
Garlapati Ramanaiah Naidu and G. Lalithamma Vs L and T Finance Ltd.

O.S.A. No. 153 of 2011 and M.P. No. 1 of 2011

Court: Madras High Court

Date of Decision: Feb. 24, 2012

Acts Referred:

Arbitration Act, 1940 " Section 12, 14(2), 2(c), 31, 31(1)#Arbitration and Conciliation Act, 1996 " Section 17, 9#Civil Procedure Code, 1908 (CPC) " Section 15, 16, 17, 18, 19#Suits Valuation Act, 1887 " Section 11

Citation: (2012) 5 CTC 172

Hon'ble Judges: M. Sathyanarayanan, J; C. Nagappan, J

Bench: Division Bench

Advocate: T.K. Seshadri, for T.K. Bhaskar, for the Appellant; T.V. Ramanujun, for Shri and Shankar, for the Respondent

Final Decision: Dismissed

Judgement

M. Sathyanarayanan, J.

The Appellants are Respondents 1 & 2 in Application No. 6498 of 2010 filed by the Respondent herein/claimant.

The said Application has been filed u/s 9 of the Arbitration and Conciliation Act, 1996 (in short "Arbitration Act") praying for a prohibitory order

directing the Appellants herein/Respondents in the said Application to furnish security to the tune of Rs. 3,50,12,958/- or such other sum as this

Court directs within such time this Court stipulates together with an order of conditional attachment and in the event of default, attachment of the

property described in the schedule through the District Court pending initiation and disposal of the arbitral proceedings and the enforcement of the

award. The Respondent also filed Application No. 6551 of 2010 praying for the relief of selling the vehicles, equipments and machineries in "as is

where is" condition in a public auction or a private treaty and to pay the sale proceeds to the Applicant.

2. Learned Judge, vide order dated 27th Jan., 2011, has taken into consideration the interim report of the Advocate Commissioner and the earlier

order dated 16th Dec., 2010 made in Application Nos. 6498 & 6551 of 2010 and passed an order directing the Advocate Commissioner to

publish the sale notice in one vernacular newspaper and one English daily, which are having circulation in the local area and sell the 18

vehicles/equipments through public auction and also to file a report. The learned Judge also directed the Appellants" herein/borrowers not to deal

with any of the items lying in Medipally, Ramagundam, Karimnagar District and Jhurala Hydro Project, Mahaboob Nagar, Andhra Pradesh, in any

manner.

3. Subsequently, on 7th Feb., 2011, this Court passed an order in Application No. 6498 of 2010 directing the Appellants herein to furnish security

to the tune of Rs. 3,50,12,958/- within a period of three weeks from the date of receipt of a copy of the order, failing which, order of attachment

will be passed without further reference to the Court. The learned Judge, while passing the order, has taken into consideration the report of the

learned Advocate Commissioner dated 7th Feb., 2011, wherein it has been stated that the Appellant herein had sold the vehicles/equipments

despite the orders passed by this Court and, therefore, directed the parties to appear before this Court on 14th Feb., 2011. Accordingly, the

Appellants appeared and the 1st Appellant herein filed an Affidavit dated 14th Feb., 2011, stating that he has not violated the orders passed by

this Court, as indicated by the Advocate Commissioner in the interim report filed and, further, stated that 6 vehicles are in the custody of Sri Durga

Bhavani Turning Works, Vijayawada and also undertook not to remove the vehicles from the said work place pending further orders.

4. As per the grounds of this Appeal, the subject matter of challenge is the order dated 27th Jan., 2011, made in Application No. 6498 of 2010

and a perusal of the order would disclose that the order was actually passed in Application No. 6551 of 2010 permitting the Advocate

Commissioner to sell the vehicles and equipments through public auction.

5. When it was pointed out to the learned Senior Counsel appearing for the Appellants, he made a submission that this Court should look into the

substance than form and what was intended to be challenged is the order dated 7th Feb., 2011 made in Application No. 6498 of 2010 in which

the conditional order of attachment came to be passed and, therefore, the said order alone is the subject matter of challenge in this Appeal.

6. This Court heard the submissions of the learned Senior Counsel appearing for the Respondent and is of the view that in order to avoid

multiplicity of proceedings, the present proceedings are taken as the Appeal challenging the vires of the abovesaid order dated 7th Feb., 2011.

However, this Court points out that the Counsel on record should have been careful while preferring this Appeal as the error in challenging a wrong

order had caused some inconvenience to the Court.

7. The facts in brief, necessary for the disposal of this Appeal are as follows:

A Loan-cum-Hypothecation Agreement came to be entered into between the 1st Respondent herein and the borrower, namely, the 1st Appellant

at Chennai on 28th March, 2009, with regard to excavators, loaders, mining tipper lorries and hydraulic excavators. The 2nd Appellant herein and

one Medarametla Subbaramaiah Naidu stood as guarantors for the due repayment of the money. As per the said agreement, the 1st Appellant is

liable to pay a sum of Rs. 4,70,02,112/- in 23 installments. The first installment commenced on 17th May, 2009 with the last installment ending on

17th March, 2011 for 18 vehicles/equipments. For the due repayment of the loan, Medarametla Subbaramaiah Naidu and Mrs. G. Lalithamma

had Executed Deeds of guarantee at Chennai.

8. According to the Respondent, the 1st Appellant herein had paid the first five installments in full and committed default from the 6th installment,

which falls due on 17th Oct., 2009 and inspite of repeated requests made by them, either to pay the dues or to surrender the vehicles/equipments,

the 1st Appellant has failed to comply with the said request and as on 9th June, 2010, a sum of Rs. 3,50,12,958/- is due and payable by the

Appellant and the other guarantors and the Respondent is also entitled for further compensation @ 36% on the installments due and payable till full

and final settlement.

9. Since the Loan-cum-Hypothecation Agreement provides for Arbitration in the event of any dispute or difference, touching or concerning the

agreement, or any condition as to the rights, duties and liabilities of the parties, apprehending that the 1st Appellant herein may secrete the

vehicles/equipments out of reach, the Respondent invoked Section 9 of the Arbitration Act and filed the following Applications on the file of this

Court:

(i) Application No. 3585 of 2010.-- for appointment of Advocate Commissioner to seize and deliver the equipments and vehicles, more fully

described in the schedule with the aid of police;

(ii) Application No. 4373 of 2010.-- to pass a prohibitory order against the garnishees, namely, M/s. Ram Projects and M/s. Nagarjuna

Constructions, Hyderabad, from paying any amount to the tune of Rs. 3,50,12,958/- to the Appellants and direct them to deposit the amount to

the credit of the said Application;

(iii) Application No. 6498 of 2010.-- to pass an order directing the Appellants herein to furnish security to the tune of Rs. 3,50,12,958/- or such

other sum this Court may fix and direct the Appellants to furnish security, failing which, order attachment of the property; and

(iv) Application No. 6551 of 2010.-- to pass an order directing the Advocate commissioner to sell the seized vehicles/equipments/ machineries in

its "as is where is" condition in public auction or by way of private treaty and pay the sale proceeds to the Respondent.

10. Learned Single Judge passed an order in Application No. 6551 of 2010 appointing an Advocate Commissioner to seize the vehicles/

equipments/machineries. The Advocate Commissioner, pursuant to the warrant of appointment dated 12th July, 2010, had proceeded to the place

of work near Medipally District, Andhra Pradesh for seizure and filed four interim reports dated 6th Aug., 2010, 18th Nov., 2010, 27th Jan, 2011

and 7th Feb., 2011 respectively. A perusal of the interim reports would disclose that in respect of the vehicles/equipments, neither the engine nor

any tyres were found and most of the vehicles/equipments were in damaged condition and in respect of Volvo-EC-460 - Hydraulic Excavator in

Sl. No. 14701, the entire vehicle has been totally dismantled by the Appellants herein.

11. The Appellants herein filed counter in Application No. 3585 of 2010 stating among other things that so far they have paid a sum of Rs. 1.43

Crores in 7 installments towards the financial facility availed by them from the Respondent and have also prepared a valuation report in respect of

the vehicles available at site and as per the said report, the vehicles are valued at Rs. 3.96 Crores. It is further averred in the Counter Affidavit that

default in payment was due to unforeseen setback in their business and, consequently, they were not able to fulfill their obligation to the

Respondent and further stated that the interim reports of the Advocate Commissioner are unrealistic and the allegations are unsupported by any

materials. It is further stated that payments were made at Hyderabad and there is no breach of contract, as a sum of Rs. 1 Crore is due from the

Respondent herein.

12. It is useful and relevant to extract paragraphs 12 & 13 of the Counter Affidavit:

12. I submit that the Respondent held discussions with the representatives of the Applicant Company on 29.5.2010 wherein two options were

proposed - either to handover the equipment and conduct sale by following auction procedure or to dispose of the equipment by the Respondent.

The Respondent also insisted that if an auction was to be conducted then the same should not be done at a throw away price but must be held in a

transparent manner so as to secure the best price for the equipment. For this purpose, the Respondent also approached the Registered Valuer who

valued the vehicle and submitted a valuation report, which was also forwarded to the Applicant-Company on 20.6.2010. The Respondent further

submit that it does not intend to hive of the equipment and further submits that the equipment are in a state of repair and that it undertakes to repair

the same and hand over to the Applicant Company. However, due to incessant rains in the area and given the hilly terrain, the repairs could not be

carried out and hence there has occurred a delay. The Respondent is also willing to find a suitable buyer after the repair work is completed. I

submit that the Advocate Commissioner"s Report filed on two occasions reveals several factual errors. I crave leave of this Hon"ble Court to

submit the objections to the Advocate Commissioner's report at a later date.

13. I submit that without final touches the other hand if the Respondent is allowed to carry out the minor repairs and thereafter sale is conducted by

open auction, it would fetch a far better price that would clear the liability of the Respondent to the Applicant and in fact fetch us payment of Rs. 1

Crore by the Applicant to the Respondent. In fact during the course of pendency of the present Application pursuant to order of this Hon"ble

Court the Applicant has also taken symbolic possession of the equipment.

13. The learned Judge has passed an order dated 16th Dec., 2010 in Application No. 6498 of 2010 in Application No. 4373 of 2010 and

Application No. 6551 of 2010 in Application No. 3585 of 2010 directing the Advocate Commissioner to seek the help of the financier and get a

valuer for valuing the vehicles/equipments and file a Report and also taken into consideration the particular order dated 12th Aug., 2010, has

directed Respondents 4 to 6 therein/garnishees to deposit the amount withheld by them payable to the 1st Appellant herein to this Court on or

before the next hearing date on 5th Jan., 2011.

14. It is also pertinent to point out at this juncture that at the time of passing the order dated 27th Jan., 2011 in Application No. 6498 of 2010 in

Application No. 4373 of 2010 & Application No. 6551 of 2010 in Application No. 3585 of 2010, which is the subject matter of challenge in this

Appeal, objection has not at all been taken with regard to the Territorial jurisdiction of this Court to entertain the Applications u/s 9 of the

Arbitration Act. Paragraphs 12 & 13 of the Counter Affidavit filed by the Appellants herein would also indicate that the Appellants herein had

prayed for permission to carry out the minor repairs to the vehicles/equipments/ machineries before conducting the public auction as it would fetch

a far better price, which would ultimately clear their liability to the Respondent herein.

15. This Court, keeping in mind the stand of the Appellants herein at the earliest point of time in respect of the Applications filed by the

Respondent herein u/s 9 of the Arbitration Act, 1996, heard the submissions of the learned Senior Counsel for the Appellants and the learned

Senior Counsel for the Respondent.

16. Mr. T.K. Seshadri, learned Senior Counsel appearing for Mr. T.K. Bhaskar, learned Counsel for the Appellants, made the following

submissions:

(a) This Court is not having Territorial jurisdiction to deal with the Applications filed u/s 9 of the Arbitration Act, 1996 as no part of the cause of

action arises within the jurisdiction of this Court except the Loan-cum-Hypothecation Agreement and the deeds of guarantees were executed at

Chennai. Admittedly, the registered office of the Respondent is located at Mumbai and all payments towards the said agreement had been made at

Andhra Pradesh, which is outside the jurisdiction of this Court.

(b) Clause 17.2 of the Loan-cum-Hypothecation Agreement states that the venue of Arbitration shall be at Mumbai and, therefore, the Courts at

Mumbai alone have the jurisdiction to entertain any dispute with respect to the abovesaid agreement.

(c) Though the deeds of guarantee were executed at Chennai, since those agreements form part of the Loan-cum-Hypothecation Agreement, and

that Clause 17.2 also provides that the venue of Arbitration shall be at Mumbai, this Court does not possess Territorial jurisdiction to deal with the

present dispute.

(d) The interim reports of the Advocate Commissioner bristle with many factual errors and the learned Single Judge, carried away by the same, has

erroneously accepted the same and ordered the sale of vehicles and by doing so, has not permitted the Appellants herein to sell the

vehicles/equipments/machineries to third-parties, who offered very good price, which would have ultimately cleared their liability.

17. In support of his submissions, learned Senior Counsel has invited the attention of this Court to the Loan-cum-Hypothecation Agreement,

schedule to the said agreement, deeds of guarantee executed by the guarantors, interim reports of the Advocate Commissioner and also the

various orders passed by the learned Single Judge, including the impugned order and the subsequent order dated 7th Feb., 2011.

18. Learned Senior Counsel for the Appellants has also placed reliance upon the following judgments to substantiate his submission that this Court

is not at all having Territorial jurisdiction to entertain the Applications filed by the Respondent herein u/s 9 of the Arbitration Act:

1. Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs. Jindal Praxair Oxygen Company Ltd.,

2. M. Venkatasamiappa v. Srinidhi, Ltd., 1950 (1) MLJ 709 (DB);

3. Sabson (India) Pvt. Ltd. Vs. Neyveli Lignite Corporation Ltd.,

4. Union of India v. P. Anantharaman & another, 1991 (1) MLJ 286 (SB);

5. The Electrical Manufacturing Co. Ltd., Calcutta and Another Vs. The Crompton Engineering Co., (Madras) Ltd., Madras,

6. Jyothi Turbopower Services Pvt. Ltd. Vs. Shenzhen Shandong Nuclear Power Construction Company Ltd. and Syndicate Bank,

7. Videocon Industries Limited Vs. Union of India (UOI) and Another,

8. Scanwell Logistics (India) Pvt. Ltd., Chennai v. Blaiklock Compass World Transport (HK) Ltd. and others, 2010 (2) CTC 675 (DB) : AIR

2010 Madras 125 (DB);

9. Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, and

10. Sri Rajah Satrucherla and others v. Maharaja of jeypore and others, 1919 ILR 813 (PC).

19. Per contra, Mr. T.V. Ramanujun, learned Senior Counsel for the Respondent submits that the order under challenge cannot be termed as an

order at all and, therefore, the Appeal itself is not maintainable. It is further contended by the learned Senior Counsel for the Respondent that the

objection with regard to the jurisdiction of this Court to entertain the Application u/s 9 of the Arbitration Act has not been taken at the earliest point

of time and, thereby, the Appellants had consented to the jurisdiction of this Court to entertain these Applications and it is also clearly disclosed in

their Counter Affidavit. In respect of the Application filed u/s 9 of the Arbitration Act, leave of this Court under Clause 12 of the Letters Patent

need not be obtained as part of cause of action has arose within the jurisdiction of this Court.

20. It is further submitted by the learned Senior Counsel for the Respondent that admittedly the Loan-cum-Hypothecation Agreement and Deeds

of Guarantee were executed at Chennai and the Respondent is also having a Branch Office at Door No. 47, Monteith Road, Egmore, Chennai-8

and, hence, this Court is having Territorial jurisdiction to entertain the abovesaid Applications. Lastly, it is submitted by the learned Senior Counsel

for the Respondent that the conduct on the part of the 1st Appellant deserves condemnation as the four interim reports of the Advocate

Commissioner, appointed by this Court, would disclose that the material parts of the vehicles/equipments/machineries have been removed and as

on today, the said items are worthless and taking into consideration of the fact that the material value of those items are going down day by day,

learned Judge has directed the Advocate Commissioner to obtain valuation and, thereafter, ordered him to conduct public auction and, in fact, the

Appellants had also agreed to the same, subject to the rider that they may be permitted to sell the same to third parties of their choice. Therefore,

learned Senior Counsel for the Respondent contends that in the absence of specific challenge to the order dated 7th Feb., 2011 and the conduct of

the Appellants herein in not raising any objection as to the Territorial jurisdiction of this Court to entertain the Application filed u/s 9 of the

Arbitration Act at the earliest point of time, and their conduct in removing the vital parts of the vehicles/equipments/machineries, the present Appeal

is liable to be dismissed with exemplary costs.

21. In support of his submissions, learned Senior Counsel for the Respondent placed reliance upon the following judgments:

(1) Dynasty Developers Private Limited Vs. Jumbo World Holdings Limited, A company incorporated and existing in accordance with the laws of

British Virgin Islands, Dandvati Investments and Trading Company Pvt. Ltd., A Company incorporated and existing in accordance with the laws of

India, Jerom Trading and Investment Limited, A company incorporated and existing in accordance with the laws of India and Gordon Woodroffe

Limited, Now known as GWL Properties Limited, A Company incorporated and existing in accordance with the laws of India,

(2) Decision of a Division Bench of the Calcutta High Court in the matter of GPI Textiles Ltd v. Pramod Metals & others, FMAT No. 470 of

2010 dated 24.6.2011.

22. This Court paid its best attention to the submissions made by the learned Senior Counsel appearing for the Appellants and the learned Senior

Counsel for the Respondent and also perused the materials available on record and also perused the documents, to which its attention was

specifically drawn and also the decision relied on by the respective learned Senior Counsel appearing for the parties.

23. As already indicated in the earlier paragraphs, the Loan-cum-Hypothecation Agreement came to be executed at Chennai and the Deeds of

Guarantee were also executed by the 2nd Appellant as well as another person, namely, Medarametla Subbaramaiah Naidu at Chennai. The 1st

Appellant is also having its branch office at Chennai. It is also very relevant to extract the following clauses in the Loan-cum-Hypothecation

Agreement entered into between the Respondent and the 1st Appellant:

1.2 ""Agreement"" means this Loan Agreement together with Summary Schedule, Supplementary Schedule/s, Annexures, Supplementary

Agreement/s attached and/or that may be attached in future thereto.

3.2 All payments of the Loan Installments and other charges and moneys due under this Agreement shall be payable by the Borrower to the

Lender at the Corporate office, or at such other addresses as may be specified in the Schedule hereto and shall deemed to have been paid on the

date on which the amounts thereunder are realized.

... ..

17. Arbitration

17.1 Any question dispute or difference that arises between parties or any of them touching or concerning this agreement or any condition herein

contained or as to the rights, duties or liabilities of parties hereto or any of them either during the continuance of the agreement or after termination

or purported termination hereof shall be referred to the sole Arbitrator to be appointed by the Lender, according to the provisions of Arbitration &

Conciliation Act, 1996 and rules thereunder and any amendment thereto from time to time shall apply.

17.2 The award of the Arbitrator shall be final, conclusive and binding on all the parties, and all the parties undertake to carry out the award

immediately without any delay. The venue of the Arbitration shall be Mumbai.

18. General

18.1 This Agreement may be amended only in writing and shall be binding upon and to the benefit of the parties hereto.

18.2 All costs, charges and expenses including the stamp duty in respect of this Agreement shall be borne by the Borrower.

18.3 The Borrower shall submit copies of its financial statements duly audited as also the unaudited half yearly statements and tax assessment order

and returns every year and such other information as may be required by the Lender and/or the institution/s providing the refinance to the Lender.

18.4 No relaxation, forbearance, delay or indulgence by the Lender in enforcing any of the terms and conditions of this Agreement or the granting

of time by the Lender to the Borrower shall prejudice, affect or restrict the rights and powers of the Lender hereunder nor shall any waiver by the

Lender of any breach hereof operate as the waiver of any subsequent or any continuing breach hereof.

18.5 Any notice or demand hereunder shall be in writing and signed by the Lender or its authorized representative and may be made by leaving the

same or sending it through post/courier addressed to the Borrower to the address specified or the address last known to the Lender; and a notice

or demand so given or made shall be deemed to given or made on the date it was so left or, as the case may be, two business days following that

on which it was so posted/ couriered, and shall be effectual notwithstanding the same may be returned undelivered and notwithstanding the

Borrowers changes of address.

18.6 The Borrower shall execute at its own cost in favour of the Lender or its nominee any further additional/fresh deeds/documents, etc.,

whenever required by the Lender to do so.

18.7 If any provision of this agreement is illegal, invalid or unenforceable for any reason whatsoever, it will be severed from the remaining

provisions, which will remain unaffected.

18.8 The Borrower shall, in the event of any change in authorised signatories, keep the Lender informed, and shall also make immediate

arrangement to replace the post dated cheques issued, if any, not still encashed with Fresh cheques signed by new signatories. Failure to keep the

Lender informed of the change or to replace the cheques shall be construed as default and Lender may take any such action that they may deem

fit.

18.9 The Borrower declares and represents that every statement and representation made and every particular given by it in relation to this

transaction are true and correct.

18.10 Words importing the plural shall, except where the context otherwise requires include the singular and vice versa. The pronouns he, she or it

and their cognate variations are used as interchangeable and should be interpreted in accordance with the context. Clause headings are for

convenience only and shall be considered for the purpose of interpretation.

19. Jurisdiction

19.1 This agreement shall be governed by and construed in all respects with the Indian laws and the parties hereto agree that any matter or issues

arising hereunder or any dispute hereunder shall, at the option/direction of the Lender, be subject to the non-exclusive jurisdiction of the Courts of

the city of Mumbai. This shall not however limit the rights of the Lender to take proceedings in any other Court of competent jurisdictions.

24. A perusal of the impugned order dated 27th Jan., 2011 as well as the order dated 7th Feb., 2011, would indicate that the Appellants" herein,

who are arrayed as Respondents in the said proceedings, did not raise any objection with regard to the Territorial jurisdiction of this Court at the

earliest point of time and only in the grounds filed in this Appeal, such objection has been raised.

25. In the decision in Om Sakthi Rennergies Limited Vs. Megatech Control Limited and A.P. Transco, , Appeal was preferred against the order

passed by the learned Single Judge of this Court u/s 9 of the Arbitration Act, wherein interim prohibitory order was made absolute. The facts of

the case would disclose that the Appellant in the said Appeal/Respondent in the Application filed u/s 9 of the Act raised an objection that the cause

of action arose within the State of Andhra Pradesh, where the project was located and executed and from where the payments were made and in

the agreement also it has been stated that ""for all practical purposes, the jurisdiction of Hyderabad Courts will be final"" and, thereby, implying that

the Courts at Hyderabad will have jurisdiction excluding the jurisdiction of all other Courts. However, at the time of hearing of the Application,

objection with regard to the Territorial jurisdiction was not pressed and, therefore, the learned Judge proceeded with the matter and made the

prohibitory order absolute. In the Appeal, it was argued on behalf of the Appellant therein that the defect of the jurisdiction would go to the root of

the matter and strike at the very authority of the Court to pass the order and such defect has always been treated as basic and fundamental and,

therefore, the order passed by a Court, having no jurisdiction, is a nullity and, hence, the validity of such an order could be challenged at any stage,

even in execution or collateral proceedings. This Court, in the said judgment, taken into consideration that the agreements were signed by the 1st

Respondent therein at Chennai and dispatch of goods and materials were also effected from Chennai and payments were also made at Chennai,

found that a part of cause of action arose at Chennai within the jurisdiction of this Court and, therefore, it is competent to entertain the lis, but for

the ouster clause relied on by the Appellant. However, the Appellant had expressed no objection for entertaining of the Application by this Court

and, therefore, he is prevented from raising the question of jurisdiction in view of the provisions of Section 21 of the Code of Civil Procedure. The

Division Bench of this Court, in the said decision, had also taken into consideration the judgments of the Hon"ble Supreme Court reported in Kiran

Singh and Others Vs. Chaman Paswan and Others, and Bahrein Petroleum Co. Ltd. v. P.J. Pappu, AIR 1996 SC 634, and the same is extracted

below:

10. In Kiran Singh and Others Vs. Chaman Paswan and Others, the Supreme Court laid down the salient principle thus:

The policy underlying Section 11 of the Suits Valuation Act, as also of Sections 21 & 99 of the Code of Civil Procedure, is that when a case has

been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless a failure of

justice has resulted. The policy of the legislature has been to treat objections as to jurisdiction, both territorial and pecuniary as technical and not

open to consideration by an Appellate Court, unless there has been prejudice on the merits.

11. In The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another, , the Supreme Court held as follows:

Counsel for the Plaintiff-Respondent submitted that it was open to the Defendants to waive this objection, and if they did so, they could not

subsequently take the objection. This submission is well founded. As a general rule, neither consent nor waiver nor acquiescence can confer

jurisdiction upon a Court, otherwise incompetent to try the Suit. But, Section 21 of the Code provides an exception, and a defect as to the place of

suing, that is to say, the local venue for suits cognizable by the Courts under the Code may be waived under this Section. The waiver u/s 21 is

limited to objections in the Appellate and Revisional Courts. But, Section 21 is a statutory recognition of the principle that the defect as to the place

of suing under Sections 15 to 20 may be waived. Independently of this Section, the Defendant may waive the objection and may be subsequently

precluded from taking it Seth Hiralal Patni Vs. Sri Kali Nath,

26. Keeping the ratio laid down by the Division Bench of this Court in the above-cited decision in mind, this Court considered the decisions relied

on by the learned Senior Counsel for the Appellant and also the factual background of this Appeal.

27. In Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs. Jindal Praxair Oxygen Company Ltd., the subject matter of challenge was the order passed

by the Bombay High Court in an Application filed u/s 9 of the Arbitration Act, 1996. In the said Appeal, the Appellant took a stand that the entire

cause of action has arisen outside the Territorial jurisdiction of the Bombay High Court. The facts of the case would disclose that the Appellant

therein invoked the jurisdiction of the Principal District Judge, Bellary and filed an Application u/s 9 of the Arbitration Act and an interim order was

passed. The Respondent therein, filed an Application to vacate the interim order and it was also dismissed. An Appeal was preferred before the

High Court at Karnataka, which allowed the Appeal and directed the issue of jurisdiction to be decided by the Bombay High Court in the

Arbitration Petition filed by the Respondent therein and by the impugned order dated 2nd March, 2006, the Bombay High Court held that it had

jurisdiction to entertain the Arbitration Petition. On Appeal before the Hon"ble Supreme Court, the Hon"ble Supreme Court has taken into

consideration number of decisions, including the Food Corporation of India Vs. M/s. Evdomen Corporation, and M/s. Patel Roadways Limited,

Bombay Vs. M/s. Prasad Trading Company, and held that Section 20 of the CPC cannot be made applicable to Letters Patent of Chartered High

Courts, namely, Calcutta, Bombay and Madras. The Hon"ble Supreme Court, in the above stated decision has taken note of the fact that almost

all part of cause of action arose within the jurisdiction of the Bombay High Court, has upheld the order of the Bombay High Court that it has got

jurisdiction to entertain the Section 9 Application.

28. In M. Venkatasamiappa v. Srinidhi Ltd., 1950 (1) MLJ 709, the scope of Sections 31 (1) & (2)(c) of the Arbitration Act, 1940, came up for

consideration and it has been held that the Court in Madras has no jurisdiction to receive the award and only the Court in Bangalore has

jurisdiction for the following reason:

In order to determine which is the Court having jurisdiction in the matter, you should first of all ascertain what the questions are, which form the

subject-matter of the reference to Arbitration. You then proceed to ask; supposing these questions had arisen in a suit, which is the Court which

would have jurisdiction to entertain the Suit ? That Court would be the Court having jurisdiction under the Arbitration Act also. The Court which

would have jurisdiction would be not the Court at the place in which the agreement was entered into or where the Defendant resides, but the Court

which would have jurisdiction in respect of the questions forming the subject-matter of the reference.

The question of residence would become relevant only should it arise out of or in connection with the subject-matter of the dispute and the

reference.

29. In Sabson (India) Pvt. Ltd. Vs. Neyveli Lignite Corporation Ltd., , the scope of Section 31(1), (2) & (3) and Section 14(2) of the Arbitration

Act, 1940, came up for consideration and the facts of the case would disclose that under Clause No. 84, it has been stated that the venue of

Arbitration shall be at Chennai and, therefore, the Arbitrators filed their award at Chennai and it was challenged by stating that the Sub-Court at

Cuddalore alone has jurisdiction. The learned Judge has taken into consideration of the fact that even as per the agreement, the parties have

accepted to the exclusive jurisdiction of the Civil Court having jurisdiction over Neyveli and, therefore, cannot ignore that clause and, therefore,

upheld the objection of the Respondent therein, namely, Neyveli Lignite Corporation.

30. In Union of India v. P. Anantharaman & another, 1991 (1) MLJ 286, again the scope of Section 31 of the Arbitration Act, 1940 came up for

consideration. The facts of the case would disclose that a Petition was filed u/s 14(2) of the Arbitration Act, 1940 to direct the Arbitrator to file the

original award and as per the agreement, the works are to be executed at Avadi, within the jurisdiction of the Sub-Court at Poonamallee. A stand

was taken that since the Petitioner as well as the 2nd Respondent have permanent address in Madras City, this Court (High Court) has jurisdiction

for passing the decree in terms of the award passed by the 1st Respondent/Arbitrator. This Court, on the facts of the case, held that no part of

cause of action arose within the Original Side jurisdiction of this Court and, therefore, ordered the Registry to return the original award for filing the

same before the appropriate Court.

31. In The The Electrical Manufacturing Co. Ltd., Calcutta and Another Vs. The Crompton Engineering Co., (Madras) Ltd., Madras, , the scope

of Section 2(c) and Section 20 of the Arbitration Act, 1940, came up for consideration. The facts of the case would disclose that a supplementary

agreement was executed at Madras and, therefore, the Application u/s 20 of the Arbitration Act, 1940, was filed for the reliefs and also leave was

sought u/s 12 of the Letters Patent and ex parte leave was granted. The 1st Respondent therein filed an Application for revocation of grant of leave

stating that even if the agreement had been executed in Madras, the material, namely, steel, had to be entrusted to the 1st defendant at Calcutta,

where its factory is situate and the claim relate to unused steel and other works to be done with lie outside the jurisdiction of this Court and,

consequently, this Court has no jurisdiction to entertain the Application u/s 20 of the Act. The learned Judge held that since the agreement having

been executed at Madras, this Court has jurisdiction to decide the question forming the subject matter of reference and the said order was put

under challenge before the Division Bench. The question arose in the said Appeal was whether in the case of specific entrustment of goods, for a

purpose under a contract, and a wrongful conversion by the Defendant, is the cause of action for a Suit, the place where the entrustment was made

and the wrongful conversion took place or the place where the contract in respect of the work was signed and the Division Bench, after taking into

consideration various decisions, held that the subject matter of the agreement is not the execution of the agreement, but the place where the alleged

misuse of surplus steel supplied to the 1st defendant took place, which falls within the jurisdiction of Calcutta High Court and, therefore, the said

Court has jurisdiction to entertain the Application u/s 20 of the Act.

32. In Jyothi Turbopower Services Pvt. Ltd. Vs. Shenzhen Shandong Nuclear Power Construction Company Ltd. and Syndicate Bank, the facts

of the case would disclose that as per the agreement, the place of Arbitration shall be in the State of Orissa. However, the II Addl. Chief Judge,

City Civil Court, Hyderabad, was approached for invoking Section 9 of the Arbitration Act and it was entertained, which was the subject matter in

the said decision. The Division Bench of the Andhra Pradesh High Court, on the facts of the case, found that as per Article 10 of the agreement,

the parties have agreed to the place of Arbitration as State of Orissa and, therefore, only the Courts in the State of Orissa will have jurisdiction to

entertain all the Applications with respect to the Arbitration agreement, including the Application u/s 9.

33. In Videocon Industries Limited Vs. Union of India (UOI) and Another, which relates to international Arbitration, the seat of Arbitration was at

Kuala Lumpur, Malaysia and there was no agreement between the parties to shift the juridical seat of Arbitration from Kuala Lumpur to London

and neither any written instrument was signed to that effect for amending the clause and, therefore, it has been held that the seat of Arbitration was

at Kuala Lumpur and not at London.

34. As regards lack of Territorial jurisdiction is concerned, reliance was placed upon the decision of the Privy Council reported in Setrucharlu

Ramabhadra Raju Bahadur & others v. Maharaja of Jeypore, 1919 ILR (42) 813, wherein it has been held that notwithstanding that no objection

as to the jurisdiction has been taken in the Sub-Court with regard to the decree for sale of mortgaged property, such an objection can be taken

before the Appellate Court.

35. In the decision reported in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, it has been held that though disputes in

question were covered by Arbitration clause, they not being arbitrable, as they relate to rights in rem, therefore it was not rightly referred to

Arbitration.

36. There cannot be any difficulty in accepting the proposition laid down by the Hon"ble Supreme Court and this Court in the above cited

decisions. It is settled position of law that ratio laid down in decisions can be made applicable to the facts and circumstances of each case and

keeping the well-settled principle of law in mind, this Court has carefully analyzed the facts of this case.

37. A perusal of the Loan-cum-Hypothecation Agreement would disclose that in the event of dispute or difference arise between the parties,

concerning the said agreement, or any condition as to the rights, duties and liabilities of the parties, it can be referred to the sole Arbitrator in

accordance with the provisions of the Arbitration and Conciliation Act. As per Clause 17 (2), the award of the Arbitrator shall be final, conclusive

and binding on all the parties and all the parties undertook to carry out the award immediately without delay and the venue of the Arbitration shall

be at Mumbai. The Respondent herein, by invoking the said clause, has filed the claim statement before the Arbitrator at Mumbai on 24th July,

2010.

38. As per clause 19 of the said agreement, the agreement shall be governed by and construed in all aspects with the Indian laws and the parties

hereto (Respondent and the 1st Appellant) agree that any matter or issues arising hereunder or any dispute hereunder shall, at the option/discretion

of the lender (Respondent) be subject to the Non-Exclusive jurisdiction of the Courts of the State of Mumbai. This shall not, however, limit the

rights of the lender (Respondent) to take proceedings in any other Court of competent jurisdiction.

39. The execution of the Loan-cum-Hypothecation Agreement and the Deeds of Guarantee is not in serious dispute. As per Clause 19, no

exclusive jurisdiction has been conferred on the Courts of the State of Mumbai and it has been clearly indicated in the said clause that the Non-

Exclusive jurisdiction of the Courts of the State of Mumbai shall not, however, limit the rights of the lender (Respondent herein) to take appropriate

proceedings in any other Court of competent jurisdiction. Accordingly, the Respondent has invoked the jurisdiction of this Court and filed the

Application u/s 9 of the Arbitration Act, 1996.

40. It is also pertinent to point out at this juncture that the Deeds of Guarantee were executed at Chennai and one of the clauses of the Letter of

Guarantee also states that nothing contained in Section 17 of the Arbitration Act, shall in any way, affect the right of any of or preclude the parties

to/ from seek/seeking such interim relief/s in any Court of competent jurisdiction, including the interim relief u/s 9 of the Arbitration Act and the

Rules framed thereunder.

41. Clause (e) of the letter of guarantee also reads that the venue of Arbitration shall be Mumbai or such other place as the lender may in the sole

discretion determine and the Courts in Mumbai or such other place shall have exclusive jurisdiction.

42. Apart from the clause in the Loan-cum-Hypothecation Agreement and Deeds of Guarantee, the Appellant, in the Counter Affidavit filed in

response to the Petition u/s 9 of the Arbitration Act has not objected to the Territorial jurisdiction of this Court to entertain these Applications and,

in fact, had also consented for the sale of the vehicles, subject to the condition that they may be permitted to negotiate with the third parties for

effecting such a sale.

43. In Om Sakthi Renegies Limited Vs. Megatech Control Limited and A.P. Transco,), this Court, after taking into consideration the decision of

the Hon"ble Supreme Court in Kiran Singh and Others Vs. Chaman Paswan and Others, and Bahrein Petroleum Co. Ltd. v. P.J. Pappu, AIR

1996 SC 634, held that ""if a party allows the Trial Court to proceed to judgment without raising objection as to the place of suing and takes a

chance of verdict in his favour, he clearly waives the objection and will not subsequently be permitted to raise it"". It has been further held in the said

decision that ""there has been an inference, the same should be in favour of the jurisdiction of the Court rather than the exclusion of such a

jurisdiction"".

44. It is to be noted at this juncture the stamp on the Loan-cum-Hypothecation Agreement would disclose that it was executed at Chennai and the

Deeds of Guarantee were also executed at Chennai. There is no specific denial in the Counter Affidavit filed by the Appellants herein to the

Application filed u/s 9 of the Arbitration Act as to the execution of the said agreements.

45. The Hon"ble Supreme Court, in the decision reported in Sushil Kumar Vs. Rakesh Kumar, held that denial being evasive and not categorical,

amounts to admission. As the Loan-cum-Hypothecation Agreement came to be executed at Chennai and so also the deeds of guarantee executed

at Chennai and that the branch office of the Respondent is also at Chennai, it cannot be said that this Court lacks jurisdiction to entertain the

Application filed u/s 9 of the Arbitration Act by the Respondent.

46. Learned Senior Counsel appearing for the Appellants made an attempt by submitting that even assuming, without admitting, that this Court has

jurisdiction to entertain the Application, in the absence of leave to sue under Clause 12 of the Letters Patent, the Applications are liable to be

rejected.

47. A Division Bench of this Court, in the decision reported in Dynasty Developers Private Limited Vs. Jumbo World Holdings Limited, A

company incorporated and existing in accordance with the laws of British Virgin Islands, Dandvati Investments and Trading Company Pvt. Ltd., A

Company incorporated and existing in accordance with the laws of India, Jerom Trading and Investment Limited, A company incorporated and

existing in accordance with the laws of India and Gordon Woodroffe Limited, Now known as GWL Properties Limited, A Company

incorporated and existing in accordance with the laws of India, has considered the question and has taken into consideration the Food Corporation

of India Vs. M/s. Evdomen Corporation, and other decisions and held that the Application under the Arbitration Act, 1996, cannot be equated

with a Civil Suit and if a part of the cause of action has arisen within the Territorial jurisdiction of this Court, Application under the Arbitration Act

can be instituted and in that event, leave under Clause 12 of the Letters Patent is not necessary.

48. Though it is vehemently contended by the learned Senior Counsel for the Appellant that the subject matter of Arbitration has not arisen within

the jurisdiction of this Court, this Court is of the view that the said submission lacks merit.

49. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, the jurisdiction of the Court to entertain a Suit on breach of contract

arose for consideration and it has been held as follows:

The jurisdiction of the Court in matter of a contract will depend on the suits of the contract and the cause of action arising through connecting

factors. In the matter of a contract there may arise causes of action of various kinds. 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 at

the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A Suit on a

contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of

contract. But making of an offer on a particular place does not form cause of action in a Suit for damages for breach of contract. Ordinarily,

acceptance of an offer and its intimation result in a contract and hence a Suit can be filed in a Court within whose jurisdiction the acceptance was

communicated. The performance of a contract is part of cause of action and a Suit in respect of the breach can always be filed at the place where

the contract should have been performed or the performance completed. If the contract is to be performed at the place where it is made, the Suit

on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where actions are to be

rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract.

In cases of repudiation of a contract, the place where repudiation is received is the place where the Suit would lie. If a contract is pleaded as part

of the cause of action giving jurisdiction to the Court where the Suit is filed and that contract is found to be invalid, such part of cause of the action

disappears.

When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause

properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting

factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto

take away jurisdiction of other Court. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts.

When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be

shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only",

"exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio unius est

exclusio alterius" - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case.

In such a case mention of one thing may imply exclusion of another, when certain jurisdiction is specified in a contract an intention to exclude all

other from its operation may in such cases be inferred. It has therefore to be properly construed.

Where the clause under which it was claimed that there was ouster of jurisdiction of Courts only stated that any dispute arising out of sale would be

subject to jurisdiction of Court within whose jurisdiction order was placed but there were no exclusive words like "exclusive", "alone", "only" and

the like, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded.

50. As per the ratio laid down in the said decision, the performance of a contract is a part of cause of action and a Suit in respect of a breach can

always be filed at the place where the contract should have been performed or it is completed and the jurisdiction of the Court in the matter of

contract will depend on the suits of the contract and the cause of action arising through connecting factors. It has been further held that if there is a

stipulation that the contract shall be deemed to have been made at a particular place, the same would provide the connecting factor for jurisdiction

of the Courts of that place in the matter of any dispute and/or arising out of that contract. As regards ouster of jurisdiction, it has been held in the

said decision that when the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of

ad idem can be shown, the other Court should avoid exercising jurisdiction and when certain jurisdiction is specified in a contract, an intention to

exclude all other from its operation may in such case be inferred.

51. In the case on hand, Clause 19(1) stipulates that it is subject to the Non-Exclusive jurisdiction of the Courts of the State of Mumbai and shall

not, however, limit the rights of the lender (Respondent) to take proceedings in any other Court of competent jurisdiction. Therefore, by virtue of

the said clause, exclusive jurisdiction has not been conferred on the Courts of the State of Mumbai and if a part of cause of action arose within the

jurisdiction of this Court, the Application u/s 9 of the Arbitration Act can be filed here and, accordingly, the Applications were filed on the file of

this Court after obtaining leave under Clause 12 of the Letters Patent.

52. As already pointed out in the earlier paragraphs, the Appellants, who are Respondents 1 & 2 in the said Applications, have subjected

themselves to the jurisdiction and not even raised an objection as to want of Territorial jurisdiction on the part of this Court to entertain the said

Applications and, in fact, consented for the sale of the vehicles, subject to the rider that they may be permitted to negotiate with the third parties for

effecting such a sale.

53. In view of the above said uncontroverted facts, the point raised by the learned Senior Counsel for the Appellants as to the lack of Territorial

jurisdiction on the part of this Court to entertain the Applications, for the first time in this Appeal, does not merit acceptance. The present Appeal,

being devoid of merits, deserves dismissal. Accordingly, this Original Side Appeal is dismissed. Consequently, connected Miscellaneous Petition is

closed. In the circumstances, there will be no order as to costs.