
(2005) 09 AP CK 0080
In the Andhra Pradesh High Court
Case No : C.M.A. No. 529 of 2005

INCOMM Tele Limited (Formerly ARM Limited)	APPELLANT
Vs	
Bharat Sanchar Nigam Limited and Others	RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Arbitration Act, 1940 — Section 17, 18, 2, 31, 31(4)
Arbitration and Conciliation Act, 1996 — Section 11, 2(1), 36, 42, 46
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 7 Rule 11, 120, 20

Citation : (2005) 6 ALT 642 : (2006) 1 ARBLR 530

Hon'ble Judges : G. Rohini, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : Nooty Ramamohan Rao, for the Appellant; Sharat Kapoor, for K. Narahari, for the Respondent

Final Decision : Allowed

Judgement

D.S.R. Varma, J.—Heard both sides.

2. This Civil Miscellaneous Appeal is directed against the order and decree, dated 16-6-2005, passed by the III Additional Chief Judge, City Civil Court, Hyderabad, dismissing the application I.A.No. 801 of 2005 in O.P.No. 739 of 2005, filed under Order 39 Rule 1 of the CPC seeking to grant a temporary injunction restraining the respondents from recovering the alleged excess payments in respect of 28500 CDMA (FWT) sets supplied to the respondents by the petitioner-company, in pursuance of the purchase Order No. CE/PO/009/2002-2003, dated 9-9-2002, pending the final award by the Arbitral Tribunal, as not maintainable for want of jurisdiction.

3. It is the case of the appellant in the main O.P., that the appellant is a Company registered under the Companies Act, having its registered office at Hyderabad; that it involved in manufacture and supply of various equipments used by the first respondent (hereinafter referred to as "the BSNL"); the appellant manufactures items strictly in accordance with the specifications as

required by the BSNL; that earlier the appellant was named as M/s. "ARM" Limited and subsequently transformed into the present Company by name "INCOMM Tele Limited

4. The BSNL issued a notification, dated 18-10-2001, inviting tenders for supply of 5.0 lakh wireless in local loop-CDMA Subscriber Terminals. The said notification invited tenders in respect of two packages, which are termed as I & II. The appellant had offered its tender for both the packages but however was successful in getting tender insofar as package No. II is concerned. Subsequently, the BSNL placed an Advance Purchase Order on 16-8-2002 for supply of 28,500 CDMA Sets for a particular price. The Advance Purchaser Order stipulates that the purchase of CDMA Sets shall be completed within a period of four months from the date of Purchase Order. The said Advance Purchase Order (for brevity "APO") contained a specific condition that the Company shall communicate its acceptance of APO, dated 16-8-2002, on 29-8-2002 along with performance Bank Guarantee for an amount of Rs. 62.0 lakhs. The appellant had accepted the APO, dated 16-8-2002, on 29-8-2002 and communicated the same to BSNL along with performance Bank Guarantee for an amount of Rs. 62.0 lakhs issued by Bank of Baroda, Bowenpally Branch, Secunderabad. The BSNL had placed a Purchase Order on 9-9-2002 containing the same terms and conditions that were incorporated in the "APO" as was in the notification inviting tender. The Purchase Order, dated 9-9-2002, contemplates the delivery of CDMS Sets to be completed before 8-1-2003. The BSNL also issued a corrigendum on 30-10-2002 rectifying certain mistakes in the Purchase Order, dated 9-9-2002.

5. It appears that as per the practice followed by the BSNL, the manufacturer is required to submit the equipment for type approval and only after such approval by the BSNL, the manufacturer is permitted to proceed ahead with the bulk production by issuing a bulk production certificate. As per the concluded contract, the appellant by its communication, dated 9-1-2003, informed the BSNL that the appellant had completed the supply of 23,500 Sets and the BSNL also issued Inspection Certificates for the same as contemplated under the agreement. It was further communicated by the appellant on 20-1-2003 informing the BSNL that the quantity supplied at various places in the country as designed by the BSNL by showing the same in a tabular form. It is not in dispute that the appellant had supplied 24,000 handsets as against the required 28,500 Sets before the delivery period i.e., as on 8-1-2003. The balance number of Sets to be supplied by the appellant is about 4,500 only. For some reason, the appellant could not manufacture and deliver the goods to the BSNL. Hence, the appellant sought for extension of delivery period for a period of four weeks without levying liquidated damage charges. Consequent upon such request made by the appellant, the BSNL extended the delivery period upto 13-3-2003, however, subject to certain conditions. The appellant was aggrieved by the imposition of the said conditions, as they are contrary to the general conditions of the Purchase Order, dated 9-9-2002. Imposition of Liquidated Damages is one among the main grievances of the appellant. However, the remaining balance of

4,500 Sets were also manufactured and supplied by the appellant by 24-2-2003 and it fulfilled its obligation of supplying a total of 28,500 sets, as per the Purchase Order, dated 9-9-2002.

6. However, the BSNL made payments with regard to the balance 4,500 Sets at the rate of 75% of firm rates as conveyed by the BSNL through its communication, dated 5-12-2002, which resulted in underpayment to the appellant to a tune of Rs. 97,04,412-63 paise apart from interest. The appellant has protested the same through its communications, dated 13-8-2003 and 8-12-2003, respectively. The other details are not worth-mentioning since the controversy involved in the present Civil Miscellaneous Appeal is altogether different. Having been aggrieved by the under-payments which, according to the appellant, are contrary to the general conditions of the Purchase Orders, the appellant sought for payment as contemplated under Clause 18 of Annexure C to the Purchase Order, dated 9-9-2002. The said request of the appellant was not accepted by the BSNL.

7. The appellant has filed the main O.P., i.e., O.P.No. 739 of 2005 u/s 9 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act"), before the Court below i.e., at Hyderabad, seeking the main relief, which is extracted for ready reference, as under:

"(a) Granting perpetual injunction permanently restraining the respondents, their agents, officers, employees or any other person claiming through or under them from recovering any alleged excess amount paid to the petitioner for supply of 28,500 CDMA (FWT) sets as required by the respondents vide Purchase Order No. CE/PO/009/2002-2003, dated 9-9-2002.

(b)...

(c)..."

8. Along with the said O.P., the appellant has also filed an application in I.A.No. 801 of 2005 under Order 39 Rule 1 of the Code of Civil Procedure.

9. The said application was resisted by the respondents.

10. The Court below, having considered the matter on merits, dismissed the main O.P., as not maintainable for want of jurisdiction to adjudicate the dispute and directed return of the papers to the appellant for presentation before appropriate Court. Hence, the present Civil Miscellaneous Appeal has been preferred by the appellant.

11. Sri Nooty Ramamohana Rao, the learned Counsel appearing for the appellant, contended that one of the parties to the contract is at Hyderabad and part of its activity is also at Hyderabad; that the two contracts were entered out of which one is at Hyderabad and the other is at Delhi; that the part of cause of action arose partially at Hyderabad and in such case the jurisdiction lies at both places. In other words, when part of cause of action arose at one place and the

other at another place, both the places have jurisdiction to entertain the lis and that there is no exclusionary clause regarding the jurisdiction of the places as per the contract. Therefore, the Court below was in error in dismissing the main O.P., filed u/s 9 of the Act, on the ground that it has no jurisdiction.

12. On the other hand, Mr. Sharat Kapoor, the learned Counsel appearing for the respondents, contended that neither any part of cause of action had arisen nor the respondents are located within the jurisdiction of the Court below; that the authorities issuing communications/orders against which the appellant had raised grievance are located beyond the jurisdiction of the Court below; that the impugned communication was issued by the authority at New Delhi, the Purchase Order in question was issued by the authority at New Delhi, the tender itself was floated, processed and finalized at New Delhi; that the location of the named arbitrator as well as the agreed place of arbitration is at New Delhi and hence the present appeal is liable to be dismissed.

13. In order to substantiate his contentions, the learned Counsel appearing for the respondents placed reliance on *Hakam Sing Vs. Gammon (India) Ltd.*, and *Food Corporation of India Vs. M/s. Evdomen Corporation*, -for the proposition that the Court below has no territorial jurisdiction to entertain the application/O.P.

14. In support of his submission that the territorial jurisdiction of the Courts in matters of contract depend upon the situs of the contract and the cause of action arising through connecting factors like place of the contract, place of payment of bills and the correspondence, he places reliance on the decision of the apex Court in *A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem*, . He also places reliance on the order dated 16-2-2005 passed by this Court in W.P.No. 19768 of 2004 in the matter of *Sinclair Infratech Ltd. v. Union of India* and also the order in W.P.No. 19577 of 2004 which was affirmed by this Court in W.A.No. 1807 of 2004 (In the matter of *MIC Electronic Limited v. Union of India (BSNL and Ors.)*), apart from other cases.

15. The learned Counsel appearing for the respondents also contended that the petition filed by the appellant in the Court below is defective for the reason that the matter is already seized of by this Court in Arbitration Application No. 26 of 2005 (titled as *ICOMM Tele Limited and the Chairman & Managing Director, BSNL and others*) and in view of the same the present petition filed by the appellant in the Court below cannot fall within the purview of Arbitration and Conciliation Act. He also contended that if at all the appellant wanted to seek any relief, as sought for in the present application in the Court below, the appellant could have filed an application in the pending Arbitration proceedings in A.A.No. 26 of 2005.

16. He also contends that the decision to levy liquidated damages and applying firm price (new tender prices) is an "excepted matter" under the arbitration clause and therefore cannot give rise to an arbitral dispute.

17. In order to substantiate his contention, as regards the jurisdiction, he relies on Section 2(1)(e) of the Act, which deals with the definition of "Court".

18. He further relies on Section 42 of the Act, which deals with the jurisdiction.

19. In the light of the above contentions, the following points would fall for consideration before this Court:

(1) Whether there is cause of action for the petitioner for the purpose of filing a petition (O.P.) u/s 9 of the Arbitration and Conciliation Act, 1996?

(2) Whether the Court below has jurisdiction to try the present O.P.No. 739 of 2005 filed by the appellant u/s 9 of the Arbitration and Conciliation Act, 1996?

(3) To what relief?

20. In Re Point No. 1: It is well settled principle that for the purpose of deciding the question of "cause of action", we have to necessarily rely upon Section 20 of the Code of Civil Procedure.

21. Way back in 1971, in *Hakam Singh v. Gammon (India) Ltd.* (1 supra), it was held by the apex Court that the CPC in its entirety applies to the proceedings under the Arbitration and Conciliation Act. Of course, the said decision was rendered when the Arbitration Act, 1940, was in force. But, the same view was reiterated by the apex Court in *Food Corporation of India v. Evdomen Corporation* (2 supra) after the new Act i.e., Arbitration and Conciliation Act, 1996, came into force. In fact, the expression "cause of action" is not defined anywhere.

22. In fact, both the facts and the judgments thereof arose under the Arbitration Act, 1940 (Old Act). But, it is to be noted that the expression "cause of action" was, nor is, defined either under the "old Act" or under the "new Act".

23. As per Mr. Mulla, in his Code of Civil Procedure, at Page No. 120, the words "cause of action" that appear in Section 20 of the Code of Civil Procedure, mean every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. In other words, the "cause of action" is a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed in the suit.

24. In *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, ., the apex Court observed thus (at paragraph 140):

"A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence."

25. In this context, we may usefully notice the provisions of Section 20 of the Code of Civil Procedure, which run thus:

"Section 20: Other suits to be instituted where defendants reside or cause of action arises:- Subject to the limitations aforesaid, every suit shall be instituted

in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation-A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place".

26. A careful perusal of the abovementioned provision makes it clear that Clauses (a) and (b) deal with the situation where the defendant or defendants actually reside either voluntarily or carrying on business or works and a suit can be instituted in a Court situate at such place having jurisdiction.

27. It is conspicuous to note that Clauses (a) and (b) do not deal specifically with the cause of action; they only deal with the place where the suit can be instituted depending upon the residence etc., of the defendant or defendants in order to file a suit. In other words, a suit can be instituted at a place where the defendant or defendants reside voluntarily or carry on business or works for gain irrespective of non-disclosure of cause of action.

28. In fact, in *Liverpool's* case (4 *supra*), while dealing with the scope of Order 7 Rule 11 (a) CPC, the apex Court observed thus (at paragraph 146):

"It may be true that Order 7 Rule 11 (a) although authorise the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

29. In the said decision, their Lordships relied on the decision of the apex Court in *D. Ramachandran v. R. V. Janakiraman* (SCC p.271 para 8), which is reextracted for ready reference, wherein it was observed:

"It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of

considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The Court cannot probe into the facts on the basis of the controversy raised in the counter."

(emphasis supplied by us)

30. From the above judgment and in the light of the language employed in Clauses (a) and (b) of Section 20 CPC, it appears that since the cause of action is a bundle of essential facts, the same need not be attached with much significance; provided that there is substantial averment or averments made in the pleadings.

31. Furthermore, it further appears from the language employed in Clauses (a) and (b) of Section 20 of the CPC that it is a matter of convenience to the plaintiff to institute a suit. It further implies that there may be another place where cause of action might arise and the Court situate at that place would get jurisdiction.

32. Our view is supported by the decision of the apex Court in *New Moga Transport Company, through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and Others*, .

33. The background facts of *New Moga Transport's* case (5 supra) are that the second Plaintiff having purchased certain material booked with New Moga Transport Co., the first defendant, for transportation to Barnala. The consignment reached Barnala at 9.30 a.m., on 23-5-1993 near the factory of second Plaintiff. On account of a fire, which took place allegedly due to electric short-circuiting there was destruction of whole of the materials. The second plaintiff claimed that he had suffered loss and lodged a claim for a sum of Rs. 5,10,000/- against the present first defendant. Since nothing was paid and only a non-delivery of goods certificate was issued by the first defendant, the first plaintiff 1 settled the claim for a sum of Rs. 4,63,516/- on the basis of surveyor's report and the amount was paid to the second plaintiff and due receipt was obtained. On receipt of the amount, the second plaintiff executed a letter of subrogation-cum-special power of attorney, assigning, abandoning and transferring all the rights in favour of the first plaintiff who claims compensation from the first defendant. In the suit a specific plea, inter alia, was taken by the first defendant that the Court at Barnala had no jurisdiction to deal with the suit. With reference to the consignment note, it was submitted that the Court at Udaipur alone had jurisdiction to deal with the matter. In the consignment note it was indicated that the Court having jurisdiction was the one situated at Udaipur. However, the trial Court did not accept the plea that the Court at Udaipur alone had jurisdiction. But in appeal, the first appellate Court upset the verdict of the trial Court. By the impugned judgment the High Court restored the judgment of the trial Court and held that the plaintiffs were entitled to relief and the Court at Barnala had jurisdiction.

34. The relevant observations made by their Lordships of the apex Court, in the

said decision (5 supra), are thus (at paragraphs 9 to 12):

"Normally, under Clauses (a) to (c) the plaintiff has a choice of forum and cannot be compelled to go to the place of residence or business of the defendant and can file a suit at a place where the cause of action arises. If the defendant desires to be protected from being dragged into litigation at some place merely because the cause of action arises there it can save itself from such a situation by an exclusion clause. The clear intendment of the Explanation, however, is that where the corporation has a subordinate office in the place where the cause of action arises it cannot be heard to say that it cannot be sued there because it does not carry on business at that place. Clauses (a) and (b) of Section 20 inter alia refer to a Court within a local limits of whose jurisdiction the defendant inter alia "carries on business". Clause (c) on the other hand refers to a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises."

(emphasis supplied by us)

On a plain reading of the Explanation of Section 20 CPC it is clear that the Explanation consists of two parts: (i) before the word "or" appearing between the words "office in India" and the words "in respect of", and (ii) the other thereafter. The Explanation applies to a defendant which is a corporation, which term would include even a company. The first part of the Explanation applies only to such corporation which has its sole or principal office of the company is situate will also have jurisdiction inasmuch as even if the defendant many not actually be carrying on business at that place, it will be deemed to carry on business at that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The expression "at such place" appearing in the Explanation and the word "or" which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation it is not the Court within whose jurisdiction the principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate office which alone has the jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office."

Section 20, before the amendment of CPC in 1976, had two Explanations being Explanations I and II. By the. Amendment Act, Explanation I was omitted and Explanation II was renumbered as the present Explanation. Explanation which was omitted reads as follows:

"Explanation I:- Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence."

This Explanation dealt with the case of place of residence of the defendant and provided with regard to a person having a permanent dwelling at one place and also temporary at another place, that such person shall be deemed to reside at

both places in respect of any cause of action arising at the place where he has such temporary residence. The language used in Explanation II, on the other hand, which is the present Explanation, was entirely different. Had the intention been that if a corporation had its principal office at one place and a subordinate office at another place and the cause of action arose at the place where it had its subordinate office it shall be deemed to be carrying on business at both places, the language used in Explanation II would have been identical to that of Explanation I which was dealing with a case of a person having a permanent dwelling at one place and also temporary residence at another place."

35. Clause (c) and the Explanation to Section 20 of the CPC deal with the aspect of "cause of action". As per Clause (c), a suit can be instituted at a place where the cause of action arises wholly or in part. The Explanation is more conjunctive with Clauses (a) and (b) rather than Clause (c) of Section 20 of the Code of Civil Procedure. It clarifies that for the purpose of cause of action, it shall be understood that where such corporation/company has a subordinate office and where arose a cause of action at such a place wholly or in part, the Court located at that place will have jurisdiction.

36. From the above clarification given by the apex Court in Food Corporation's case (2 supra), it is obvious that it is the choice of the plaintiff to institute a suit at his convenience at any place where the cause of action wholly or in part arises, however, subject to the conditions mentioned in the Explanation to Section 20 C.P.C. In our considered view, in fact, the Explanation to Section 20 CPC is in the nature of a proviso.

37. It is necessary to note the fact that the above elaborate reasoning of the apex Court in Food Corporation's case (2 supra) was given in the context, and in a case, where the jurisdiction of one Court had been excluded by an explicit agreement between the parties. In the present case, there is no such express ouster of jurisdiction of a Court or Courts.

38. In D. Munirangappa Vs. Amidayala Venkatappa and Another, , the High Court of Mysore held:

"Every suit has to be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. It cannot be contended that because a very small fraction of the cause of action accrued within the jurisdiction of a Court, the plaintiff would not be entitled to institute the suit in that Court. Even a fraction of a cause of action is a part of the cause of action and, therefore, if even a fraction of the cause of action accrues within the local limits of the jurisdiction of a Court, that Court has the jurisdiction to entertain the suit. Clause (c) of Section 20 CPC is passed on broad principle to avoid the multiplicity of the proceedings and inconvenience to the parties."

39. However, the apex Court in Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, , cautioned thus:

"We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High court to decide the matter on merits. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of "forum conveniens" (see Bhagat Singh Bugga Vs. Dewan Jagbir Sawhney, ; Madanlal Jalan v. Madanlal (1945) 49 CWN 357 : AIR 1949 Cal. 495 ; Bharat Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd. 1997 CWN 122; S.S. Jain & Co. v. Union of India (1994) 1 CHN and M/s. New Horizons Limited and another Vs. Union of India and others,)."

(emphasis supplied by us)

40. From a conjoint reading of the above said two decisions i.e., Munirangappa's case and Kusum Ingots's case (6 and 7 supra), it is apparent that even a fraction of a "cause of action" is sufficient to decide the territorial jurisdiction of a particular Court, but the same alone need not always necessarily be the decisive factor to decide the question of territorial jurisdiction.

41. From the above decision, broadly the following principles would emerge:

(1) There may be more than one Court where a suit can be instituted depending upon the fact where the whole or part of cause of action arises;

(2) Even though cause of action arises at two different places, either wholly or in part, the parties by way of specifically excluding one place in the agreement can institute a suit, and the same is binding on both parties;

(3) Fraction of cause of action is enough and sufficient to decide territorial jurisdiction of a Court in appropriate cases, having regard to the totality of the facts and circumstances; and

(4) However, if there is no specific clause in the agreement suit can be instituted at any of the places subject to fulfillment of conditions mentioned in Section 20 CPC. The jurisdiction of other Court or Courts can be excluded by way of an express agreement entered into between the parties.

42. It is obvious from the abovementioned conditions that the seat of arbitration is not an essential condition. It is rather flexible and depends upon the discretion and convenience of the arbitrator.

43. It is the specific contention of the learned Counsel appearing for the respondents, as recorded in the earlier paragraphs of this judgment that neither the cause of action or any part of cause action had arisen at Hyderabad.

44. In this regard, as already noticed, the totality of the circumstances have to be looked into in order to decide the question of cause of action. The decision of the apex Court in Food Corporation's case (2 supra) is to the effect that the cause of action is not necessary to be mentioned. If there is substantial grievance expressed in the pleading, the Court can gather the information and

decide the question of cause of action, having regard to the totality of the facts and circumstances on record.

45. It is to be further noted that furnishing Bank Guarantee by the appellant almost is in the nature of condition precedent for issuing Purchase Order. As could be seen from the Advance Purchase Order, dated 16-8-2002, it is not in dispute that subject to time compliance of the said condition along with other conditions, the Purchase Order, dated 9-9-2002, was given by the BSNL. It could be further seen that the Bank Guarantee, which was drawn on Bank of Baroda, Bowenpally Branch, Secunderabad, Andhra Pradesh State, is liable to be invoked any time for any alleged violation of terms and conditions of the contract by the appellant, in which event, even before the appellant invokes the arbitration clause, the BSNL may invoke the Bank Guarantee and in such an event the appellant would certainly be put to hardship and the quantum of the Bank Guarantee is not a small amount, which can be ignored. It is needless to say that invocation of Bank Guarantee is in addition to various other steps that can be taken against the appellant by the BSNL like withholding of amounts etc. It is not the question where such amounts are deposited or in whose custody but it is the appellant who is likely to be aggrieved with any such action, which is penal in nature. It is to be further noted, though not on record, that any payments made by the BSNL have to be encashed in all probability at Secunderabad only, for the simple reason that the Bank Guarantee has been drawn from a Bank located at Secunderabad, A.P. State.

46. Furthermore, the Registered Office of the appellant is situate admittedly at Hyderabad. It has been although corresponding with the BSNL from Hyderabad only. Added to that, the appellant, as per the agreement, has been manufacturing and supplying the material to various parts of the country from Hyderabad only. In other words, his entire operation of the business of appellant is from Hyderabad only.

47. Of course, the location of Registered Office may not be a sole consideration for the purpose of "cause of action" in all cases but, still, having regard to the overall circumstances on record and the nature of business that is being carried on and the terms and conditions between the parties that factor also gains some significance for the purpose of cause of action.

48. Therefore, having regard to the fact that the Bank Guarantee had been invoked at Secunderabad, A.P. State, and the likelihood of invocation of the Bank Guarantee by the BSNL arises only at Hyderabad and since the appellant has been operating the entire business activity from Hyderabad and also having regard to the overall connecting circumstances, we have no hesitation to hold that the "cause of action" had arisen at Hyderabad and the Court at Hyderabad had jurisdiction to entertain an application filed by the appellant u/s 9 of the Act.

49. In other words and since there is no exclusionary clause in the General Terms and Conditions of the Contract ousting the jurisdiction of Courts at Hyderabad

and conferring the exclusive jurisdiction on the Courts at Delhi by virtue of the fact that the Head Office of the BSNL is located at Delhi, it has to be held that the Court below has the jurisdiction to entertain the application filed by the appellant u/s 9 of the Act.

50. Insofar as the contention of the learned Counsel appearing for the respondents that as contemplated u/s 42 of the Act, the relief sought for in the application now filed u/s 9 of the Act should also be filed before the same Court where the application u/s 11 of the Act had been filed is concerned, it appears that the appellant had filed an application u/s 11 of the Act before this Court seeking appointment of an Arbitrator invoking the arbitration clause and the same is pending. If the contention of the learned Counsel appearing for the respondents is to be acceded to, an interlocutory application, making the prayer now made in the application filed u/s 9 of the Act, also ought to be filed only before this Court in the application filed u/s 11 of the Act. Ex facie, this contention cannot be sustained for the simple reason that if that is the intention of the Legislature there is absolutely no need to incorporate Section 9 of the Act, and the same would be otiose.

51. It is a well-known fact that the aspects of "cause of action" and "jurisdiction" are very closely intertwined and both the aspects have overlapping areas.

52. In this context, it is necessary to look into the provisions of Section 31(4) of the old Act (1940 Act) to the extent relevant and also the provisions of Section 42 of the new Act (1996 Act).

53. Section 31(4) of the old Act (1940 Act) reads:-

"(1) ...

(2) ...

(3) ...

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

54. Section 42 of the new Act (1996 Act) which is almost akin to Section 31 of the old Act (1940 Act), reads thus:-

"Jurisdiction:- Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

55. A bare reading of these two provisions would only suggest that both are in pari materia the same, including the Legislative intent, despite the fact that the law of arbitration had undergone a substantial change under the new Act.

56. Visibly, the aspect of "cause of action" has not been defined under either of these two Acts. Hence, under the old Act, in Hakam Singh's case and Food Corporation's case (1 and 2 supra) the apex Court held that the CPC in its entirety applies to proceedings under the Arbitration Act and that the jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure.

57. Again the basic object of Section 18 of the old Act (1940 Act) and Section 9 of the new Act (1996 Act) to the extent of conferring the power on the Court to pass interim orders is similar, though the latter is more elaborate.

58. For ready reference and better appreciation, Section 18 of the old Act (1940 Act) is extracted hereunder, which runs thus:

"Section 18: Power of Court to pass interim orders:- (1) Notwithstanding anything contained in Section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary, and just."

59. It is also necessary to extract Section 9 of the new Act (1996 Act) for ready reference and better appreciation, which runs thus:

"Section 9: Interim measures, etc., by Court:

A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court,-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely,-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient;

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

(emphasis supplied by us)

60. It implies that the Court has the power to deal with such proceedings like any other proceeding, including a suit; obviously meaning thereby that the CPC is applicable.

61. Section 41 of the old Act (1940 Act), which deals with the power of the Court, to the extent relevant, runs thus:-

"Procedure and powers of Court:-...

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court and to all appeals under this Act; and

(b) ..."

62. From the above, it is clear that the provisions of the CPC were made applicable and consequently Section 120 of the CPC was held to be applicable, in the judgments of the apex Court in Hakam Singh's case and Food Corporation's case (1 and 2 supra) referred to above.

63. It would be useful to refer to the definition of "Court" u/s 2(c) of the old Act (1940 Act), which runs thus:-

"Section 2. Definitions:-...

(a) ...

(b) ...

(c) "Court means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings u/s 21 include a Small Causes Court;"

64. Though the language employed in Section 2(c) of the old Act (1940 Act) is

slightly different from that of Section 2(1)(e) of the new Act (1996 Act), the purpose and intention are again one and the same.

65. "Court" is defined in Section 2(1)(e) of the new Act (1996 Act), in the following terms:

"Section 2(i):...

(a) ...

(b) ...

(c) ...

(d) ...

(e) "Court" means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court; or any Court of Small Causes;"

66. From the above, it is clear that "Court" means "Principal Civil Court of Original Jurisdiction" in a district, or High Court exercising "ordinary original civil jurisdiction". In such a case, such Court would and should be guided by the prescribed procedure, which can be no other than the one prescribed under the Code of Civil Procedure; and for the purpose of cause of action vis-a-vis jurisdiction - Section 120 of the Code of Civil Procedure.

67. In other words, in the absence of any specific provision as contained in Section 41(b) of the old Act, particularly in view of the language employed in Section 9 of the new Act and the definition of "Court" provided u/s 2(1)(e), by necessary implication, the provisions of Section 120 of the CPC have to be made applicable while dealing with a petition filed u/s 9 of the new Act (1996 Act).

68. Now, the consequential question that arises for consideration is - as to whether any cause of action either in whole or in part arose within the jurisdiction of the Court below?

69. The jurisdiction of the Court to entertain the proceedings relating to arbitration is governed by the provisions of CPC (*Food Corporation of India v. Evdomen Corporation* (2 supra)).

70. For all purposes, the original agreement, dated 18-10-2001 and the Purchase Order, dated 9-9-2002, shall be read together and be treated as a composite Agreement for the reason that though the initial Agreement contains the General Terms and Conditions, the Second Agreement which is in the shape of Purchase Order, dated 9-9-2002, again imposes certain terms and conditions.

71. It is to be remembered that the Purchase Order, dated 9-9-2002, is pursuant

to the breach of non-supply of about 4,500 sets and extension of time was granted by the BSNL, such extension of time by the BSNL, in fact, was subject to certain conditions, which is in the shape of Purchase Order.

72. In addition to various conditions, Clause 9 of the Agreement deals with Bid Prices. It postulates inter alia that the bidder shall give the total composite price, inclusive of all levies and taxes, packing, forwarding, freight and insurance etc.

73. Clause 9.3, which is relevant, reads thus:

"The prices quoted by the bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non-responsive and rejected."

74. Perhaps, the said Clause 9.3 of the agreement is the source of provocation for the appellant to raise the dispute under the Act.

75. In fact, it is averred in the O.P., before the Court below, in so many words, about the grievances and also hardships that are likely to be faced by the appellant because of the attitude of the BSNL. It is also specifically averred that in an arbitrary and unilateral manner, the BSNL made payment with regard to 4,500 sets at the rate of 75% of the firm up prices that was communicated by BSNL vide its communication, dated 5-12-2002. The same has resulted in under-payment to the appellant to a tune of Rs. 97,04,412-63 paise apart from interest. In spite of the communication, dated 13-8-2003, sent by the appellant, the BSNL replied through a communication, dated 18/22-11-2004, sticking to its guns.

76. As per the terms and conditions of General Terms and Conditions "of the Contract, as already extracted above, if the payments to the appellant, after performance of the contract, would be made on various conditions, the BSNL has the option to invoke the Bank Guarantee also.

77. It is also further averred in the O.P., before the Court below, that added to no payment by way of perverse interpretation on the conditions of the contract, the BSNL is now seeking to recover the amounts from the appellant and in fact started doing so through its communication, dated 24-3-2005, which may result in loss of crores of rupees.

78. Therefore, the natural corollary, as could be seen apparently, is that as per the terms and conditions of the original agreement as well as the APO, dated 16-8-2002, which is the very basis is in pari materia to the Purchase Order, dated 9-9-2002. The appellant has to give Bank Guarantee and while making payment the BSNL has the authority to invoke the said Bank Guarantee. Therefore, it is obvious that the BSNL may even resort to invoke the Bank Guarantee furnished by the appellant, as per the original terms and conditions and also the Purchase Orders and accordingly in compliance of those agreements, particularly with regard to the Purchase Order for the balance

stocks i.e., 4,500 sets to be manufactured and supplied by the appellant, the Bank Guarantee was obtained from Bank of Baroda, Bowenpally Branch, Secunderabad, Andhra Pradesh State.

79. Most important thing to be noted is incorporated at Clause 10(3) of the agreement, whereby a Bank Guarantee has to be given for the supply of the goods. In compliance of the said condition in Clause 10(3), the appellant had taken the Bank Guarantee from Baroda Bank, Bowenpally, Secunderabad, Andhra Pradesh State.

80. The said Clause 10(3) further requires the appellant that the Bank Guarantee shall be extended without fail for a suitable period in writing and failure to do so shall result in forfeiture of Bank Guarantee and further that the Bank Guarantee would be released only after the cases are settled in accordance with the provisions available in the bid document or Purchase Order.

81. Every provision and every expression in the Legislation is meaningful and purposeful.

82. Accordingly, Point No. 1 is answered in favour of the appellant and against the respondents.

83. In Re Point No. 2: In view of the findings recorded on Point No. 1, we have to hold that the Court below erroneously refused to exercise its jurisdiction u/s 9 of the Act and consequently erred in holding that the main O.P.No. 739 of 2005 is not maintainable for want of jurisdiction. Hence, Point No. 2 is answered in favour of the appellant and against the respondents.

84. In Re Point No. 3: For the foregoing reasons, the Civil Miscellaneous Appeal is allowed; the impugned order in I.A.No. 801 of 2005 and the consequential order in the main O.P.No. 739 of 2005 are set aside; the O.P.No. 739 of 2005 is restored to file with a direction to the Court below to dispose of the application I.A.No. 801 of 2005 and O.P.No.739 of 2005 afresh on merits, uninfluenced by any of the observations, if any, made by this Court in the present Judgment. However, there shall be no order as to costs.