(2010) 01 MAD CK 0166

Madras High Court

Case No: O.A. No''s. 1109 and 1110 of 2009

Dynasty Stockholdings Private Limited and Another		APPELLANT
	Vs	
Silva Limited and Others		RESPONDENT

Date of Decision: Jan. 8, 2010

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9
- Companies Act, 1956 - Section 209(1)

Citation: (2011) 1 ARBLR 322

Hon'ble Judges: V. Ramasubramanian, J

Bench: Single Bench

Advocate: P.S. Raman, for Sathish Parasaran, for the Appellant; Sriram Panchu, for Arun Anbumani, Arya Raj, H. Karthik Seshadri and P.V. Balasubramaniam, for the Respondent

Judgement

V. Ramasubramanian, J.

While OA No. 1109 of 2009 is for an interim order of injunction restraining the 7th Respondent and its administrator, viz. the 8th Respondent, from alienating or encumbering the shares held by the 7th Respondent in the 1st Respondent company, the other application OA No. 1110 of 2009 is for an interim order of injunction restraining the 1st Respondent from recognising or registering any transfer of its shares held by the 7th Respondent, in favour of the 9th Respondent or any other person or entity. Both these applications are filed u/s 9 of the Arbitration and Conciliation Act, 1996.

2. I have heard Mr. P.S. Raman, learned senior counsel appearing for the applicants, Mr. Sriram Panchu, learned senior counsel appearing for the Respondent Nos. 1, 4 and 5, Mr. H. Karthik Seshadri, learned Counsel appearing for the Respondent Nos. 3, 7 and 8 and Mr. P.V. Balasubramaniam, learned Counsel appearing for the 9th Respondent.

3. The applicants herein are private limited companies promoted by one Mr. Jitendra Virwani and they form part of a group known as the "Embassy Group of Companies". These companies are said to be engaged in the business of real estate development in the States of Karnataka, Tamil Nadu and Maharashtra.

4. The 7th Respondent is a company constituted under the laws of Luxembourg. The 7th Respondent floated the first Respondent and incorporated it in Mauritius, for the purpose of making real estate investments in India, by availing the double taxation avoidance agreement between Mauritius and India.

5. The applicants herein and their promoters Mr. Jitendra Virwani and Vandana Virwani on the one hand and the first Respondent herein on the other hand, joined together and promoted the 6th Respondent herein as a joint venture company, incorporated in Chennai. The authorised share capital of the 6th Respondent is Rs. 1 crore, divided into 10 lakh equity shares of a face value of Rs. 10 each. 50% of the shareholding of the 6th Respondent is held by the applicants and its promoters. The remaining 50% of the shareholding of the 6th Respondent is held by the first Respondent.

6. A joint venture agreement dated 12.04.2007 was entered into between --(i) the applicants herein and their promoters Mr. Jitendra Virwani and Ms. Vandana Virwani, described together as "Embassy Investors"; (ii) the first Respondent herein; and (iii) the 6th Respondent herein. The purpose of the joint venture was to develop certain lands acquired by the 6th Respondent in Sholinganallur Village, Tambaram Taluk, Kancheepuram District for commercial exploitation. In terms of the said agreement, the first Respondent ploughed money in the form of equity participation, by buying 5 lakhs equity shares of the face value of Rs. 10 each, at a premium of Rs. 2,390 per share in the 6th Respondent company.

7. Among other things, the joint venture agreement contained a restriction on the right of the shareholders to transfer the shares for a period of 3 years, prescribed as "lock-in period". The agreement also contained an arbitration clause, apart from a clause prescribing "governing law and submission to jurisdiction" under Clause 27.13.

8. In November 2008, the 7th Respondent, which was incorporated under the laws of Luxembourg, went into liquidation. An attorney by name Me. Gaston Stein, residing in Luxembourg, was appointed as curator for the 7th Respondent company by the Commercial District Court of Luxembourg, by an order dated 07.01.2009. The 8th Respondent herein is a partner of the person so appointed as curator.

9. After such appointment, the curator appears to have sold all the properties of the 7th Respondent, including the shares held by the 7th Respondent in the first Respondent company. It is pertinent to note here that the 7th Respondent holds the entire equity share capital of the first Respondent and consequently, the curator appears to have sold the entire shareholding of the 7th Respondent in the first

Respondent. When Mr. Jitendra Virwani received a e-mail dated 20.10.2009 from the 9th Respondent, claiming to have bought the shares from the liquidator in Luxembourg, the applicants construed the same as a breach of the restrictive covenant contained in the joint venture agreement. Therefore, they have come up with the present applications u/s 9 of the Arbitration and Conciliation Act, 1996, seeking--(i) an interim order of injunction restraining the 7th and 8th Respondents from alienating or transferring the shares held by the 7th Respondent in the first Respondent company; and (ii) an interim injunction restraining the first Respondent from recognising or registering any transfer of shares from the 7th Respondent to and in favour of any other person,

10. On 29.10.2009, when both the applications were moved for ad interim ex parte orders, I ordered notice returnable by 19.11.2009 in OA No. 1109 of 2009. However, in OA No. 1110 of 2009,1 also granted an ex parte ad interim order of injunction restraining the 1st Respondent from recognising or registering any transfer of shares held by the 7th Respondent, in favour of the 9th Respondent or any other person.

11. After service of notice, the Respondent Nos. 1,4 and 5 filed a common counter-affidavit. Similarly, the Respondent Nos. 3, 7 and 8 filed a common counter-affidavit. The 9th Respondent filed a cryptic one line reply.

12. At the outset, the Respondent Nos. 1, 4 and 5 have raised the issue of territorial jurisdiction, in view of Clause 27.13 of the joint venture agreement dated 12.04.2007. It reads as follows:

27.13. Governing law and submission to jurisdiction--This agreement shall be governed by and construed in accordance with the laws of India. Subject to Clause 25, each party agrees that the courts at Bangalore shall have exclusive jurisdiction to settle any claim or matter arising under this agreement.

Clauses 25.3 and 25.4, to which Clause 27.13 is made subject, read as follows:

25.3. In the case of failure by the parties to resolve the dispute in the manner set out above within 30 (thirty) days from the date when the dispute arose, the dispute shall be referred to a panel of three arbitrators, with the investor appointing one arbitrator, the Embassy Investors'' representative appointing one arbitrator, and the arbitrators so appointed jointly nominating a third presiding arbitrator and the extent that the investors and the Embassy Investors'' representative cannot agree on the appointment of a third arbitrator either shall be able to refer the decision to the head of the International Chamber of Commerce in Mumbai, India who shall make such appointment.

25.4. The place of arbitration shall be Mumbai, India. The arbitration proceedings shall be governed by the ICC Rules of Arbitration and shall be conducted in the English language. The arbitrators shall decide by majority the dispute in question

and shall also decide whose (if not both) responsibility the costs of the arbitration proceedings shall be.

13. However, the applicants have claimed in paragraph 17 of the affidavit in support of these applications that no part of the cause of action arose within the jurisdiction of the courts in Bangalore and that, therefore, Clause 27.13 is ineffectual, inasmuch as the parties cannot confer jurisdiction, by consent, upon a court, which otherwise would have no jurisdiction. The applicants have pleaded that the joint venture agreement was signed by the applicants as well as the 6th Respondent in London and was signed by the first Respondent in Mauritius. According to the applicants, the situs of the shares of the 6th Respondent is Chennai, since the registered office of the 6th Respondent is located in Chennai. Therefore, the applicants have specifically pleaded, even in the first instance, with particular reference to Clause 27.13 of the joint venture agreement, that no part of the cause of action arose within the jurisdiction of the courts at Bangalore and that, therefore, they did not approach a court in Bangalore.

14. In response to the averments contained in paragraph 17 of the affidavit in support of these applications, the Respondent Nos. 1, 4 and 5 have stated in paragraphs 5, 6 and 20 of their common counter-affidavit that the transaction in respect of the shares of the 6th Respondent emanated/concluded in Bangalore; that the correspondence between the parries to the joint venture agreement was exchanged in Bangalore; that the JVA was negotiated and finalised in Bangalore by and between the representatives of the first Respondent and the applicants; that in terms of Form No. 23 AA filed with the Registrar of Companies u/s 209(1) of the Companies Act, 1956, the books of accounts are required to be kept at Bangalore; that the Chairman and Non-Executive Director has his permanent place of residence at Bangalore; that the applicants and the first Respondent have already entered into an escrow agreement, in terms whereof, M/s. AZB and Partners at Bangalore have been appointed as escrow agents, to hold all the documents including the share certificates; that under the joint venture agreement, all notices are required to be served only at Bangalore; and that, therefore, the exclusive jurisdiction conferred upon courts in Bangalore, cannot be said to be ineffectual.

15. The Respondent Nos. 1, 4 and 5 have also filed a copy of the escrow agreement dated April 2007, entered into between--(i) the 7th Respondent; (ii) the first Respondent; (iii) the Embassy Investors (applicants and their promoters); (iv) the 6th Respondent; and (v) AZB and Partners. Under the said agreement, AZB and Partners were appointed as escrow agents. Under Clause 3 of the escrow agreement, the Embassy Investors and the first Respondent were obliged to deposit with the escrow agents, the share certificates of the Embassy Investors and the first Respondent in the 6th Respondent company, along with a power of attorney from each of the Embassy Investors and the first Respondent. Clause 10 of the escrow agreement required all notices to be served on the escrow agents at their Bangalore address.

This escrow agreement also contained a clause, similar to the one in Clause 27.13 of the joint venture agreement. Therefore, it is the contention of Mr. Sriram Panchu, learned senior counsel for Respondent Nos. 1, 4 and 5 that since an escrow agent was appointed in Bangalore and the share certificates were in fact deposited with them at Bangalore, it cannot be contended that no part of the cause of action arose within the jurisdiction of the courts in Bangalore.

16. However, Mr. P.S. Raman, learned senior counsel for the applicants contended that the escrow agreement was actually a separate agreement, like a bank guarantee and that, therefore, the place where it was executed cannot determine the jurisdiction. In this connection, the learned senior counsel relied upon the decision of the Supreme Court in South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others, wherein it was held that the mere execution of a bank guarantee, in accordance with the terms of a contract, would not give raise to a cause of action.

17. The learned senior counsel for the applicants also relied upon a decision of the Privy Council in Eri Beach Co. Ltd. v. Attorney General of Ontario, AIR 1930 PC 10, to contend that the place where the shares could be effectively dealt with, would be the place where the property should be deemed to be situate. Since the dispute in question relates to the shareholding in a company registered in Chennai, the learned senior counsel contended that this Court has jurisdiction to entertain the application u/s 9.

18. I have carefully considered the rival submissions. Though the legal maxim, as originally formulated, reads as "boni judicis est ampliare jurisdictionem" meaning thereby "It is the duty of a judge to extend the jurisdiction", Lord Mansfield suggested the substitution of the word jurisdictionem, by the word justitiam. It so substituted, the maxim would read as "boni judicis est ampliare justitiam", meaning thereby "It is the duty of a judge to amplify the remedies". Therefore, as Lord Chancellor Bacon advised Mr. Justice Hutton, while swearing him, a court should take care to contain its jurisdiction, within the ancient milestones without removing the mark.

19. But normally, at the time of entertaining a lis, a court would goby the averments contained in the pleadings of the party who approaches the court for a relief, to decide if it has jurisdiction, both pecuniary and territorial. But if those averments are challenged as incorrect, by the opposite party, the question of jurisdiction becomes a disputed question of fact. In a routine civil litigation, where such questions of fact are seriously disputed and hotly contested, the court could frame an issue for trial and arrive at a finding, after both parties lead evidence. But in cases arising u/s 9 of the Arbitration and Conciliation Act, the very jurisdiction of the court is confined only to granting interim measures of protection. Therefore, the court cannot, in every application u/s 9, afford the luxury of a trial, to arrive at a finding on a disputed question of fact relating to jurisdiction.

20. Moreover, commercial contracts have today become highly complex, with multiple parties residing in several jurisdictions. It is quite possible, as rightly contended by Mr. H. Karthik Seshadri, learned Counsel for the Respondent Nos. 3, 7 and 8 that the parties to an international contract may even choose a place totally unconnected either to the subject matter or to the cause of action, as the neutral venue for arbitration. Interestingly, the parties have done so even in this case, by naming the International Chamber of Commerce at Mumbai as the venue for arbitration, under Clause 25.3 of the joint venture agreement, though there is no indication as to whether any part of the cause of action arose within Mumbai. Therefore, the application stricto sensu of the provisions of CPC relating to jurisdiction to cases arising u/s 9 of the Arbitration and Conciliation Act, 1996, may not lead us swiftly to the destination, though the Arbitration and Conciliation Act does not exclude the applicability of the provisions of the Code of Civil Procedure.

21. In view of what is stated above, I kept aside the issue of jurisdiction, for a while, to see if the applicants have at least made out a prima facie case for the grant of an interim order of injunction as prayed for. I am conscious of the fact that unless the court has jurisdiction to entertain a lis, it cannot decide whether the applicant has made out a prima facie case or not. But in the applications on hand, the applicants have made sufficient averments, to justify the invocation of the jurisdiction of this court. Therefore, if the averments made by the applicants are presumed at first blush to be true, this Court can certainly see if the applicants have made out a prima facie case.

22. Viewed from the said angle, it is seen that the applicants are not entitled to an order of injunction as prayed for, in view of what was stated by the Respondent Nos. 3, 7 and 8 in paragraphs 5 to 9 of their common counter-affidavit and also in the light of what was stated by the 9th Respondent in his counter-affidavit.

23. Paragraphs 5 to 9 of the common counter-affidavit of Respondent Nos. 3, 7 and 8 read as follows:

5. The 7th Respondent was declared bankrupt by the Commercial District Court of Luxembourg vide its order dated 9th January, 2009. Mr. Gaston Stein was appointed as administrator (curator) of the 7th Respondent by virtue of the aforesaid order. By a subsequent order dated 12th August, 2009, the Commercial District Court of Luxembourg authorised my partner Mr. Gaston Stein in his capacity as administrator of the 7th Respondent to sell the shares of the first Respondent. I respectfully submit that I was inducted as a Director of the first Respondent after the initiation of proceedings for winding up of the 7th Respondent. As we are partners in a law firm, I have been actively involved in dealing with the disposal of the assets of the 7th Respondent and have attempted to get the highest price. A copy each of the orders of the Commercial District Court of Luxembourg (along with their translated versions in English) is annexed hereto and marked collectively as Annexure R-2.

6. The applicants have, through entities under their control and after direct negotiations, sought to purchase the shares of the first Respondent on two occasions. The first attempt was made by virtue of an offer dated 1st January, 2009 submitted to the liquidator of Landsbanki through Star Phoenix, a Cayman Island entity ("offer"), which is even prior to the date when the 7th Respondent was declared bankrupt, i.e. 9th January, 2009. The second attempt was by way of a bid dated 1st June, 2009 submitted to this Respondent through Dynasty International, also a Cayman Island entity ("bid"). Both of these were attempts to purchase the assets of the 7th Respondent. It is also relevant to point out that both the offer and the bid are signed by the same person, Mr. Poly Byrne. A copy each of the offer and the bid is annexed hereto and marked collectively as Annexure R-3.

7. The said Jitendra Virwani, even met with Mr. Gaston Stein and myself in Luxembourg and also met with Landsbanki seeking to purchase the shares of the first Respondent. It is clear that the said Jitendra Virwani believed that Landsbanki had enforced its pledge (even before the 7th Respondent was declared bankrupt on 9th January, 2009) which is apparent and the reason why the offer was made on 1st January, 2009, but did not challenge such a perceived transfer in favour of Landsbanki (pursuant to enforcement of the pledge) knowing that a transfer of shares of the first Respondent could not be prohibited.

8. The action that has been complained of relates to the proposed sale of the entire issued share capital of the first Respondent on a fully disputed basis ("Silva Shares") by the administrator of the 7th Respondent pursuant to receipt of several offers from prospective purchasers of the Silva Shares. It is necessary to point out the bid was made by Dynasty International, apparently an Embassy Group Company, as this Respondent invited offers for the purchase of the Silva Shares based on the order of the Commercial District Court in Luxembourg and in fact received several offers for the Silva Shares. As the best offer was made by Feline Investments Limited ("Feline"), a share purchase agreement was executed in favour of Feline based on the authorisation issued by the Commercial District Court in Luxembourg.

9. When the applicants and their affiliates were unsuccessful in purchasing the Silva Shares under the bid and it was found by the applicants that a share purchase agreement was executed in favour of Feline, the applicants have approached this hon''ble court with unclean hands suppressing the facts that have been stated above.

24. Paragraphs 1 and 2 of the counter-affidavit of the 9th Respondent read as follows:

1. I am the 9th Respondent in the application. The allegations in the affidavit of the applicants are not admitted and the applicants are put to strict proof of the same. I am not a necessary or proper party to this proceeding and have been impleaded as a party for reasons known only to the applicants.

2. I confirm that I have not agreed to purchase the shares of the first Respondent or the 6th Respondent.

25. The portions of the common counter-affidavit filed by Respondent Nos. 3, 7 and 8 and the counter-affidavit filed by the 9th Respondent, make two things very clear, viz.:

(i) that the applicants and their promoter, Mr. Jitendra Virwani, were fully aware of the liquidation of the 7th Respondent company and the sale of the shares held by the 7th Respondent in the first Respondent company, under orders of a competent court at Luxembourg; and

(ii) that it is not the 9th Respondent but somebody else who had purchased the shares held by the 7th Respondent in the first Respondent company.

26. To be precise, the 7th Respondent company was declared bankrupt by the Commercial District Court of Luxembourg on 09.01.2009. Mr. Jitendra Virwani, upon coming to know of the impending liquidation, appears to have made an offer for the purchase of the shares of the 7th Respondent in the first Respondent, even as early as on 01.01.2009. Since it did not fructify, he made a second attempt on 01.06.2009. He appears to have even met the 8th Respondent and the curator personally at Luxembourg.

27. But unfortunately, the affidavit in support of these applications, tend to give an impression as though the applicants came to know of the liquidation proceedings and the sale only upon seeing the e-mail dated 20.10.2009 from the 9th Respondent. In paragraphs 10 and 11 of the affidavit in support of these applications, there is no whisper either about the knowledge of the promoters of the applicants about the liquidation proceedings or about the attempts made by the applicants and their promoter, from January 2009 onwards for the purchase of the shares of the 7th Respondent in the first Respondent.

28. There is no dispute about the fact that the sale of the shares of the 7th Respondent in the first Respondent company was made under order of a competent court at Luxembourg. Mr. Jitendra Virwani has obviously been in touch with the curator and the administrator appointed by the court at Luxembourg. Therefore, what the applicants want to achieve in these applications u/s 9, at this distance of time, could have been achieved by them, by following up the matter even in the court at Luxembourg or at least with the 8th Respondent or the curator. Having failed to do so, the applicants have disentitled themselves to the discretionary relief of injunction.

29. In any case, the applicants have come up with the stand that the shares have been purchased by the 9th Respondent. But the 9th Respondent has denied the same in his counter-affidavit. This denial is also corroborated by the counter-affidavits filed by Respondent Nos. 3, 7 and 8. Persons who have actually

purchased the shares are not before this court. The sale of the shares has taken place pursuant to an order of a competent court, in liquidation proceedings. I cannot now pass an order that would have the effect of nullifying the order of the Commercial District Court at Luxembourg. Even a court in Bangalore cannot do that. Therefore, there is no point in driving the applicant to a court in Bangalore, to meet with the same fate. Hence, both these applications are liable to be dismissed. They are accordingly dismissed. However, it is made clear that I have not ventured to adjudicate the dispute on merits and consequently the applicants are at liberty to work out their remedies elsewhere. There will be no order as to costs.