

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.08.2021	Pronounced on : 11.08.2021
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Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

A.No.8552 of 2019
in C.S.No.567 of 2019

M/s.Kirloskar Brothers Limited,
Having its registered Office at Udyog Bhavan,
Tilak Road, Pune – 411 002.

And Corporate Office at : Yamuna' 98 (3-7),
Plot No.3, Baner, Pune – 411 045.

And Regional Office at Raj Paris Trimeni Towers,
2nd Floor No.147, G.N.Chetty Road,
T.Nagar, Chennai – 600 017. ... Applicant/Defendant.

/versus/

M/s.Bharat Engineering Construction Company (P) Ltd.,
Represented by Mr.A.G.M.Salman, Director,
Jhaver Plaza, 6th Floor,
Nungambakkam High Road,
Chennai – 600 034. ...Respondent/Plaintiff

Prayer:- This application is filed under Order XIV and Rule 8 of Original Side
Rules read with Order 7 Rule 11 of C.P.C.

a). Why the above application should not be treated as urgent?

b). Why this Hon'ble Court should not be pleased to reject the plaint for want of jurisdiction and cause of action and pass such further or other orders as this Hon'ble Court may deem fit in the circumstances of this Case.

For Applicant : Mr.V.Suresh

For Respondents : Mr.G.Surya Narayanan

ORDER

The suit for recovery of money of Rs.5,08,81,095/- with interest of 18% from the date of plaint till the date of realisation.

2. The suit is filed as a Commercial dispute. The defendant, on receipt of the summons has taken out the application to reject the plaint for want of jurisdiction and cause of action.

3. The gist of the plaint:-

The plaintiff Company is a Construction Company doing various civil work. The defendant got the tender of M/s.Bharatiya Nabhikiya for its IGCAR

BHAVINI project at Kalpakkam. In respect of Sea Water Pump house and electro-chlorination building at IGCAR BHAVINI Project at Kalpakkam, a portion of the Civil Work was given contract to the plaintiff. The Letter of Intent for the portion of the civil work was issued at the Office of the plaintiff at Nungambakkam, Chennai dated 02.12.2008. The plaintiff accepted the letter of Intent. The detailed purchase order was received by the plaintiff at Chennai from the defendant. The Letter of Intent is for performance of civil work to a tune of Rs.30,00,00,000/- which includes excise duty and TNVAT. The Letter of Intent stipulated that the price will be subject to price variation. As per the formula of BHAVINI in Clause 2(1). In the said project, the civil work was to be completed by the plaintiff and rest of the work was to be done by the defendant. The work under Letter of Intent is to be completed within 13 months from the date of letter of award and 12 months is a defect liability period. The plaintiff, as per Letter of Intent mobilised its source at site. However, the construction drawing was not issued by the respondent in time. The preliminary drawing for the commencement of work was issued to the plaintiff only on 26.06.2009 and same was revised subsequent on several dates. Even after commencement of the work, the defendant failed to finalize the foundation level for SWPH which was done only in June 2019. The

preliminary architectural drawings, elevation and section drawings were issued on January – 2011 and good for construction drawing was issued only on March 2013 which significantly led to substantial escalation and prolongation cost to the plaintiff and emanate how plaintiff incurred escalation costs. Hence, the suit filed for recovery of money.

4. The cause of action for the suit as stated in the plaint is extracted below:-

The cause of action for the suit arose at Nungambakkam within Chennai on 02.12.2008 when the defendant issued the Letter Intent and Purchase Order to the plaintiff, received by the plaintiff after signing of both parties on 18.12.2008 and on various dates when the plaintiff gave the Bank Guarantee for execution contract from the Bank at Chennai and when the site was handed over with much delay and on various dates namely; 26.06.2009, 09.06.2009, 29.09.2009, 13.10.2009, 23.10.2009, 28.10.2009, 27.11.2009 the drawings was revised and on 05.07.2011 when the reinforcement drawing was given and subsequently revised on 09.08.2011 and good for construction of drawing was issued only in March, 2013 and on various dates when the earth sliding happened due to the poor shoring work and non

provision of retaining walls and the delay of work at various level, due to non-completion of other works undertaken by the defendant after which alone the plaintiff could complete the civil work and on various dates, the RA bills was submitted with price variation and approved by the Supervisor and Engineer of the defendant at Chennai and sent to the defendant for payment and on various dates, when the defendant effected part payment and failed to make payments as per the RA bills and on various dates, when the excess recovery of non-payment of bills under certain heads was found and pointed out to the defendant and on 31.01.2017, when the final escalation bill was submitted and on 07.02.2017, when the defendant made part payment by discharging Bank Guarantee and transferring amounts to the plaintiff's banker at Chennai and on 17.02.2008, when the plaintiff caused legal notice to be issued to the defendant and the same was received by the defendant and not complied with and on all subsequent days, the defendant failed to make payment of amounts due by them to the plaintiff under the contract.

5. Gist of the application to reject the plaint:-

According to the defendant, the respondent is carrying on business at Pune and having its Corporate Office at 'Yamuna' 98 (3-7), Plot No.3, Baner,

Pune-411 045. As per the Letter of Intent issued by the applicant, the jurisdiction clause clearly mentioned that the dispute should be subject to Pune, Maharashtra jurisdiction. Accepting this Letter of Intent, the respondent entered into a contract. The corresponds between the applicant/defendant and the respondent/Plaintiff were only from and to the Pune address. The purchase order dated 03.02.2009 was awarded by the applicant from its registered office situated at Pune-Maharashtra and in the purchaser order, the jurisdiction is specified as Pune-Maharashtra. The contract work was done at Bhavini, Kalpakkam. No cause of action arisen within the jurisdiction of this Court. In the said contract of construction of Sea Water Pump House, fore bay, electro chlorination building at Kalapakkam. In this the Chennai Office of the applicant/defendant was not at all involved in any of the process. The payment for the work done by the plaintiff at Kalpakkam was made from Pune-Maharashtra. The entire negotiation took place at Pune and execution of the contract was monitored from Pune. As a part of contractual obligations, the plaintiff/respondent had submitted the Bank Guarantee for a sum of Rs.60,00,000/- through Indian Overseas Bank and that guarantee was also addressed only to the Applicant's Pune Office.

6. The respondent/plaintiff mischievously and deliberately made applicant's Chennai Office as part of the proceedings merely to vest jurisdiction to this Court. No cause of action has arisen within the local limits of this jurisdiction. The respondent/plaintiff had not obtained leave to sue the defendant, who is carrying on business outside the jurisdiction of this Court. Hence, the suit is liable to be rejected.

7. The Learned Counsel for the applicant/defendant would submit that the suit is to be rejected under Order 7 Rule 11 of C.P.C, since the plaintiff has not disclosed any cause of action within the jurisdiction of this Court. Whereas, the Learned Counsel appearing for the plaintiff/respondent would submit that for deciding the jurisdiction, the averments made in the plaint alone to be looked into and in the plaint, at paragraph Nos.4, 9, 14 & 15, the plaintiff has stated the entire cause action arisen within the local limits of this Court.

8. The Learned Counsel for the respondent rely upon the following judgments, to buttress his submissions:-

(i). *General Assurance Society Ltd -vs- Chandumull Jain and others* reported in *AIR 1966 SC 1644*.

(ii). *Radha Sundar Dutta -vs- Mohd. Jahadur rahim and others* reported in *AIR 1959 SC 24*.

9. To impress upon the Court, why the application to reject the plaint has to be dismissed, the Learned Counsel for the respondent/plaintiff submitted that the agreement Clause 14 though confers jurisdiction to the Courts in Pune-Maharashtra, same is diluted by the penultimate Clause which opens the jurisdiction to all Courts in India. Further, the Learned Counsel would submit that Section 6 of the Commercial Court Act, does not contemplate leave to sue. Reading of Section 16(3) and Section 21 of the Commercial Courts Act, would clearly show that, any suit under the Commercial Courts Act, the rule of jurisdictional High Court or any amendment to the Code of Civil Procedure will be subject to the amendment made to the Civil Procedure Code under the Commercial Courts Act.

10. The written submission of the respondent/plaintiff runs as under:-

(4). Page 7 of the LOI “**Applicable Law And Competent Jurisdiction** - This LOI shall be governed by the Indian Laws. All disputes between the parties arising out of or in connection with the interpretation and execution of the order shall be exclusively submitted to the jurisdiction of the Courts of India to the exclusion of any other concurrent courts. You are requested to send one copy of this Letter of Award duly stamped and signed as a token of your acceptance. The detailed purchase order shall be sent shortly.”

(5). For rejection of plaint, plaint alone is relevant and the Court has to look into the cause of action as alleged by the plaintiff as held in AIR1998 SC 3085 paragraph 11 and 18.

(6). In AIR 2003 SC 759, will state the averments in the plaint alone has to be considered and not the averments in the affidavit.

(7). In 2005 (7) SCC 510 paragraph No.14 and 15 is relevant for determining application Order VII Rule 11.

(8). The Supreme Court time and again has said that the averments in the plaint should be seen as truth for the

purpose of Order VII Rule 11.

(9). Though under the clause 14 all disputes arising out of this contract will be subject to Pune Maharashtra jurisdiction. The penultimate clause under the agreement will state that the jurisdiction is on all the Courts in India.

(10). When it is the intention of the parties to give jurisdiction to Courts at Pune/Maharashtra, it need not be said again included that all disputes arising of or in connection with interpretation and execution of order shall be exclusively submitted to jurisdictions of Courts of India. The Commercial Courts Act, Section 6 states "Jurisdiction of Commercial Court. The Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction."

Explanation: For the purposes of this section, a commercial dispute shall be considered to arise out of the entire territory of the State over which a Commercial Court has been vested jurisdiction, if the suit or application relating to such commercial dispute has been instituted as per the provisions of Section 16 to 20 of the Code of Civil Procedure, 1908 (5 of 1908).

Section 16 of the Commercial Courts Act, 2015

Amendments to the Code of Civil Procedure, 1908 in its application to Commercial Disputes.

16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.— (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.

21. Act to have overriding effect:- Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.

Section 16(3) makes it clear that Code of Civil Procedure will prevail over the jurisdictional High Court.

Section 21 will state that if another law or rule is inconsistent to with the provisions of this Act shall prevail.

Therefore, the provisions in Order Rule 3 of Madras High Court O.S Rules and Section 120 CPC is not applicable to suits filed under the Commercial Courts Act. When the plaint states that the entire cause of action arose within the jurisdiction of this Court, that is the statement which will confer jurisdiction on this court on Section 20 CPC reads as follows **"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 works 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.

(12). The Last but not the least point of argument is on *contra proferentem* when a party has prepared a contract and he presses for a clause which is contrary to the other clause, the Court has to hold against the said party.

In the present suit, it is admitted case that the applicant/defendant prepared the LOI and sent it for signature of the respondent/plaintiff as averred in the plaint and therefore looking into this principle, this Court has to hold that the point of Legal jurisdiction being contrary to the plain reading of Last Clause for general enforcement of contract, this Court has to read against the applicant/defendant who has prepared the contract. AIR 1966 SC 1644 - General Assurance Society Ltd., Vs. Chandumull Jain & ors.

(13). Therefore the applicant in Application No.8552/19 has not demonstrated that the suit is liable to be presented before proper Court.

(14). The judgment in 2013 (9) SCC 32 will not apply to the facts of this case, as this a peculiar case having 2 clauses for the purpose of entertaining dispute and therefore the clause which confers jurisdiction on all the Courts in India with regard to interpretation and execution of contract alone will prevail over clause 14. Similarly, AIR 1991 SC 1020 and AIR 1959 SC 24 is on interpretation of major clause of agreement for which the parties had entered into the agreement. Here the point is whether the jurisdiction is available or not. It has to be held that the parties shall prove the real meaning of the agreement and their understanding after trial, as in all those cases, the interpretation was taken after trial and after letting in evidence by the parties.

11. Per contra, the Learned Counsel for the applicant submit that none of the correspondence on behalf of the defendant emanated from its Chennai Office. The documents relied by the plaintiff would show that the transactions were only from Pune. Further, clause 14 of the agreement clearly excludes the jurisdiction of the other Courts. Clause 22 of the agreement is a clause meant for foreign agreement and inapplicable to the present contract. Hence, it has to be eschewed.

12. Being a dispute above specified value filed before the High Court on its ordinary original Civil jurisdiction, the provisions applicable **are** Section 7 of the Commercial Courts Act and Clause 12 of Letter Patent.

13. The Learned Counsel for the applicant/Defendant reply upon the following judgments to emphasis his case.

(i). *Swastik Gases Private Limited -vs- Indian Oil Corporation Limited* reported in (2013) 9 SCC 32.

(ii). *Radha Sundar Dutta -vs- Mohd. Jahadur Rahim and others* reported in AIR 1959 SC 24.

(iii). *M.O.H.Uduman and others -vs- M.O.H.Aslum* reported in (1991) 1 SCC 412.

14. The contention raised by the Learned Counsels appearing for the applicant/Defendant and the Learned Counsel for the respondent/Plaintiff considered.

15. The suit has been filed stating the entire cause of action arisen within the jurisdiction of this Court and the defendant is carrying on business within the jurisdiction of this Court. Whereas, these two facts vehemently denied by the defendant through this Application.

16. In *Popat and Kotecha Property -vs- State Bank of India Staff Association* reported in 2005 (7) SCC 510, relied by the respondent/plaintiff, the Hon'ble Supreme Court has observed at paragraph No.19 as under:-

19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At

the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

17. The Letter of Intent dated 02.12.2008, is the plaintiff's first document. In this document, there is no reference about the Chennai Office or any transactions within the local limits of this Court. No doubt, the plaintiff's Office is at Chennai. Whereas, address of the defendant's Office is specifically mentioned at Mukund Nagar Pune and registered Office at Udygo Bhavan, Tilak Road, Pune - 411 002 and no documents filed along with the plaint to show the defendant is carrying on its business within the local limits of this Court.

18. The Learned Counsel for the defendant rely upon clause 14 of the Letter of Intent, which reads as below:-

Legal Jurisdiction:-

All disputes arising out of this contract will be subject to "Pune, Maharashtra", jurisdiction.

19. Per contra, the Learned Counsel for the plaintiff justifies jurisdiction of this Court relying upon the penultimate clause of the Letter of Intent, which reads as below:-

Applicable Law and Competent Jurisdiction:-

This LOI shall be governed by the INDIAN Laws. All disputes between the parties arising out of or in connection with the interpretation and execution of the order shall be exclusively submitted to the jurisdiction of the Courts of India to the exclusion of any other concurrent courts. You are requested to send one copy of this letter of award duly stamped and signed as a token of your acceptance. The detailed Purchaser Order shall be sent shortly.

20. As pointed by the Learned Counsel for the defendant, the above clause on plain reading without any doubt indicates that it has no relevancy to the said contract. This Clause which says about the Indian Law and Indian Courts in general will be applicable only if one of the party is of foreign national or a foreign Company and/or clause of action wholly or in part had arisen outside India otherwise this clause in this Letter of Intent gives no meaning. The recitals found in the agreement should be read as a whole. If one clause is inconsistent to the

other clause which rule of interpretation to be applied depends upon the recital and the nature of the document. For the said purpose, the citations relied by the Counsels may be of some assistance for this Court. The context and text in the Letter of Intent dated 02.12.2008, this Court find that the penultimate clause leads to a absurd meaning irrelevant to the context.

21. In paragraph No.14 of the *M.O.H.Uduman and others -vs- M.O.H.Asium* reported in (1991) 1 SCC 412, the Hon'ble Supreme Court has said,

“14. It is settled canon of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein. The cardinal principle is to ascertain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. It is seldom that any technical or pedantic rule of construction can be brought to bear on their construction. The guiding rule really is to ascertain the natural and ordinary sensible meaning to the language through which the parties have expressed themselves, unless the meaning leads to absurdity.”(Emphasis added).

22. As far as this case is concern, the Letter of Intent is between two Indian Companies. One having registered Office at Pune and another at Chennai. The Letter of Intent is in respect of civil work contract. The situs of the contract is at Kalapakkam, which is neither within the jurisdiction of Chennai nor within the jurisdiction of Pune. Therefore, the parties have pre-decided to the effect the dispute are subject to Pune-Maharashtra jurisdiction. Such ouster of jurisdiction is permissible under Law and Courts had sanctified it. (Refer:- *ABC Laminarts (P) Ltd -vs- A.P.Agencies Salem* reported in *1989 (2) SCC 163*). If one look at the penultimate clause of the Letter Patent, it deals about Applicable Law and Competent Jurisdiction. This clause does not convey any meaning in the given context, even if this clause is not included in the agreement, the dispute among the two parties which are Indian Companies incorporated in India will be governed only by Indian Law and dispute can be resolved only by Courts in India. Nowhere else they can file suit to resolve the dispute. Whereas, clause 14 of the agreement, specifically oust other Courts and confers jurisdiction to a Court in Pune. While there is a meaningful clause in the agreement which says the parties should resolve the dispute before the Court in Pune Maharashtra any other clause which is absurd and meaningless in the given context has to be ignored. Even the principle of

Harmonious construction does not arise in such cases. Therefore, this Court holds that filing of the suit in this Court, amounts to *forum shopping*.

23. The Learned Counsel for the plaintiff submit that a combined reading of Section 6, 16(3) and 21 of the Commercial Courts Act, 2005, will confers jurisdiction to this Court. These provisions indicates Section 20 of C.P.C alone is applicable and not the Letters Patent.

24. This Court is not in agreement with the said submission. First of all, jurisdiction of a commercial division is envisaged under Section 7 of the Commercial Courts Act and not under Section 6 of the Commercial Courts Act. Under the scheme of the Act, Jurisdiction of Commercial Court is dealt under Section 6 and jurisdiction of Commercial Division in High Court is dealt under Section 7 of the Act. The present suit is before the Commercial Division of High Court as defined under Section 4 of the Commercial Courts Act and not before Commercial Courts as defined under Section 3 of the Act. The words employed in Section 6 and Section 7 are different. The instant Commercial suit of specified value is filed before the Commercial Division under Section 7. Hence, the

argument of the Learned Counsel for the plaintiff that under Section 6 of the Act, the suit is maintainable before the Commercial Division of the High Court is untenable.

25. In fact, in the plaint it is stated that suit is filed under Section 2(1)(c)(i) of the Commercial Court Act, 2015 (Act 4 of 2016) as amended in 2018 read with Section 12 of the Act (4 of 2016) and Section 7 proviso (1) of Act 4 of 2016. Having stated so, in paragraph No.17 of the plaint, the Learned Counsel for the plaintiff for the sake of argument, rely upon Section 6 of the Commercial Courts Act, to justify filing the suit against the defendant who is not dwelling/carrying on business or work for gain within the local limits of this Court.

26. Similarly, Section 16(3) of the Commercial Courts Act, 2005, is of no help to the plaintiff to circumvent the mandatory requirement of clause 12 of the Letters Patent. Section 16 of the Commercial Courts Act, only speaks about the Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, which is in conflict to the Civil Procedure Court as amended by

Commercial Court Act. This Section does not refers about Letter Patent. Clause 12 of the Letters Patent, mandates leave to sue. The defendant in cases when whole cause of action not arisen within the local limits of this Court or if the defendant carrying on business/work for gain/dwell outside the jurisdiction of this Court. While so, in the instant case without leave, the suit is filed against the defendant who is carrying on business outside the jurisdiction of the Court.

27. The Learned Counsel for the plaintiff also rely upon the overriding provision in Section 21 of the Commercial Courts Act. It is to be noted this overriding effect will be only in respect of any provisions which is inconsistent with that of the provisions under Commercial Courts Act. Clause 12 of the Letters Patent is not inconsistent to Section 7 or Section 16(3) of the Commercial Courts Act. The Learned Counsel by wrongly relying upon Section 6 of Commercial Court Act, which speaks about Jurisdiction of Commercial Court, pleads that, Section 16 to 20 of Civil Procedure Code will apply in the light of the explanation given to Section 6 of Commercial Courts Act. The said agreement is fallacious.

28. As already pointed out, Section 6 is not at all applicable to suits of specified value filed before the Commercial Division at High Court. Further, Section 16, 17 and 20 are not applicable to the High Court in the light of Section 120 of C.P.C. Furthermore, the Letters Patent, which is unique and special to the Chartered High Court of Madras, cannot be given a go-by in the light of the subsequent legislations, which does not carry any inconsistent provision to that of Letter Patent to override its requirement. Here the principle of Harmonious Construction has to be applied. Hence, in this case, going by plaintiff's own document, there is no evidence to show that the cause of action wholly or partly arose within local limits of this Court. The place of plaintiff's Office at Chennai will not *per se* confer jurisdiction upon this Court. Unless, the defendant carry on business at Chennai. An address of defendant at Chennai is not sufficient to infer the defendant is carrying on business at Chennai. Either way, in the instant case in view of the leave to sue is required. Since no cause of action arose within the jurisdiction of this Court even according to the documents filed along with the plaint and no document to support the plea, the defendant carrying on business at Chennai. Contrarily, the plaint documents indicates, the defendant was operating at work site, Kalpakkam, which is outside the limits of this Court.

(i). In ***Clan Line Steamers Ltd -vs- Gordon Woodroffe and Co.(Madras) (Pte.) and others*** reported in ***AIR 1980 Mad 73***, this Court has held as below:-

“9. Where leave under Clause 12 is necessary, the granting of such leave is a condition precedent to the court having jurisdiction to entertain the suit; and therefore, such leave has to be obtained at the time of the institution of the suit (Vide:- ***Shamchandra Rampratab v. Bhikamchand Ganeshlal*** reported in ***A.I.R. 1929 Bom.468***, ***Motilal Trithovandas Chokesey v. Shankarlal Chaganlal*** reported in ***A.I.R.1939 Bom.345***, ***Bimal Singh Kothari v. Muir Mills Ltd.*** reported in ***A.I.R.1952 Cal.645***, ***Khitish Kumar Som v. State of Bihar*** reported in ***A.I.R.1953 Cal.639*** and ***Laliteswar Singh v. Rameshwar Singh*** reported in ***34 Cal 619.***)”

(ii). ***Urooj Ahmed v. Preethi Kitchen Appliances Private Limited*** reported in (2013) 6 CTC 247

“5(b). Clause 12 of the Letters Patent Act, 1970:-

There is no difficulty in appreciating the submissions of the learned counsel appearing for the appellant that when there is a part of cause of action having arisen outside the jurisdiction of the Court, a leave under Clause 12 of the

*Letters Patent is required mandatorily. Consequently, when such a leave has not been obtained already, the same cannot be cured subsequently, as held by this court in **The Clan Line Steamers Ltd. v. Gordon Woodroffe & Co., (AIR 1980 Madras 73)**.*

29. The Learned Counsel for the plaintiff referring the long and short cause title in the plaint and paragraph Nos.4, 9, 14 and 15 submitted that, the defendant is carrying on business within the local limits of this Court Jurisdiction. These assertion in the plaint surprisingly not found in the correspondence between the parties. In fact, the plaint document only indicates the defendant have registered Office at Pune and site/project Office at Kalapakkam. No communication by the plaintiff been forwarded to Chennai Office of the defendant. The invoices and communication were sent only to Pune Address of the defendant. To prime facie hold that the defendant carrying on business within the jurisdiction of this Court, there must be evidence to show the effective presence of the defendant within the jurisdiction of this Court. If any Office of the defendant at Chennai was acting as a Post Office, it cannot be considered as the place where the defendant is carrying on business. The meaning of the expression “carrying on business” has been clarified by the Division Bench of this Court

nearly a century ago in ***J.D.John and others -vs- Oriental Government Security Life Assurance Company Limited*** reported in [1928 SCC Online Mad 347], following the judgment in ***Bombay Co. Ltd. v. Municipal Council Dindigul*** reported in [A.I.R. 1929 Mad. 146] in the following terms:-

“7. The other objection depends upon the question whether the Oriental Government Security Life Assurance Co. Ltd., carries on business in Madras. It is no doubt true that the company has got an agency in Madras, but it is not stated that this agency has any directors here or any persons who form a kind of controlling Board in Madras or at least have some direction as regards the policies. The affidavit filed on behalf of the company is to the effect that so far as the Madras office is concerned, it has no independent discretion in the matter, but simply acts as a post office which receives applications or moneys and passes them to the Head office in Bombay, and that is the Head Office that issues all orders there being no vestige of discretion in the local office here to do anything. These facts are not contradicted and the question is whether it can be said that the Oriental Government Security Life Assurance Co. Ltd., carries on business in Madras. I think this question is really concluded by the judgment of Beasley, J., in ***Bombay Co. Ltd. v. Municipal Council Dindigul*** [A.I.R. 1929 Mad. 146.] which was a suit filed by the Bombay Co. Ltd., Madras, against the Municipal Council of Dindigul. It was there shown that the representatives of the Bombay Company in

Dindigul had no discretion except receiving orders and sending them on. The question was whether they carried on business in Dindigul to be taxed. It was held that they were not, and Beasley, J., in an elaborate review of the authorities states that there is no difference in principle between residence for purposes of either the Income-tax Act, or the Municipal Act, or for purposes of jurisdiction. This judgment was affirmed by the Chief Justice and Madhavan Nair, J., in O.S. Appeal No. 6 of 1928 where all the authorities have been discussed by the learned Judges. I think that the facts disclosed in the present case in the affidavit, namely, that the agency in Madras does nothing, but acts as a post office forwarding proposal and sending moneys and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, the Oriental Government Security Life Assurance Company does not carry on business in Madras. It was stated that a suit may lie under S. 12 of the Letters Patent if the money is not paid. That may be so not on the ground that there is business carried on in Madras, but because the proposal was made in Madras and forwarded and part of the cause of action arose in Madras and on that ground leave may be given. I do not think we can confuse the fact of jurisdiction arising out of a part of the cause of action with jurisdiction arising out of the carrying on of business.”

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30. The Learned Counsel for the plaintiff further submitted that Letter

of Intent was prepared by the defendant favouring the defendant and therefore, clause 14 should not be given any serious consideration. This argument does not hold good, in view of the fact that every other term of the Letters of Intent has been acted upon by the parties and the plaintiff without any murmur had till end of July-2017 making claim and receiving money based on the terms of this Letter of Intent. All of the sudden, just because, clause 14 is not suitable to their interest, plead the *Doctrine of Contra Proferentem*:-

31. The term Contra proferentem, also known as "interpretation against the draftsman", is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

32. In the instant case, first of all, there is nothing to show that the Letter of Intent was unilaterally prepared by the defendant. Even otherwise, as pointed out earlier, clause 14 is legally sustainable. If clause 14 and the penultimate clauses of the letter of intent read in the context of the agreement between two Indian Companies for a work contract in India, clause 14 gives meaning and sense. Whereas, the penultimate clause is out of context and means

absurd. The principle of *contra proferentem* is not applicable to the facts of this case.

33. In this case, neither the cause of action nor place of defendant's business falls within the jurisdiction of this Court. In the Letters of Intent, parties have specifically accepted the jurisdiction of Pune Court where the defendant carrying on business. Therefore, this Court holds that the Application is liable to be rejected under Order 7 Rule 11(a) of C.P.C., for want of jurisdiction and cause of action. Hence, the ***Application is Allowed.*** Suit is rejected for want of jurisdiction.

11.08.2021

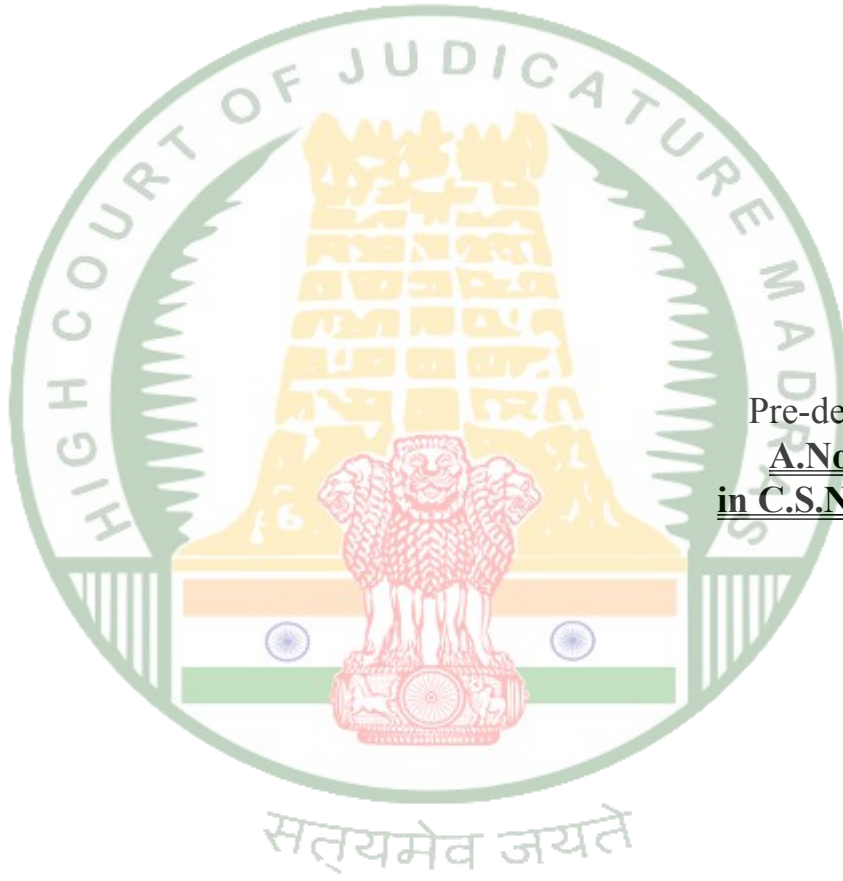
Index : Yes
Internet : Yes/No.
Speaking order/Non-speaking order

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Dr.G.Jayachandran,J.

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