

**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA**

PRADERSH

CCCA.No.10 of 2016

Between:

M/s. Apollo Health and Lifestyle Limited and another

.....Appellant

And:

Mr. Anupam Saraogi of Indian Inhabitant,
presently at No.14, Plot 35 Boshrum,
Okunsanya Street Lekki Phasa Lagos, Nigeria,
rep. through his constituted attorney,
Mr.Satish Rajgarhia,

..... Respondent

JUDGMENT PRONOUNCED ON : ON 01-03-2017

HON'BLE SRI JUSTICE : V. RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE : J. UMA DEVI

1. Whether Reporters of local
Newspapers may be allowed to see
the Judgments? : Yes
2. Whether the copies of judgment
may be marked to Law Reporters/
Journals? : Yes
3. Whether their Ladyship/Lordship
wish to see the fair copy of the
judgment? : Yes

* THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE MS. JUSTICE J. UMA DEVI

+ CITY CIVIL COURT APPEAL No.10 of 2016

% 01-03-2017

M/s. Apollo Health and Lifestyle Limited and another

.... Revision Petitioner

AND

Mr. Anupam Saraogi of Indian Inhabitant,
presently at No.14, Plot 35 Boshrum,
Okunsanya Street Lekki Phasa Lagos, Nigeria,
rep. through his constituted attorney,
Mr.Satish Rajgarhia,

.... Respondent

! Counsel for petitioner: Sri Anand Kumar Kapoor,

^ Counsel for respondent: Smt. Manjari S. Ganu

< Gist:

> Head Note:

? Cases referred:

- 1) (1991) 4 SCC 270
- 2) (2013) 12 SCC 64
- 3) (2003) 7 SCC 410
- 4) (1943) A.C. 32
- 5) (1996) A.C. 669
- 6) (1760) 2 Burr. 1005
- 7) AIR 1962 SC 779
- 8) 1993 Supp (4) SCC 136
- 9) 2002 (1) SCC 367

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

Reserved on : 08-02-2017 & Delivered on : 01-03-2017

Coram :

The Honourable Mr. Justice V.RAMASUBRAMANIAN
and
The Honourable Ms. Justice J.UMA DEVI

City Civil Court Appeal No.10 of 2016

1. M/s. Apollo Health and Lifestyle Limited,
a Company registered under the Companies Act, 1956
having its registered office at 19, Bishop Gardens,
R.A.Puram, Chennai-600 028,
rep. by its Director Dr. Pratap C Reddy.

2. M/s. Apollo Health and Lifestyle Limited,
Corporate Office at Life Science Center,
Apollo Hospital Complex, Jubilee Hills,
Hyderabad-500 033
rep. by its CEO Mr. Ratan Jalan.

... Appellants

Vs.

Mr. Anupam Saraogi of Indian Inhabitant,
presently at No.14, Plot 35 Boshrum,
Okunsanya Street Lekki Phasa Lagos, Nigeria,
rep. through his constituted attorney,
Mr.Satish Rajgarhia, residing at Phoenix Tower A
1804, 18th Floor, Senapathi Bapat Marg Lower
Parel, West Mumbai – 400 013.

... Respondent

For Appellants : Sri Anand Kumar Kapoor

For Respondent : Ms. Manjari S Ganu

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE MS. JUSTICE J. UMA DEVI

CITY CIVIL COURT APPEAL No. 10 of 2016

JUDGMENT: *(per V.Ramasubramanian, J.)*

The defendants in a suit for recovery of money have come up with this appeal, challenging the judgment and decree of the trial Court.

2. We have heard Mr. Anand Kumar Kapoor, learned counsel for the appellants/defendants, and Ms. Manjari S Ganu, learned counsel for the respondent/plaintiff.

3. The respondent herein filed a suit in O.S.No.692 of 2007 on the file of the XIII Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad, against the appellants herein for recovery of a sum of Rs.44,60,170/-, together with interest at the rate of 18% p.a. from 10.11.2007 till realization, upon the principal amount of Rs.44,08,000/-.

4. In brief, the averments contained in the plaint were that with a view to establish health clinics/diagnostic centers at Aundh and Kothrud at Pune, with the technical know-how supplied by the appellants/defendants, the respondent/ plaintiff entered into two Memoranda of Understanding on 09.12.2004 with the appellants/defendants; that in terms of Clause 4 of the Memoranda of Understanding, the respondent/plaintiff paid a sum of Rs.20,00,000/- under each of the MOUs together with service tax to the tune of Rs.2,04,000/- each; that

under the Memoranda of Understanding, the appellants/defendants were liable to provide technical and operational specifications and also grant a licence to the respondent/plaintiff to establish the clinics under the brand name “the Apollo Clinics” using the trade marks, logos, and other designs of the appellants/defendants; that the appellants/ defendants failed and neglected to carry out their obligations under the two Memoranda of Understanding; that under the receipts issued on 09.12.2004, evidencing payment of Rs.22,04,000/- each, the amounts paid thereunder were interest free security deposits liable to be returned; that the respondent/plaintiff worked and identified sites to meet the specifications of space mentioned by the appellants/ defendants in their Site Selection Manual, but the appellants/ defendants denied approval for the identified properties arbitrarily; that since the appellants/defendants evinced a desire to set up clinics in some areas of Mumbai, the respondent/plaintiff also identified properties in Mumbai, but the appellants/defendants did not approve the same; that since the process of approval itself dragged on for a period of 19 months, the market conditions changed, making the project unviable; that since the project could not take off and the appellants/defendants did not provide the technical and operational specifications to set up the clinics and did not grant a licence either to establish and run the clinics or to use the technical know-how, etc., the consideration for the contract failed, making the respondent/plaintiff entitled to seek refund of the amount paid; that the repeated requests made by the brother-in-law of the

respondent/plaintiff with the representatives of the appellants/defendants for refund of the amount, did not yield the desired results; that in a meeting held on 06.11.2007, the Chief Executive Officer of the appellants/defendants, by name, Mr. Ratan Jalan, offered to refund a sum of Rs.20,00,000/- in full and final settlement, but the offer was not accepted by the respondent/plaintiff; that the respondent/plaintiff issued a legal notice, to which the solicitors of the appellants/defendants issued an interim reply; and that, therefore, the respondent/plaintiff was entitled to a decree as prayed for.

5. The second appellant herein filed a written statement contending *inter alia* that since no part of the cause of action arose in Hyderabad and also since the registered office of the appellants/defendants is not in Hyderabad, the City Civil Court, Hyderabad, had no jurisdiction to entertain the suit; that parties to the Memoranda of Understanding cannot confer jurisdiction upon a Court, which inherently lacked jurisdiction; that since the payments were made by one Mrs. Sapna Rajgarhia, her non-impleadment made the suit bad for non-joinder of parties; that the payments made under the two Memoranda of Understanding, is a franchise licence fee and, hence, non-refundable; that though the amounts indicated in the Memoranda of Understanding were to be paid by way of demand drafts, the respondent/plaintiff paid the same by way of cheques and, hence, the appellants/defendants were compelled to encash the cheques, after duly notifying the respondent/plaintiff by a letter, dated 11.12.2004; that the appellants/defendants executed a number of activities on the

request of and on behalf of the respondent/plaintiff incurring expenditure of resources; that as per Clause 4 of the Memoranda of Understanding, the amounts are non-refundable and the endorsements contained in the receipts dated 09.12.2004 have to be read in conjunction with the said Clause; that the respondent/plaintiff actually floated a Company, in which three persons including the sister of the respondent/plaintiff became shareholders; that the appellants/defendants submitted a due diligence report and recommended that the shareholders of the Company are professionally qualified to set up the Apollo Clinics at Pune; that as part of the execution of the Memoranda of Understanding, the representatives of the appellants/defendants visited the sites located by the respondent/ plaintiff and also made a lay out; that the appellants/ defendants cooperated with the respondent/plaintiff in all respects, but the respondent/plaintiff wanted to shift the territory from Pune to Mumbai, in view of the alleged differences between the shareholders; that thereafter, the respondent/plaintiff associated himself with one Mr. Manoj Yadav; that the appellants/defendants agreed even to the shifting of the territory to Mumbai and finalized five areas; that despite the above cooperation, the respondent/plaintiff could not gear up to the situation, but started dodging; that in response to the legal notice, the appellants/defendants sent a proper reply dated 05.12.2007; that the appellants/ defendants were always ready and willing to perform their part of the obligation, but the respondent/plaintiff was shying away from the responsibility; that the respondent/plaintiff did not adhere to

the requirements of the Memoranda of Understanding and failed to sign the licence agreements, despite reminders; that the respondent/plaintiff thus committed a breach of both the Memoranda of Understanding and, hence, he is not entitled to the refund of fees; that though the two Memoranda of Understanding were entered in the year 2004, the respondent/plaintiff was unable to comply with the covenants of the Memoranda of Understanding; that if the franchise agreement has been entered as scheduled, the appellants/defendants could have earned a revenue of Rs.20,00,000/- per month; that the appellants/defendants lost the said opportunity, due to the failure of the respondent/plaintiff; that the appellants/defendants did not offer to pay Rs.20,00,000/- in full and final settlement; that no interest can be claimed on the amount, and that, therefore, the suit was liable to be dismissed.

6. On the above pleadings, the trial Court unfortunately framed a single issue in a slip shod manner to the following effect:

“Whether the plaintiff is entitled for recovery of suit amount as prayed for?”

7. The power agent of the respondent/plaintiff examined himself as P.W.1 and marked Exs.A.1 to A.23. On behalf of the appellants/defendants, their legal advisor was examined as D.W.1. Exs.B.9 to B.14 were marked through D.W.1 by consent, and Exs.B.1 to B.8 were marked during his cross-examination.

8. Thereafter, the trial Court passed a judgment dated 09.04.2014 granting a decree as prayed for.

9. As against the said judgment, the appellants/ defendants came up with a regular appeal in C.C.C.A.No.105 of 2014. The said appeal was allowed, by a judgment dated 23.12.2014, on the short ground that despite several issues arising for consideration in the suit, the trial Court chose to frame only one issue for consideration, and that the same was not in consonance with the requirement of Order XIV of the Code of Civil Procedure. Therefore, this Court remanded the suit back to the trial Court for a fresh disposal. The relevant portion of the judgment of the Division Bench of this Court dated 23.12.2014 in C.C.C.A.No.105 of 2014 is extracted as follows:

“8. In the present case, the trial court has framed only one issue for consideration i.e., “whether the plaintiff is entitled for recovery of suit amount as prayed for”. This practice/procedure adopted by the learned judge was wrong and it was inadequate requirement of the provisions contained in Order 14 of the Code. We find the approach of learned judge was absolutely casual in dealing with the suit. It is apparent that the learned judge even did not refer to the material evidence on record, such as Exs.A-3 and A-4 and the relevant clauses thereof, in particular. When we noticed all this and expressed our view, in the course of hearing, the learned counsel for the parties agreed for an order that we propose to pass. Hence, we dispose of this appeal by the following order:-

a. The appeal is allowed. The impugned judgment and decree dated 09.04.2014 is set aside and the suit (O.S.No.692 of 2007) is restored to file and remanded to the trial Court. The trial Court shall decide the suit, from the stage of the arguments, afresh as expeditiously as possible, preferably on or before 30.06.2015.

b. It is needless to mention that the learned Judge shall frame proper issues and deal with the same on merits in accordance with law. Further, the learned Judge shall indicate all the issues that he proposes to frame and address, while delivering the judgment, to the learned counsel appearing for the parties even before

commencement of arguments so as to enable them to address their arguments on all issues. No order as to costs.”

10. Thereafter, the trial Court framed six issues for consideration, which are as follows:

“1. Whether the suit is maintainable for the recovery of money contrary to the terms of the Ex.A.3 and A.4? Whether the plaintiff discharged his obligations under Ex.A.3 and A.4, if not, whether entitled to relief as prayed for?

2. Whether the defendants rejected and not accrued the clinic/diagnostic centre through all the specifications was satisfied by the plaintiff?

3. Whether the defendants cooperated with the plaintiff to perform agreement territorial?

4. Whether this Court vested territorial jurisdiction to entertain the suit?

5. Whether the defendants are entitled to withhold the amount paid by the plaintiff in absence of the fulfilment of the Clause 1,2,3 of MOU?

6. To what relief?”

11. No additional evidence was let in by both parties, probably in view of the indication given by this Court in C.C.C.A.No.105 of 2014.

12. Thereafter, by a judgment dated 29.06.2015, the trial Court decreed the suit with costs, after answering all the issues arising for consideration, in favour of the respondent/ plaintiff and against the appellants/defendants. Hence, the present appeal.

13. At the outset, it should be pointed out that the trial Court has miserably failed to consider any of the rival contentions in the proper perspective, with reference to the pleadings, the evidence and the law.

There is not even a reference to any of the documents filed by the appellants/ defendants. A careful look at the judgment would show that both law as well as language have taken a beating in the judgment under appeal. For instance, Issue No.2, as framed by the trial Court after remand, does not make any sense in whatever manner we attempt to read the same. The same is the case with Issue No.3. The answer to Issue No.3 is found in two sentences in Paragraph-73. We do not wish to point out all the mistakes, as the same may not serve any purpose.

14. Considering the nature of the disposal that the trial Court has given to the suit, any appellate Court would be tempted to set it aside and remand the same for a fresh disposal. But, we do not wish to do the same for two reasons. The first is that there was already one order of remand, which has not served its purpose. The second reason is that as a Court of first appeal, exercising jurisdiction under Section 96(1) read with Order XLI Rules 24 and 33, this Court is entitled to deal with the actual issues and pronounce a judgment. Order XLI Rule 24 is extracted as follows:

“Where evidence on record sufficient, Appellate Court may determine case finally – Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.”

15. Assailing the judgment of the Trial Court, the learned counsel for the appellants/defendants contended,

(1) that the Court below had no territorial jurisdiction to entertain the suit, as no part of the cause of action arose within its jurisdiction and the law laid down by the Supreme Court in *Patel Roadways Limited v. Prasad Trading Company*¹ on the question of interpretation to the Explanation to Section 20 of the CPC has not been followed;

(2) that the plaintiff did not enter into the witness box and the evidence of P.W.1 who is the plaintiff's power agent had no evidentiary value in view of the law laid down by the Supreme Court in *S.Kesari Hanuman Goud v. Anjum Jehan*²;

(3) that the respondent/plaintiff cannot seek a decree contrary to the terms of the contract which makes the amount paid thereunder non-refundable;

(4) that a forfeiture clause contained in a contract cannot be sought to be annulled by a party to the contract, who, by his own conduct precluded the execution of the contract, as pointed out by the Supreme Court in *National Highways Authority of India v. Ganga Enterprises*³;

(5) that in any case, the Court cannot award any interest, in the absence of a clause for payment of interest in the contract and that therefore the suit was liable to be dismissed with costs.

¹ (1991) 4 SCC 270

² (2013) 12 SCC 64

³ (2003) 7 SCC 410

16. In response to the above, it is contended by the learned counsel for the respondent/plaintiff,

(1) that there was no concluded contract, inasmuch as the agreement to grant a licence, never fructified into a licence and hence the appellants/defendants were not entitled to retain the money;

(2) that it was P.W.1 who was none else than the brother-in-law of the plaintiff, who negotiated with the appellants and it was the wife of P.W.1 (sister of the plaintiff) who paid the amount under the two MoUs and hence his evidence cannot be treated as invalid;

(3) that the expression used in the Explanation to Section 20 of the Code is “principal office” and not “registered office” and hence it is open to the plaintiff to institute a suit where the defendants have a principal office;

(4) that in any case, the meeting of the Board of Directors of the appellants/Company in which D.W.1 was authorized to represent the Company was held only at Hyderabad and hence the appellants cannot go back on the clause contained in the MoU stipulating that the Courts in Hyderabad alone will have jurisdiction;

(5) that the appellants/defendants cannot retain the amounts paid under the MoU as the same would tantamount to unjust enrichment attracting the principles of Section 70 of the Indian Contract Act, 1872 and that therefore, the judgment of the Trial Court, though not a well drafted one, does not call for any interference and that the decree needs to be confirmed.

17. As we have pointed out earlier, the Trial Court has dealt with the matter in a very shabby manner. The manner in which the issues have been framed and the manner in which the issues were dealt with and the evidence analysed leaves much to be desired. But as pointed out above, it is permissible for the Appellate Court under Order XLI, Rule 24 CPC to finally determine the suit after resettling the issues if necessary, provided the evidence on record is sufficient to enable the High Court to pronounce judgment, notwithstanding that the Court below had proceeded upon some ground other than one on which the Appellate Court proceeds. Fortunately this is not a case where the Court below failed to frame or try any issue, requiring the invocation of Rule 25 of Order XLI, CPC. It is not the case of the appellants that the Trial Court failed to frame an issue or failed to try an issue or failed to determine any question of fact.

18. Therefore, in the light of the rival contentions, we are of the considered view that the following issues/points arise for determination in the present appeal:

(1) Whether the Court below had territorial jurisdiction to entertain the suit and what was the impact of clause (7) of the two MoUs which made the MoU subject to the exclusive jurisdiction of the Courts in the city of Hyderabad ?

(2) Whether the failure of the plaintiff to get into the witness box was fatal to his case, as P.W.1 had no knowledge about the circumstances in which the 2 MoUs were entered into ?

(3) Whether a suit for refund of money paid under a contract can be laid, completely contrary to the terms of the contract which prescribe the amounts to be non-refundable?

(4) Whether the two MoUs in question were concluded contracts and if not what were their legal status?

(5) Whether the respondent/plaintiff would be entitled to interest, in the absence of a specific clause in the agreement? and

(6) Whether the plaintiff is entitled to any relief at all?

ISSUE NO.1:

19. The 1st issue arising for our consideration relates to the jurisdiction. Both the Memoranda of Understanding dated 09-12-2004 were admittedly entered into at Mumbai as seen from para-2 of the plaint. Both the MoUs also contain an indication that they were executed at Mumbai. The address of the licensor, namely, the 1st appellant herein was indicated to be at Chennai, where the registered office of the appellants/Company is located. The address of the respondent/plaintiff, who was described as the licensee was indicated to be at Mumbai. But clause (7) of both the MoUs contain a stipulation to the following effect:

“This Memorandum of Understanding is subject to the exclusive jurisdiction of Courts in the city of Hyderabad, Andhra Pradesh”.

20. Therefore, it is contended on the basis of the prescription contained in the Explanation under Section 20 of the Code, that unless the whole or any part of the cause of action had arisen within the

jurisdiction of the Civil Courts in Hyderabad, the suit could not have been laid, even on the basis of clause (7) of the MoUs. In support of this contention, strong reliance is placed upon the decision of the Supreme Court in *Patel Roadways Limited*. It was pointed out in the said case that the Explanation to Section 20 is in two parts, the first of which would apply only to such a Corporation which has its sole or principal office at a particular place. In such an event, the Courts within whose jurisdiction the sole or principal office of the defendants is situate will also have jurisdiction, even if the defendants may not be actually carrying on business at that place, by virtue of the fiction created by the Explanation. But if a case falls within the latter part of the Explanation, it is not the Court within whose jurisdiction the principal office of the defendants is situate but the Court within whose jurisdiction it has a subordinate office which alone shall have jurisdiction in respect of any cause of action arising at any place where it has also a subordinate office.

21. We have carefully considered the above submissions of the appellants. Since the case on hand is one for recovery of money on the basis of a failed contract, it would not fall within the ambit of Sections 16, 17, 18 or 19 of the Code. It has to fall necessarily under Section 20. Section 20 contemplates 3 different contingencies. They are:

- (1) The place where the defendant actually and voluntarily resides or carries on business or personally works for gain,
- (2) The place where any of the defendants, where there are more than one, actually and voluntarily resides or carries on business

or personally works for gain, provided the leave of the Court is taken or the defendants who do not so reside or carry on business acquiesce in such institution, and

(3) The place where the cause of action, wholly or any part arises.

22. There can be no dispute about the fact that by consent, parties cannot confer jurisdiction upon a Court within whose territorial limits, no part of the cause of action arose. What the Explanation to Section 20 seeks to do, is to delineate the meaning of the expression “carry on business”.

23. The reliance placed upon *Patel Roadways Limited*, appears to be completely misplaced. It was a case where ‘A’ was carrying on business of carrier of goods with its principal office at Bombay and a branch office at Madras. ‘B’ entrusted goods to ‘A’ at Madras to be delivered at Delhi. The goods got damaged during transportation and ‘B’ filed a suit for damages in the City Civil court at Madras. ‘A’ contended that in view of the exclusion of jurisdiction of all Courts other than those in Bombay, under the contract between the parties, the Courts in Madras have no jurisdiction, though ‘A’ had a subordinate office in Madras. The Supreme Court held that the second part of the Explanation to Section 20 was disjunctive and, hence, when a Corporation has a principal office and a subordinate office and a part of the cause of action arose within the jurisdiction of the subordinate office, the Courts within whose jurisdiction the subordinate office was situate, would have jurisdiction and by

consent, the parties cannot confer jurisdiction upon the Courts in Bombay.

24. In the case on hand, both the MoUs, Exs.A.3 and A.4, were executed at Mumbai and the respondent/plaintiff was shown in both the MoUs to be a resident of Mumbai. But, the appellants/defendants were not indicated in both the MoUs, to be having any office in Mumbai. The appellant/defendant was described in both the MoUs as follows:

“M/s. Apollo Health and Lifestyle Limited, a Company incorporated under the Companies Act, 1956 and having its registered office at 19, Bishop Gardens, R.A. Puram, Chennai-28, represented by its Deputy General Manager, Mr. Majoh Dani, hereinafter referred to as “the licensor”.”

25. In other words, the MoUs by themselves did not indicate the appellants as a Corporation having either their principal office or a subordinate office at Mumbai. They only described themselves as having the registered office at Chennai, within whose jurisdiction also, no part of the cause of action arose. Therefore, the appellants cannot fall back upon the second part of the Explanation to Section 20 and the exposition of the law laid down in *Patel Roadways Limited*.

26. Clause (7) of both the MoUs making the MoUs subject to the exclusive jurisdiction of Courts in the city of Hyderabad, Andhra Pradesh, has to be viewed in the context of the complete lack of indication in both the MoUs about the location of either a principal office or a subordinate office at Mumbai for the respondent/plaintiff. In the absence of any indication in the MoUs that the appellants/

defendants had a subordinate office or a principal office at Mumbai, it is not open to the appellants/defendants to fall back upon the second part of the Explanation to Section 20.

27. A careful look at the written statement filed by the appellants/defendants would show that the appellants/defendants never even pleaded that they had a subordinate office at Mumbai, and that since the cause of action related to the subordinate office at Mumbai, the Courts in Mumbai alone had jurisdiction, by virtue of the later part of the Explanation under Section 20 of C.P.C. Paragraph-2 of the written statement where the issue of jurisdiction was raised, reads as follows:

“Before advertng to the facts of the case it is submitted that the present suit filed by the plaintiff is liable to be dismissed in limini for lack of jurisdiction to try this matter by this Hon’ble Court. The registered office of the defendants is not in Hyderabad. Admittedly, no part of cause of action arose within Hyderabad. Though the MoU confers jurisdiction to the courts at Hyderabad, as no part of cause of action arose in Hyderabad including signing of the MoU, the same cannot confer jurisdiction, which this Hon’ble Court inherently lacks.”

28. A defendant, who does not even plead the existence of a subordinate office in Mumbai especially in a case where the two MoUs which form the basis of the action also do not disclose the existence of a subordinate office at Mumbai, cannot be allowed to fall back upon the second part of the Explanation to Section 20 of C.P.C. On the basis of the other documents filed by the respondent/plaintiff in which an address for communication is indicated at Mumbai, it cannot be established that there was a subordinate office at Mumbai.

29. As a matter of fact, all cases that have come up before Court so far, are those where the defendants relied upon clauses in the contract relating to conferment of exclusive jurisdiction upon certain Courts. Wherever the defendants challenged the jurisdiction of any other Court on the basis of certain clauses contained in the contract conferring exclusive jurisdiction upon other Courts, the Courts tested the validity of the contentions on the touchstone of the theory of cause of action. In other words, **most of the cases that have come up before Courts are those where the plaintiffs ignore such clauses and go before other Courts and the defendants rely upon those clauses.**

30. But, *in the case on hand, the respondent/plaintiff, who is a resident of Mumbai and who could have easily filed a suit in Mumbai, did not want to get fooled by choosing a forum of his convenience.* The respondent/plaintiff as per the MoUs had only two options, namely, to file a suit at Chennai where the appellants/defendants have a registered office and which is what was indicated in the MoUs. In such an event, the respondent/plaintiff would have committed a breach of clause (7) of the MoU and would have also committed a breach of the later part of the Explanation to Section 20. Though it was not convenient for the respondent/plaintiff to sue the appellants/defendants in any place other than Mumbai, since the respondent/plaintiff was a resident of Mumbai, they chose to file the suit in Hyderabad to ensure that they are not non-suited on the basis of Clause (7) of the MoUs. Therefore, we would not permit the

appellants/defendants to jettison Clause (7) of the MoU especially when the MoUs do not contain any indication of the existence of a subordinate office in Mumbai. A party who was in a dominant position at the time of entering into the contract, cannot be permitted to ask the defendant to go on a merry-go-round.

31. It is true that in a few correspondence which are subsequent to the MoUs, an address at Mumbai is shown in the letter-heads of the appellants/defendants. But the Mumbai address shown in the letter-heads, Exs.A.6 and A.7, do not bear any indication whether it was a principal office or a branch office or a subordinate office. On the contrary, Exs.A.6 and A.7, contain the address of the corporate office of the appellants/defendants to be at Hyderabad. Since the corporate office of the appellants/defendants are located in Hyderabad, they appear to have included Clause (7) in both the MoUs. After having chosen a place to suit their convenience, it is not open to the appellants/defendants to go back and raise the present contention.

32. Apart from the indication contained in Exs.A.6 and A.7 that the appellants/defendants have their corporate office at Hyderabad, the Site Selection Manual handed over by the appellants/defendants to the respondent/plaintiff and marked as Ex.A.10 also contains the address of the appellants/defendants as “Jubilee Hills, Hyderabad”. In the second inner page of Ex.A.10, there is a disclaimer provided by the appellants/defendants. It reads as follows:

“The material contained in this Site Selection Manual is confidential and belongs to Apollo Health and Lifestyle Limited, Hyderabad”.

33. Therefore, it may be true that the appellants/defendants may have an address for communication in Mumbai as found in the letter-head. But, as seen from Ex.A.10 Site Manual Manual, the task of creating retail environments in franchising, is handled by Life Science Center whose corporate office is indicated to be at Hyderabad in Exs.A.6, A.7 and B.8. In other words, if clinics had been established at the places mentioned in the 2 MoUs, the task of running the clinics could have been done only with the technical assistance from Hyderabad office. This is the reason why the appellants/defendants incorporated Clause (7) of the MoU and hence they are estopped from setting up a defence of this nature. It may not be out of place to mention that at least Section 20 (b) of the Code recognizes the possibility of acquiescence to a limited extent. The appellants/defendants, who have their Life Science Center at Hyderabad, as reflected in Ex.A.10 and who have their corporate office in Hyderabad, cannot go back on Clause (7) of the MoU.

34. The learned counsel for the respondent/plaintiff relied upon Ex.B.14 which is the extract of a resolution passed at the Meeting of the Board of Directors of the appellant/defendant Company at Hyderabad, authorizing D.W.1 to prosecute the case on behalf of the appellant/defendant. But, this was pooh-poohed by the learned counsel for the appellants/defendants on the ground that what

happened subsequent to the institution of the suit cannot constitute a cause of action. In support of the said contention, the learned counsel for the appellants/defendants also relied upon a decision of the Supreme Court in *Mohannakumaran Nair* {2007 (14) SCC 426}, wherein it was pointed out by the Supreme Court that the material date for the purpose of invoking Section 20 of C.P.C. is the date of institution of the suit and not the subsequent change of residence.

35. There can be no quarrel with the proposition that what happened subsequent to the institution of a suit cannot constitute a cause of action for the suit and confer jurisdiction upon a Court. But, the purpose of the learned counsel for the respondent/plaintiff relying upon Ex.B.14 was not really to show that a cause of action arose at Hyderabad. Reliance was placed upon Ex.B.14 only for the purpose of showing that it was the location of the corporate office of the appellants/defendants at Hyderabad that led to Clause (7) of the MoU and it is not now open to the appellants/defendants to turn it to the disadvantage of the respondent/plaintiff. Hence, the first issue relating to jurisdiction, is answered against the appellants/defendants.

ISSUE NO.2:

36. The second issue that arises for consideration is as to whether the failure of the respondent/plaintiff to get into the witness box was fatal to his case.

37. Since both the MoUs were entered into by the respondent/plaintiff by himself, it is contended by the appellants/defendants that the power agent of the respondent/plaintiff was not competent to speak about the

terms and conditions of the MoU and that the failure of the respondent/plaintiff to get into the witness box was fatal to his case. Reliance is placed by the appellants/defendants in this regard on two decisions of the Supreme Court, one in *Janki Vashdeo Bhojwani* 2005 (2) SCC 217 and another in *S. Kesari Hanuman Goud* 2013 (12) SCC 64.

38. It is true that a power of attorney holder can appear only as a witness in his personal capacity and whatever knowledge he has about the case, he can state on oath, but he cannot appear as a witness on behalf of the party in the capacity of that party. He cannot depose for the principal in respect of a matter as regards which the principal alone had personal knowledge and in respect of which the principal was liable to be cross-examined.

39. But, in the case on hand, nothing actually turned on the MoUs, except the scope of the Clauses in the MoUs. Admittedly, the power of attorney of the respondent/plaintiff was none else than the sister's husband of the respondent/plaintiff. Everything else other than signing the two MoUs, had been done only by P.W.1 and his wife. This can be seen from the following:

- 1) Ex.A.5 letter dated 09.12.2004 was issued by the wife of P.W.1, who was none other than the sister of the respondent/plaintiff.
- 2) The payments under both the MoUs were made by way of two cheques only by the wife of P.W.1, who was the power of attorney holder of the respondent/plaintiff.

- 3) Ex.A.8 bank statement of the standard chartered bank from out of which the payment was made to the appellants/defendants, shows that the power of attorney holder examined as P.W.1 and his wife were the joint account holders, and it was they who paid the money.
- 4) Ex.A.9 is a statement of account of the wife of the power of attorney holder in HSBC Bank.
- 5) Ex.A.11 is a set of e-mails exchanged between the power of attorney holder (P.W.1) of the respondent/plaintiff and the officers of the appellants/defendants.
- 6) Similarly, Ex.A.12 series is a set of correspondence exchanged between multi-parties including the power of attorney holder.
- 7) Ex.A.13 is a reply sent by the officials of the appellants/defendants to the power of attorney holder of the respondent/plaintiff.

40. Therefore, it is clear from the evidence on record that the power of attorney holder of the respondent/plaintiff was privy to everything that transpired from the time when the two MoUs were entered into. Both the MoUs were witnessed by the sister of the respondent/plaintiff, who is also the wife of P.W.1. The payments, of which refund is now sought, were also made from out of the joint savings bank account of the power of attorney holder and his wife.

41. The evidence required in this case for the purpose of sustaining the claim, was within the knowledge of the power of attorney holder. If at all the plaintiff had examined himself, he could have merely

stated whatever transpired up to the time of execution of the MoUs. Since the execution of the MoUs and the payments made thereunder are not disputed by the appellants/defendants, there was nothing that was within the exclusive knowledge of the plaintiff which he alone was competent to speak and in respect of which he could have been cross-examined. The payments made by the power agent and his wife, the site selection process in which P.W.1 was involved, the negotiations that took place between P.W.1 and the officials of the appellants/defendants, and the demand made by P.W.1 for refund of money on the ground that the contract failed, were all within the knowledge of the power of attorney agent examined as P.W.1 and, hence, the non-examination of the respondent/plaintiff was not fatal to the case of the respondent/plaintiff. Hence, the second point is answered against the appellants/defendants and in favour of the respondent/plaintiff.

ISSUE NOS.3 & 4:

42. The third point arising for determination is as to whether a suit for refund of money paid under a contract can be laid completely contrary to the terms of the contract which prescribed the amounts to be non-refundable. The fourth issue is as to whether the two MoUs in question were concluded contracts and if not, what was their legal status.

43. Since both the issues 3 and 4 revolve around the terms of the contract and their enforceability, they may be conveniently dealt with

together. This is for the reason that the findings with regard to these issues may overlap.

44. A close look at the MoUs would show that what was agreed to between the parties under the MoUs was that the respondent/plaintiff would set up a clinic under the name ‘Apollo Clinic’ at two places in Pune as per the technical and operational specifications provided by the appellants/defendants and that the appellants/defendants would grant (1) a licence to the respondent/plaintiff to establish the clinic, (2) a right to use the technical know-how and provide training inputs for the purpose of rendering consultation, diagnostic and pharmacy services, and (3) a right to use the trade marks, logos, and other designs. In other words, the MoUs were a prelude to a Licence Agreement that was to be entered into, after the respondent/plaintiff established a clinic as per the specifications given by the appellants/defendants. This is why Clause (5) of the MoUs requires the respondent/plaintiff to enter into a Licence Agreement, after the grant of licence. It will be useful to extract Clauses (1) to (6) of the MoU for a better understanding of the nature of the MoUs. Hence, they are extracted as follows:

- “1. The Licensee agrees to set up a Clinic under the Name “The Apollo Clinic” in Kothrud – Pune as per the Technical and Operational Specifications provided by the Licensors and to run this clinic on a commercial basis.
2. The Licensor agrees to:
 - a) grant Licence to the Licensee to establish and run the “The Appollo Clinic” in Kothrud – Pune.
 - b) grant the Right to use the Technical know-how and provide training inputs for the purpose of rendering

- consulting, diagnostic and pharmacy services for running the said Clinic.
- c) grant the Right to use the Trade Marks, Logos and offer Designs of the Licensor in the Operations of the said Clinic.
3. The licensee agrees and confirms that the Licensor grants to the Licensee only a non exclusive, non transferable and limited right to use the name “The Appollo Clinic” in respect of the said Clinic of the Licensee and that the use of said Name is as per the terms and conditions, which may be stipulated by the Licensor from time to time.
4. In consideration of the above, the Licensee shall pay a sum of Rs.20 lakhs (rupees twenty lakhs only) and service tax @ 10.2%, i.e. Rs.2.04 lakhs (a total of rupees twenty two lakhs four thousand only) to the Licensor on or before 8th January 2005 through a demand draft, which is non refundable and shall not carry any interest.
5. The Licensee shall on the Licensor granting License, enter into the Licence Agreement with the Licensor providing for the standard terms and conditions of the Licence and agrees that the Licence will commence only on signing the Licence Agreement.
6. This Memorandum Of Understanding is valid for a period of 30 (thirty) days from the date hereof unless otherwise extended with the consent of the Parties expressed in writing.”

45. It is clear from the terms and conditions of the MoU that the same provided a platform for the parties to do certain things to enable them to enter into a Licence Agreement. If the MoUs were construed as agreements, what they contemplated was the execution of another agreement in the form of a Licence Agreement containing standard terms and conditions of licence. *In simple terms, the MoUs could be understood to be agreements to enter into agreements for licensing certain rights.*

46. The *contracts of this nature are actually called executory contracts in contra distinction to executed and concluded contracts.*

The *English law sometimes refers to them as executory consideration and executed consideration*. In *Von Hatzfeld-Wilden Burg Vs. Alexander (1912 (1) Ch. 284)*, such agreements were called *contracts to make a contract*.

47. Another way of describing such agreements is to call them as “*in-principle agreements*”. As indicated in *Western Broadcasting Services Vs. Seaga (2007 UKPC 19)*, parties may reach an agreement on essential matters of principle and leave important points unsettled, so that their agreement is incomplete. A passage from Cheshire Fifoot and Furmston’s Law of Contract (15th Edition) makes an interesting reading and, hence, it is extracted as follows:

“The accepted classification of consideration is into the two categories, *executory* and *executed*. The classification reflects the two different ways in which the plaintiff may buy the defendant’s promise. Consideration is called *executory* when the defendant’s promise is made in return for a counter-promise from the plaintiff, *executed* when it is made in return for the performance of an act. An agreement between seller and buyer for the sale of goods for further delivery on credit is an example of the former. At the time when the agreement is made, nothing has yet been done to fulfill the mutual promises of which the bargain is composed. The whole transaction remains *in futuro*. Of the latter, the best example is the offer of a reward for an act. If A offers £5 to anyone who shall return his lost dog, the return of the dog by B is at once the acceptance of the offer and the performance of the act constituting the required consideration. B has earned the reward by his services, and only the offeror’s promise remains outstanding.

48. To constitute a binding contract, there must be a concluded bargain. A concluded contract is one which settles everything that is necessary or essential to be settled. It follows therefore that *there is no concluded contract where further agreement is expressly required*. The MoUs on hand fall under these categories, since the

actual contract for licensing the right to establish and run a clinic under the name “Apollo Clinic”, and the right to use the technical know-how and provide training inputs, and the right to use the trade marks, logos and other designs, were to be the subject matter of a Licence Agreement to be entered into in future. Hence, the learned counsel for the respondent/plaintiff was right in contending that the MoUs by themselves were un-concluded contracts. Once it is clear that they are only un-concluded contracts, it would follow as a corollary that the right to retain the money paid thereunder would accrue, only if such a Licence Agreement had come into existence.

49. *The non-refundability of the money paid in terms of Clause (4) of the MoUs, has unfortunately been misunderstood by the appellants/defendants to be equivalent to a forfeiture clause. A forfeiture clause stands on a completely different footing from a clause stipulating payment of a non-refundable amount.* While forfeiture arises when there is a breach of the obligation, the non-refundability arises only when a contract comes into existence as stipulated in the MoUs. It is this fine distinction that has completely been lost sight of by the appellants/defendants. Hence the reliance placed by the learned counsel for the appellants on the decision of the Supreme court in *National Highways Authority of India vs. Ganga Enterprises* {(2003) 7 SCC 410} is completely misplaced, since the court was concerned in that case with the forfeiture of an earnest money deposit made by a person who participated in a tender and later withdrew his offer.

50. Despite the fact that the parties to this litigation attempted to take forward the reciprocal promises made under the MoUs, a clinic was never established by the respondent/plaintiff. Therefore, a Licence Agreement as contemplated under Clause (5) of the MoU never came into existence. The payment made under Clause (4) of the MoU was in consideration of the licensor, namely, the appellants/defendants agreeing to grant three things, namely, (a) a licence to establish and run a clinic, (2) the right to use the technical know-how and provide technical inputs, and (3) the right to use the trade marks, logos and other designs of the appellants/defendants. That consideration has actually failed and the Licence Agreement never came into existence. Once the consideration, on account of which a non-refundable payment was made, failed, the non-refundability goes. The moment a clinic was actually set up and a licence actually granted by the appellants/ defendants, the money paid under Clause (4) would have become non-refundable. Otherwise not.

51. To put it differently, the *MoUs did not contain a condition that in the event of a failure on the part of the respondent/plaintiff to set up a clinic as per the specifications provided by the appellants/ defendants, the payment made under Clause (4) will stand forfeited. In the absence of such a clause, the appellants/defendants cannot elevate Clause (4) of the MoU to the status of a forfeiture clause.* Therefore, the appellants/defendants are wrong in projecting as though a claim has been laid by the respondent/ plaintiff, contrary to the terms of the MoUs. The MoUs did not lead eventually to a

Licence Agreement and, hence, the claim for refund of the money paid under the MoUs cannot be stated to be contrary to the terms of the MoUs. The decision of the Supreme court in ***Rajasthan State Industrial Development and Investment Corpn vs. Diamond & Gem Development Corpn Ltd*** {(2013) 5 SCC 470} relied upon by the learned counsel for the appellants to the effect that a party cannot claim anything more than what is covered by the terms of the contract, has no application to the case on hand. This is for the simple reason that the MoUs in this case, were agreements to enter into contract in the form of License Agreements and the non-refundability of the amounts was directly dependent upon the coming into force of the License Agreements. Since no license agreements came into force, the non-refundability clause naturally lost its value and a claim for refund of the amount cannot be looked at as one contrary to the terms of the contract.

52. The learned counsel appearing for the respondent/plaintiff relied upon Section 70 of the Contract Act to contend that even on the theory of unjust enrichment, the appellants/defendants were liable to refund the money. However, this argument was countered by the learned counsel for the appellants/defendants, on the ground that this issue was never raised by the respondent/plaintiff in their pleadings, and that, therefore, the case cannot be projected on the basis of the theory of unjust enrichment. Reference was placed by the learned counsel for the appellants/defendants in this regard to the observations of the Supreme Court in ***Hansraj Gupta Vs. Union of India*** {(1973) 2

SCC 37} wherein the Supreme Court pointed out that for the applicability of Section 70 of the Contract Act, the plaintiff should at least set out in the pleadings, the conditions required for the same.

53. We have carefully considered the above submissions. In *Hansraj*, a claim to the benefit of Section 70 of the Contract Act was raised for the first time before the Supreme Court. But, in the case on hand, it is raised at the first appellate stage. In any case, the conditions necessary for the applicability of Section 70 have already been pleaded in the plaint. In Paragraph-14 of the plaint, it was clearly stated that since the consideration under the MoUs had failed, the defendants were not entitled to retain the payments made under the MoUs. Therefore, we are of the considered view that the plea of unjust enrichment can be raised by the respondent/plaintiff.

54. That takes us to the more important question as to whether the respondent/plaintiff is entitled to refund of the money paid under both the MoUs, on the principle of unjust enrichment.

55. In the previous paragraphs we have rejected the contention of the appellants/defendants that the suit claim was contrary to the terms of the contract which make the amounts paid thereunder as non-refundable. Once the contention regarding non-refundability, raised on the basis of clause (4) of the agreement, is rejected, then the question as to whether the amounts are liable to be refunded should be considered. Since the claim for refund is made on the principle of unjust enrichment, it may be necessary for us to look at what the theory of unjust enrichment actually means.

Theory of Unjust Enrichment

56. If we look at the origin of the principle of unjust enrichment, it could be found that this principle formed the theoretical basis of what was known in common law as “*restitution*”. Distinguishing restitutionary remedies from those traditionally available in contract or tort, Lord Wright said in **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.**,⁴ as follows:

“It is clear that any civilized system of Law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution”.

57. It appears that common law was not alone in providing restitutionary remedies. Equity independently developed some principles which are aimed at the same result of giving up to the claimant, benefits received. For driving home the point that “in equity, restitutionary principles have been influential in a number of ways”, Chitty on Contracts (30th Edition – Sweet & Maxwell) provides the following illustrations in paragraph-3 of Chapter 29:

“First in the constructive trust, whereby a defendant is deemed to be a trustee of property for the claimant by operation of law, so that the claimant as beneficiary is able to recover what is due to him. Secondly, the better developed rules of tracing in equity enable the claimant to recover property or its substitute from the defendant, despite being mixed with other property. Thirdly, there is the equitable remedy of an account of profits which involves the return of value to the claimant when the defendant has profited from the commission of an equitable wrong. Fourthly, the equitable doctrine of acquiescence has enabled relief to be given to a person who has expended

⁴ (1943) A.C. 32

money on the property of another. Fifthly, the equitable concept of unconscionability has proved important in the development of certain grounds of unjust enrichment, especially those relating to the exploitation of the claimant by the defendant.”

58. Chitty on Contracts also points out that in the United States different principles of common law and equity have been amalgamated into a single topic in the law called “Restitution”. English law has always been aware of the interrelation of law and equity in the field of restitution.

59. Historically “the theory of implied contract” provided the theoretical foundation for the principle of restitution, as seen from a series of decisions from *Sinclair v. Brougham*. But this was eventually rejected by the House of Lords in **Westdeutsche Landsbank Girozentrale v. Islington LBC**⁵

60. Thereafter, two alternative theories were floated, as providing the theoretical basis for the law of restitution. The first is unjust enrichment and the second is a composite theory, whereby restitutionary remedies are available either where the defendant has been unjustly enriched or where the defendant has profited from the commission of a relevant wrong or where the defendant has interfered with the claimant’s proprietary rights.

61. In *Lipkin Gorman v. Karpnale Ltd.*, the House of Lords pointed out that the concept of unjust enrichment lies at the heart of, and is the principle underlying the individual instances in which the law does give a right of recovery in restitution.

⁵ (1996) A.C. 669

62. In **Moses v. Macferlan**⁶, Lord *Mansfield* rationalized, way back in 1760, the action for money had and received, in the following passage, which is now well-known:

“This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money which, *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his minority, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was debarred from recovering...[T]he gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”

63. A variety of situations in which an action for money had and received could be maintained were listed by Lord *Mansfield* in the aforesaid decision. They are :-

- (1) Money paid by mistake;
- (2) Money paid on a consideration which failed;
- (3) Money got through imposition or extortion; and
- (4) An undue advantage taken of claimant's situation, contrary to the laws made for the protection of persons under those circumstances.

64. The case on hand falls under the second category, namely, “money paid on consideration, which failed”. Under the English Law which formed the foundation for the statutory prescription contained in Section 70 of the Indian Contract Act, 1872, a failure of consideration occurs where there has been a complete failure of the performance for which the payer had bargained. In *Fibrosa Spolka Akcyjna* (cited *supra*), it was pointed out that “***the failure of consideration is judged***

⁶ (1760) 2 Burr. 1005

from the payer's point of view and that when one is considering failure of consideration, it is not the promise which is referred to as the consideration, but the performance of the promise”.

65. If we apply the above test it will be clear that what the respondent/plaintiff bargained for under the two MoUs was to set up two clinics and to have a licence to run them and the right to use the properties of the appellants including their intellectual properties. The performance of the promise made by the appellants/defendants having failed, they have become liable to refund the money received for the bargain, whose performance failed.

66. In paragraph-56 of Chapter 29, Chitty on Contracts provides the following illustrations of total failure of consideration.

“Where money was paid to brokers to purchase goods in accordance with instructions, but the brokers did not make the contract authorized by their principals, it was held that the money could be recovered by the principals on the basis of a total failure of consideration. Similarly, bondholders who had subscribed money for a purpose which failed were entitled to recover their money from the bank which held the subscriptions. In another case sellers were bound to deliver at Antwerp a quantity of rye then in a ship en route to Antwerp, and the buyers paid the price against a delivery order directed to the sellers' against at Antwerp; but the Germans occupied the town and the cargo was sold by the sellers in Lisbon where the ship discharged. The House of Lords held that the consideration had wholly failed so that the buyers were entitled to recover the price.

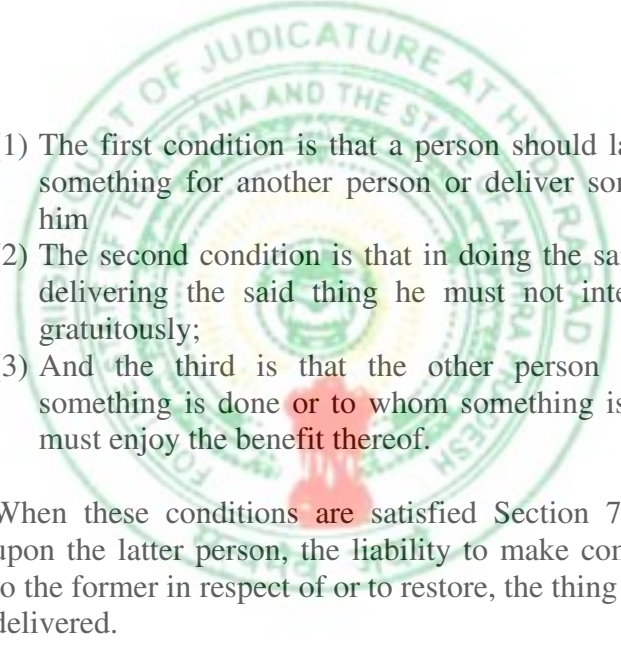
67. It is of relevance to point out that *the theory of unjust enrichment has been extended by Courts even in cases where some benefits had accrued to the payer and certain detriments suffered by the payee*. A passage under the caption “Artificiality of distinctions” in paragraph-57 of Chapter 29 of Chitty on Contracts may be usefully extracted to drive home the above point:

“The role of the contractual specification means that it is not true to say that there can be a total failure of consideration only where the payer received no benefit at all in return for the payment. The concept of total failure of consideration can ignore real benefits received by the payer if they are not the benefits bargained for and despite significant detrimental reliance by the payee. Thus, in cases of the sale of a car by a non-owner, the price paid has been recovered despite substantial intermediate enjoyment of the car by the purchaser even where the vendor is subsequently able to perfect his title and where the value of the car has depreciated considerably. This is because the benefit, for which the payer had bargained, namely title to the car, had not been obtained. Similarly, if the purchaser of an estate pays the purchase money and enters into possession of the land but, before the conveyance is executed, he is evicted in consequence of a defect in the vendor’s title, he can recover the purchase-money. Again, an installment paid under a film distributorship agreement was said to be recoverable despite the receipt of films because the relevant bargain was the opportunity to earn a share of gross receipts with the certainty of recouping the advance and no receipts had been earned.”

68. Therefore, it is clear that *even in cases where the payer had received some benefits or the payee had suffered some detriment, the payer is entitled to claim refund of money on the ground that the benefit that he had, was not what he bargained for.* In the case on hand it is not even the case of appellants/defendants that either the plaintiff gained any advantage or that they suffered any detriment. In the case on hand, the respondent/plaintiff paid more than Rs.40.00 lakhs for the purpose of setting up clinics and diagnostic centres at two places in Pune. While the consideration for the appellants/defendants was the sum of Rs.40.00 lakhs, the consideration for the respondent/plaintiff was –(1) the technical knowhow and specifications for setting up clinics and diagnostic centres; (2) the licences to run those clinics; and (3) the right to use the properties including intellectual properties of the appellants. This consideration

for the respondent/plaintiff totally failed and there is no pleading to the effect that the appellants either suffered detriment or that the respondent/plaintiff gained any advantage. Hence the case on hand is one where the plaintiff's claim is well founded on the principle of unjust enrichment, which has statutory recognition under Section 70 of the Indian Contract Act, 1872.

69. The principal conditions for the application of the provisions of Section 70 of the Indian Contract Act were indicated by the Supreme Court in **State of West Bengal v. B.K. Mondal and Sons**⁷, as follows:

- 
- (1) The first condition is that a person should lawfully do something for another person or deliver something to him
 - (2) The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously;
 - (3) And the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

When these conditions are satisfied Section 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered.

70. All the above principal conditions are satisfied in the case on hand. Therefore, the respondent/plaintiff is justified in seeking refund of the money paid to the appellants under both the MoUs, on the ground of total failure of consideration. Such a claim cannot be treated as contrary to the terms of the contract, as the MoUs constituted contracts to contract and the non-refundability clause would apply only if the contract to licence had come into existence. Hence the third

⁷ AIR 1962 SC 779

and fourth issues arising for consideration are also answered against the appellants/defendants.

ISSUE No.5.

71. The 5th issue arising for consideration is as to whether any interest is payable on the amount claimed by the respondent/plaintiff for refund, in the absence of a contract providing for payment of any interest.

72. The contention of the learned counsel for the appellants/defendants is that since the two MOUs entered into between the parties do not contain any stipulation for payment of interest, the Court cannot award interest contrary to the terms of the contract, even if the Court holds that the amount paid under the two MOUs is refundable. Heavy reliance is placed by the learned counsel for the appellants/defendants upon the observations of the Supreme Court in Paragraphs 123 to 125 of the decision of the Supreme Court in *Ferro Alloys Corporation Ltd., v. A.P. State Electricity Board and another*⁸.

These paragraphs are reproduced as follows:

“123. As regards the applicability of [Interest Act](#), we find that the Division Bench of Rajasthan High Court has erred in holding that it is applicable. [Section 4\(2\)](#) (g) of the [Interest Act](#) of 1978 reads as under:

"Notwithstanding the aforesaid and without prejudice to the generality of the provisions of sub-section (1), the Court shall in each of the following cases allow interest from the dates specified below to the date of institution of the proceedings at such rate as the Court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed namely:

⁸ 1993 Supp (4) SCC 136

(a)Where money or other property has been deposited as security for the performance of an obligation imposed by law or contract from the date of the deposit."

124. This section has no application to a case where on account of a contractual term or a statutory provision payment of interest is not permitted.

125. A careful reading of [Section 4\(2\)](#) of the Interest Act would disclose that it merely enlarges the category of cases mentioned in [Section 4\(1\)](#). Even otherwise, there is nothing to indicate that [section 4\(2\)](#) could override other statutory provisions or a contract between the parties. No doubt, [Section 4\(2\)](#) contains a non-obstante clause. But such a clause is restricted to the provisions of [Interest Act](#) and cannot extend to other laws or a contract between the parties.

73. On the basis of the above, it is contended by the learned counsel for the appellants/defendants that the provisions of the Interest Act, 1978 do not apply to the case on hand and that therefore, in the absence of any stipulation contained in MOUs, the Court cannot award interest, based on the provisions of the statute.

74. We have carefully considered the above submissions. In order to test the veracity of the above contention, it may be necessary to have a look at the provisions of the Interest Act, 1978. The Act contains six sections. The Act was intended to replace the old Interest Act of 1839. It is made clear by Section 5 of the Act that the provisions of Section 34 of the Code of Civil Procedure will not be affected by the Act.

75. Other than the preliminaries and the provision with regard to the repeal and saving, the Interest Act 1978 contains only two substantial provisions, which form the nerve centre of the Act. They are in Sections 3 and 4. Section 3 deals with the power of the Court to allow interest and Section 4 deals with the interest payable under certain

enactments. Section 3 actually deals with the power of the Court to allow interest in any proceedings for the recovery of any debt or damages. Sub-section (3) of Section 3 makes it clear that nothing contained in Section 3 would apply (1) either to a debt or damages upon which interest is payable as of right, by virtue of any agreement; (2) or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. In other words, if interest is payable upon any debt or damages as of right, by virtue of an agreement, then the Court can look only into such agreement and not into Section 3. Similarly, if any claim for payment of interest upon a debt or damages is expressly barred by an agreement such agreement will prevail over Section 3 of the Interest Act, 1978.

76. Therefore, it is clear from Section 3 (3) that if there is an agreement either providing for payment of interest or prohibiting the claim for payment of interest, upon any debt or damages, Section 3 cannot be invoked and the Court has to look only into the agreement. If the agreement is silent either about the payment of interest or about prohibition for claiming any interest, then Section 3 will certainly apply. In the case on hand, there is neither a prescription in the two MOUs allowing any interest nor any prescription barring a claim for interest. Keeping this aspect in mind, let us now go to Section 4 of the Act.

77. Sub-section (1) of Section 4 makes it clear that in all cases where interest is payable by virtue of any enactment or other rule of law or usage having the force of law, the provisions of Interest Act will not

apply. For instance, there are certain enactments, which provides for allowing interest at a particular rate. To those cases, Section 3 of the Interest Act 1978 will not apply and this is what is made clear by Section 4 (1). Section 4 (2) of the Interest Act 1978 reads as follows:

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section (1), the court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed, namely:—

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract, from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action

78. In *Ferro Alloys Corporation Ltd*, the question that arose before the Supreme Court was as to whether the Electricity Board was liable to pay interest on the security deposit made by the consumers, by virtue of the provisions of the Interest Act, 1978. While considering this question, the Supreme Court observed that Section 4 (2) could not override other statutory provisions or a contract between the parties. Therefore, the decision rendered by the Supreme Court in *Ferro Alloys Corporation Ltd*, in the context of a security deposit cannot be applied to the case on hand. As a matter of fact, the Supreme Court

pointed out in Para 127 of the said decision that security deposit cannot be equated to a fixed deposit. Security deposit is for ensuring prompt payment of the bills. It was held in Paragraph 127 of the decision in *Ferro Alloys Corporation Ltd* that such deposit was in the nature of a running current account. Hence, the said decision is not on the proposition as to whether Section 4 (2) can be invoked in cases of this nature or not.

79. In ***Central Bank of India v. Ravindra and others***⁹ a question as to the meaning to be assigned to the phrases "the principal sum adjudged" and "such principal sum" as occurring in Section 34 of the Code of Civil Procedure, 1908 was referred to a Constitution Bench for an authoritative pronouncement. Though the question referred to the Constitution Bench was with respect to the language employed in Section 34 of the Code, the Supreme Court nevertheless went into the question as to the different classes of interests and the rationale behind the award of interest and held in Paragraph 36 of the report as follows:

"Black's Law Dictionary (7th Edition) defines 'interest' inter alia as the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of the borrowed money. According to Stroud's Judicial Dictionary of Words and Phrases (5th edition) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money. In Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy, [1992] 1 SCC 508, the Constitution Bench opined that a person deprived of the use of money to which he is legitimately

⁹ 2002 (1) SCC 367

entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages.....this is the principles of [Section 34](#), Civil Procedure Code. [In Dr. Shamlal Narula v. C.I.T., Punjab](#), [1964] 7 SCR 668, this Court held that interest is paid for the deprivation of the use of the money. The essence of interest in the opinion of Lord Wright, in *Riches v. Westminster Bank Ltd.*, [1947] 1 All ER 469, 472, is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in *C.I.T., Punjab v. Dr. Shamlal Narula*, AIR (1963) Punjab 411 thus articulated the concept of interest - "the words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money..... In whenever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable." It is the appeal against this decision of Punjab High Court which was

dismissed by Supreme Court in Dr. Shamlal Manila's case (supra)."

80. From the portion extracted above, it will be clear that both in England and in India Courts have treated interest as a payment which becomes due as compensation for the deprivation. Though in the narrow sense, interest is understood to mean the amount which one has contracted to pay for use of borrowed money, it is actually seen as a compensation allowed by law or fixed by the parties or permitted by custom or usage for use of money belonging to another.

81. In *Central Bank of India v. Ravindra*, the Constitution Bench of the Supreme Court referred to its previous decision in *Secretary, Irrigation Department v. Government of Orissa* and pointed out that pre-suit interest is referable to substantive law and can be subdivided into two heads namely (1) where there is a stipulation for payment of interest at a fixed rate; and (2) where there is no such stipulation. If there is a stipulation for the rate of interest, the Court must allow that rate up to the date of the suit subject to certain exceptions namely; (1) any provision of law applicable to such transactions, having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; and (2) any interest, which is penal, subject to the discretion of the Court as found reasonable. The following portion in Para 38 of the decision of the Constitution Bench in *Central Bank of India* is of relevance:

"If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except on proof of

mercantile usage, statutory right to interest or an implied agreement”.

82. Keeping the above in mind, if we come back to Section 4 (2) of the Interest Act, 1978, it will be clear that the case on hand is covered by clause (a) of sub-section (2) of Section 4. The amounts paid by the respondent-plaintiff under the two MOUs, could at the most be termed as security for the performance of an obligation namely to set up two clinics and diagnostic centres. Therefore, the Court is entitled to award interest at such rate as the Court considers reasonable, unless the Court is satisfied that there are special reasons why interest should not be allowed.

83. In the case on hand, we do not find any special reasons as to why interest cannot be allowed. In paragraph 18 of the plaint, the respondent-plaintiff claimed interest at 18% p.a. from 10-11-2007, the date on which a period of 3 weeks expired after the service of a legal notice dated 15-10-2007. It must be remembered that the total amount of Rs.44,08,000/- was paid by the respondent-plaintiff on 09-12-2004. The respondent-plaintiff was not overcome by avarice to claim interest from the date of the MOU namely 09-12-2004. The respondent-plaintiff claimed interest only from the date of expiry of three weeks from the date of service of a legal demand, namely 10-11-2007.

84. In response to the claim made by the plaintiff in paragraphs 18 and 19 of the plaint for payment of interest, all that the appellants/defendants stated was a one line denial, in paragraph 13 of the written

statement. It was stated in paragraph 13 of the written statement as follows:

“.....The allegation that the defendants failed and neglected to refund to the plaintiff the said sum of Rs.44,08,000/- is stoutly denied for the reasons stated supra. For the above stated reasons, the plaintiff is not entitled to the suit amount with interest @ 18% p.a.....”

85. So long as there is no prohibition in the MOUs, barring any claim for interest, the provisions of Section 4 (2) (a) will not stand ousted. Therefore, on the principles underlying the payment of interest, as pointed out by the Constitution Bench in *Central Bank of India v. Ravindra*, the appellants are liable to pay interest. The Court below awarded interest as prayed for without any discussion and which is why we have taken the trouble of dealing with all the aspects. We find that the transaction between the parties was commercial in nature, and hence, the claim for interest at 18% p.a. and that too only from 10-11-2007 (by which time a period of 3 years had elapsed from the date of payment), is apparently reasonable. A look at the Paragraph 11 of the written statement filed by the appellants would show that they anticipated a revenue of Rs.20,00,000/- per month from the clinic/ diagnostic centre. If the venture is so profitable, the rate of interest should also be commensurate. Therefore, we are of the considered view that the respondent/plaintiff would be entitled to interest at 18% p.a. from 10-11-2007 up to the date of the decree.

Issue No.6:

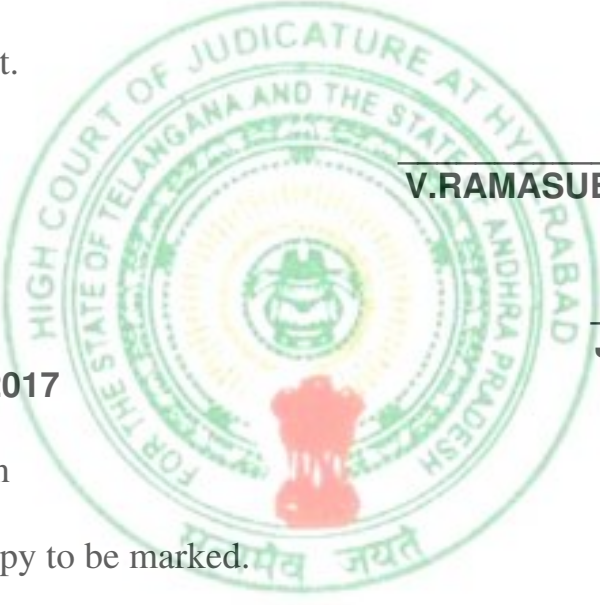
86. The 6th issue arising for consideration is as to whether the respondent-plaintiff is entitled to any relief?

87. As a result of our findings on Issue Nos.1 to 5, it follows as a corollary that the respondent-plaintiff is entitled to a decree as prayed for. The respondent-plaintiff is entitled to pre-lite and *pendente lite* interest at 18% p.a., in view of our finding that the nature of the transaction between the parties was commercial and that the return on investment was expected even by the appellants to be of a high order. But in so far as payment of interest from the date of the decree is concerned, we have no evidence on record to know what was the rate at which monies were lent or advanced by Nationalised Banks in relation to commercial transactions on the date of the suit, so as to invoke the proviso to Section 34 (1) of CPC. Therefore, the respondent-plaintiff will be entitled to interest, post decree, only at 6% p.a.

88. In the result, the appeal is partly allowed and the decree of the trial Court is modified to the following effect:

- a. there will be a decree in favour of the respondent-plaintiff and against the appellants/defendants directing the appellants to pay to the respondent-plaintiff a sum of Rs.44,60,170/- (comprising of the principal amount of Rs.44,08,000/- together with interest on the said amount calculated at 18% p.a. from 10-11-2007 up to the date of presentation of the plaint viz., 05-12-2007);

- b. there will also be a decree directing the appellants/defendants to pay to the respondent/plaintiff pendente lite interest at 18% p.a. from the date of presentation of suit viz., 5-12-2007 up to the date of the decree of the trial Court viz., 29-06-2015;
- c. there will be a decree directing the appellants/defendants to pay to the respondent/plaintiff future interest at 6% p.a. on the principal amount of Rs.44,08,000/-, from the date of the decree viz., 29-6-2015 up to the date of payment; and
- d. the appellants are liable to pay the costs of the plaintiff throughout.



V.RAMASUBRAMANIAN, J

J.UMA DEVI, J

Date: 01-03-2017

Cbs/Ak/Js/Ksn

Note: L.R. Copy to be marked.

B.O./Ksn