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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 24th January, 2017
Pronounced on: 16th February, 2017

\+ CS (COMM) 1576/2016 & IA No.564/2017 (under Order VII Rule 10 CPC)

AIA ENGINEERING LIMITED ..... Plaintiff

Through: Ms. Pratibha M. Singh, Sr. Adv. with Mr. Sanjeev K. Tiwari, Mr. Devang Nanawati, Mr. Rishit Bhatt, Mr. Prateek Sehrawat and Mr. Saurabh Anand, Advocates

versus

BHARAT HEAVY ELECTRICALS LTD (BHEL) & ORS ..... Defendants

Through: Mr. Ashim Vachher, Advocate for D-1
Mr. Puneet Taneja and Ms. Shaheen, Advocates for D-2
Mr. Sudhir Chandra, Sr. Adv. with Mr. Saikrishna Rajagopal, Ms. Julien George and Mr. Ranjeet Singh Sindhu, Advocates for D-3

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

1. The civil suit in the course of which application for return of the plaint under Rule 10 of Order VII of the Code of Civil Procedure, 1908 (CPC), it being IA No.564/2017, has been filed by the third

defendant (Shri Balaji Industrial Products Limited, 48, Industrial Area, Jhotawara, Jaipur-302012, Rajasthan), taking exception to it having been instituted before this court primarily on the ground of lack of territorial jurisdiction, raises commercial dispute claiming cause of action alleging violation and infringement by the third defendant of the plaintiff's patent, it being Indian Patent Number 248740 (IN'740) ("suit patent").

2. Before coming to the contentions urged by the third defendant seeking return of the plaint, it is essential to take note, *albeit* briefly, of certain background facts.

3. The plaintiff claims to be the owner of suit patent in respect of a method for the manufacture of an improved wear resistant metal part and its wear resistant metal part in addition to a method for improving wear characteristics of metallic parts used by various industries like cement, mining and thermal power, etc., the said wear resistant metal part meant to be used as wear part of grinding rollers or crushing elements or vertical liner. It is clear from the plaint that the plaintiff is a company incorporated having its principal office at Ahmedabad in the State of Gujarat, all its activities relevant for the present litigation being located there only.

4. It is revealed by the averments in the plaint itself that the third defendant is a company incorporated having its principal office in Jaipur in the State of Rajasthan, it also being engaged in manufacturing activity or business similar to that of the plaintiff, both apparently being competitors to each other in the market relevant for their respective products. The infringing products statedly offered to

be sold by the third defendant, due to which plaintiff felt aggrieved and brought the suit at hand, are described in the plaint as "grinding elements consisting of Grinding Rolls and matching Bull Ring Segments for Operation & Maintenance (O&M) spares" ("the impugned product" or "the defendant's product").

5. There is a history to litigation involving the claims of the plaintiff respecting the suit patent, to which passing references were made in the course of hearing on the application for return of the plaint at hand, it having been subject matter, *inter alia,* of civil suit No.3317/2001 instituted in Ahmedabad City Civil Court founded on the allegation of illegal access of technology by the third defendant leading to order dated 31.01.2002 which, upon being challenged by appeal from order dated 02.06.2002 was upheld by a learned Single Judge of the High Court of Gujarat at Ahmedabad, the special leave petition (civil) No.4327/2007 preferred there against having been dismissed by the Supreme Court on 16.03.2007. Interestingly, documents filed by the plaintiff included copy of the bid documents that had been submitted by the third defendant in response to a notice inviting tender issued by Maharashtra State Power General Corporation Limited in April, 2015 and offering to supply the impugned product.

6. Though the third defendant also craves to raise the issue of pleadings about the cause of action having arisen first in May, 2016 for the present suit to be factually incorrect, *inter alia,* referring in this context to the possession and use of the technology in question by it (the third defendant) from earlier times (it having been made subject-

matter of the suit instituted at Ahmedabad referred to above), for present discussion this court refrains from passing any comment either way on such plea.

7. The plaint describes the first defendant (Bharat Heavy Electricals Ltd. or "BHEL") as under:-

> *"That the defendant no.1, Bharat Heavy Electricals Ltd. (BHEL) having registered office at BHEL House, Siri Fort, New Delhi-110049, India and having multiple regional offices across India including a regional office at Ramachandrapuram, Hyderabad-502032, is an integrated power plant equipment manufacturer and one of the largest engineering and manufacturing company of its kind in India engaged in the design, engineering, manufacture, construction, testing, commission and servicing of a wide range of products and services for various sectors viz. power, transmission, industry, transportation (Railways), Renewable Energy, Oil & Gas, Water and Defense with over 180 products. It has a network of 17 manufacturing units, 2 repair units, 4 regional offices, 8 service centers, 8 overseas offices, 15 regional centers, 7 joint ventures, and infrastructure allowing it to execute more than 150 projects at sites across India and abroad. It is India's one of the largest power plants equipment manufacturer. The consumers of defendant no.1 include all major thermal power producers in India like State Electric Boards, NTPC Ltd. and independent private entities. Defendant no.1 also participates in after-market requirements for Operations and Maintenance (O&M) of these thermal power plants. As part of O&M business, it participates in supply of grinding elements (wear parts for coal pulverizors) to thermal power plants."*

8. It must, however, be noted that it is admitted case of the plaintiff that the notice inviting tender, which led to the cause of action, was floated not by the afore-mentioned principal office of the first defendant but by its regional office located at

Ramachandrapuram, Hyderabad-502032. The pleadings and the documents filed therewith indicating that the said tender notice bearing No.K6C1P17797 dated 01.06.2016 [BHEL NIT No.278281] for Rate Contract for Grinding Elements for XRP 623 to HP 1203 Bowl Mill for 8000 hours guarantee – BHEL Spec BA 35026 ("BHEL - Tender") was for supply of the grinding rolls of grinding wear life of 8000 hours and matching bull ring segments for Raymond type bowl mills (XRP-623 to HP-1203), the supplies to be made for "BHEL Hyderabad stores", the end use also being intended for manufacturing units in State of Telangana.

9. The second defendant (National Thermal Power Corporation Limited or "NTPC") is described in the plaint as under:-

> *"That the defendant no.2, NTPC Limited, having registered office at NTPC Bhawan, SCOPE Complex, Institutional Area, Lodhi Road, New Delhi-110003, and having multiple regional offices across India including at Vindhyachal Super Thermal Power Station, PO Vindhyanagar – 486885, Distt. Singrauli, Madhya Pradesh, as well as at Feroz Gandhi Unchahar Thermal Power Project, PO Unchahar, Distt. Raebareli-229406, Uttar Pradesh, is India's largest energy conglomerate with roots planted way back in 1975 to accelerate power development in India. Since then it has established itself as the dominant power major with presence in the entire value chain of the power generation business with generation capacity of more than 45,000 MW. The Vindhyachal Super Thermal Power Station, located at Vindhyachal, Madhya Pradesh, is one of the coal-fired power stations of the defendant no.2. It is the largest power station in India with an installed capacity of 4760 M@. Further, the Feroz Gandhi Unchahar Thermal Power Project, located at Unchahar, Uttar Pradesh, is*

also one of the coal-fired power stations of the defendant no.2."

10. The plaintiff justifies impleadment of the second defendant in the suit referring primarily to the following facts:-

> *"29. That defendant no.2 (NTPC) had floated two tenders through its regional office located at Vindhyachal & Unchahar respectively. The Vindhyachal Super Thermal Power Station located at Vindhyachal, MP had floated a tender under NIT No.060/MM/PUR/100106777 dated 08.05.2015 (hereinafter referred to as the NTPC-Vindhyachal-Tender) for procurement of high performance grinding rolls and bull ring segments for XRP 803 coal mills St-1. The Feroz Gandhi Unchahar Thermal Power Project located at Unchahar, UP had also floated a tender bearing no.40049443 dated 16.12.2015 under Bid Document No.100122161 for procurement of wear parts i.e. grinding rolls and bull ring segments for XRP 883 type pulverisers (hereinafter referred to as the NTPC-Unchahar-Tender). The plaintiff reasonably believes that the defendant no.3 has been awarded the NTPC-Vindhyachal-Tender and has supplied the infringing product to the regional office of defendant no.2 thereby infringing the suit patent of the plaintiff. Copies of said two tenders of defendant no.2 are filed along with the list of documents."*

11. It is clear from a bare reading of the averments, as is also borne out from the document filed therewith that the aforementioned tenders of second defendant ("NTPC – Tenders") which are the subject matter of the cause of action claimed by the plaintiff were not floated by the principal office of the second defendant at New Delhi but by its regional offices located at Vindhyachal and Unchahar respectively, the procurement of grinding rollers thereby intended to be used for manufacturing facilities in that region.

12. It is the claim of the plaintiff that in May, 2016 it had obtained a sample of the defendants' product and got it tested and analyzed by an independent expert laboratory in Baroda, the test results dated 09.05.2016 revealing that the same contained alumina, zirconia and titanium oxide it thereby falling within the invention covered by the plaintiff's patent IN'740. It refers to another similar testing of yet another sample of the product of the third defendant obtained from a scrap metal merchant in November, 2016, the results issued on 19.11.2016 giving similar results, as further confirmed by an expert in the field of metallurgy.

13. In the suit, the plaintiff alleges that the award of contract for supply of the impugned product against the tender documents of the third defendant in its favour by the second defendant pursuant to the NTPC-Vindhyachal-Tender infringes its rights under the suit patent. It avers that in the bidding process, in the wake of BHEL-Tender, the third defendant has been declared as the lowest bidder ("L1") and there is apprehension that the contract for supply of the impugned product would be granted in its favour since the first defendant has chosen not to give any response to the legal notices sent on behalf of the plaintiff, beginning with notice dated 25.10.2016 calling it upon to *"cease and desist"* from procuring such infringing material from the third defendant. It alleges that instead of sending a reply to such legal notice, the first defendant approached and handed over a copy of the said notice to the third defendant who, in turn, issued a legal notice to the plaintiff on 28.10.2016 calling it upon to withdraw the legal notice served on the first defendant.

14. The plaint sets out the cause of action (in para 40) thus:-

"40. In light of the above-mentioned facts, it is submitted that the cause of action first arose in May, 2016, when the Plaintiff through its credible source found out that the defendant no.3 is manufacturing, selling or offering for sale the infringing products. The cause of action further arose on May 9, 2016 when the plaintiff got the infringing product tested by Metallurgy and Materials Engineering Division of M.S. University, Baroda which clearly established the infringement by defendant no.3. The cause of action further arose on June 1, 2016, when the defendant no.1 floated a Tender bearing No.K6C1P17797. The cause of action further arose on October 25, 2016, November 12, 2016 and November 17, 2016 when plaintiff issued notices to defendant no.1 and continues as no action has been taken pursuant thereto. The cause of action further arose on November 19, 2016 when the plaintiff got the infringing product tested by Metallurgy and Matrials Engineering Divison of M.S. University, Baroda which established infringement by defendant no.3. Cause of actions also arose on all such dates when defendant nos.1 and 2 decided to accept the bid of defendant no.3 in respect of infringing product. The cause of action is continuing and subsisting as defendant no.3 is likely to offer for sale, sell, manufacture, use the infringing products. Further, the cause of action is continuing and subsisting qua defendant nos. 1 and 2 herein have/are likely to award the tender/future tender to defendant no.3 thereby procuring/likely to procure, using/likely to use the infringing products supplied by defendant no.3."

15. The plaintiff invokes the jurisdiction of this court on the basis of following pleadings:-

"42. That this Hon'ble Court has the jurisdiction to try and entertain the present suit under Section 20 of the Code of Civil Procedure, 1908.

i. *It is submitted that as the cause of action has arisen in New Delhi as and the said defendants also carry out their day to day business/commercial operations from New Delhi.*

ii. *It is submitted that acceptance of bid of defendant no.3 by defendant nos.1 and 2 in respect of infringing products establishes that defendant no.3 is amenable to the jurisdiction of this Hon'ble Court."*

43. *That there is a credible and imminent threat that the defendants will use, offer for sale, manufacture or otherwise deal with the infringing products within the jurisdiction of this Hon'ble court and this threat gives rise to a substantial and integral part of the cause of action within the jurisdiction of this Hon'ble Court."*

16. On the basis of above noted averments the plaintiff prays for the following reliefs against the three defendants:-

"(a) A decree of permanent injunction restraining the defendants, their defendants, their directors, employees, officers, servants, agents, licenses, franchisees, distributors and all other acting for and on their behalf from using, manufacturing, selling, distributing, advertising, exporting, offering for sale, using, procuring and dealing, any other manner directly or indirectly, in grinding rollers and wear resistant metallic part/pad/roller, ceramic insert thereof or any similar product that infringe the subject matter of the plaintiff's suit patent IN'740;

(b) A decree for rendition of accounts of profits in respect of use, manufacture, sale, export, import or any other infringing activity in relation to products that infringes the subject matter of the plaintiff's patent IN'740 and a decree for the amount so found and

ascertained by this Hon'ble Court may be passed in favour of the plaintiff and against the defendants;

(c) A decree for delivery up of all the stock of infringing products, that infringe the subject matter of the plaintiff's patent IN'740 as available with the defendants to an authorized representative of the plaintiff;

(d) A decree for damages in favour of the plaintiff and against the defendants as stated hereinabove;

(e) A decree for order for cost in the present proceedings in favour of the plaintiff and;

(f) Such other reliefs that this Hon'ble Court deems fit and proper in the facts and circumstances of the present case."

17. By order dated 01.12.2016 summons in the suit and notice on the applications filed therewith were issued to the defendants, returnable on 24.01.2017. By the said order, upon consideration of the prayer made in the application seeking interim relief under Order 39 Rules 1 and 2 CPC (IA No.14874/2016), an *ex-parte* ad interim injunction was issued restraining the first defendant from finalization of the bid process – that is to say not to award any contract – pursuant to its tender notice (BHEL-Tender), till the next date of hearing.

18. While all the defendants have since been served and put in appearance, the third defendant by its application (IA No.564/2017) has taken exception to the territorial jurisdiction of this court being invoked against the above noted factual matrix. The other defendants, *i.e,* BHEL and NTPC, support the third defendant in this objection, the latter (NTPC) orally submitting that its tender process having been

completed, the contract having been granted in favour of the third defendant and even supplies received thereunder it was unfair and improper on the part of the plaintiff to club the issues arising out of the two separate tender processes issued by two different entities in one suit, in absence of any averments showing nexus between the first defendant on the one hand and the second defendant on the other.

19. Referring in the above context to the provision contained in Rule 3 (b) of Order I CPC, the learned senior counsel for the plaintiff sought to justify clubbing of the cause of action claimed on the basis of two different tender processes of two separate entities under one umbrella by describing the third defendant as the common factor its impugned product being at the bottom of the entire controversy. The issue concerning patent, in her submission, would be a question of facts and law and, therefore deservedly addressed at one place. In the opinion of this court, the objection of misjoinder need not be one the consideration of which should govern the decision on the question of territorial jurisdiction.

20. The application seeking return of the plaint under Order VII Rule 10 CPC sets out the prime grounds for such prayer as under:-

> *"(a) That the plaintiff operates in Ahmedabad, Gujarat, while the answering defendant operates in Jaipur, Rajasthan. Also the tenders in the question in the present suit were floated by the branch offices of defendant no.1& 2 in Hyderabad, A.P. and Vindhyachal, MP and Unchahar, UP respectively (as stated in paragraphs 24 and 29 of the Plaint). Thus, admittedly, as per the averments contained in the pleadings of the plaint itself, none of the parties related to the cause of action claimed*

in the instant suit, reside in or carry on business or personally works for gain within the jurisdiction of this Hon'ble Court;

(b) Also admittedly the cause of action wholly or even a part of it has not arisen within the jurisdiction of this Hon'ble Court.

(c) In fact as per the plaintiff's own claims as captured in paragraph 42 of the plaint, jurisdiction of this Hon'ble Court is being solely claimed on account of the fact that defendant no.1 and 2 have their registered offices within Delhi. However, these offices have absolutely no relation to the cause of action claimed in the instant suit. In fact the tenders of defendant no.1 and 2 itself specifies the jurisdiction in case of any dispute to be the following courts – Sangareddy/Hyderabad Courts, Singrauli District MP and District Court, Raebarelli, UP respectively. Thus, in light of the explanation to Section 20 of the CPC, 1908, the suit can be filed either before the aforementioned courts or the District Courts of Rajasthan.

(d) Most importantly since defendant no.1 and defendant no.2 are neither necessary nor proper parties for deciding the lis in the present suit and the claim of infringement has been solely attributed to the answering defendant by the plaintiff, it is apparent that the other defendants have been included merely for stalling the tendering process and to extend jurisdiction of this Hon'ble Court, which it otherwise does not possess in the instant facts and circumstances."

21. The plaintiff joins issue by arguing in the reply to application thus:-

"i. Principal/registered office of defendant nos.1 and 2 is in Delhi.

ii. Principal office of defendant no.1 is essentially involved in all/any tender floated by all its branch office(s) and issuance of tender by a branch/regional office is not an activity solely attributable to such branch office. Defendant no.1 has various branch offices executing work/assignment across all parts of the country. For the purposes of such execution/completion of work/assignment, such branch offices may time and again issue various tenders. It is submitted that registered/principal office of defendant nos.1 and 2 have major role in all/any tender floated by all its branch office(s) and issuance of tender by a branch/regional office is not an activity solely attributable only to such branch office.

iii. The tender document of defendant no.1 in issue enlists various terms, conditions and requirements of the tender. As evident from the record, every bidder was required to sign the "Integrity Pact" with the principal/head office of defendant no.1. Said Integrity Pact was/is one of the essential document to be executed by every bidder as part of the tender of defendant no.1. Said Integrity Pact prescribes jurisdiction of the Courts at New Delhi. Thus, by vitue of Integrity Pact every bidder under the relevant tender of defendant no.1 agreed to submit itself to the exclusive jurisdiction of the courts at New Delhi.

iv. Execution of Integrity Pact between every bidder and the principal/registered office of defendant no.1 itself *clearly establishes that the involvement of registered office of defendant no.1 itself clearly establishes that the involvement of registered office of defendant no.1 in the tender process. In fact, the Integrity Pact clearly mandates that non-execution of the Integrity Pact is a disqualification from the bidding process itself. Further, guidelines have been issued by the registered/principal office of defendant no.1 under the said Integrity Pact for suspension of business dealing with supplier/contractors. Therefore, in the humble submissions of the plaintiff it is incorrect to allege that no cause of action has arisen in relation to the tender of defendant no.1 at New Delhi.*

v. Defendant no.3 has admittedly participated in the tender in issue of defendant no.1 and in doing so, has accepted all the terms, conditions and requirements of the tender. Defendant no.3 cannot deny the execution of the said Integrity Pact with the registered office of defendant no.1. Thus, it is submitted that defendant no.3, has itself agreed to be amenable to the jurisdiction of this Hon'ble Court as well as relation to offer/supply/use of the accused product under the said tender.

vi. That the said Integrity Pact of the defendant no.1 clearly states that if a bidder/contractor acts in any manner which puts its reliability or credibility in question the registered office of defendant no.1 is entitled to disqualify such bidder/contractor from the tender process or take action as per the said guidelines.

vii. The plaintiff, vide its letter dated November 12, 2016, addressed to the principal/registered office of defendant no.1, at Delhi, presented its grievance regarding infringing activities of the defendant no.3 and had requested the registered/principal office of defendant *no.1 to take cognizance of the illegal activities of defendant no.3 and intervene in the matter. However, principal office of defendant no.1 did not take any action even though they have ample authority to do so under the terms and conditions of the said tender.*

viii. That similarly the Integrity Pact of defendant no.2 confers jurisdiction to the courts at New Delhi. Moreover, the tender documents of defendant no.2 on record particularly the General Purchase Conditions "e" tendering, clearly confers exclusive jurisdiction to the courts at New Delhi. It is submitted that registered/principal office of defendant nos.1 and 2 are, therefore, integrally involved in their respective tender processes of any of their regional/branch office.

ix. Defendant no.3 by participating in the tender in issue has offered for sale the accused products to defendant no.1. Further, defendant no.3 has admitted supply of the accused product to defendant no.2 in accordance with the tender in issue. Thus, act of offering for sale and selling/providing the accused products by defendant no.3 as well as use of said products by defendant no.1 under the said tenders give rise to the jurisdiction of this Hon'ble Court in the present matter."

22. During the course of arguments it was fairly conceded that the documents pertaining to the BHEL- Tender include the stipulation (see page 283 of Volume II of plaintiff's documents) that *"any dispute in operation of the rate contract shall be subjected to the exclusive jurisdiction of courts at Sangareddy / Hyderabad, Telangana State, India.* It is also not disputed that there are similar stipulations as to the jurisdiction of the courts in the event of dispute arising out of NTPC –

Tenders to pertain to *Singrauli District, MP and District, Raebarelli, UP* respectively.

23. The plaintiff argues that it was inherent part of the process of bidding that the parties participating in the process were not in breach of the intellectual property rights of the competitors and that, towards this end, they were obliged to submit, along with other tender documents, a declaration *"that no third party has raised any patent claim against the bidder, which has gone against or is still unresolved, with respect to the product up to the date of the agreement"* this being connected to an indemnity clause. (see page 280 of the Volume II of the plaintiff's documents).

24. As noticed above, however, reference is made by the plaintiff to the document in the nature of "Integrity Pact" to be signed and submitted by each bidder, which the plaintiff points out was intended to "form part of the contract" (see page 289 of Volume II of the Plaintiff's document). A copy of the document in the nature of "Integrity Pact" has been submitted (see pages 319 to 325 of Volume II of plaintiff's documents) and its bare perusal shows that it is a "Pact" between the principal office of the first defendant at New Delhi and the bidder, vesting in the former discretion to "disqualify" from tender process, and exclusion from future contracts, such bidder as is found to be in breach of its terms. The plaintiff relies upon clause 10.1 of this "Integrity Pact" which stated that the said agreement ("Integrity Pact") *"is subject to Indian Laws and jurisdiction shall be registered office of the Principal, i.e. New Delhi"* (page 325).

25. The defendants in their riposte, however, pointed out that the prime purpose and objective of the insistence upon execution of "Integrity Pact", as revealed by its various clauses, is *"to prevent corruption",* to treat all bidders with *"equity and reason",* to maintain confidentiality of the process and exclude possibility of any undue advantages or illegal assistance, cartelization, *etc.*

26. The defendants referring to the decision of a division bench of this court in *State Trading Corporation of India Ltd. vs. Government of Peoples Republic of Bangladesh, 1997 (40) DRJ (DB),* argued that the "initial assumption of jurisdiction" by the court "to pass *interlocutory* orders and grant interim reliefs" would not enure further upon issues of law concerning territorial jurisdiction in the case at hand being raised and, thus, instead of allowing the proceedings to be protracted before a court whose jurisdiction is not properly invoked, the court must now form a clear opinion in such regard. *Per contra,* the plaintiff relies on the same ruling to submit that the determination of jurisdiction of the court in the present state of facts and circumstances is a mixed question of fact and law which, consequently, must be deferred for adjudication for later.

27. Before proceeding further, it is necessary to note the following observations in (para 39 of) the judgment in *State Trading Corporation of India Ltd.* (supra):-

> *"39. To sum up, our conclusions are as under:*
>
> *x x x*

(iv) A court seized of a suit and a prayer for the grant of ad interim relief may be faced with a doubt or challenge as to the availability of jurisdiction to try the suit in a variety of circumstances. The court has to act as under :-

(a) In the case of inherent lack of jurisdiction apparent on the face of the record, court cannot exercise jurisdiction over the suit so as to pass any interlocutory order or grant interim relief;

(b) If it appears from a bare reading of the plaint that the court does not have jurisdiction to try the suit, the plaint itself may be returned for presentation to a proper court under Order 7 Rule 10 CPC;

(c) If the suit appears to be barred by any law, the plaint may be rejected under Order 7 Rule 11 CPC;

(d) It may be a disputed question of fact or law or both- whether court has jurisdiction over the suit or not. Such a. question if it be a pure question of law it can be decided on hearing the parties on a preliminary issue. Such a challenge to the jurisdiction of the court to entertain the suit being laid by the defendant as a pure question of law, it is incumbent upon the Judge to determine that question as a preliminary issue before making absolute the rule issued earlier;

(e) If the determination of jurisdiction of the Court is a question of fact or mixed question of fact and law requiring evidence to be adduced before recording a finding, the determination of the question may in appropriate cases be liable to be postponed till after the determination of all or several other issues if the evidence to be adduced by the parties may be common on the issue of jurisdiction and such other issues;

(v) Every Court has inherent power to decide the question of its own jurisdiction. Characteristic attribute of a judicial act and decision is that it binds whether it be right or wrong unless set aside by a competent forum in appropriate proceedings.

(vi) The Court having assumed initially the jurisdiction over the suit, pending decision on its jurisdictional competence it has power to make interlocutory orders and grant interim relief by way of injunction or otherwise lest the suit itself should be frustrated by the time the court arrives at a positive finding on the question of its jurisdiction.

(vii) A High Court is a Court of plenary jurisdiction having inherent power to pass such orders as would meet the ends of justice. It can draw upon analogy of what is specifically provided elsewhere and can devise suitable form of process to achieve the ends of justice consistently with the principles of justice, equity and good conscience, the only rider being while doing so it should not offend any provision of law. In appropriate cases its precept/writ can run even beyond the territory of its jurisdiction."

(emphasis supplied)

28. Having regard to the averments in the plaint and the contents of the documents filed therewith, this court does not find the question of territorial jurisdiction as raised by the defendants to be one also involving questions of fact. Since it is a pure question of law, the issue raised in the application seeking return of the plaint deserves to be considered at this very stage of the process.

29. As regards the argument of "plenary" powers of the High Court, all that need be said is that the litigation at hand arises out of a commercial dispute brought before this court in terms of its original

jurisdiction under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and, consequently, the issue of jurisdiction will have to be considered and answered primarily in light of the provisions contained in the Code of Civil Procedure, 1908 (CPC). To borrow the expression from decision in State Trading Corporation of India Ltd. (supra), the court *"should not offend any provision of law"*.

30. Though, during the course of arguments, at one stage, reference was also made to the doctrine of "forum non convenience" it was fairly conceded to be well settled that this principle does not apply to civil suits governed by CPC. *[Horlicks Limited vs. Henz India Private Limited, 164 (2009) DLT 539 (DB)].*

31. The case at hand is essentially one founded on the plea of infringement of patent. Unlike certain other laws governing intellectual property rights – for example, Trade Marks Act, 1958 and Copy Rights Act, 1957 – the Patent Act, 1970 does not contain any special provision governing the issue of jurisdiction of courts. Thus, it is fairly conceded by the learned counsel on all sides that the issue of jurisdiction in the case at hand would have to be addressed in light of prescription in Section 20 CPC (the preceding provisions being inapplicable), which reads thus:-

> ***"20. Other suits to be instituted where defendants reside or cause of action arises.***
>
> *Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-*

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation -A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

32. It is well settled that the expression "Corporation" as appearing in Section 20 CPC is meant not only for a statutory corporation but also respecting a company registered under the Indian Companies Act. Thus, all parties to the suit at hand are corporations for purposes of Section 20 CPC. *[Hakam Singh vs. Gammon (India) Ltd., (1971) 1 SCC 286.]*

33. The defendants rely on *Patel Roadways Limited Bombay vs. Prasad Trading Company (1991) 4 SCC 270,* to contend that it is impermissible for this suit to be instituted in this court merely on account of the fact that first and second defendants have their registered offices within the local territorial jurisdiction. Reliance is also placed on another decision of the Supreme Court reported as *South East Asia Shipping Company Limited vs. Nav Bharat*

Enterprises Pvt. Ltd., (1996) 3 SCR 405 and decisions of the division benches of this Court reported as *Gupta Sanitary Stores vs. Union of India & Anr., AIR 1985 Delhi 122 and Sector Twenty One Owners Welfare Association vs. Air Force Naval Housing Board, 65 (1997) DLT 81* besides one of a learned single judge of this Court in *Sri Ganesh Research Institute vs. Union of India & Ors., 115 (2004) DLT 410.*

34. *Per contra,* the plaintiffs rely on view taken by another single bench of this Court in *Gulf DTC FZ LLC vs. Dishtv India Limited & Ors., CS(OS) 3355/2015, decided on 30.08.2016.*

35. Having heard arguments on both sides, this Court is of the view that reference to the decision of the learned single judge of this Court in *Gulf DTC FZ LLC (supra)* is misplaced. The ruling on the issue of jurisdiction which had been raised in that matter turned on the fact that the first defendant had its registered office and was carrying on business within Delhi, the control of all its operations being from the head office.

36. The case of *Patel Roadways Limited Bombay* (supra) is a decision of a bench of three Hon'ble Judges of the Supreme Court wherein Section 20 CPC fell for consideration and interpretation. After referring to the bare provision of law (as extracted earlier), having noted that there was no contention urged that the cause of action wholly or in part had arisen in Bombay, the suit having been instituted in the State of Tamil Nadu, the carrier against whom damages were claimed having its godown in Delhi where they had

been damaged in fire, on the subject of jurisdiction, the Court observed thus:-

> *"12. We would also like to add that the interpretation sought to be placed by the appellant on the provision in question renders the explanation totally redundant. If the intention of the legislature was, as is said on their behalf, that a suit against a corporation could be instituted either at the place of its sole or principal office (whether or not the corporation carries on business at that place) or at any other place where the cause of action arises, the provisions of clauses (a), (b) and (c) together with the first .part of the explanation would have completely achieved the purpose. Indeed the effect would have been wider. The suit could have been instituted at the place of the principal office because of the situation of such office (whether or not any actual business was carried on there). Alternatively, a suit could have been instituted at the place where the cause of action arose under clause (c) (irrespective of whether the corporation had a subordinate office in such place or not). This was, Therefore, not the purpose of the explanation. The <u>explanation is really an explanation to clause (a).</u> <u>It is in the nature of a clarification on the scope of clause (a) viz. as to where the corporation can be said to carry on business.</u> This, it is clarified, will be the place where the principal office is situated (whether or not any business actually is carried on there) or the place where a business is carried on giving rise to a cause of action (even though the principal office of the corporation is not located there) so long as there is a subordinate office of the corporation situated at such place. <u>The linking together of the place where the cause of action arises with the place where a subordinate office is located clearly shows that the intention of the legislature was that, in the case of a corporation, for the purposes of clause (a), the location of the subordinate office, within the local limits of which a cause of action arises, is to be the relevant place</u>*

<u>for the filing of a suit and not the principal place of business.</u> If the intention was that the location of the sole or principal office as well as the location of the subordinate office (within the limits of which a cause of action arises) are to be deemed to be places where the corporation is deemed to be carrying on business, the disjunctive "or" will not be there. Instead, the second part of the explanation would have read "and in respect of any cause of action arising at any place where it has a subordinate office, also at such place".

13. As far as we can see the interpretation which we have placed on this section does not create any practical or undue difficulties or disadvantage either to the plaintiff or a defendant corporation. It is true that, <u>normally, under clauses (a) to (c), the plaintiff has a choice of forum and cannot be compelled to go to the place of residence or business of the corporation and can file a suit at a place where the cause of action arises.</u> If a corporation desires to be protected from being dragged into litigation at some place merely because a cause of action arises there it can save itself from such a situation by an exclusion clause as has been done in the present case. The <u>clear intendment of the Explanation,</u> however, <u>is that, where the corporation has a subordinate office in the place where the cause of action arises, it cannot be heard to say that it cannot be sued there because it does not carry on business at that place.</u> It would be a great hardship if, in spite of the corporation having a subordinate office at the place where the cause of action arises (with which in all probability the plaintiff has had dealings), such plaintiff is to be compelled to travel to the place where the corporation has its principal place. That place should be convenient to the plaintiff; and since the corporation has an office at such place, it will also be under no disadvantage. Thus the Explanation provides an alternative locus for the corporation's place of business, not an additional one".

(emphasis supplied)

37. In *South East Asia Shipping Company Limited* (supra) the Supreme Court held that an act of defendant is essential to constitute cause of action. The case had been instituted in Delhi against facts wherein the contractual obligation had to be performed at Bombay, the execution of Bank guarantee thereunder executed at Delhi being found not sufficient to confer jurisdiction on Delhi Court. The court did not accept the submissions of plaintiff about jurisdiction of court having been invoked only on account of fact of execution of Bank guarantee and observed thus:-

> *"….. It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if transverse, 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 right to claim relief against the defendant. <u>It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise</u>……"*
>
> (emphasis supplied)

38. A division bench of this Court in the matter of *Sector Twenty One Owners Welfare Association* (supra), arising out of writ jurisdiction, took the view that a trivial or insignificant part of the cause of action at a particular place would not be enough to confer jurisdiction on Court located there.

39. It is on the analysis of such precedents as quoted above that the learned single judge rendering decision in *Sri Ganesh Research Institute* (supra) held thus:-

> "*An analysis of the various pronouncements of the Hon'ble Supreme Court reveals that even though the express terms of Section 20 of the CPC permit the filing of a suit against a Corporation at its principal office, pre-eminence has been accorded to the place where the cause of action had substantially arisen, from amongst those places where it has incidentally or partially arisen………*"

(emphasis supplied)

40. Having regard to the past precedents, particularly the decision of the Supreme Court in *Patel Roadways Limited Bombay* (supra), the view taken by the learned single judge in *Sri Ganesh Research Institute* (supra) commends itself to be adopted and followed. By virtue of the explanation appended to Section 20 CPC, the defendant company would be deemed to be carrying on business at a place where cause of action arises if it has a subordinate office there even if the principal office were situated elsewhere. For showing cause of action to have arisen at a particular place, the plaintiff must plead and prove some act done by the defendant necessary for accrual of such cause of action.

41. Applying the above law to the facts at hand, this Court is of the opinion that the objection taken by defendants to the suit being instituted in Delhi must be upheld. The impugned activity of third defendant is undertaken, not in Delhi but in Jaipur in State of Rajasthan. The NTPC - Tender was floated not by its principal office

in Delhi but by its regional office in Vindhyachal and Unchahar. The place where goods were to be supplied pursuant to the contract under the said tender notice was not Delhi. They were put to use not in Delhi but in the facilities of NTPC in Vindhyachal & Unchahar respectively. Similarly, the BHEL-Tender was floated not by the principal office in Delhi but by its regional office in Hyderabad. Supplies are to be made in terms to the contract to be awarded thereunder for being put to use by BHEL in the facilities under the control of regional office in the State of Telangana. Mere presence of the principal offices of NTPC and BHEL in Delhi by itself would not confer jurisdiction over the disputes arising therefrom upon the Courts at Delhi.

42. One is conscious of the settled law that the doctrine of *forum convenience* would not strictly apply to ordinary civil litigation governed by the Code Of Civil Procedure. But then, as the settled law guides, insignificant or trivial part of the cause of action – which the plaintiff impliedly argued to be emanating from the fact of service of legal notice on principal office of BHEL located in Delhi – cannot be the decisive factor on the question of jurisdiction. As noted in the context of facts concerning the case at hand, the contract documents, as culled out from the tender notice, clearly show that for purpose of adjudication upon dispute arising out of the NTPC-Tender, the jurisdiction of the Courts in Vindhyachal and Unchahar had been specifically provided for. Similar clauses exist in the context of the BHEL-Tender wherein the jurisdiction is intended to be vested in the courts at Hyderabad in the State of Telangana.

43. Reference to the "integrity pact" by the plaintiff, particularly in the context of BHEL-Tender is incorrect. As pointed out by the defendants, the objective to be served by the integrity pact expected to be executed by the parties submitting their bids in response to the tender notice was to ensure the integrity of the tender process – nothing more and nothing less. It is in that context that the BHEL headquarters at New Delhi had some role to play. Integrity pact, if it were to be invoked, would give some jurisdiction in the hands of the principal office of BHEL at New Delhi to take action against the defaulting party. But, noticeably, in the integrity pact there is no reference to the claims arising out of competing intellectual property rights of different bidders or their parties, its objective primarily being to ensure fair play in the award of contract under the process of tender. The said integrity pact not having been even invoked or being a matter of issue in the litigation at hand, the jurisdiction specified in such document cannot regulate the present proceedings.

44. On the foregoing facts, and in the circumstances, the objection to the institution of the suit in this Court is found to be correct and proper. Since the substantial part of cause of action (assuming a cause of action of patent infringement) has actually arisen against the defendants and in favour of the plaintiff, would pertain to jurisdiction of courts other than that of Delhi. Conversely put, since only a very trivial part of the acts alleged is shown to have occurred in Delhi – this, with reference to the fact that the plaintiff had served a legal notice on BHEL at its principal office in Delhi prior to institution of the suit, which even otherwise is not an act of the defendant – the suit

has been wrongly presented in this Court. Consequently, the plaint is liable to be returned under Order VII Rule 10 CPC

45. During the course of arguments on the application of the defendant for return of the plaint under Order VII Rule 10 CPC, the learned senior counsel appearing for the plaintiff was asked as to whether, in the event of the court upholding the objection to the jurisdiction, the plaintiff would seek directions in the nature envisaged in Order VII Rule 10-A CPC for date to be specified for appearance of the parties in the Court where the plaint is to be presented again upon its return by this Court. In response, the learned senior counsel, after taking instructions, submitted that the plaintiff do not seek any such directions.

46. Having regard to the foregoing, the objection to the jurisdiction is upheld. The prayer for return of the plaint under Order VII Rule 10 CPC is granted. The application (IA No.564/2017) to that effect is consequently allowed. Resultantly, the interim orders passed earlier stand vacated. The plaint is returned to the plaintiff giving it liberty to present it again in the Court of appropriate jurisdiction for further proceedings in accordance with law. The date (23.03.2017) fixed by earlier order stands cancelled.

47. The registry shall carry out necessary further action in accordance with law and rules.

(R.K. GAUBA)
JUDGE

FEBRUARY 16, 2017
vk/nk