

(2012) 11 MAD CK 0136
In the Madras High Court
Case No : S.A. No. 448 of 2007

Hindustan Corporation (Hyd) Private Ltd., No. 1-2-3,
Domalguda Hyderabad Branch Office 22, Trevalyn Basin
Street Chennai 600079

APPELLANT

Vs

M/s. SSB Industries Limited Pondicherry and United India
Insurance Co. Ltd.

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Carriers Act, 1865 — Section 10, 5, 6, 9
Civil Procedure Code, 1908 (CPC) — Section 21

Citation : (2013) 1 CTC 279 : (2013) 1 LW 40

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : P. Valliappan, for the Appellant; Nageswaran and Narichania, for the Respondent

Judgement

Honourable Mr. Justice P.R. Shivakumar

1. The defendant in the original suit is the appellant. The original suit in O.S. No. 5378 of 1998 was filed by the respondents 1 and 2 for the recovery of a sum of Rs. 29,343/- as compensation for the damage caused to the goods transported in the appellant's/defendant's vehicle. The suit was decreed by the trial Court and the same was confirmed by the lower appellate Court. As against the concurrent judgments of the Courts below holding the appellant/defendant liable to pay the above said amount as damages with interest, the present second appeal has been filed. For the sake of convenience, the parties are referred to in accordance with their ranks in the original suit and if necessary, further descriptions shall also be furnished at appropriate places. The claim was made based on the following plaint averments: Hindustan Corporation (Hyd) Private Ltd., the defendant is a common carrier and a Private Limited Company having its registered office at 1-2-3, Domalguda, Hyderabad. It is carrying on its business in other places including Chennai. Its Chennai Branch Office is at No. 22,

Trevelyan Basis Street, Madras 600 079. S.S.B. Industries Limited, Puducherry, the first plaintiff, purchased 1469 numbers of Porcelain Electrical Insulators from W.S. Industries (India) Limited for their plant in Puducherry under two invoices for a total sum of Rs. 2,99,510/- (Rs. 25,240/- + 2, 54,270/-). The said insulators were neatly packed in wooden crates in conformity with the standards and norms worthy of normal road carriage and were entrusted to the defendant common carrier in good condition for being transported by road from Chennai to Puducherry for door delivery to the first plaintiff. On being satisfied with the apparent sound condition of the consignment, the defendant common carrier accepted the consignment for transporting the same to Puducherry for door delivery to the first plaintiff for reward. The said consignment was made on 22.02.1996. The said consignments were delivered to the first plaintiff under two consignment notes bearing numbers 059458 and 059459 on 23.02.1996 in a damaged condition and on inspection, it was found that 78 numbers of insulators under Consignment Note No. 059458 and 46 numbers of insulators under Consignment Note No. 059459 were found damaged. The Porcelain Insulators which were found damaged could not be used and it did not have any salvage value. The value of the insulators found damaged was Rs. 23,512/- adding 20% of Excise Duty and 4% of CST, a total amount of Rs. 29,343/- was arrived at as the loss caused to the first plaintiff due to the damage caused to the insulators. An independent surveyor, after conducting survey, submitted his report on 08.03.1996 opining that the insulators had been broken due to negligence / mishandling on the part of the transport personnel during transit/loading/unloading. The first plaintiff thereafter issued a notice of loss required u/s 10 of the Carriers Act, 1865 on 25.02.1996. The defendant common carrier did not deny the fact of the damage caused to the suit consignments, but denied their liability to pay damages in their letter dated 28.03.1996. Only as a result of negligence on the part of the defendant Common Carrier while discharging their statutory obligations, the loss has occurred. As the suit consignments have been insured with the second plaintiff under Policy No. 011701/21/26/10717/95, the second plaintiff, namely United India Insurance Co. Ltd., paid the said amount of Rs. 29,343/- to the first plaintiff. Pursuant to the same, the first plaintiff executed a letter of Subrogation and Power of Attorney in favour of the second plaintiff on 20.12.1996. Subsequent to the settlement of the claim under the insurance policy, the second plaintiff lodged a claim through the recovery agent on 07.02.1997. As such the second plaintiff, the United India Insurance Co. Ltd., is entitled to file and maintain the suit in their own name. However, in order to avoid any technical defence being taken by the defendant, both the plaintiffs have jointly filed the suit and the plaintiffs do have no objection for a decree being passed either in favour of the second plaintiff or in favour of both the first and the second plaintiffs. A decree directing the defendant to pay a sum of Rs. 29,343/- with interest at the rate of 18% p.a. from the date of plaint till realization and to pay the cost of the plaintiffs should be passed.

2. The suit was resisted by the defendant based on the written statement which

contains the following averments, besides the general denial of the claim of the plaintiffs:-

The defendant, as a common carrier, was merely asked to transport the suit consignment to the first plaintiff's plant in Puducherry as per the terms of the agreement found in the two invoices concerned in the suit, bearing Nos. D.B. 11022 and 11023. As such the defendant was not in a position to verify the contents of the suit consignments and the defendant believed that the goods were in good order. The first plaintiff took delivery of the suit consignments after duly acknowledging the fact that the goods were delivered in the same condition as they were at the time of entrustment of the same to the defendant for transportation. The plaintiff allegations that 78 numbers of insulators were delivered in a damaged condition and the said insulators were totally damaged and were of no salvage value are false. The plaintiffs are not entitled to rely on the surveyor's report or the photographs as the defendant was not intimated about any survey of the loss. The alleged Subrogation is misconceived and the suit filed by the plaintiffs 1 and 2 jointly is liable to be dismissed. The claim made by the second plaintiff through recovery agent was validly repudiated. In addition, the goods were transported by the defendant on the understanding that they were transported on the basis of owner's risk. Having agreed that the goods would be transported at owner's risk, the plaintiffs cannot claim any sum by way of damages for the alleged damage caused to the goods transported. The agreement itself clearly shows that the Courts at Hyderabad alone shall have jurisdiction and the suit before the trial Court is not maintainable. For the said reasons, the suit must be dismissed with exemplary costs.

3. Based on the above said allegations made in the plaint and the counter allegations made in the written statement, the learned trial Judge framed two issues and one additional issue, which are as follows:

Issues:

- 1) Whether the plaintiffs are entitled to a decree as prayed for in the plaint?
- 2) What other relief?

Additional Issue:

- 1) Is it correct to state that this Court (trial Court) does not have the jurisdiction to try the suit?

4. The parties went for trial and in the trial, two witnesses were examined as Pws 1 and 2 and 12 documents were marked as Exs. A1 to A12 on the side of the plaintiffs, whereas one witness was examined as DW1 and one document was marked as Ex. B1 on the side of the defendant. After hearing the arguments advanced on both sides, the learned trial Judge considered the pleadings and evidence and upon such consideration decided the issues in favour of the plaintiffs and granted a decree as prayed for directing the defendant to pay the plaintiffs a sum of Rs. 29,343/-together with an interest on the said amount

calculated at the rate of 18% p.a. from the date of plaint till realization and also the cost of the suit. Against the said decree of the trial Court dated 22.10.2003, the defendant preferred an appeal in A.S. No. 704 of 2005 on the file of the lower appellate Judge, namely II Additional Judge, City Civil Court, Chennai. The learned lower appellate Judge, after hearing, concurred with the findings of the trial Court and dismissed the appeal confirming the decree passed by the trial Court. The said decree of the lower appellate Court dated 20.07.2006 made in A.S. No. 704 of 2005 is challenged in the present second appeal.

5. The second appeal has been admitted on the following substantial questions of law:

a) Whether the Courts below are correct in law in holding that since the issue of jurisdiction is not decided as a preliminary issue, the defendant/appellant is precluded from raising the same during trial against well established principles of law?

b) When PW1 has categorically admitted during cross-examination, that there is a possibility of the goods being packed in a damaged condition and when there is no evidence whatsoever to prove negligence on the part of the appellant, whether the Courts below are correct in law in granting decree as prayed for?

c) Whether Ex. A8 Surveyor's report can be relied upon especially when he had made the alleged survey without notice to the appellant and there was no explanation from PW2 surveyor, for the interval of three clear days from the date of delivery and the date of survey?

d) Whether the Courts below are correct in law in discarding Ex. A12, which would clearly prove that the goods were transported at the owner's risk?

6. The arguments advanced by Mr. P. Valliappan, learned counsel for the appellant and Mr. Nageswaran and Narichania, learned counsel for the respondents were heard. The materials available on record were also perused.

7. The defendant, who suffered a decree in the hands of the trial Court, has approached this Court by way of the present second appeal after unsuccessfully prosecuting an appeal before the lower appellate Court. The suit was filed by the plaintiffs for recovery of a sum of Rs. 29,343/- together with interest from the date of plaint till realization towards compensation for the damage caused to the goods transported through the defendant, a common carrier, from Chennai to Pondicherry (now Puducherry). It is not in dispute that Porcelain Electrical Insulators covered by two invoices bearing Nos. D.B. 11022 and D.B. 11023 were accepted in Chennai for being transported to Puducherry for effecting door delivery at Plant -II of the first plaintiff and that the goods were accepted for transportation under two consignment notes bearing numbers 059458 and 059459. The said consignments were made on 22.02.1996. At the time of delivery of the said consignments on 23.02.1996, according to the case of the plaintiffs, 78 numbers of insulators covered by Consignment Note No. 059458

and 46 numbers of insulators covered by Consignment Note No. 059459 were found damaged. The defendant does not dispute the fact that such number of insulators sent under the suit consignment notes were found damaged at the time of delivery. But the defendant took a stand that the breakage to the insulators could have been caused due to defective packing. It was also a stand taken by the defendant that whether the Porcelain Electrical Insulators consigned for transportation were in good condition could not be verified at the end of the defendant and that the breakages found in the insulators could have been there even at the time of consignment for transportation. Yet another stand taken by the defendant is that there was no negligence or want of care on the part of the officers, agents or employees of the defendant which lead to the damage to the goods and that the goods were transported at owner's risk. A further stand taken by the defendant is that since there was a clause in the agreement to the effect that only the Courts in Hyderabad shall have the jurisdiction in respect of any disputes regarding the consignments the trial Court did not have the jurisdiction to entertain the suit.

8. Admittedly the defendant, as common carrier, accepted the suit consignments for transportation to Puducherry from Chennai and door delivery of the consignment at plaint II of the first plaintiff in Puducherry. It is also not in dispute that out of a total number of 1,469 Porcelain Electrical Insulators sent under the suit consignments, 114 number of insulators were found damaged at the time of delivery to the first plaintiff on 23.02.1996. The invoices for the purchase of the insulators have been produced as Exs. A2 and A3. The suit consignment notes dated 22.02.1996 have been marked as Exs. A4 and A5. Ex. A2 invoice bearing No. D.B. 11022 dated 22.02.1996 covers 145 number of Porcelain Electrical Insulators each costing Rs. 250/-. Ex. A3 invoice bearing D.B. 11023 dated 22.02.1996 covers 1,323 number of insulators each one costing Rs. 154/-. The goods covered by Ex. A2 are the subject matter of Ex. A4 consignment note. Similarly, the goods covered by Ex. A3 are the subject matter of Ex. A5 consignment note. On 25.02.1996, the first plaintiff sent an intimation to the defendant by registered post informing that 78 numbers of insulators covered by Ex. A3 invoice and 46 numbers of insulators covered by Ex. A2 invoice were found damaged during transit. It was also informed in the said letter that necessary claim for a sum of Rs. 29,343/- being the value of the insulators damaged would be made with a detailed report. Copy of the said notice and the postal acknowledgment card in proof of service of the same have been produced as Exs. A6 and A7 respectively. As the goods had been insured with the second plaintiff, the surveyor engaged by the second plaintiff, conducted a survey and submitted a report on 08.03.1996. The said report along with the photographs have been marked as Ex. A8. For Ex. A6 letter, the defendant has sent a reply under Ex. A9 dated 28.03.1996 admitting that there had been some damage caused to the consignment during transit. But, it was contended on behalf of the defendant that the damage had been caused despite maximum care and retention had been given by them during transit and that the damage had

occurred due to normal transit hazards. It was also contended that the consignments were booked on owner's risk and therefore the claim of the first plaintiff could not be entertained. Thereafter the insurer, namely the second plaintiff paid the value of the goods damaged during transit and got a letter of Subrogation and Power of Attorney for recovering the same from the common carrier, namely the defendant. The said letter of Subrogation and special Power of Attorney has been marked as Ex. A10. Based on the same, W.C. Narichania Private Limited, a recovery agency was engaged by the second plaintiff who issued the demand under Ex. A11 to the defendant. But the defendant, again reiterating the stand taken under Ex. A9, sent a reply to the recovery agency on 07.04.1997 and the same has been marked as Ex. A12. Only thereafter the plaintiffs chose to file the suit.

9. One Mr. Vijayan, Assistant Divisional Manager of the second plaintiff company figured as PW1 and he repeated the plaint averments in his evidence. In addition, the surveyor who assessed the damage and submitted Ex. A8 report has deposed as PW2. Though the defendant would have made an attempt to contend that the defendant could not verify the condition of the goods sent under the suit consignments, the sole witness examined on the side of the defendant as DW1 has admitted that for the letter produced as Ex. A6, they had sent a reply, but copy of such a reply had not been produced by the defendant. They have also not disputed the fact that Ex. A9 was the reply sent for Ex. A6. In Ex. A9, a clear admission has been made that certain damage had been caused to the goods sent under the suit consignments. It was not mentioned therein that the defendant's men were not aware of the condition of the goods entrusted to them at the time of entrustment for transportation. On the other hand, it had been stated that due to normal transit hazards, the damage had occurred. The defendant cannot get over such a clear admission that the damage had been caused either at the time loading or at the time of unloading or during voyage. In the letter dated 30.03.1996 addressed by the first plaintiff to the defendant requesting the defendant to send a damage certificate to proceed with the insurer, a foot note had been made with the following content "as our insurance authorities are insisting Damage Certificate you are requested to send the same at the earliest without fail".

10. Of course, the plaintiffs have not produced any damage certificate admitting the extent of damage issued by the defendant. But it is a fact which could not be disputed that the defendant had admitted that at the time of effecting delivery, a number of Porcelain Electrical Insulators covered by the suit consignments as narrated in the letter of the first plaintiff marked as Ex. A6 were found damaged. The plaintiffs have also proved by the evidence of PW2, the insurance surveyor and his report and the photographs marked as Ex. A8 that 78 numbers of insulators under Consignment Note No. 059458 and 46 numbers of insulators under Consignment Note No. 059459 were found damaged and that the broken Porcelain Electrical Insulators could not be used and the same did not have any salvage value. Hence, the price of those broken insulators found in Exs. A2 and

A3 invoices along with 20% Excise Duty and 4% CST was claimed as compensation from the defendant. Since the goods were insured with the second plaintiff, as per the contract of insurance, the second plaintiff paid the value of the damaged goods to the first plaintiff and got Ex. A10 Letter of Subrogation and Special Power of Attorney. When such is the case, simply because PW1, an officer of the second plaintiff, during examination, admitted that he did not have the personal knowledge of the condition in which the goods were entrusted with the defendant and that he could not deny a suggestion that there was a possibility of damaged goods being packed and entrusted with the carrier for transportation, it does not mean that the same would amount to an admission that the goods, entrusted with the carrier, namely the defendant, were not in good condition. No special note has been made in the consignment notes that the transporter did not verify the condition of the goods packed and entrusted for transportation. Moreover, the defendant admitted under Ex. A9 that the damage had been caused due to the normal transit hazards. Having admitted the same, the defendant cannot contend that the plaintiffs have not proved any negligence on the part of the defendant or their agents or employees that resulted in the damage to the goods. Substantial Question No. (b) has been raised in utter disregard of the above said admission made by the defendant under Ex. A9 and also the absence of any document to show that the condition of the goods consigned was not verified by the carrier at the time of consignment. Hence, the question of law framed as substantial question of law No. (b) is answered against the defendant (appellant) and it is held that the fair admission made by PW1 that he could not deny the possibility of the goods having been packed in a damaged condition, is sought to be misinterpreted to mean that there is an admission that the goods had been packed in a damaged condition.

11. The surveyor engaged by the insurer, namely the second plaintiff surveyed the consignments and noted the damage caused to the consignments. His report is in consonance with Ex. A6 notice regarding the number of Porcelain Insulators found damaged. It was also found by the surveyor, namely PW2, that the Porcelain Electrical Insulators found damaged could not be used and they did not have any salvage value. The objection taken by the defendant is that the surveyor's report produced as Ex. A8 could not be relied on since the inspection was made by him without notice to the defendant. It is pertinent to note that the surveyor was engaged by the insurer to take a decision as to whether the insured has to be indemnified in accordance with the contract of insurance and hence the failure of the surveyor to issue notice to the defendant cannot be projected as a ground for rejecting the report of the surveyor. It should also be noticed that the inspection by the surveyor was made on 26.02.1996. On 25.02.1996 itself the defendant was informed about the damage under Ex. A6 letter in which it had been stated that a detailed report would be submitted in a week. When the defendant had been informed of the damage caused to the consignment, the defendant ought to have requested the first plaintiff to make the damaged goods available for inspection by the defendant. But the defendant

without doing it and without engaging a surveyor to inspect the goods, had chosen to send a reply admitting that damage had been caused to the goods due to normal transit hazards. Having given such a reply, the defendant cannot take a stand that Ex. A8 report of the surveyor, namely PW2, could not be relied upon especially when he has adopted only the value found in the invoices produced as Exs. A2 and A3. Hence, the Substantial Question of Law No. (c) is also answered against the defendants and in favour of the plaintiffs.

12. The next contention raised by the defendant is that since the goods were transported at owner's risk, the defendant is not liable to pay compensation for the damages caused to the goods during transit. The said plea is based on Section 6 of the Carriers Act which enables the common carrier to limit its liability by a special contract. Section 5 of the Act provides that where the property entrusted to the carrier is lost or damaged, then owner thereof should be entitled not only to recover damages for the loss or damage to the property, but he will also be entitled to recover any amount which might have been paid to the carrier as a consideration for carrying the goods. Section 6 of the Carriers Act speaks of unlimited liability of the common carrier in respect of the goods not, being of the description contained in the schedule to the Act. It provides that the liability of the Carrier shall not be deemed to be limited or affected by any public notice. Section 9 of the Act provides that in a suit for recovery of damages for loss or non-delivery of goods, the burden of proof would not be on the plaintiff to establish that the loss or damage or non-delivery was caused owing to the negligence or criminal Act of the carrier, his servants or agents.

13. A consideration of the above said provisions will show that an absolute liability is cast on the carrier for the loss or damage caused to the goods entrusted to the carrier for transportation and the law presumes negligence and absence of due care on the part of the carrier, his agents or his servants in case of loss or damage or non-delivery. The burden of proving the absence of any negligence or want of care shall be on the carrier. The owner of the goods who sues the carrier for compensation for the loss of or damage to or non-delivery of goods need not prove negligence, want of care or criminal Act on the part of the carrier, since the law casts the burden on the carrier to prove that the goods were handled without negligence and with due care and despite such care being taken by the carrier, due to reasons beyond the control of the carrier, the damage to the goods had occurred. When such is the case, the Carrier's liability cannot be limited by a public notice or by a mere clause printed in the consignment note that the goods were accepted for transportation at owner's risk. Unless it is proved that the said clause was brought to the notice of the consignor / consignee or the representative of the consignor / consignee agreed for such a condition, then only it will amount to a special contract limiting the liability of the carrier. Even in case of special contract, the liability of the carrier for the loss or damage or non-delivery caused owing to the negligence or criminal act of the carrier or his servants or agents does not get affected or limited. The public carrier is always liable for the loss, damage or non-delivery

caused due to his fault or the fault of his servants or of his agents.

14. A conjoint reading of the relevant provisions of the Carriers Act will show that the owner of the goods suing the carrier for the compensation for the loss, damage or non-delivery is not expected to prove any negligence or criminal act on the part of the carrier, his servants or agents and on the other hand, the burden is cast on the carrier to prove the absence of the said factors leading to the loss, damage or non-delivery. By a special contract, the public carrier cannot limit his liability to the loss or damage or non-delivery caused owing to negligence or criminal act of the carrier, his servants or agents. By a special contract liability for the loss caused not due to the other reasons beyond his control alone can be limited. Even where there is a special contract that the goods are transported at owner's risk, the liability of the carrier for loss, damage or non-delivery caused owing to the negligence or criminal act of the carrier or his servant or his agent is kept intact. The plaintiff, who sues the carrier for compensation for loss, damage or non-delivery, can rely on the statutory presumption that the loss, damage or non-delivery was caused due to the fault on the part of the public carrier, his servant or his agent. The burden is on the public carrier to prove that despite the fact that there was no negligence, no want of care and there was no criminal act, the damage, loss or non-delivery was caused due to reasons beyond the control of the common carrier.

15. In view of the above said position of law, the burden is on the defendant to prove absence of negligence or criminal act leading to the damage caused to the goods. The defendant has not adduced any other evidence to discharge the above said burden of proof excepting the oral testimony of DW1 and the letter sent by the first plaintiff requesting the defendant to issue a Damage Certificate marked as Ex. B1. Even DW1 in his evidence has admitted that he was not present when the goods were loaded in the vehicle. Even though the defendant had admitted under Ex. A9 that there had been damage to the goods, DW1 would state that no such admission had been made in the said document. However, he has admitted that in the said letter the defendant had stated that the damage had been caused due to the normal transit hazards. No reliable evidence has been adduced on behalf of the defendant to show that the goods were transported without any negligence on the part of the servants of the public carrier. On the other hand, DW1, who does not have the personal knowledge of entrustment of the goods under the suit consignment for transportation and who also was not present at the time of entrustment, loading, unloading and delivery at the place of the first plaintiff, would simply state that the defendant had taken utmost care for the delivery of the goods and delivered them in the same condition in which it had been handed over to the defendant. The said statement of DW1 is contrary to the admission made in Ex. A9 that the goods were found damaged at the time of delivery to the first plaintiff. The defendant has not produced copy of the consignment note or special agreement to show that the consignor or consignee or the representative of either the consignor or consignee agreed for the transportation of the goods at owner's risk. Hence, the contention

of the defendant that the goods were transported at owner's risk under a special contract cannot be countenanced. Even assuming that the printed clause found in Exs. A4 and A5 consignment notes will constitute a special contract, the defendant is not absolved of its liability for any loss or damage caused to the goods due to the negligence of its servants or agents. The crux of the question is whether there was a special contract for transporting the goods at owner's risk. Since the defendant has not discharged the onus of proving that the loss had occurred not due to any negligence or criminal act on the part of the defendants or his servants or agents, the defendant's contention that the defendant is not liable in view of the special contract is not sustainable. Even while framing the 4th substantial question of law, the defendant has referred to Ex. A12 reply notice alone and did not refer to any other document as evidencing a special contract to show that the goods were transported at owner's risk. The question should have been framed making reference to Exs. A4 and A5 also. Such a technical flaw need not be given much importance. In view of the aforesaid discussions, this Court holds that the Substantial Question of Law No. (d) is answered accordingly against the defendant.

16. The main contention of the defendant is that the trial Court did not have the jurisdiction to entertain the suit in view of a clause in the agreement between the parties that the Courts in Hyderabad alone shall have the jurisdiction. Of course, the defendant took a stand in the written statement that there is a condition printed on the reverse side of the consignment notes that the Courts in Hyderabad City alone shall have jurisdiction in respect of claims, matters arising under the consignments or of the goods entrusted for transportation. Of course, in a catena of decisions, the Apex Court has held that when two or more Courts shall have jurisdiction to entertain a suit, the parties shall be at liberty to agree between themselves for conferring exclusive jurisdiction on any one of such Courts and excluding the jurisdiction of the other Courts. Such a contract was held to be not offending the public policy. It is a well settled principle that the parties by their act cannot confer jurisdiction on a Court which does not have jurisdiction. In *M/s. Patel Roadways Limited Vs. M/s. Prasad Trading Company and M/s. Patel Roadways Limited Vs. Tropical Agro Systems Pvt. Ltd* and another reported in AIR 1992 Supreme Court 1514, a three Judge bench of the Hon'ble Supreme Court held that the parties cannot confer jurisdiction on a Court at a place where a Corporation has its principal office if the cause of action does not arise within the jurisdiction of the Court exercising jurisdiction over the place of principal office of the corporation, when the corporation does have a subordinate office in the place where the cause of action arose. If the ratio found in the said judgment of the Hon'ble Supreme Court bench consisting of three judges is applied to the present case, the contention of the defendant that only the Courts in Hyderabad shall have jurisdiction has got to be discountenanced. Admittedly, the cause of action arose in Chennai where the goods were entrusted to the carrier and also in Puducherry where the goods were delivered in a damaged condition. No part of the cause of action arose in Hyderabad. Except the fact that

the Head Office of the defendant is in Hyderabad, there is no jurisdictional fact which would otherwise confer jurisdiction on the Courts in Hyderabad regarding the suit consignment. As it is a well settled preposition that the parties cannot confer jurisdiction on a Court which would not have jurisdiction but for such agreement, the said clause in the agreement conferring jurisdiction on such court shall not be given effect to.

17. Even assuming that the defendant could have been sued at Hyderabad, though the defendant could not have sued the plaintiffs at Hyderabad in the absence of the special agreement, the special agreement preferring the jurisdiction of the Hyderabad Courts has not been proved by the defendant to the satisfaction of the Court. Except a clause on the back side of the consignment notes printed in microsize letters, there is no other document to show that there was such an agreement for the preference of the jurisdiction of the Courts in Hyderabad. A clause printed on the back side of the invoice or the consignment note in small letters without prominence cannot be projected as a special agreement preferring the jurisdiction of the Courts at a particular place. The signature of the consignor or consignee or their representative has not been obtained in token of having brought the said clause to the notice of the consignor or consignee. Such an important clause preferring jurisdiction of the Courts at a particular place should have been printed in prominent letters preferably in a different ink than the ink used for printing the other clauses to show that any one coming across the document would not have missed the same. In this case, Clause 17 printed on the back side of the consignment notes cannot be read without straining the eyes. As such, the reliance made by the defendant on the said clause for contending that only the Courts in Hyderabad have got jurisdiction to entertain the suit is improper and the contention made by the defendant in this regard is bound to be rejected. Even assuming for argument sake that such a special contract is there preferring the jurisdiction of the Courts in Hyderabad, unless the defendant is able to prove that there had been a consequent failure of justice due to the entertainment of the suit by the Court whose jurisdiction has been ousted, the objection as to the place of suing shall not be allowed by the appellate Court. As per Sub-section 1 of Section 21 of the Civil Procedure Code, a defendant shall succeed in the appeal against the decree passed by the trial Court against him, only if he is able to prove the following conditions:-

- 1) Objection as to the place of suing should have been taken in the Court of first instance (trial Court) at the earliest possible opportunity and in all cases where issues was settled, at or before such settlement; and
- 2) There has been a consequent failure of justice.

18. The mere fact that the objection as to the place of suing was taken at the earliest possible opportunity alone shall not be enough and it should have been shown that the entertainment of the suit by the Court has resulted in a consequent failure of justice. Hence, the defendant cannot succeed in the appeal on the ground of territorial jurisdiction also. It is not the case of the defendant

that the defendant did not have any branch office in Chennai. On the other hand, admittedly the defendant does have a branch office in Chennai and the defendant is carrying on business in Chennai also. The cause of action also arose in Chennai. The defendant has engaged a lawyer and contested the suit. Under such circumstances it cannot be said that a reasonable opportunity was denied to the defendant for defending itself and that a consequent failure of justice has occurred. For all the reasons stated above, this Court comes to the conclusion that the questions of law No. (a) should also be decided against the defendant (appellant). Accordingly, this Court holds that the trial Court did have the jurisdiction to entertain the suit and the decree of the trial Court which was confirmed by the appellate Court cannot be interfered with in the second appeal on the ground of jurisdiction.