
(1963) 09 KAR CK 0002
In the Karnataka High Court
Case No : Misc. First Appeal No. 97 of 1963

New India Assurance Co. Ltd. and Others	APPELLANT
Vs	
T.K. Nanjunda Setty and Sons and Another	RESPONDENT

Date of Decision : 11-09-1963

Acts Referred:

Arbitration Act, 1940 — Section 34, 39 (1) (iv)
Contract Act, 1872 — Section 28

Citation : AIR 1964 Kar 147 : (1963) 2 MysLJ 513

Hon'ble Judges : T.K. Tukol, J;M. Sadasivayya, J

Bench : Division Bench

Advocate : T. Krishna Rao, for the Appellant; S.C. Javali, for the Respondent

Judgement

Tukol, J.—This is an appeal u/s 39(1)(iv) of the Arbitration Act, 1940, against the order passed by the principal District Judge, Bangalore, directing that the arbitration agreement between the appellants and the respondents be filed in Court.

2. The facts leading to the present appeal are not in dispute. Messrs. T.K. Nanjanda Setty and Sons a firm of Merchants carrying on business in silk goods in their shop situated at No. 282/1 Rangaswami Temple Street, Bangalore-2, insured their goods against fire with the New India Assurance Co. Ltd., (Respondent No. 1) under policy No. 10792 in April 1961 for a sum of Rs. 2,00,000/-for the period commencing from 11-4-1961 to 11-4-1962. The firm, and the State Bank of Mysore who had advanced some loans to the firm on hypothecation of goods had jointly insured the goods in February 1961, against fire with the Bombay Fire and General Insurance Company Limited, under Policy No. 303295 for a sum of Rs. 1,00,000/- for the period commencing from 17-1-1961 to 17-1-1962.

On the night of 29th August, 1961, a fire broke out in the premises being partially or wholly destroyed. The Firm reported about the fire to the Police as also to the Officials of the two Insurance Companies. On 5-9-1961 the Proprietor

of the firm sent a letter along with an inventory showing that the fire had resulted in a loss of Rs. 37, 375-25 and that the value of "Sound goods under the custody of Banks against Key-Loans was Rs. 1,86,725-00". The Firm subsequently put forward an amended claim stating that the prior claim put forward was mistaken as the "Statements did not take into account the value of goods totally consumed by fire beyond recognition and remaining merely in shape of ashes" and that the correct loss suffered by them was to the tune of Rs. 2,58,581.85 nP.

The Respondents did not accept this claim and first offered to pay "without prejudice" a sum of Rs. 37,375.25 nP. and subsequently intimated also "without prejudice" that after working out the deductions in respect of the partially damaged goods, the "total net loss" payable amounted to Rs. 31,681.45. An amended voucher in duplicate was also, sent for compliance. The Petitioners did not accept the offer and claimed the amount as mentioned in their amended claim. Respondent No. 1 informed on 11-1-1952 that their subsequent investigations had shown that the claim put forward by the claimant was not at all sustainable under the Policies and that the Companies were not liable to pay any amount to-any one of the claimants under the said policies.

The firm and the Bank then filed a petition on 2nd June 1962 in the Court of the Principal District Judge, Bangalore, praying that the two arbitration agreements contained in the two Policies issued by the two respondents which are identical in terms be ordered to be filed and that an order be passed referring the matter to arbitration through the Court. The petition contained incidentally prayers to the effect that the claims made by the petitioners against the respondents "are all covered by and under the said two policies in question in general and under the arbitration clause" contained in both the policies, There was also a prayer for holding that a valid arbitration agreement was in existence between the parties under the two policies.

3. The Respondents objected to the petitioner and contended that under Clause 40 of the Policy issued by the first respondent and Clause 15 of the Policy issued by the second respondent, all claims, arising in respect of the property insured against each of the policies is to be respectively settled only in the competent Court at Madras and Bombay and that the District Court at Bangalore was not competent to entertain the petition. They also contended that the Petition was bad for misjoinder of parties and as there was "no question of any difference as to the amount of any loss or damage having arisen between the parties" since they had repudiated their liability in respect of the claim, the petitioners are not entitled to approach the Court for reference to arbitration. The other contentions contained in the statement of objections are not relevant for the purpose of the present appeal.

4. The learned District Judge heard arguments "with respect to jurisdiction and maintain-ability" on the basis of the documents produced by both the parties and overruled the objection in regard to the misjoinder of parties. On the question of

his competency to entertain the petition, he was of the opinion that "there would have been much force in the objection with regard to the jurisdiction" if separate applications had been filed against respondents 1 and 2 and that the Courts at Madras and Bombay "will not have jurisdiction to entertain such an application" against the two respondents. He further observed that

"as the cause of action, if not wholly at least in part, has arisen within the jurisdiction of this Court due to the place of the fire accident in view of Section 20, C. P. C. this Court will have jurisdiction to entertain the application".

As regards the second question, he considered the authorities cited before him and came to the conclusion that there was no point of difference between the parties as to the amount of loss or damage within the meaning of the condition contained in the Insurance Policy and that "there was nothing to refer to arbitration and the civil suit was not barred". In his view "had the petitioners instituted a suit without making an application for reference to arbitration, then that would have been maintainable". As a logical result of his second finding the petition should have been dismissed. But, instead, the learned judge ordered the agreements to be filed and directed the parties to appoint an arbitrator or arbitrators as in his opinion a party cannot be deprived of the benefit of the arbitration clause which was meant for expeditious disposal merely because the other party repudiated the claim.

5. The respondents Insurance Companies have preferred this appeal challenging the finding of the learned District Judge on the first question and the Order for filing the agreements for reference to arbitration. Mr. T. Krishna Rao the learned Advocate appearing for the appellants has contended that the learned District Judge had failed to consider the legal effect of Clauses 40 and 15 contained respectively in the Policies the first and the second appellants on the question of competency of the District Court to entertain the petition and had also overlooked the fact that the provisions of Order 1, Rule 3 of the CPC as regards the joinder of parties were subject to the pre-requisite condition that the petitioners should have the right to institute the petition in his Court. He sought to substantiate the finding of the learned District Judge by citing a number of authorities to the effect that the petitioners were not entitled to pray for a reference to arbitration as there was no difference between the parties "as to the amount "of loss of damages" as contemplated by conditions 18 and contained in the two policies.

Mr. Javali the learned Advocate for the Respondents (petitioners) sought to support the Order of the learned District Judge by contending that the condition as to the place of suing was a separate warranty under the two contracts of Insurance, that it was not intended to be a fundamental condition of the contract and having regard to the difficulties which the petitioners will have to face in filing two applications at two different places, one at Madras and the other at Bombay for identical reliefs and having regard also to the possibility of two arbitrators coming to different conclusions in respect of the same subject-matter

of dispute, the present petition against the two appellants jointly was competent as the District Court at Bangalore had jurisdiction to deal with the dispute between the parties under the provisions of the Code of Civil Procedure.

He further contended that it was not open to the appellants to claim any benefit under any of the terms of the contract of insurance as they had repudiated the same. Mr. Javali further submitted that even if this Court were to hold that the District Court ought not to have entertained the petition, the Order passed by the learned District Judge should not be set aside in the appeal in view of the provisions contained in Sections 21 and 99 of the Code of Civil Procedure. On the question of maintainability of the petition, his submission was that the correspondence between the parties clearly established that there was a difference between the parties as to the amount of damage suffered by the petitioners as a consequence of the fire.

6. So the first question for our decision is whether the petitioners are precluded from filing their instant petition in the District Court at Bangalore by the terms of their contract of insurance requiring them to institute all proceedings in respect of any claim under each of the two policies in a competent Court either at Madras or Bombay only, as the case may be. It is not disputed before as by the learned Advocates that the District Court at Bangalore has territorial jurisdiction to deal with the subject-matter in dispute between the parties as the cause of action has partly arisen in the City of Bangalore itself. It is not also disputed that the Head Office of the first appellant is situated at Madras while that of the second appellant is situated at Bombay. It is common ground that the claim under each of the policies is respectively payable at Madras and Bombay. It would thus follow that but for the agreement between the parties, the appropriate Courts in Bangalore and Madras in one case, and Bangalore and Bombay in the other case are competent to entertain the claim under the provisions of the Code of Civil Procedure.

It is in the light of these facts that the legal consequences of condition No. 40 in the case of the first policy and condition No. 15 in the case of the second policy have got to be considered. Condition No. 40 reads as follows:

"It is hereby declared and agreed that in case of any claim arising in respect of the property injured under the policy, the same shall be settled and paid in Madras and the entire cause of action shall also be deemed to arise in Madras and further that all legal proceedings in respect of any such claim shall be instituted in a competent Court in the City of Madras only".

Condition No. 15 in the case of the second policy is identical in import but is slightly different in wording:

"It is hereby declared and agreed that in case of any claim arising in respect of the property hereby insured the same shall be settled, and paid in Bombay and the entire cause of action shall also be deemed to arise in Bombay and further that all legal proceedings in respect of any such claim shall be instituted in a

competent Court in the City of Bombay only".

A plain reading of these two conditions of the Insurance Policies will indicate that the petitioners agreed in unambiguous terms to institute in a competent Court in the City of Madras against the first appellant and in the City of Bombay against the second appellant all legal proceedings in respect of any claim arising in respect of the property insured under each of the policies. In so agreeing, they also consented to the settlement of the claim and the payment of the amount respectively in Madras and Bombay.

7. It is well established, and the same is not disputed by Mr. Javali appearing for the respondents, that a contract under which parties agree to have their claims instituted and decided in any one of the two or more Courts having jurisdiction to entertain a suit or petition under the provisions of Sections 16 to 20 of the Code of Civil Procedure, is not contrary to the provisions contained in Section 28 of the Indian Contract Act. S. 28 of the Contract Act reads as follows:

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the Ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The latter part of this Section which pertains to an agreement limiting the time within which any party thereto may enforce his rights, is not relevant for the present purpose. We are concerned with the former part; what is rendered void by that part is an agreement which restricts absolutely any party, from enforcing, by the usual legal proceedings in the Ordinary tribunals, his rights under or in respect of any contract. It does not, however, debar a party from agreeing to have his claim instituted and settled in one only out of the two or more competent Courts having territorial jurisdiction in respect of the subject-matter of dispute under the contract. Such an agreement is not against public policy as it neither confers jurisdiction on a Court which has no jurisdiction nor deprives a Court of its jurisdiction in the matter. All that such an agreement does, is to restrict the parties to a competent forum in a specified place of their choice.

In this connection reference may be made to the decisions in *Musaji Lukmanji v. Durga Das* AIR 1946 Lah 57, *Continental Drug Co. Ltd., Bombay Vs. Chemoids and Industries Ltd., Calcutta*, , *Libra Mining Works v. Baldota Bros* AIR 1962 AP 452 and *Maganur Basappa and Sons v. Krishna Setty* 1963 Mys LJ 194 which lay down that Section 28 of the Contract Act does not prevent parties to a contract from selecting one of the two competent Courts for the adjudication of their disputes and that such an agreement is perfectly valid and binding between the parties and is enforceable by a Court of law. The Supreme Court in *Michael Golodetz and Others Vs. Serajuddin and Company*, , while dealing with the scope of Sec. 34 of the Indian Arbitration Act in an Appeal, referred, to an arbitration agreement under which the parties contracted to settle their differences before a particular forum. In dealing with the enforceability of such a contract, his

Lordship Mr. Justice Shah who spoke for the Court laid down:

".....The Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance; it merely seeks to promote the sanctity of contracts xxx x."

8. While the learned Advocate for the respondents does not dispute the correctness of this legal position, he has however submitted three grounds as depriving the appellants of their right to enforce this term of the contract, and they are:

(1) neither condition 40 nor condition No. 15 was a fundamental term of the contracts as the same was introduced by a separate warranty:

(2) the appellants having repudiated the contract, they are debarred from praying to the Court to enforce this term of the contract; and

(3) equity and convenience are in favour of the respondents as otherwise they would be required to file two different applications at two different places, incur heavy expenditure, appoint different arbitrators at different places and face the risk of possibly different conclusions by the arbitrators.

9. Dealing with the first contention that this term of the contract was not intended to be a fundamental condition of the contract on the ground that it was inserted as a warranty by attaching a separate printed form of conditions and warranties, we are unable to find any force in this contention. In the main body of the policy issued by the first appellant we find, amongst other typed matter, the following recital: "Subject to warranties Nos. 1, 3, 5, 8, 15, 37, 38, 39 and 40 as per form M attached."

Form M attached to the policy contains the following head note: "Warranties, Clauses and Conditions referred to and forming part of the policy." Then the form enumerates the warranties and conditions and also contains a "List of hazardous goods" with which we are not concerned. In the policy issued by the second appellant, there is an identical typed recital viz;-- "Subject to warranties Nos. 1, 4, 7, 11 and 15 to 19 as per form "M" attached hereto".

Form "M" contains the same head note and the enumeration of the different warranties and list of hazardous goods.

The typed note in the main body of the policy read with the head note of form "M" attached thereto, would indicate that the parties agreed to treat the additional warranties as integral conditions of the contract of fire insurance. The mere fact that the condition is contained in an attached form is of no consequence. An answer to this argument is to be found in paragraph 935 of Mac"Gillivray on Insurance Law by Denis Browne" Fifth Edition, page 935, Vol. I.

"A Warranty may be written on any part of the policy, either at the top or

bottom, or transversely on the margin, or on the back. If written on the back, however, it should be referred to on the face of the policy, since if the policy is apparently complete on the face of it the assured's attention might never have been directed to the back, and he would be entitled to accept what appeared on the face as constituting the whole contract between the parties."

There is no such difficulty in the present case as there is clear indication in the main body of the policy on the front page itself that the policy was subject to the other warranties enumerated therein but found in the "M" form attached to the policy. Dealing with an argument that a pasted-on slip was not part of the policy in *Bensaude v. Thames and Mersey* 1897 AC 609, the House of Lords gave effect to the clause as a warranty and Lord Halsbury said:

"There is a sort of insinuation to the effect that the warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that. It either is or is not part of the contract.....Why am I to reject this clause? Is it because it is pasted on? ...No one can seriously suggest that."

On a careful consideration of the recitals in the body of the policy, we have no doubt that this objection raised by the learned Advocate for the respondents has no substance.

10. It is next contended for the respondents that the appellants were debarred from enforcing this term of the contract as they had repudiated the contract itself.

On the other hand, it is argued for the appellants that they had never repudiated the contract of insurance but that what they had urged against the respondents' claim is that in view of certain terms and conditions contained in the policy of insurance the respondents were not entitled to claim any amount under the policy. Mr. Javali the learned Advocate for the respondents drew out attention to parts of the correspondence and the contentions raised by the appellants in their pleadings to the instant petition. Our attention is drawn to Ex. P. 26 which is a letter addressed by one of the appellants, probably on behalf of both the companies, on 14th January 1962 in which it has been stated as follows:

"On receipt of some information recently, we have further investigated into the matter and on the basis of our findings, we regret to inform you that your claim is not at all entertainable under the policies in any way whatsoever and we have absolutely no liability to pay any amount to any one under the said policies. All your claims, therefore, are hereby repudiated and rejected in toto."

It would be apparent from the wording of this letter that what was repudiated was not the contract but the right of the respondents to claim any amount "under the said policies". It is the claim that is repudiated and not the contract, and so it should be borne in mind that the basis for the repudiation of the claim is what is contained in the said policies.

Mr. Javali then drew our attention to paras 7 and 10 of the objection written statement. The relevant portions read thus:

"7. The respondents submit that since the respondents have repudiated all liability in respect of the claim, there is no question of any difference as to the amount of any loss or damage having arisen between the parties and hence there is no legal scope or applicability to the respective arbitration clauses (viz. Condition 18 of the policy)....."

"10..... It is denied that the petitioners" claim falls within the scope of the policy. The respondents contend that there is no liability under the policies issued by them."

The substance of these pleadings is that the appellants have not repudiated the contract of fire insurance but have asserted that under the policies issued by them the respondents" claim is not tenable as it does not fall "within the scope of the policy". Paragraph 10 of the Memo of appeal is also relied upon by Mr. Javali, contains an averment to the effect that "the learned District Judge erred in holding that notwithstanding the disclaimer of liability under Clause 13 of the policies of insurance still the arbitration clause survived". It would be evident from the pleadings that the appellants have not repudiated the contract of fire insurance but have only sought to exonerate themselves from all liability to the respondents" claim on the ground that either the respondents" claim was not tenable under the clauses of the insurance policies "or that they had been exonerated from their liability on the facts of the case considered in the light of the terms and conditions of the policies.

This factual aspect apart, it was conceded by Mr. Javali for the respondents that his client had never accepted the alleged repudiation of the contract; in fact, the respondents" claim springs out of the term of contract of insurance. In this case the term contained in the policy on the strength of which the objection as to the place of filing the petition or suit for the adjudication of the claim is raised, is very comprehensive. We have quoted above Conditions Nos. 40 and 15 in the two policies in paragraph 6 of the judgment and they are very wide in import. They clearly indicate that the parties to the contract agreed that "any claim arising in respect of the property hereby insured" shall be settled and paid in Madras or Bombay, as the case might be, and "further that all the legal proceedings in respect of any such claim shall be instituted in a competent Court" either in the City of Madras or in the City of Bombay "only". There cannot be any doubt on the facts of this case that whatever contentions the appellants might take to disclaim their liability under the insurance policies, the respondents have unequivocally bound themselves by their own choice to litigate their rights in any of the competent Courts in Madras or Bombay only. The Respondents" objection about the alleged repudiation is of no consequence.

Mr. Javali has placed reliance on certain decisions of British Courts on the question of repudiation. They are *Juredini v. National British and Irish Millers Insurance Co. Ltd.* 1915 AC 499, *Stebbing v. Liverpool and London and Globe Insurance Co. Ltd.* (1917) 2 KB 433. *Dennehy v. Bellamy* (1938) 2 All ER 262 and *Hayman v. Darwins, Ltd.* (1942) 1 All ER 337. The two main features which

distinguish all these cases from the one with which we are now dealing are (1) none of those cases had to deal with a clause like 40 or 15 as in the present case, restricting the parts to a competent Court of their choice under the terms of the contract for settlement of their disputes; and (2) those decisions were mainly concerned with the right of the defendant who either repudiated the contract or his liability thereunder, to enforce the arbitration clause with which we are not concerned just at present. We have already indicated that in this particular case, the grounds for the repudiation of the claim (including the ground of fraud on the part of the respondents in putting forward the claim), arise from the terms of the contract of fire insurance. We do not think it necessary to deal any further with the argument based on the alleged repudiation since, as pointed out above, the stand taken by the appellants as regards their liability under the policies does not preclude them from urging that the respondents have disabled themselves from approaching the Court at Bangalore by the very terms of the contract. The last decision relied upon by Mr. Javali on this point is the one in *Newzealand Insurance Co. Ltd., Jullunder City Vs. Nagpal Hosiery Factory, Amritsar*, and it throws no light on the point at issue.

11. The third contention of Mr. Javali, namely that equity and convenience are in favour of the respondents, cannot be allowed to over-ride the terms of the contract between the parties. As laid down by the Supreme Court in the *Michael Golodetz and Others Vs. Serajuddin and Company*, referred to in paragraph 7 above, the Court in such cases

"merely seeks to promote the sanctity of contracts but does not abdicate its jurisdiction in respect of the disputes within its cognizance".

The terms of contract embodied in Clauses 40 and 15 of the policy merely give effect to the principles behind the provisions of Clause (b) of Section 20 of the CPC which requires a suit to be instituted at a place where the defendant resides so that he should be able to defend the suit without undue trouble. The Head Offices of the appellants are respectively situated in Madras and Bombay and their documentary evidence connected with the policies and facilities of their legal advisers etc., would be available to them easily at the head-quarters of their respective offices. The Insurance Companies are public utility concerns and the specific terms noted in the contract that the Company should be sued at a particular place where its Head Office is situated is intended to enable the Company to meet the claims of different insurance without much inconvenience and harassment. There would be policy holders all over the country and in the absence of such a stipulation as in the two insurance policies, the companies would be required to make arrangements and even send their officers or agents to meet the claims under the different policies to various Courts in distant parts of the Country, thus affecting adversely the normal working of the Companies economically and smoothly in the interest of the public.

The learned District Judge overruled the objection as to misjoinder of parties on the ground that if separate applications were to be filed against each of the

respondents (appellants before this Court) there would not only be delay in the disposal of the matter but an apprehension of conflicting decisions also. In taking this view, the learned Judge has entirely overlooked the effect of one of the terms of the contract between the parties precluding the respondents from approaching the Court at Bangalore, though in the Ordinary course it had jurisdiction to entertain the present claim. The learned District Judge has erroneously sought to support his view by relying on the decisions in Kurivalli Lingayya Setty Vs. Sitharam Agarwala and Another, . It has been, clearly laid down therein that

".....:the rules providing for joinder of parties and clubbing of different causes of action can only apply to the case of defendants residing within the jurisdiction of a particular Court and in respect of causes of action arising within its jurisdiction".

and that

"Order 1, Rule 3 must be read with the sections which confer jurisdiction on Courts."

The same view has been expressed by the Calcutta High Court in Bengal and North-Western Railway Co. Ltd. Vs. Sadaram Bhairadan, . Therein, the plaintiff instituted the suit for recovery of the value of two bales of piece goods alleged to have been delivered in Calcutta to the River Steam Navigation Company Limited and the India General Steam Navigation and Railway Company Ltd., for alleged despatch and delivery of transmission to Bhuptiahi, The Railway Company had its place of business, amongst other places, at Gorakpur but none at Calcutta. The suit was instituted at Calcutta and in dealing with the objection as to territorial jurisdiction taken by the Railway Company, Woodroffe, J. observed.

".....The fact that the Court has jurisdiction against the Steamer Company does not give jurisdiction against the Railway Company. The fallacy of the argument, it appears to me, lies in the use of the words the Court has jurisdiction over the suit." Such jurisdiction as the Court has is over the suit as regards the Steamer Company. This does not give jurisdiction over the Railway Company, and in my opinion, Order 1, Rule 3, has no bearing on the case. That rule of the order is a provision which relates to a joinder of parties, and it assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit If the Court has such jurisdiction, then Order 1 R. 3, may come into play."

We are in respectful agreement with the above proposition of law. In the present case, when, by reason of the terms of a valid contract between the parties, the respondents could not have filed a separate petition against either of the appellants in the District Court at Bangalore, that disability could not have been got over by resorting to the simple expedient of joining both the appellants in a single petition. Hence the learned District Judge was clearly in error in rejecting the appellants' objection as to misjoinder of parties. This contention of Mr. Javali has no merit.

The learned Advocate, lastly, contended that it was not open to the appellants to raise objection as regards "place of suing" in view of the provisions contained in Sections 21 and 99 of the Code of Civil Procedure. Section 21 of the Code reads as follows:

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."

Mr. Javali does not dispute the fact that in the present case the objection as to the place of suing was taken at the earliest possible opportunity as required by the Section. His submission, however, is that there has been no consequent failure of justice. Mr. T. Krishna Rao appearing for the appellants submitted that Section 21 of the Code has no application to a case where objection as to the place of suing is taken on the ground that it is not in accordance with the terms of a valid contract between the parties.

The case law on this point discloses that there has been some divergence of views on this point. Before referring to the decisions cited by the Advocates it is necessary to mention that Sections 15 to 25 of the CPC occur in Part 1 and under the heading "place of suing". The marginal note to Section 21 is "objections to jurisdiction." Sections 15 to 20 lay down different rules as regards the place of suing. So, read in the context of the various provisions grouped together under the common heading "place of suing", we are inclined to the view that Section 21 refers to what is popularly known as territorial or local jurisdiction and the objection contemplated therein is restricted to the infringement of any of the requirements contained in the provisions of Sections 16 to 20 of the Code. So the objection about the "place of suing" in the present case is not covered by Section 21 of the Code as it is based on a term of contract between the parties. That apart, the clause "unless there has been a consequent failure of justice" occurring at the end of the section seems to restrict the operation of the Section to cases which have been decided on merits. Where the Order appealed against touches only the objection with regard to the "place of suing" or the territorial jurisdiction and the finding recorded on such objection is only preliminary and the parties come up in appeal before going to trial on merits of the case, the question of consequent failure of justice does not arise for consideration since the words "failure of justice" necessarily imply injustice suffered by a party as a consequence of the decision rendered on the merits of his case.

At this juncture, it may be advantageous to refer to the scheme of Section 20 of the Indian Arbitration Act, 1940. Sub-section (1) enables any of the persons who has entered into an arbitration agreement to apply to a Court having jurisdiction in the matter for an Order "that the agreement may be filed in Court". Admittedly the present petition is one which falls under Sub-section (1) of Section 20. Sub-section (2) requires that the application shall be in writing and

be numbered and registered, as a suit between the parties. Sub-section (3) enjoins upon the Court to direct notice to be given to the parties to the agreement other than the applicants, requiring them to "show cause within the time specified in the notice, why the agreement should not be filed. Sub-sections (4) and (5) which are material may be read here:

"(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

What has been done in the present case is that an order in pursuance of the first part of Sub-section (4) has been passed. The parties have yet to appoint an arbitrator. It is thereafter that the arbitrator will have to proceed with the arbitration in accordance with the procedure provided by the Act for passing an award on a reference made through Court. So the stage at which this Court has been approached by an appeal is prior to the decision on merits. Therefore, considered from any point of view, Section 21 of the Code does not apply to the "objection as to the place of suing" where such objection is founded on the terms of a valid contract between the parties. Mr. Javali for the respondents has relied upon the decision of the Punjab High Court in *Dina Nath Dutt Vs. Maha Vir Gupta*, in which their Lordships held, that:

".....Objection as to the place of suing, in Section 21 is not restricted to the grounds with regard to place of suing with reference to Sections 15 to 20. The expression "objection as to the place of suing" is used in a generic sense."

For the reasons already given, we are in respectful disagreement with this view, as, in our opinion the objection to the place of suing cannot be read in a comprehensive sense to cover an objection based on the terms of a valid contract.

As regards Section 99 of the Code, it occurs in Part VII of the Code under the heading "appeals". It lays down:

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court".

Obviously the word "jurisdiction" is here used, in the sense of pecuniary or local jurisdiction relating to the subject-matter of the suit. In other words, the word "jurisdiction" is used in the sense of "competence to try" covering the competence of the Court as to locality, pecuniary value and subject-matter of the suit. The Section undoubtedly relates to the powers of an appellate Court in

reversing or substantially varying a "decree". The provisions contained in Clause (a) of Sub-section (2) of the CPC defining a decree, make it clear that the term "decree" does not include "any adjudication, from which an appeal lies as an appeal from an Order." The order appealed against in the instant case is one such order and does not therefore amount to a "decree". So, Section 99 of the Code does not in terms apply to the present appeal.

The learned Advocate for the respondents therefore sought to derive assistance from this Section by placing reliance on Section 108 of the Code. That Section reads:

"The provisions of this part relating to appeals from Original decrees shall so far as may be, apply to appeals:

(a) from appellate decrees, and

(b) from Orders made under the Code or under any special or local law in which a different procedure is not provided."

Undoubtedly, the Order in appeal is an order made under a special law which does not prescribe a different procedure for appeals against such Order. But Section 108 limits the application of the other provisions in that part by using the expression "so far as may be." That expression should be taken to mean so far as is consistent with the nature of the order appealed against. If the Order appealed against is only in respect of a preliminary contention and not one dealing with the merits of the case, then the prohibition imposed by Section 99 against the reversal or substantial variation of the decree passed by the trial Court except where the irregularity or error affects the merits of the case, cannot apply. In its very nature such an order has no reference to the merits of the case and it would be therefore wrong to circumscribe the powers of the appellate Court with all the limitations imposed by the section.

Section 107 and Order XLI Rule 22, which deal with the powers of the appellate Court, make it clear that subject to the conditions and limitations as are prescribed by the Code, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by Code on Courts of Original jurisdiction in respect of suits instituted therein and that it can pass any decree and make any Order which ought to have been passed or made by the Original Court dealing with a suit instituted before it. The combined effect of these provisions is that where the order appealed against relates only to a preliminary contention without reference to the other points touching the merits of the case and the trial Court has passed the Order erroneously, the appellate Court will have power to set aside or rectify the Order as the interest of justice in the case before it might require. The decision of the learned District Judge in the present case completely overlooks the terms of the valid-con-tract and neither Section 21 nor Section 99 read with Section 108 of the Code prohibits the appellate Court from entertaining the objection in appeal and reversing the Order,

Mr. Jayali placed reliance on a decision of this High Court in *Nilawwa v. Virupaxappa* AIR 1959 Mys 99. In that case, the decree-holder in an execution petition instead of moving the Court which passed the decree for bringing the legal representatives on record, had moved the transferee Court to proceed u/s 50 of the Code and the Court had proceeded with the execution without objection from the legal representatives of the deceased judgment-debtor. In appeal, their Lordships held that the appellate Court was precluded from interfering with the Order of the transferee Court as it was not shown that the irregularity either affected the merits of the case or the jurisdiction of the Court as contemplated by Section 99 of the Code. Their Lordships expressly mentioned:

".....We would like to make it clear that we have not considered as to what would have been the position if objection to the forum had been taken at the earliest possible opportunity and the Court below had ignored the same."

Their Lordships observed that the difficulty in that case was one of procedure and that it merely touched the form and not the substance of the matter.

The decisions in *Lachha Ram alias Lachman Vs. Virji and Another*, and *Seth Hiralal Patni Vs. Sri Kali Nath*, relied upon by Mr. Javali do not help him. In the former decision the first Court had tried the case upon merits "in such a way, that all the available evidence which either party wanted to call has been called" and the decision had been given after hearing arguments. Their Lordships found that the trial was satisfactory as a matter of procedure and the decision given on merits was right. In those circumstances, they held that "the question of the territorial jurisdiction is relegated to obscurity" In the Supreme Court case the validity of the decree had been challenged in the execution proceeding on the ground that the Court which passed the decree had no territorial jurisdiction. In that case, the suit had been filed on the original side of the High Court of Bombay after obtaining leave under Clause 12 of the Letters Patent. Thereafter the matter had been referred to arbitration, the arbitrator had given his award and a decree had been passed in terms of the award. Proceedings had also been taken in the High Court for setting aside the award and that High Court had held that there was no defect in the award and that there was no legal misconduct on the part of the arbitrator. The appeal filed against the decree had also been dismissed by a Division Bench of the High Court. When the decree was transferred to the Court of the District Judge at Agra for execution, the appellant contended that the Bombay High Court had no jurisdiction.

It is obvious from the facts of the case that the case had been decided on merits and that even though objection to the territorial jurisdiction of the Court had been raised in the written statement, it was not pressed at the final hearing. In these circumstances, their Lordships laid down:

"It is well settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case, goes to the very root of the jurisdiction and where it is lacking, it is a case

of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by enactment like Section 21 of the Code of Civil Procedure."

Neither on facts nor on law can the respondents derive any assistance from these decisions.

12. Mr. T. Krishna Rao appearing for the appellants has sought to sustain his contention that neither Section 21 nor Section 99 of the CPC has application to the facts of the case, by relying upon the Full Bench decision of the Madhya Bharat High Court in *Premadib Pictures v. New Sound Pictures*, (S) AIR 1955 MP 193. In that case, the objection as to the place of suing was raised in circumstances identical with those of the present case. The Plaintiff filed his suit in the Court of the District Judge, Ujjain against the defendants for recovery of certain amount for breach of a contract. By an agreement between the parties, the Plaintiffs had been appointed as agents of the Defendants for the distribution of the cinema film "Dehati". Amongst the terms of contract Clause 14 provide that "any dispute arising out of the agreement will be settled in Bombay." The objection of the defendant against the entertainment of the suit by the Court at Ujjain was overruled and a decree was passed on merits. In appeal there was a difference of opinion between the two Judges and the matter was placed before the learned Chief Justice. .

The objection was upheld by the Full Bench, and the scope of Section 21 was explained in the following terms:

".....Section 21 imposes a bar against the Court itself. It lays down that the Court has no jurisdiction to entertain a suit if any of the provisions of Sections 16 to 20 be contravened. In the present case the Defendant does not object to the jurisdiction of the Court at Ujjain to try the suit. His objection is that the plaintiff is debarred from filing the suit in Ujjain on account of a valid agreement entered into between the parties. In other words, he states that the bar is against the plaintiff and not against the Court. All that he wants is to enforce the agreement which is perfectly valid. In these circumstances Section 21 of the CPC can have no application whatsoever to the present case....."

Their Lordships referred to the decisions of the other High Courts in support of this view.

In the Full Bench decision of the Madras High Court in *Zamindar of Ettivapuram v. Chidambaram Chetty* ILR 43 Mad 675 : AIR 1920 Mad 1019, Wallis, C. J., who spoke for the Court, laid down:

".....I am clearly of opinion that the provisions of Section 21 of the CPC apply to all objections based on the alleged infringement of the provisions of Sections 16 to 18 of the CPC as regards the institution of suits relating to Immovable property. The words "objection as to the place of suing" in their ordinary

meaning include objections to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the Immovable property which was the subject of the suit; and the words "place of suing" are used in the heading prefixed to Section 15, as descriptive of the subject-matter of the provisions in Sections 15 to 20 as to the Courts in which suits, including suits as to Immovable property, are to be instituted."

The decision of the Supreme Court in *Kiran Singh and Others Vs. Chaman Paswan and Others*, considered the scope of Sections 21 and 99 of the CPC and of Section 11 of the Suits Valuation Act. It laid down that:

".....The policy underlying Sections 21 and 99 Civil "Procedure Code, and Section 11 of the Suits Valuation Act, is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."

In the present case, there has been no decision on merits and it is open to this Court to entertain the objection. The decision in *Murari Lal Vs. Madan Lal and Others*, does not lay down any new proposition.

13. For all these reasons, we are of the opinion that the learned District Judge was in error in overruling the objection of the appellants as to "the place of suing". In this view, we do not think it necessary to consider the arguments advanced for the parties as to the availability of the arbitration clause to the respondents, because the parties have agreed that "all legal proceedings in respect of any claim shall be instituted in a competent Court in the City of Madras only" in the case of the first appellant and "in the City of Bombay only in the case of the second appellant, and we think that it is for those Courts to decide the tenability of the present petition. In this view the respondents had no right to present the petition in the District Court at Bangalore. The proper order to make in such a case, as was made in *Continental Drug Co. Ltd., Bombay Vs. Chemoids and Industries Ltd., Calcutta*, , is one of returning the petition to the present respondents for presentation to the proper Court.

14. In the result, we allow the appeal, set aside the Order passed by the learned District judge and direct the petition to be returned to the respondents for presentation to proper Court. The appellants shall get their costs of both the Courts from the respondents who shall bear their own costs.

15. Appeal allowed.