

IN THE HIGH COURT OF BOMBAY AT GOA**COMMERCIAL APPEAL NO.4 OF 2018**

Ocean Marine Environment
Coatings Private Limited,
a Company incorporated
within the meaning of
Indian Companies Act, 1956,
having its registered office at 19A,
Deodar Street, Kolkata-700 019,
Police Station : Ballygunge,
District : South 24 – Parganas,
also having branch office at
B4 S2 Queeny Vision,
Queeny Nagar, Velsao Pale,
Post Office Cansaulim,
Velsao, Goa-403 712. Represented
through Mr. Santanu Sanyal.

.... Appellant

V/s.

A.P. Usmani,
Sole Proprietor of
M/s. Excellent Engineers,
having his office at 162,
1st Floor, Shop No.3,
Jijima Mansion,
Modi Street, Fort,
Mumbai-400 001.

.... Respondent

Mr. Y.V. Nadkarni, Advocate for the Appellant.
Mr. R.G. Ramani, Advocate for the Respondent.

**Coram :- S. C. GUPTE &
NUTAN D. SARDESSAI, JJ.**

Date:- 26th June, 2019

ORAL JUDGMENT : (Per S.C. Gupta, J.)

This commercial appeal challenges a judgment and
order passed by the District and Sessions Court, South Goa at

Margao. By the impugned judgment, the District Court held that it did not have territorial jurisdiction to try the appellant's suit. The Court accordingly returned the plaint under Order VII Rule 10A of the Code of Civil Procedure for presentation to the proper Court.

2. The Special Civil Suit was originally filed in the Court of Civil Judge, Senior Division, Vasco-da-Gama. The suit sought a money decree in the sum of ₹1,92,43,907/-. The cause of action in the suit was excess payment made to the respondent herein (original defendant), who was the sub-contractor of the plaintiff. The plaintiff, amongst the other things, sought to recover this excess payment. After coming into force of the Commercial Courts Act, the suit was transferred to the Court of District Judge.

3. The plaintiff's case on the place of accrual of cause of action was on the basis of its sub-ordinate place of business in Goa from where the contract was arrived at and where the defendant was bound to pay in pursuance of the legal notice issued by the plaintiff. It was submitted that not only did the plaintiff carry on business at its branch office in Goa but that all

payments to the defendant were made from Goa.

4. The defendant contested the suit by filing a written statement. Amongst other things, the defendant raised a preliminary objection to the suit on account of want of territorial jurisdiction. The defendant contested the plaintiff's plea of accrual of part of cause of action in Goa. The defendant denied that he was bound to pay the plaintiff at its branch office at Goa. The defendant denied that the entire transaction was made within the jurisdiction of the Court or that the defendant was liable to make payment in Goa. Other than the issue of territorial jurisdiction, the defendant denied the plaintiff's case of excess payment or that the plaintiff had suffered any loss or that the defendant owed any amount to the plaintiff. The defendant also contested the plaintiff's case of loss or damages. The defendant also resisted the suit on the ground of bar of limitation.

5. By its order dated 04/08/2018, the Court framed and recast the following issues :

1. Whether the plaintiff proves that the defendant owes to the plaintiff a sum of ₹1,92,43,970/-?
2. Whether the plaintiff proves that he had suffered

a loss of ₹12,36,050/- as the plaintiff had to replace the defendant by another sub-contractor?

3. Whether the plaintiff proves that they are entitled for damages for a sum of ₹50,00,000/- from the defendant for stoppage of work without proper intimation?

4. Whether the plaintiff proves that this Court has territorial jurisdiction to try and decide this suit? and

5. Whether the plaintiff proves that this suit is within limitation?

6. At the hearing of the suit, the Trial Court proceeded to determine only issue no.4. The Trial Court observed that the Explanation to Section 20 of Civil Procedure Code provided for the place of business of the defendant and not that of the plaintiff. The Trial Court did not accept the plaintiff's contention that since the plaintiff had an office within the jurisdiction of the Court, the amount paid in excess was to be returned to the plaintiff at its office in Goa. The Court held that merely because the payments were allegedly made from its Goa office, the Court does not get territorial jurisdiction to try the suit. Having, thus, held that the Court lacked territorial jurisdiction to try the suit, the plaint was returned under Order VII Rule 10A for presentation to a proper Court.

7. At the very outset, under Order XIV Rule 2 of the Code of Civil Procedure, notwithstanding that a case is capable of being disposed of on a preliminary issue, a Civil Court is enjoined to pronounce judgment on all issues. This rule, contained in sub-rule (1) of rule 2 of Order XIV, is only subject to the provisions of sub-rule (2). Sub-rule (2) provides that where issues both of law and of fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first, if that issue relates to – (a) the jurisdiction of the Court or (b) a bar to the suit created by any law for the time being in force. The Court, for that purpose, may, if it thinks fit, postpone the settlement of the other issues and may deal with the suit in accordance with the decision on that issue. The District Court was, in the premises, bound to pronounce judgment on all issues even if it was of the view that the case could be disposed of on the preliminary issue of want of territorial jurisdiction. It did not have the sanction of law to dispose of the case merely on that preliminary issue, unless that preliminary issue was a pure issue of law pertaining to either jurisdiction of the Court or a bar to the suit created by any law for the time being in force.

8. An issue of jurisdiction such as the one we are concerned with in the present case cannot be described as a pure issue of law. The case of the plaintiff in the present suit was that it carried on business in Goa; that it made all payments forming part of the contract, including the payments which were said to be made in excess, in Goa and was, accordingly, entitled to receive from the defendant refund of the payment made in excess in Goa. The defendant contested each of these propositions. The issue of territorial jurisdiction on these pleadings is a mixed issue of law and facts and not a pure question of law.

9. Learned Counsel for the respondent submits that the plaintiff never made an averment in its plaint that repayment of excess amount was to be made by the defendant to the plaintiff in Goa. Learned Counsel further submits that in a suit for damages for breach of contract, the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or where it should have been performed and the breach occurred. Learned Counsel places reliance on the case of **A.B.C. Laminart Pvt. Ltd. & Anr. V/s. A.P. Agenceies, Salem**¹, in support.

¹ AIR 1989 Supreme Court 1239

10. The liability of a debtor to pay his creditor at the place at which the creditor resides or carries on business is a matter of law. It need not be pleaded. It has been held by Indian Courts in a number of cases, and by our Court as far back as in the old case of **Nathubhai Ranchhod V/s. Chhabildas Dharamchand**² and consistently followed ever thereafter, that the maxim of English law that a debtor must seek out his creditor and pay him where the creditor is, applied very much in India. There is no statutory rule in the Contract Act to the contrary. Section 49 of the Contract Act provides for the place of performance of a promise, where no application is to be made and no place is fixed for its performance. The Section provides that when a promise is to be performed without application by the promisee, and no place is fixed for its performance, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for performance and perform it at such place. Our Court in **Nathubhai Ranchhod** (supra) held that Section 49 does not detract from this principle. The Court held that the promise to pay the creditor implies that the debtor will find the creditor to pay him and pay where the creditor is; under Section 49 it is reasonable to suppose that if

² AIR 1935 Bombay 283

the debtor applies for a place to be appointed, the creditor will appoint the place where he himself resides and at any rate, he has a power so to appoint; if the debtor fails in his duty to apply, he cannot by his failure better his position, or deprive the creditor of his statutory power to appoint a reasonable place. Thus, it is enough for the plaintiff to say that he has a place of business within the territorial jurisdiction of the Court and that he carried on the transaction with the defendant including payments made to the latter at such place, and on that basis, seek to institute a suit in that Court. No doubt, it is for the defendant to contest these jurisdictional facts, but if these facts are established, the principle that debtor must seek out the creditor kicks in as a matter of law and the liability to pay on the part of the debtor accrues at the place where jurisdiction is claimed.

11. In the present case, the defendant contested the jurisdictional facts pleaded by the plaintiff, namely, the plaintiff having acted in the matter of the contract or made payments at Goa. That will be a matter of trial, but precisely because it is a matter of trial and to be established by evidence, the issue of territorial jurisdiction based on those facts cannot be termed as

a pure question of law and if it cannot be so termed, then, as we have noticed above, the suit cannot be disposed of by merely deciding that issue.

12. The case of **A.B.C. Laminart** (supra) does not detract from this position of law. The Supreme Court, in that case, ruled on how jurisdiction of the Court is to be determined under Section 20(c) of the Code of Civil Procedure. One of the places for instituting a suit on contract is a place where the contract or any part of it was to be performed. If the plaintiff makes out a case that the payment was to be made at a place within the jurisdiction of the Court, that Court would clearly have jurisdiction to decide the suit. The trial in the present case is yet to take place. We are merely at the threshold and deciding whether on the basis of a supposed preliminary question of law and facts, the suit could be disposed of without deciding other issues. **A.B.C. Laminart** (supra) has nothing to say there.

13. In the premises, the impugned judgment and order of the learned Trial Judge returning the plaint for presentation to proper Court on the basis of want of territorial jurisdiction cannot be sustained.

14. For the reasons stated above, the judgment is set aside and the suit is remanded to the Trial Court for a fresh hearing in accordance with law and in keeping with the observations made above. The appeal is disposed with no order as to costs. It is clarified that so far as the issue of territorial jurisdiction and, in particular, the truth or otherwise of the jurisdictional facts alleged in respect of it, is concerned, this Court has not come to any conclusion one way or the other. That will be for the Trial Court to decide.

NUTAN D. SARDESSAI, J.

S. C. GUPTE, J.

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