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Delhi High Court

Case No: Arbitration A. No. 9 of 2013

Morgan Securities and Credits Pvt. Ltd.	APPELLANT
Vs	
B.P.L. Ltd.	RESPONDENT

Date of Decision: May 31, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 37(2)(b), 9
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 4, 151, 19

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Harish Malhotra with Mr. Simran Mehta, Ms. Yogita Sunaria and Mr. Tarun, for the Appellant; Dhananjay Joshi, with Ms. Kavitha Damodaran and Ms. Mekhala, for the Respondent

Judgement

Manmohan Singh, J.
Prior to the present appeal, the appellant filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for interim protection, being OMP No. 865/2012. The case set up in the said OMP against the respondent was that the respondent was generating such huge sums of money so as to divert several crores of rupees to its subsidiary companies, in such a short span of time. The appellant apprehends that the respondent is selling, disposing off and/or encumbering its assets. A sum of Rs. 21.05 Crores is sought to be diverted to another company which is under the same management, control and ownership, but is at the same time a distinct legal entity on account of the principle of separate corporate personality. As the proposed transferee of funds is not a party to the arbitral proceedings and will not be subject to any award passed by the Arbitral Tribunal, the proposed transfer will operate to the irreparable prejudice of the petitioner. The transfer of the entire healthcare business of the respondent company, admittedly valued at Rs. 21.05 crores, to an unnamed, wholly owned subsidiary coupled with a simultaneous investment of Rs. 21.05 crores in the

same subsidiary in order to defeat the interests of bonafide creditors; by moving monies and assets to subsidiary companies, in such manner that the real character of the said monies and assets is lost. It was alleged at the time of filing the petition that the appellant has a huge claim of Rs. 172,52,57,158/- against the respondent as on 31st August, 2012.

1.1 In OMP No. 865/2012 filed by the appellant u/s 9 of the Act the Court issued an ex-parte interim order, dated 12th September, 2012, restraining the respondent from dealing with its healthcare business which was confirmed by an order dated 4th December, 2012 during the pendency of the arbitration proceedings by clarifying that the order may be modified by the learned Arbitrator if the respondent is able to demonstrate that the entire liability owned to the petitioner has been fully discharged.

1.2 In appeal by its order dated 14th January, 2013, the Division Bench modified the order dated 4th December, 2012 and held, "it is for the Arbitral Tribunal to consider as to whether the claim of the respondent herein before the Arbitral Tribunal or any lesser amount is liable to be secured in an appropriate manner as also the manner of securing the said amount."

1.3 In the Special Leave to Appeal (Civil) Nos. 4502-4504/2013, filed by the respondent by an order dated 8th February, 2013, the Supreme Court was pleased to further modify the orders dated 4th December, 2012 and 14th January, 2013 and made it clear that the Arbitral Tribunal shall consider the application for vacation of interim order that may be made by the petitioner, independently and uninfluenced by any of the observations made by the Single Judge.

In the impugned order it has been recorded that in pursuance of order of Supreme Court, respondent No. 2 (respondent herein) before the Arbitral Tribunal filed an application under Order XXXIX Rule 4 read with Section 151 CPC and Section 19 of the Act, inter alia, pleading that respondent No. 2 is engaged in the diverse business and is intending to set up focused management on specific business divisions so as to nurture and develop each such business division with a dedicated management team and to enable investors to bring in funds as well access to modern technology required to survive and compete effectively in the industry. The respondent No. 2 is intending to do and to place its "healthcare" business in a subsidiary company that would have only this one business to manage with dedicated management and operations team which will enable the investor to bring in funds against which they would be issued shares. If the said business remains as business division in the books of respondent No. 2 company then the investors would have to be allotted and issued shares of the respondent No. 2 company which would mean that the said investors would be entitled to profits or would suffer losses of all businesses run by respondent No. 2. Whereas for limited business of "healthcare" investor would be included in that business and they will have no direct right on respondent No. 2"s business. Respondent No. 2 shall remain a substantial shareholder of the subsidiary entities in which the "healthcare" business is intended to be placed. It was also alleged in the application which was recorded in the order that the

current book value of the assets of "healthcare business" in the books of respondent No. 2 is less than Rs. 20 crores but on capitalization of "healthcare business" in subsidiary the book value of assets of healthcare will increase. The placement of the "healthcare business" in a subsidiary is only a legal corporate mechanism to enable focused management and investment limited only to the specific business division and is not either on facts or in law, a sale or a disposal of the business division. The "healthcare business" shall continue to be operated in the name and with the trademark of respondent No. 2. If this procedure is not allowed to be conducted by respondent No. 2 and restrained continues from developing its "healthcare business" respondent No. 2 would have to incur monthly cost of approximately Rs. 75 to 80 lac towards funding the business, which it will find difficult to do without fresh investments and focused attention. The growth of "healthcare business" would not only be adversely affected but will also lead to financial losses to respondent No. 2. For the said reasons, respondent No. 2 prayed in the application that in order to enable and allow growth of "healthcare business", restrained order against "healthcare business" and other businesses may be vacated. Further action of the respondent No. 2 does not amount to diversion of assets nor it violates clause 6 of the agreement dated 27th December, 2002 entered with the claimant.

2. Learned Tribunal recorded the case set by respondent No. 2 in the application on merit. The details are given below:

that placing businesses of the respondent No. 2 with its subsidiary is not covered in any of the conditions stipulated in clause 6 of the agreement. Furthermore allegation of the claimant that respondent No. 2/applicant herein defaulted in repayment of its due since 2002-03 is incorrect. In fact respondent would prove that entire payment has been made. Claimant deliberately did not present the cheques issued by the respondent, therefore has no right to claim interest. Even otherwise claimant did not bother to take any step to secure the amount in dispute since 2004. No ground has been set up in its application seeking restraining order against respondent No. 2. In fact respondent No. 2/applicant has been taken by surprise by order passed restraining it from running its business through subsidiary. Claimant has not been able to make out nor demonstrated that respondent No. 2 is intending to remove its fixed assets with a view to defraud its creditors. Respondent No. 2 in fact has paid more than Rs. 3300 crores towards settlement of its debts.

3. The application was contested by the appellant on the grounds that from the annual account statement produced by respondent No. 2, it shows that respondent No. 2 has been defaulting and selling its fixed assets. It is running in loss and is in poor financial position. It is allowed to divert its fixed assets through a subsidiary, claimant will be left with nothing to recover if ultimately award is passed in favour of the claimant. The High Court passed the restraining order because the respondent No. 2 consistently had been defaulting and selling its fixed assets. If the stay is vacated, respondent No. 2 will divert the fixed asset that will deprive the appellant its right to recover.

4. Before the learned Arbitral Tribunal it was stated by respondent No. 2 that in order to secure claimant"s interest applicant is prepared to furnish security of M/s. E.R. Computer (P) Ltd. who owns a plot of land bearing No. 20/1, 20/2 and 20/3 situated at 11th KM, Bannerghatta Main Road, Arakere, Bangalore measuring 02 Acres and 19 Gunthas. The official declared value of the said plot is approximately Rs. 31 crores. It was alleged that by actual market value is much more than what is assessed by Government.

5. After arguments, the respondent No. 2 filed the affidavit of Mr. Ajit G. Nambiar, Director of M/s. E.R. Computers Private Limited on 16th April, 2013 stating that on the request of respondent No. 2 the said company undertakes that until the date of the final award that may be passed by this tribunal, the company shall not sell, dispose of, encumber and/or create third party rights over or in respect of said property. He also produced the Board Resolution dated 16th April, 2013 empowering him to give this undertaking by way of this affidavit. Alongwith this affidavit he filed the copy of sale deed and latest tax receipt. In support to prove the value of the plot as assessed by the government he has placed the book titled "Estimated Market Value of Immovable Properties & Buildings within the limits of Distt. Registration Office, Bangalore Urban District" wherein Govt. of Karnataka assessed the value of this plot at Rs. 31 crores.

6. After considering the application, rival submission of the parties as well the concerning documents and an affidavit of Ajit G. Nambiar, the learned Arbitral Tribunal allowed the application with certain conditions. The operative portion of the impugned order dated 23rd April, 2013 reads as under:

I allow the application of respondent No. 2 vis-a-vis "healthcare business" and accept the security subject to applicant"s depositing the original title deed of the property mentioned in his application and also producing the original tax receipt, beside non-encumbrances certificate from the authority, copy of the minutes by virtue of which the resolution was passed and also statement of the authorized representative of M/s. E.R. Computer (P) Ltd. that this security will be kept alive till the award is made and/or till such time the arbitrator decides. On production of above documents security will be accepted and restraining order passed against respondent No. 2 vis-■-vis healthcare business only shall be vacated.

7. In view of the order dated 23rd April, 2013, the respondent agreed to furnish security by deposit of title deeds on 27th April, 2013. By its order dated 27th April, 2013 the Arbitral Tribunal accepted and recorded the creation of security by the respondent. But it appears from the record that appellant raised its objection about the validity of the security by alleging that the immovable property did not even belong to the party brought up by the respondent. In order to counter the objection raised by the appellant against the security offered by the respondent, the Arbitral Tribunal adjourned the matter to 4th May, 2013 to deal with objection but in the meanwhile the appellant has chosen to file the present appeal u/s 37(2)(b) of the Arbitration and Conciliation Act, 1996, challenging question the Arbitral Tribunal"s decision in vacating the order of injunction against the

respondent in relation only to its healthcare business.

8. Mr. Harish Malhotra, learned Senior advocate appearing on behalf of the appellant has firstly referred the relevant facts which are that the respondent had admittedly purchased certain goods from BPL Display Devices Limited (BDDL). As the respondent was unable to pay for the said goods, the respondent and BDDL jointly approached the appellant for the grant of financial accommodation in the form of a bill discounting facility.

8.1 Two bills dated 27th December, 2002 and 11th June, 2003 discounting facilities were granted by the appellant to the respondent and BDDL under which BDDL drew bills of exchange on the respondent, which were duly accepted by the respondent and subsequently discounted with the appellant. The said bills of exchange contained an express promise by the respondent to repay the amount thereof to the appellant, on the date of maturity, mentioned on the face of the bill. That based on this promise and representation, the appellant paid to BDDL the price of the goods. As an additional, enabling resource, BDDL was also made liable under the bills of exchange. The liability of the respondent and BDDL was thus joint and several. It is pertinent to mention that the BDDL was a subsidiary of the respondent; and now stands liquidated. The respondent is thus the only solvent party before the Arbitral Tribunal and nothing can possibly be recovered from BDDL.

8.2 It is alleged that the aforementioned bills discounting facilities as also the various bills of exchange discounted thereunder are written documents admitted signed by the parties. The transaction is in the nature of a commercial contract, entered into with open eyes, it is not open to the respondent to allege that the transaction is void, unconscionable or oppressive. The respondent and BDDL were in financial difficulty and were thus unable to discharge their obligations under the aforesaid bill discounting facilities in a timely manner. They sought further time from the appellant in this regard and made part payments of their liability during the years 2004, 2005 and 2007.

9. Mr. Malhotra next referred letter dated 2nd February, 2007 written by CMD of the respondent Company to the appellant in support of his submission. The contents of the same are reproduced as under:-

Dear Sir,

Re: Pending Payments

This is with reference to the discussions we had today at our Office with your representative, Mr. Madhukar Dodrajka regarding the outstanding dues pertaining to the BDDL account.

At the outset, I would like to thank you for your patience and understanding during the really trying phase of BPL Limited.

As you may be aware, BPL Limited has restructured its businesses and has formed a joint venture company for its Colour Television business with our JV partners, SANYO. After the formation of the JV, BPL has been striving hard to get back to normalcy and is in touch with various financial institutions for sanction of required funds for our working capital requirements and settlement of all outstanding dues. I am constantly monitoring the situation and rest assured we will settle your outstandings within the next 6 months.

Looking forward to your support, as always and thank you once again for your patience and understanding.

Thanking you & with regards.

Sd/-

Ajit G. Nambiar

Chairman & Managing Director.

10. It is argued that despite the aforesaid assurance, the liability of the respondent was not discharged within 6 months. The appellant left with no option but to initiate the arbitral proceedings against the Respondent and BDDL.

11. It is submitted by learned Senior advocate that out of 67 hundis discounted under the aforesaid 2 bill discounting facilities dated the principal sum of 32 hundis is unpaid. Further, the interest due on all the 67 hundis is unpaid, for the last 10 years. The current outstanding amount if Rs. 210,31,40,597/-. The financial condition of respondent is becoming weak every year. It is done by the respondent in systematically manner by selling its assets as it appear from the chart produced that in the year 2009, the fixed assets of the respondent were Rs. 155 crores which has been reduced by the respondent to a mere Rs. 26 crores in 2012. Now, there is no operational income of the respondent company who is just transferring valuable asset to a subsidiary company so that in case an award is passed against the respondent who may at the later stage would show its helplessness.

12. Mr. Malhotra, learned Senior counsel, has also referred the order dated 14th January, 2013 passed by the Division Bench in FAO (OS) No. 612/2012 wherein it was mentioned that in determining the issue, the terms and conditions of the agreement would be examined. He argues in view of the said order, clause 6 totally debars the respondent to sell its asset to its subsidiary company. Thus, learned Arbitral Tribunal ought to have considered the said aspect while passing the impugned order. As the same having not considered, the impugned order is liable to be set aside.

13. Clause 6 of the agreement which contains a clear negative covenant referred by Mr. Malhotra is reproduced as under:

6. In the event of any amount remaining overdue on any hundi/bill of exchange under this facility, neither of the drawer and drawee shall without the prior written permission of the discounting company pass any resolution for its winding up for its amalgamation/merger or otherwise or for amalgamation/merger of any other company into drawer or drawee; enter directly or indirectly into new area/field of business/operation or dispose of or sell or encumber any of its undertaking or business or any of its investments in shares etc.; register/recognize any transfer of its shares by any of its present promoters" group; change its paid up share capital or redeem any security; appoint or re-appoint or modify any term and condition of appointment of any whole time or managing director; pay any remuneration to any of its managing directors, whole time directors or pay any divided on any shares.

14. By concluding his submissions, he stated that in view of total failure on the part of respondent to secure the amount of appellant and slippery conduct of the respondent, the impugned order is liable to be set aside by allowing the prayer made in the appeal.

15. On the other hand, learned counsel appearing on behalf of respondent argued that there is sufficient security offered by his client in order to secure the amount at this interim stage, the appeal filed therefore is not maintainable. He submits that on the date of issuance of letter dated 2nd February, 2007 by the respondent company the total principal amount due was about Rupees Five Crores, the respondent failed to understand how the claim of the appellant would become more than Rs. 200 crores even any rate of interest claimed by the appellant is calculated. His case is that the entire liability owned by the respondent had been fully discharged, it was a fault on the part of the appellant not to presented the cheques issued by his client to the bank for encashment. He further states that claims of the appellant are yet to be examined by the Arbitral Tribunal. Parties have to lead their evidence. At this stage, while considering the prayer of the appellant, in its injunction application, the balance has to strike between the parties. The Tribunal has rightly passed the impugned order to secure the interest of appellant. The learned Arbitral Tribunal has passed the impugned order after hearing of both parties by exercising its discretion vested with it which should not be substituted by this Court in appeal unless it finds to be perverse or contrary to law.

16. As regard to objection raised by the appellant about the validity of security, the appellant instead of satisfying the Arbitral Tribunal who fixed 4th May, 2013 has filed the present appeal. In case the Arbitral Tribunal is not satisfied with the security offered by the respondent, the appellant ha every right to make its submission before the Arbitral Tribunal for fully satisfaction in order to secure the interest of the appellant.

17. The respondent has filed an affidavit dated 20th May, 2013 of Mr. Srinath Maniyal, Company Secretary of the respondent company, as well as certificate issued by Auditor of the company.

18. After having considered the rival submission of the parties, in my view, at this interim stage, it would not be proper to decide the present appeal after discussing and deciding the case on merit as any finding, if arrived, it would definitely affect one of the parties. Therefore, this Court would only deal with the issue with regard to interim protection sought by the appellant. From the material placed on record, it has come on record that the book value of the healthcare business is Rs. 21.05 crores. The contention of the respondent is that after capitalization of the business by way of investment by a financial investor, the value of the healthcare business is expected to grow by a minimum of two to three times. The book value of the healthcare business being transferred to the subsidiary is the consideration for the subscription and issuance of the equity shares. No cash is being paid. The newspapers reports relied upon by the appellant do not depict the true nature. The investor is investing a sum of Rs. 58.69 crores in the respondent''s subsidiary company towards subscription for 49% equity shareholding in the subsidiary as per the affidavit filed by the respondent. It is also the case of the respondent that on the basis of this arrangement, the valuation of the healthcare business would increase to approx. Rs. 1201 crores in the books of the subsidiary, leading thereto an increase in the value of the respondent''s shareholding therein from Rs. 21.05 crores to approx Rs. 60 crores.

19. It is not in dispute that the respondent has arranged for security of the immovable property having value of Rs. 31 crores. As per respondent, the market value of the said immovable property is more than Rs. 70 crores.

20. From the affidavit of the respondent and material placed on record, it does not appear that the respondent''s said act is not bonafide. Being an unsecured creditor whose claims are yet to adjudicate before the Arbitral Tribunal, the respondent is offering reasonable security subject to satisfaction of Arbitral Tribunal, in order to secure the interest of the appellant. The appellant has every right to raise its objection about the validity of security arranged by the respondent, the law also permits the appellant to move fresh application for interim measure in case the change of circumstances or any incorrect statement made by the respondent. The Arbitral Tribunal has jurisdiction to entertain such plea of the appellant as per its own merit.

21. As far as the present appeal is concerned, I am of the considered view that the order passed by the Arbitral Tribunal is reasonable and legal which has been passed after considering the overall facts and circumstances of the case. Therefore, the same cannot be interfered with except it is clarified to the extent that till the time security offered by the respondent is accepted on production of original title deeds and after fully satisfaction of the Arbitral Tribunal, the interim order dated 12th September, 2012 which was confirmed by order dated 4th December, 2012 shall continue.

22. The appeal is accordingly disposed off with these directions. Pending applications are also disposed of in view of disposal of the main appeal. Copy of this order be sent to the learned Arbitral Tribunal for further direction.