

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.02.2017

Verdict on : 17.03.2017

Coram:

The Honourable Mr.Justice M.M.SUNDRESH

S.A.No.822 of 2015

DRS Logistics Private Limited,

221, Kabara Complex, 61-M.G.Road,
Secunderabad-500 003.

Represented by its Director Mr.Dinesh Agarwal .. Appellant/
Appellant/Defendant

Vs.

1.Blue Star Limited,

Kasturi Buildings, Mohan T.Advani Chowk,
Jamshedhi Tata Road, Mumbai-400 020.

represented by its Power Agent/Subrogee

The Oriental Insurance Company Limited

Represented by their Senior Divisional Manager

R.Viswanathan.

2.The Oriental Insurance Company Limited,

Oriental House, A25/27, Asaf Ali Road,
New Delhi-110 002.

Represented by their

Sr. Divisional Manager R.Viswanathan

Also at No.10, Dwaraka, II Floor, No.79,

Nungambakkam High Road,

Chennai-600 034.

..Respondents/

Respondents/Plaintiff

Second Appeal is filed under Section 100 C.P.C., to set aside the judgment and decree dated 10.03.2015 made in A.S.No.325 of 2014 on the file of II Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 23.06.2014 made in O.S.No.14441 of 2010 on the file of II Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Sathish

For respondents : M/s Nageswaran and Narichania for R2

R1- Notice Served

JUDGMENT

For sake of convenience, the parties before the trial Court are arrayed as such.

2. The sole defendant, who suffered decree before the Courts below, is the appellant. The suit has been laid for recovery of a sum of Rs.4,21,119/- with interest. The appellant seeks to assail the decree granted by the Courts through the following substantial questions of law.

1. Whether in absence of the author of a document (Surveyor Report Ex.A4) not being brought in as a witness and not tested by way of cross examination, whether the said document has evidentiary value and can be admissible as evidence?

2. Whether the plaintiff who is not the author of document (Surveyor Report Ex.A4) mark the same and thereby deny the defendant an opportunity to test the truthfulness of the document, especially when the author of the document (Surveyor) is alive and available?

3. Whether the Court can have jurisdiction on the basis of a Letter of Subrogation and Special Power of Attorney when the defendant is not a party to the said documents?

4. Whether the Court can have jurisdiction on the basis of branch office of a defendant which has no connection with the transaction in respect of which suit is filed?

5. Whether the Court can override the explicit contractual agreement between the plaintiff and the defendant when the same are legal, reasonable and explicit and have been agreed to between the parties?

3. Facts of the Case:-

3.1. The first plaintiff, who is the first respondent herein, has despatched 38 water coolers from their office at Kala AMB, Sirmour, Himachal Pradesh to their office at Secunderabad. The consignment was entrusted with the appellant/defendant being a common carrier. In acknowledgment of the entrustment of the consignment, the appellant issued the Goods Consignment Note bearing No.718581 dated 04.12.2007. It

was insured by the first plaintiff with the second plaintiff under Policy bearing No.412000/21/2007/391/0023. It is nobody's case that such an insurance took place within the territorial jurisdiction of this Court.

3.2. The first plaintiff found that 19 water coolers out of 38 water coolers were heavily damaged. A Surveyor was appointed, who quantified the damage to the suit consignment at Rs.4,08,089/- through his Report dated 04.01.2008 while fixing the appellant as the reason for such damage.

3.3. The first plaintiff issued a legal notice to the appellant. Thereafter, the second plaintiff indemnified the first plaintiff followed by execution of letter of subrogation and a special power of attorney dated 22.07.2008 at Chennai. In the above background, the suit has been laid before the City Civil Court, Chennai, for recovery of money in O.S.No.14441 of 2010 with the following cause of action.

"10.The Cause of Action for the suit arose at Chennai within the jurisdiction of this Hon'ble Court where the defendant is carrying on business for gain, where the claim was lodged and made payable, where the Letter of Subrogation and Special Power of Attorney was executed on 22.7.2008 by the first plaintiff in favour of the second plaintiff subrogating and assigning their rights, where the defendant are conducting their business for gain, on 4.12.2007 when the consignment was entrusted to the defendants, on 10.12.2007 when the goods was received by the consignee in damaged condition and when the first plaintiff had knowledge of the loss, on 15.12.2007 when the first plaintiff issued notice of loss to the defendant which was served under clear acknowledgement, on 18.12.2007 when the survey was conducted by the surveyor, on 4.1.2008 when the survey report was issued on 21.1.2008 when the defendant issued damage certificate admitting the extent of damage and denied their liability, on 14.2.2008 when the first plaintiff submitted their claim bill with the second plaintiff, on 22.7.2008 when the first plaintiff executed a Letter of Subrogation and Special Power of Attorney in favour of the second

plaintiff at Chennai, on 27.3.2009 when the recovery agents lodged claim bill on the defendant which was delivered under clear postal acknowledgment, when the defendant failed to settle the claim and subsequently."

3.4. The appellant/defendant denied its liability. It also questioned the territorial jurisdiction of the Court. On merit, the Report of the Surveyor was put into question. One ground of challenge to the report is that the Surveyor has not been examined by the plaintiffs. The Courts below decreed the suit as prayed for by placing reliance upon the Surveyor's Report while rejecting the contention qua the territorial jurisdiction placing reliance upon the judgments rendered by this Court. Ex.A2 is the consignment note. It confers the jurisdiction to the Courts in Secunderabad. It was held that Ex.A2 did not find the signature of the first plaintiff and in any case, Ex.A7 would give a cause of action, being a letter of subrogation and a special power of attorney, between the plaintiffs.

4. Submissions of the Appellant:-

The learned counsel appearing for the appellant/defendant concentrated his case on the territorial jurisdiction. It is submitted that Ex.A2 does not give such jurisdiction. The plaintiffs are not questioning Ex.A2. They have accepted Ex.A2. Ex.A7 does not give

the jurisdiction. It only deals with the situs between the plaintiffs. It does not deal with the cause of action. The policy has not been marked. The policy has not been issued at Chennai. The Surveyor's Report cannot be relied upon being unilateral and made at the instance of the plaintiffs. The Surveyor having not been examined, there is no admissibility in evidence. The learned counsel has made reliance upon the judgments in support of his contentions.

- 1.A.B.C. LAMINART PRIVATE LIMITED AND ANOTHER V. A.P.AGENCIES, SALEM. (1989 (2) SCC 163);
- 2.M/S PATEL ROADWAYS LTD., BOMBAY V. PRASAD TRADING COMPANY (CDJ 1991 SC 049);
- 3.MAHARAJI EDUCATIONAL TRUST AND OTHERS V. SGS CONSTRUCTION & DEV. P. LTD., AND OTHERS (CDJ 2015 SC 486)
4. ALCHEMIST LIMITED AND ANOTHER V. STATE BANK OF SIKKIM AND OTHERS(CDJ 2007 SC 312);
- 5.UNION OF INDIA V. ADANI EXPORTS LIMITED (CDJ 2001 SC 1060); and

- 6.THE SHIPPING CORPORATION OF INDIA LTD., V.

BHARATH EARTH MOVERS LTD., AND ANOTHER (CDJ 2009 MHC 5031).

5. Submissions of the Respondents:-

The learned counsel appearing for the respondents/plaintiffs would submit that a concurrent finding of fact does not require any interference, as settled by this Court in series of decisions. The Surveyor Report has been taken into consideration by the Courts below being a piece of evidence. The plea of not filing the policy has not been taken earlier. Ex.A2 has not been signed by the first plaintiff. Ex.A7 does give jurisdiction to the trial Court. Submissions are sought to be supported by the following decisions.

1. PATEL ROADWAYS LTD., V. INDO MATSUSHITA APPLIANCES COMPANY LTD., (2000 (3) CTC 129);
2. ALLIANCE ASSURANCE COMPANY LIMITED V. UNION OF INDIA (AIR (1959) CALCUTTA 563 (VOL.46 C.152) (1));
3. BOND FOOD PRODUCTS PRIVATE LTD. AND THE ORIENTAL INSURANCE COMPANY LTD., (NOW CHANGED AND HITHERTO KNOWN AS THE ORIENTAL FIRE AND GENERAL INSURANCE COMPANY) V. PLANTERS AIRWAYS LIMITED (2004 (2) Law Weekly 663);
4. M/s RAVICHANDRAN TRANSPORTS, METTUR DAM, SALEM DISTRICT V. UNITED INDIA INSURANCE COMPANY LIMITED, DIVISIONAL OFFICER, (2002 (2) Law Weekly 770); AND
5. HARNATHRAI BINJRAJ V. CHURAMONI SHAH AND OTHERS (AIR 1934 CALCUTTA 175).

6. The first plaintiff is having its office at Mumbai. The second plaintiff is having its office at New Delhi. The consignment was transported between Himachal Pradesh and Secunderabad. Ex.A2 is not in dispute. The plaintiffs themselves speak about the existence of Ex.A2. After accepting Ex.A2, the policy has been taken. There is no averment that the policy has been taken at Chennai. Even the cause of action does not refer to the policy. The suit has been laid based upon Ex.A7 alone for the purpose of creating jurisdiction to the trial Court.

7. There is a fundamental difference between a cause of action and a document which deals with situs. Almost the entire occurrence has taken place outside the jurisdiction of this Court. Ex.A7 is subsequent to the alleged damage caused by the appellant/ defendant. A cause of action involves a material fact and thus, not any other fact. This Court, in MYTRAH ENERGY (INDIA) LIMITED V. GAMESA RENEWABLE PRIVATE LIMITED AND OTHERS

((2016) 4 LAW WEEKLY 86), has held as follows:

"8. Cause of Action:-

8.1. Before going in to the merits of the case, let us deal with the word "cause of action". The word "cause of action" has not been defined either under the Civil Procedure Code or under the Letters Patent. A cause of action has to be seen in the context of territorial jurisdiction available to the Court while entertaining a suit. It is the basis for the maintainability of a suit. It is the foundation of a suit, around which, the other provisions of the Civil Procedure Code revolve. While dealing with the cause of action, the Courts are concerned with the material facts required to be established in support of the right of the party to get a judgment. Such a material fact may be a fact in issue or a relevant fact. It has got no relationship with the case of a defendant. Such a fact shall not be equated with the evidence, which is necessary to prove a fact. A cause of action would include not only the right of the plaintiff, but also, the facts disclosing the infringement of its right. Therefore, the facts which are in support of its right and leading to infringement would form cause of action. Thus, what is important is that a fact will have to be material to the suit and the relief. Therefore, all facts, which are not material, would not constitute cause of action. There has to be an existence or infraction coupled with the right.

8.2. It is nothing but bundle of facts, which, when added with the law applicable provide the adequate right to the plaintiff's relief. In a suit relates to a breach of contract, the making of a contract and its breach would be the proper cause of action. Therefore, the place in which it occurred would be very relevant. Thus, the fact which is remotely connected to another which forms a cause of action cannot be one, just for the purpose of giving jurisdiction to a Court. Similarly, termination of a contract would certainly create a part of cause of action and therefore, the place in which it takes place gives jurisdiction to the Court. The legal

position aforesaid has been reiterated by the Division Bench of this Court in D.LAKSHMINARAYANA CHETTIAR AND ANOTHER ((1954) AIR Madras 594) in the following manner.

"41. There is no definition of "cause of action" in the Civil Procedure Code; but it is the fundamental pivot around which many of the provisions of the Civil Procedure Code revolve. It is the basis for the maintainability of the suit. It is the foundation for the adding up of parties, and it is an important ingredient in working out the principle of res judicata and that embodied in Order 2, Rule 2, Civil P.C. It has, therefore, necessarily become the subject of judicial scrutiny. Brett's J. defined it in -- 'Cooke v. Gill', (1373) 8 CP 107 (Z1) a leading case on the subject, to mean "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse." In -- 'Bead V. Brown', (1889) 22 QBD 128 (Z2), Lord Esher adopted the same definition, but expressed it in more felicitous language as follows:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Lord Watson in 'Chandkour v. Partab Singh', 16 Cal 08 (PC) (Z3) approved of the definition, but added a rider that

"the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff."

Subsequent decisions have followed the lead given by the earlier decisions.

48. In 'Gangi v. Ramaswami', 12 Mad LJ 103 (Z.7), Bhashyam Aiyangar J. struck a different note which is more in consonance with the later view regarding the meaning of

the word "cause of action." There a first suit was brought by the plaintiffs for the recovery of some land which was in the possession of the defendant on the ground that they succeeded to the father's estate, and that the alienation made by the mother during her lifetime was bad. They obtained a decree therein, but subsequently they filed another suit to recover possession against another defendant in respect of another item which they claimed as part of the same inheritance. It was contended that the later suit was barred by Section 43, Civil P. C. In dealing with that contention, Bhashyam Aiyangar J. made the following pertinent remarks at p.105 :

"The former suit was instituted against the de-fondant therein, by reason of his wrongfully withholding from the plaintiffs, on the death of their mother, possession of the land in Schedule B, and the present suit is brought on the defendants herein similarly withholding the land comprised in schedule A, the defendants in both the cases having respectively come into possession of the lands comprised in schedules B and A under separate alienations made by the mother in favour of each on a different occasion. It will thus be seen that though the ground of title is one and the same in both the suits and the cause of action in respect of both arose at the same time, viz., the date of the mother's death, yet the persons who wrongfully withheld the land in schedule A are quite different and there was no manner of combination or privity between them in respect of the lands which they severally withheld.

"The words 'cause of action' have fill along been held to mean 'every fact which it is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse' and have no relation whatever to the defence, but refer entirely to the grounds set forth in the plaint as the cause of action: (1873) 6 CP 107 (Z1), -- 'Shankar

Baksh v. Daya Shankar', 15 Ind App 66 (PC) (Z8), 16 Cal 98 (PC) (33).

"Though the ground of title on both suits are founded in one and the same and the causes of action also arose at the same time, yet the properties comprised in the two suits are different and the persons who severally withheld the same are also different. A reference to [Section 50](#), C. P. C. clearly shows that in every suit the plaintiff must show that the defendant is or claims to be interested in the subject matter and that he is liable to be called upon to answer the plaintiff's demand. This clearly shows that the cause of action is not an abstraction, something independent of the defendant, but that the plaintiff should disclose a cause of action against the defendant."

We respectfully agree with the aforesaid observations of the learned Judge, and this passage clearly brings out the distinction between the ground of title and the cause of action. A cause of action is something more than a ground of title. It not only includes the facts necessary to support the plaintiff's title, but also the facts which entitled him to relief against a particular defendant.

49. An interesting and instructive discussion, if we may say so, on the question raised is found in -- 'Bahadur Singh v. Sultan Husain Khan', AIR 1922 Oudh 171 (Z9). Syed Wazir Hasan A. J. C. held that,

"A revisioner has a separate cause of action in respect of each alienation made by the widow, and a suit to recover property comprised in one alienation is not barred by Order 2, Rule 2, C. P. C. by reason of a proper suit for the recovery of property comprised in another alienation."

The learned Judge traced the history of the meaning of the words "cause of action" and then made some weighty observations to the following effect at p. 175 ;

"Though the cause of action has no relation to the defence which may be set up by the defendant, yet it would be an error

to suppose that it has no relation to the defendant and his acts preceding the suit. A 'cause of action' is not a theoretical term entirely picked up from text books and placed on a plaint. In cases of torts, the right of the plaintiff and its infringement by the defendant will generally make up the 'cause of action'. In --'Williams v. Morland', (1824) 107 ER 620 (210), cited by Bowen L. J. in -- 'Bransden v. Humphrey', (1885) 14 QBD 141 (211), Little-dale J. said 'Generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case.' Order 7, Rule 5 (Act 5 of 1908) is based on the same principle. It is as follows : 'The plaint shall show that the defendant is or claims to be interested in the subject matter and that he is liable to be called upon to answer the plaintiff's demand. 'Now in the present case the defendants' connection with the land in suit is wholly different from his connection with the lands covered by the other sales both in point of time and the subject matter of the alienations. Their act of infringement of the plaintiffs' right qua the property in suit is 'different from their act or acts of infringement of the plaintiffs' right qua one or the other of the properties previously in suit.'

It would be seen from the aforesaid decisions that though under Act 3 of 1859 this court was inclined to take the view that the unity of title was synonymous with cause of action, the later decisions clearly laid down that cause of action was something more than unity of title, and that it would include not only the right of the plaintiff but also the facts disclosing the infringement of that right.

8.3. A similar view has been taken by the Apex Court in A.B.C. LAMINART PVT. LTD., AND ANOTHER V. A.P. AGENCIES, SALEM (1989 AIR 1239), in which, the following passage would be apposite.

"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. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a fight 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. It is not limited to the actual infringement of the fight sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a fight to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

8. Section 20 of the Code of Civil Procedure speaks about the institution of the suit. A suit, accordingly, has to be instituted where the defendant resides and a cause of action arises. Admittedly, in the case on hand, the appellant is residing outside the territorial jurisdiction of this Court. Ex.A7 being a document executed between the plaintiffs can never be said to give the cause of action on its own. It merely gives a right to the second plaintiff to step into the shoes of the first one. Therefore, it is not a material fact as even dehors Ex.A7, the first plaintiff can maintain the suit. To put it differently, even assuming Ex.A7 is not true and genuine, the first plaintiff is entitled to the decree on merit. Hence, merely based upon Ex.A7, a jurisdiction cannot be conferred to a Court. Even by consent of the parties to a transaction, a jurisdiction to a Court cannot be conferred is a settled principle of law. A subsequent agreement entered into between the plaintiffs on a cause of action which has arisen already between one of them and the defendant, cannot clothe a Court with jurisdiction. Therefore, this Court has to necessarily hold that the suit, as laid, placing reliance upon Ex.A7, i.e., letter of subrogation and the special power of attorney in the teeth of Ex.A2-consignment note, is not maintainable. The decision relied upon by the learned counsel appearing for the respondent in PATEL ROADWAYS LTD., V. INDO MATSUSHITA APPLIANCES COMPANY LTD., (2000 (3) CTC 129) has to be seen in its own context. In the said case, the consignment was to be

sent from Faridabad to Madras. There is no finding about the policy having been taken outside the territorial jurisdiction of the Court. There was also no document in such a case as Ex.A2, which gives the specific jurisdiction between the parties as agreed upon. The averments in the plaint therein was to the effect that the goods were delivered at Chennai. The contention of the defendant therein that the Courts at Bombay alone have jurisdiction was also rejected based upon Section 20 of the Code of Civil Procedure. Thus, the said judgment does not apply to the case on hand.

9. In ALLIANCE ASSURANCE COMPANY LIMITED V. UNION OF INDIA (AIR (1959) CALCUTTA 563 (VOL.46 C.152)(1)) also the insurance policy was issued within the territorial jurisdiction of the Court.

10. The matter can be looked into different perspective as well. There is a difference between subrogation and assignment. A subrogation is nothing but an act of substitution of one person with another. Therefore, the right of the one would get transferred to the other. Thus, a subrogation is not a species of assignment. If that is a case, it will not give a cause of action being a transfer of right. Such a fact will not give jurisdiction to a Court notwithstanding the other material facts which would disclose the cause of action before some other Court. Thus, the decisions relied upon by the learned counsel appearing for the respondents in BOND FOOD PRODUCTS PRIVATE LTD. AND THE ORIENTAL INSURANCE COMPANY LTD., (NOW CHANGED AND HITHERTO KNOWN AS THE ORIENTAL FIRE AND GENERAL INSURANCE COMPANY) V. PLANTERS AIRWAYS LIMITED (2004 (2) Law Weekly 663) does not help his case. The following paragraph would in fact help the case of the appellant.

"14.10. In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the assured, vide Oberai Forwarding Agency v. New India Assurance Co. Ltd., (2000) 2 SCC 407.

14.11. The distinction between the subrogation and assignment, as explained

in the standard textbook Insurance Law by MacGillivray & Parkington (7th Edition), is referred to as follows:

"1131. Difference between subrogation and assignment:- Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name..."

11. The facts involved in the decision rendered by this Court in *M/s RAVICHANDRAN TRANSPORTS, METTUR DAM, SALEM DISTRICT V. UNITED INDIA INSURANCE COMPANY LIMITED, DIVISIONAL OFFICER*, (2002 (2) Law Weekly 770) are different. As per the averments in the plaint therein, the insurer of the plaintiff had its

registered office at Madras. The finding was to the effect that there was an assignment.

12. Thus, on a consideration of the above, this Court is of the view that the suit as filed based upon Ex.A7 is not maintainable. Even according to the plaintiffs, Ex.A7 is only a letter of subrogation and special power of attorney and not an assignment. The Courts below have also not given a finding that Ex.A1 is an assignment. Thus, being a document of subrogation and a power of attorney, there cannot be any cause of action arisen from it. Accordingly, the substantial question of law Nos.3 and 5 are answered in the affirmative in favour of the appellant/defendant and against the respondents/plaintiffs.

13. In view of the above, the other substantial questions of law 1, 2 and 4 have not been gone into. Accordingly, the decrees and the judgments of the Courts below are set aside and the second appeal stands allowed. However, liberty is given to the plaintiffs to file a suit before the jurisdictional Court and they may rely upon Section 14 of the Limitation Act for the aforesaid purpose. No costs.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

raa

To

1. II Additional Judge, City Civil Court, Chennai.

2. II Assistant Judge, City Civil Court, Chennai.

+1cc to Mr.S. Satish, Advocate Sr. 16699

+1cc to M/S. Nagaswaran and Narichania, Advocate SR. 16707

Pe-Delivery Common Judgment
in S.A.No822 of 2015

KS (CO)
VR(05/04/2017)