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O.S.A. (CAD) No.104 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2024

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MR.JUSTICE **N.SENTHILKUMAR**

O.S.A. (CAD) No.104 of 2021

M/s.Bharat Engineering Construction Company
(P) Ltd., rep. By Mr.A.G.M.Salman, Director,
Jhaver Plaza, 6th Floor,
Nungambakkam High Road, Chennai – 34.

.. Appellant

Vs

M/s.Kirloskar Brothers Limited
Having 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 – 17.

.. Respondent

Original Side Appeal filed under Section 13 of The Commercial Courts Act, 2015 read with Order XLIII Rule 1 of Code of Civil Procedure to set aside the order in A.No.8552 of 2019 in C.S. No.567 of 2019 dated 11.08.2021 and restore the suit to the file of this Court.



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For Appellant : Mr.G.Surya Narayanan
For Respondent : Mr.Shivakumar
of M/s.Shivakumar and Suresh

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JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

In the captioned 'Original Side Appeal' (hereinafter 'OSA' for the sake of brevity), sole appellant is 'Bharat Engineering Construction Company (P) Ltd.,' (hereinafter 'BECCPL' for the sake of convenience and clarity) and the lone respondent is 'Kirloskar Brothers Limited' (hereinafter 'KBL' for the sake of brevity). To be noted, before the Hon'ble Commercial Division, BECCPL was sole plaintiff and KBL was lone defendant.

2. Captioned OSA has been presented in this CAD on 09.09.2021 assailing an order dated 11.08.2021 wherein and whereby Commercial Division has in effect held that BECCPL should have filed the main suit viz., C.S.No.567 of 2019 only in jurisdictional Court in Pune, State of Maharashtra. This '11.08.2021 order of the Hon'ble Commercial Division' which is under challenge in the captioned OSA shall hereinafter be referred to as 'impugned order' for the sake of convenience and clarity.



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3. In the hearing today, Mr.G.Surya Narayanan, learned counsel for appellant (BECCPL) and Mr.Shivakumar of M/s.Sihvakumar and Suresh (Law Firm) for lone respondent (KBL) are before us i.e., before this CAD. Both the learned counsel submit in unison in one voice that the main appeal i.e., main OSA can be taken up and disposed of as both learned counsel are on the same page as regards the position that the main suit i.e., plaint ought to be presented in a Pune Court. In this regard alone, consensus has been arrived at between the parties but we make it clear that all other questions are left open and all the rights and contentions of both sides viz., BECCPL and KBL are preserved for the purpose of being canvassed in a Pune Court pursuant to this order.

4. In the light of the consensus, considering the nature of the matter, short facts shorn of granular particulars will suffice. Factual matrix in a nut shell is that BECCPL presented a plaint drawn up in the month of July of 2019 claiming a sum of a little over Rs.5.08 crores against KBL; that this claim was predicated on a contract for construction of Sea Water Pump House and Electrochlorination of IGCAR Bhavini Project at Kalpakkam; that this Court, owing to the nature of legal drill at hand, deems it appropriate to not to dilate any further on the lis; that on the



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plaint drawn in July of 2019 being presented, the suit was instituted and on institution of suit, the plaintiff manifested itself as C.S. (Comm. Div.) No.567 of 2019; that suit summons was served on KBL; that on service of suit summons, KBL took out an application in A.No.8552 of 2019; that the burden of the song in this application i.e., burden of the song qua KBL is that the suit ought to have been presented only in a Pune Court by BECCPL as the contract specifically says that the parties have agreed to go to Pune Court, the cause of action has arisen in Pune and that the suit will lie only with the Pune Court; that however the prayer in this application i.e., A. No.8552 of 2019 was 'rejection of plaint' rather than 'return of plaint'; that there will be some discussion/allusion infra in this regard as the order progresses; that this application i.e., A.No.8552 of 2019 was taken up by the Hon'ble Commercial Division (after completion of pleadings) and the Hon'ble Commercial Division in and by the impugned order (order dated 11.08.2021) held that BECCPL ought to have presented the plaint only in a jurisdictional Court in Pune inter-alia as the cause of action has arisen only in Pune (no cause of action has arisen within the territorial jurisdiction of Madras, according to the impugned order); that the parties have agreed to submit the lis, if any, in the Pune Court; that as already alluded to supra, both the counsel are



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on the same page as regards the obtaining position that the plaint has to be presented in Pune Court but the problem presents itself in a different manner as Hon'ble Commercial Division has rejected the plaint; that this Court now proceeds to consider the impugned order and make an order disposing of the captioned OSA.

5. Paragraph 33 i.e., the concluding paragraph of the impugned order is of immense significance/relevance and the same reads as follows:

'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.'

6. Adverting to the aforementioned paragraph, both counsel submitted that it is a clear case of return of plaint and not rejection of plaint. On return of plaint, the same is vide Order VII Rule 10 of 'The Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity] unlike rejection of plaint



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which is vide Order VII Rule 11 of CPC, however, Order XLIX Rule 3 sub-rule (1) of CPC makes it clear inter-alia that Rule 10 of Order VII will not apply to Chartered High Courts in exercise of ordinary or extra ordinary original civil jurisdiction. The case on hand is clearly a case of exercise of ordinary original civil jurisdiction. There can hardly be any disputation that Madras High Court is a Chartered High Court. This means that Rule 10 of Order VII (return of plaint) will not apply to Madras High Court which is a Chartered High Court. In this regard, reliance can be placed on a case law i.e., *R.P.C'Connor* case [***R.P.C'Connor Vs. P.G.Sampath Kumar***] decided on 29.09.1952 by Justice Rajamannar as Chief Justice of this Court (as Hon'ble Judge then was) and reported in **1952 SCC OnLine Madras 250**. In the light of **Padma Sundara Rao** principle [***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in **(2002) 3 SCC 533**] and more particularly paragraph 9 thereat, we deem it appropriate to set out the facts in *R.P.C'Connor* case very shortly before we rely on *R.P.C'Connor* principle. In *R.P.C'Connor* case, a suit for recovery of money (a princely sum Rs.6,720/- in 1952) on the foot of a promissory note was presented in this Court and this suit was resisted by the defendant inter-alia on the ground that the Original Side of the Madras High Court does not have jurisdiction as the entire



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transaction has taken place in Bangalore, the promissory note was executed in Bangalore and all endorsements were made in Bangalore. When the matter was listed before Hon'ble Justice Panchapakesa Ayyar, Hon'ble Judge referred the matter to Hon'ble Chief Justice for constitution of a Full Bench to decide this very issue i.e., exclusion of Rule 10 of Order VII by Order XLIX Rule 3 sub-rule (1) of CPC. Then Hon'ble Chief Justice presiding over a Division Bench along with Hon'ble Justice Venkatarama Ayyar took the view that it is not necessary to constitute a Full Bench as there is no conflict or dichotomy in decisions and decided the matter as a Division Bench. In deciding the matter as a Division Bench in *R.P.C'Connor*, it was held that in the light of inherent powers of the Court which is saved vide Section 151 of CPC, there will be no impediment in the Original Side of this Court returning a plaint (dehors Order XLIX Rule 3 sub-rule (1) of CPC which excludes application of Rule 10 of Order VII to proceedings on the Original Side i.e., of this Court) and returning a plaint, if it is found that the Original Side of this Court does not have territorial jurisdiction to entertain the matter. This is articulated in paragraphs 12 and 13 of *R.P.C'Connor* and the same reads as follows:

'12. Assuming that it is necessary to preserve carefully the proceedings taken in a Court of Record, we see no reason why the suitor should lose the benefit of the Court-fee stamps which he



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*had affixed to the plaint filed by him in a wrong Court. A memorandum of appeal filed in this Court can certainly be returned if it is found that this Court has no jurisdiction to entertain the appeal. Such a memorandum is never retained on the file of this Court in spite of the fact that this Court is a Court of Record. Logically there should not be any difference between a Memorandum of Appeal filed on the Appellate Side of this Court and a plaint filed on the Original Side of this Court. Apparently the practice on the Original Side of the Bombay High Court had changed since the days of *In re Bai Amrit(1)* because we find in *Sewaran Gokaldos v. Bajrangdat Hardwar(2)* Macleod, J. sitting on the Original Side directing a plaint to be returned to the plaintiffs for presentation in the proper Court after holding that the High Court had no jurisdiction.*

13. After giving my full consideration to the matter I am of opinion that it is open to this Court to direct the plaint to be returned to the plaintiff for presentation to the proper Court when this Court finds that it has no jurisdiction to entertain it.'

7. Be that as it may, notwithstanding *R.P.C'Connor* principle, we are convinced that Clause 12 of Letters Patent would hold the field as regards jurisdiction. In Clause 12 of Letters Patent, the lead case law is ***Captain Tractors vs. Ashok Leyland*** (Ashok Leyland case) reported in **2018 SCC OnLine Madras 13669 : 2018 (8) MLJ 564**. This Division Bench has held that Ashok



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Leyland rendered by Hon'ble Single Judge is good law. However,

in the case on hand, BECCPL did not choose to seek leave under Clause 12 of Letters Patent and if leave had been obtained, it is quite possible that KBL might have resorted to revocation of leave under Clause 12 rather than coming up with A.No.8552 of 2019. In the case on hand, obviously KBL cannot seek revocation of 'leave to sue' which was neither sought nor given but a party cannot be without remedy merely because plaintiff comes to Court without seeking 'leave to sue' and the Registry numbers the suit and in such cases *R.P.C'Connor* comes to the reference of such defendants. Therefore, either way, there is no impediment in the Original Side of this Court returning a plaint for presentation in the proper Court with jurisdiction if the Original Side finds that no part of cause of action has arisen within the territorial jurisdiction of that Court and if the Original Side does not have jurisdiction to try the suit for any other reason i.e., Special Statutes such as IPR statute which make a departure from Section 20 CPC or contractual covenant/s as in the case on hand.

8. Be that as it may, in this regard, while on this discussion, we deem it appropriate to write that there is a subtle but a certain and nice distinction in language between Section 120 CPC and



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Order XLIX Rule 3 sub-rule (1). Vide Section 120 CPC, the application of three provisions of law viz., Sections 16, 17 and 20 have been excluded for exercise qua original jurisdiction by the High Court. Section 120 CPC reads as follows:

'Section 120. Provisions not applicable to High

Court in original civil jurisdiction:

(1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.'

9. Order XLIX Rule 3 sub-rule (1) CPC excludes the application of inter-alia Rule 10 of Order VII and some other provisions to exercise of ordinary or extra ordinary original civil jurisdiction of the High Court. In Section 120 CPC, the expression used is 'High Court' whereas in Order XLIX Rule 3 CPC, the expression used is 'Chartered High Court'. This means that Section 120 CPC would apply to five out of 25 High Courts of the country viz., the three Chartered High Courts - Madras, Bombay and Calcutta besides Delhi and Himachal Pradesh which have Original Side by statutory powers in contra distinction Order XLIX Rule 2 will apply only to three out of 25 High Courts viz., the three Chartered High Courts viz., Madras, Bombay and Calcutta. The



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reason is not far to seek and we may say that it is even obvious as these three Chartered High Courts have Letters Patent unlike the two other High Courts which have Original Side but do not have Letters Patent.

10. Reverting to the legal drill on hand, paragraph 33 of the impugned order makes it clear that no part of cause of action has arisen within the jurisdiction of the Original Side of this Court. Obviously, the reference is to territorial jurisdiction and both learned counsel do not have any disagreement on that. Thereafter, Hon'ble Commercial Division, after holding that the parties have specifically accepted/restricted to the jurisdiction of the Pune Court has proceeded to reject the plaint by holding that there is no cause of action. We have no hesitation in making it clear that when a Court says that it does not have territorial jurisdiction and directs return of plaint, no other application including a rejection of plaint can be looked into. The reason is, one will run into the other. A Court cannot in one breath say that it does not have territorial jurisdiction, direct return of the plaint for presentation in jurisdictional/proper Court and also consider the matter on merits including rejection of plaint (though rejection of plaint application would not be considering the lis on merits) as that would turn



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more on the plaint averments. Ergo, we have no hesitation in holding that aforereferred paragraph 33 of the impugned order to the extent that it talks about rejection of plaint deserves to be set aside. However, the other limb of paragraph 33 which directs return of plaint for presentation in appropriate Court viz., Pune Court is sustained by applying *R.P.C'Connor* principle and *Ashok Leyland* principle in the light of Clause 12 of Letters Patent.

11. In the light of the narrative, discussion and dispositive reasoning set out infra, we hold that the plaint in C.S. No.567 of 2019 is returned for presentation in appropriate Court by BECCPL.

12. For the sake of enhanced clarity and specificity, we write our order as an operative paragraph by way of points which are as follows:

12.1 Captioned OSA is partly allowed and partly sustained i.e., allowed as regards rejection of plaint and sustained with regard to return of plaint;

12.2 It is now open to BECCPL to present the July of 2019 plaint (plaint which manifested itself as C.S. No.567 of 2019 on institution of suit) in an appropriate Court in Pune;



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12.3 If BECCPL presents the plaint in the appropriate Court in Pune, we are sure that the jurisdictional Court will examine the plaint on its own merits and in accordance with law untrammelled by any observations made by this Court in this order which is for the limited purpose of facilitating return of plaint for presentation in proper Court;

12.4 If the plaint is presented in a proper Court in Pune all questions are left open qua both sides. All rights and contentions including rights and contentions raised before Hon'ble Commercial Division thus far and in the captioned OSA are preserved;

12.5 The further sequitur of above means, it is still open to KBL to file in Pune Court a rejection of plaint application on any available ground if so advised and if so desired. If any application of above nature is filed, the same shall be considered on its own merits and in accordance with law.

12.6 Registry is directed to return all original



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*documents to the counsel on record for the plaintiff
under due acknowledgment but preserve the case file
as this is a Chartered High Court i.e., Court of Record.*

There shall be no order as to costs.

(M.S.J.) (N.S.J.)
05.09.2024

Index:Yes/No
Neutral Citation: Yes/No
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To

- 1.The Sub Assistant Registrar,
Original Side, High Court,
Madras.
- 2.The Section Officer,
Original Side (Records),
High Court, Madras.



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**M.SUNDAR, J.,
and
N.SENTHILKUMAR, J.,**

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