration agreement, a presumption may arise that law of Country where the arbitration is agreed to be held is proper law of Arbitration agreement. In paragraph no.25 the Hon'ble Apex Court has observed as under :

> "25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as law of country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract."

29. In Aurohill Global Commodities ltd. .vrs. Maharashtra STC Ltd. (2007 (6) Mh.L.J. 690) paragraph no.14 the Hon'ble Apex Court has observed that where the parties with open eyes agree to settle their dispute in London and in accordance with the rules of Arbitration of Great Britain, it was not possible for it to substitute the same by procedural law under 1996 Act. It is therefore apparent that because of Article No.15 of DPSA and respondent no.1 have agreed that DPSA agreement shall be governed by the laws of Japan. The arbitration agreement Article 17 expressly stipulates that arbitration proceedings shall be conducted in London, U.K. pursuant to then existing rules of Arbitration and Conciliation in International Chamber Commerce by 3 Arbitrators appointed in accordance with the same Rules and proceeding shall be conducted in English language. As already mentioned above, the agreement has been signed with open eyes and there is no argument of any fraud or deceit in the matter by respondent no.1. The intention of parties is also apparent from the fact that arrangement agreed to in relation to any dispute about personal guarantee or about date of hypothecation is entirely different i.e. in accordance with the Indian Law and place of arbitration happened to be Mumbai.

Thus when all these clauses are read together it is clear that respondent no.1 cannot challenge the proceeding initiated as per Article 17.

30. Attention has been invited to judgment in the case of LIC of India vs. Consumer Education & Research Centre (supra), particularly paragraph nos. 31 and 40 to state that Article 17 is oppressive and the respondent no.1 being a un-equal person with very less and no bargaining capacity, the conduct of arbitration proceeding at London is inequitable for him. Perusal of paragraph no.31 of this judgment shows that a unfair and untenable or irrational clause in a contract is also unjust and amenable to judicial review. In paragraph no.40 the Hon'ble Apex Court has observed thus :

> "40. All that is necessary is whether the presence of the correlative social role of the drafting party and adherent is available in equal terms is the test. The doctrine of unequal bargaining power, the doctrine of unconscionability "unjust in some sense" etc., were considered and formulated doctrines for applying the amended 211 Restatement [Second] of Contracts."

31. Thus when a contract or clause in contract is found unreasonable or unfair ig that too only relating to bargaining power of contracting parties, becomes relevant, moreover the DPSA is not stated to be "Dotted Line Contract". Provision of Section 45 of the Arbitration and Conciliation Act, 1996 stipulates that reference to arbitration can be rejected only after it is found that the agreement is null and void or inoperative or incapable of being performed. It is not the argument of respondent no.1 that the agreement is null and void or inoperative or incapable of being performed. On the contrary when the agreement was entered into between the parties, the terms and conditions were accepted without any objections. It is not the case of the respondent no.1 that he wanted Bajaj Auto Limited to be added as party to said DPSA and it was turned down. It is clear from the facts disclosed to this Court during arguments that, there was some dispute about workmanship, however this court is not required to consider the alleged disputes either on the part of the respondent or then on the part of Bajaj Auto Limited in the present matter and that can be sorted out in Special Civil Suit No.881/1999.

32. The judgment of in the case of Michael Golodetz vs. Serajuddin & Co. (supra), relied upon by Advocates Shri Joshi, shows that there the suit was allowed to continue in peculiar circumstances. Notings by the Hon'ble Apex Court in paragraph no.3 shows that the appellants before the Hon'ble Apex Court were carrying on business as importers and they had agreed to pay 25000 tonnes of Manganese Ore. The arbitration clause provide for arbitration in New York according to the rules of American Arbitration Association, the dispute arose between the parties and respondents then commenced an action on original side of Calcutta High Court and claimed a decree that written contract dated 15.07.1995 be adjudged void. The appellant then approached the High Court with request to stay the said proceedings in view of Section 34 of the Arbitration Act, 1940 and the learned Single Judge accepted that stand and stayed the suit. The Division Bench in L.P.A. found that the learned Single Judge has not exercised the discretion property. The Hon'ble Apex Court noticed that all evidence in the case relating to dispute was in India, and it was sound ground for not exercising discretion in favour of the appellant. It found that because of other restrictions imposed in the matter of providing Foreign Exchange to individual citizens it was impossible for the respondents to take witnesses to New York and it would result in to injustice and inconvenience to them. Thus the view taken is on the facts before it. However, in paragraph no.2 the Hon'ble Apex Court has found that the Law Court stay the suit not because it found that it abdicate its jurisdiction in respect of disputes within its cognizance, but, because it merely seeks to permit the sanctity of contract.

33. The ruling cited by Advocates Shri Joshi, in the case of M/s. B.S.S.S. Line vs. M. & M. Trading Corpn., (supra), considers a clause where jurisdiction was confined to Russian Courts. There again a finding reached is after considering the law that legal enforcement of a Foreign jurisdiction clause is discretionary. It was found that the claim was so small that it would be unrealistic and unfair to drive respondent to resort to Russian Courts. The ruling therefore, does not held the present respondent in any way. It is therefore, difficult to hold that clause is either inoperative or null and void. The contract also cannot be said to be incapable of performing.

34. In view of this discussion, it is apparent that the learned trial Court has erred in rejecting the application at Exh.13, filed by the present revision applicant. In view of the agrement i.e. DPSA and its binding nature suit filed with a version to arrest further prosecution of Arbitration proceeding at London UK, was itself misconceived. With the result, the said application is allowed. The Court below in view of section 45 of 1996 Act ought to have referred the parties to arbitration.

Accordingly the parties are directed to prosecute their remedies as per clause 17 of DPSA. Prayer (i) in Civil Revision Application is granted and Regular Civil Suit No. 1715/2007 is therefore dismissed.

JUDGE ******* *GS.