

(2018) 11 DEL CK 0206

In the Delhi High Court

Case No : Civil Suits (Comm) 1251 Of 2018 & Interlocutory Application 16098 Of 2018

Affinity Beauty Salon Pvt. Ltd. & Anr

APPELLANT

Vs

Affinity Beauty Salon Pvt. Ltd. & Anr

RESPONDENT

Date of Decision : 29-11-2018

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 14, 331(3)

Citation : (2018) 11 DEL CK 0206

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Akhil Sibal, Tushar John, Parinay T. Vasandoni, Abhinav Hansaria, Somesh Shukla, Jagriti Ahuja, Sandeep Sethi, Gaurav Varma, Kaustubh Prakash

Judgement

Prathiba M. Singh, J

1. The present suit for permanent injunction has been filed by Affinity Beauty Salon Pvt. Ltd. and Mr. Vishal Sharma (hereinafter "Plaintiffs")

against Kotak Mahindra Bank Limited- Defendant No.1 (hereinafter "Bank") and Wella India Private Limited (hereinafter "Defendant").

The reliefs sought in the present suit are as under:

a. Pass a decree of permanent injunction against the Defendant No.1 from encashing the Bank Guarantee bearing No. 0187OBG16012697 dated

30.09.2016 for an amount Rs. 15,50,00,000/- (Rupees Fifteen Crore Fifty Lakh Only).

b. Pass a decree of permanent injunction against the Defendant No. 1 from encashing the Bank Guarantee bearing no. 0187OBG16012694 dated

30.09.2016 for an amount Rs.9,00,00,000/- (Rupees Nine Crore Only) c. Pass an order in favour of the Plaintiffs directing the Defendants to pay costs

as incurred by the Plaintiffs.â??

2. The case of the Plaintiff is that it runs a chain of salons in India and renders hair and beauty services. Defendant (including its predecessor) and the

Plaintiffs entered into an arrangement for promoting sale and distribution of the products of the Defendant in the Plaintiffsâ?? salons. The following

agreements were entered into between the parties;

a) Memorandum of Understanding dated 27th April, 2010 (MOU)

b) Memorandum of Agreement dated 26th July, 2010

c) Amendatory Agreement dated 1st November, 2012

d) Amendatory Agreement dated 24th October, 2015.

3. Pursuant to the above Agreements between the parties, the Plaintiff was to order, purchase and take delivery of the Defendantâ??s cosmetic

products. Various payments were also to be made by the Defendant to the Plaintiff for each of the salons established by the Plaintiffs and each of the

studios to be established by the Plaintiff. Apart from that, Defendant was to also supply its products to the Plaintiff on a discount.

4. In terms of the agreement, the Plaintiff had executed two Bank Guarantees for the sum of Rs.15,50,00,000/- and Rs.11,00,00,000/- in favour of

Defendant No.2. The said Bank Guarantees are alleged to have been issued by the Bank after taking properties of Plaintiff No.2, who is a director of

the Plaintiff No.1 Company, as security. The initially issued Bank Guarantees were subsequently amended on 28th December, 2017 and the new

Bank Guarantees were issued for a sum of Rs.9,50,00,000/- and Rs.9,00,00,000/-. Both the said Bank Guarantees were extended till 21st September,

2019. Various disputes arose between the parties in respect of the payments, which were to be made by the Defendant to the Plaintiff and the

Plaintiff to Defendant. It is the case of the Plaintiffs that the Defendant owes a sum of Rs.1,00,80,003/- to the Plaintiff. In view of the various

disputes, which arose in respect of the payments, it is the case of the Plaintiffs that meetings were held between the parties in order to resolve the

dispute. The last meeting was held on 25th October, 2018. The minutes of the said meeting are claimed to have been captured in the email dated 15th

November, 2018 written by the Defendant. According to the Plaintiff, an agreement was reached as to the manner in which the disputes between the

parties were to be resolved.

5. Subsequent to the receipt of this email, the Plaintiff states that it made a payment of Rs.15 lakhs to the Defendant. Despite this, the Defendant

invoked the two Bank Guarantees on 20th November, 2018. Hence, the present suit has been filed by the Plaintiff seeking an injunction against the

invocation and release of payments by the Bank to the Defendant.

6. The suit was first listed on urgent mentioning at 4:15 pm on 26th November, 2018. The Plaintiff was directed to serve the Defendants and the

matter was taken up as the first item on 27th November, 2018. The Bank and the Defendant were duly represented. Submissions by Counsels were

heard on behalf of all parties.

7. Mr. Sandeep Sethi, Learned Senior Counsel, appearing on behalf of the Defendant has raised two preliminary objections.

â?¢ First, that this Court lacks territorial jurisdiction to entertain and try the present suit and

â?¢ Secondly, that there is an arbitration clause in the Memorandum of Agreement dated 26th July, 2010 and thus, in any event a civil suit is not

maintainable. In support, he relies on the following judgments:

a) South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. and Ors. (1996) 3 SCC 44 (3hereinafter, â??South East Asia Shipping Co.

Ltd.â??);

b) Hellenic Electricity Distribution Network Operator S.A. v. Bharat Heavy Electricals Ltd. and Ors. 2017 (164) DRJ 145 (hereinafter, â??Hellenic

Electricity Distribution Network Operatorâ??);

c) Alfa Therm Ltd. v. Canara Bank & Anr. 163 (2009) DLT 543 (hereinafter, â??Alfa Thermâ??);

d) NHAI v. Elsamex TWS-SNC Joint Venture 150 (2008) DLT 215;

e) STC v. Jainsons Clothing Corporation (1994) 6 SCC 597;

f) Mahatama Gandhi Sahakre Sakkare Karkhane v. National Heavy Engg. Coop Ltd. (2007) 6 SCC 470;

g) UP Coop. Federation Ltd. v. Singh Consultants and Engg. (1988) 1 SCC 174;

h) UP State Sugar Corporation v. Sumac International Ltd. (1997) 1 SCC 568;

i) Hindustan Steel Workers Construction Ltd. v. GS Atwal Co. (1995) 6 SCC 76

8. It is further submitted on merits that at the time when the meeting was held on 25th October, 2018, it was not disclosed to the Defendant that

liquidation proceedings had been commenced under the Insolvency and Bankruptcy Code, 2016 (hereinafter, 'IBC') against the Plaintiff no.1. It

is submitted that even as per the e-mail which is admitted between the parties, there is a huge amount of outstanding against the Plaintiff, which is to

the tune of more than Rs.56 crores and hence there is a reasonable apprehension that the Defendant may not be able to recover any sums including the admitted sums.

9. On the other hand, Mr. Akhil Sibal, learned Senior Counsel for the Plaintiff submits that the Bank Guarantee is independent of the main contract

between the parties. The invocation, according to learned Senior Counsel, is fraudulent, inasmuch as once the settlement had been arrived at, as

captured in the minutes of meeting held on 25th October, 2018, the Plaintiff had, in fact, given effect to the settlement and paid some moneys to the

Defendant. In light of this, the Bank Guarantee could not have been invoked. It is further submitted that the present suit only relates to the Bank

Guarantee, which does not have either a jurisdiction clause or an arbitration clause. Thus, the suit is maintainable before this Court as

¶ The Bank Guarantee was issued by a branch office of Kotak Mahindra Bank located in Delhi;

¶ the Bank Guarantee has been invoked in Delhi, and

¶ the invocation letter has been received in Delhi.

10. Further, it is submitted that the invocation is not in terms of the Bank Guarantee as the exact amount due ought to have been specified in the

invocation letter. It is further submitted that the reason being given for invoking the Bank Guarantee i.e., the kicking off of the moratorium period

under the IBC is also not valid as performance Bank Guarantees are excluded from the scope of insolvency proceedings under Section 14 read with

Section 331(3) of the IBC. It is further submitted that this is a case which is covered by the settled precedents, which hold that an injunction

restraining release of payments under the Bank Guarantee can be granted if the invocation is fraudulent. The disputes having been settled between the

parties, and the mode of payment having been agreed, the invocation of the Bank Guarantee four days after the e-mail dated 15th November, 2018 is

not just fraudulent but also malafide and dishonest, according to the Plaintiff.

11. Learned Senior Counsel for Plaintiffs relies on the following judgments:

- a) Hindustan Paper Corporation Ltd. v. Keneilhouse Angami (1980) 68 CompCas 361 (Cal);
- b) NCC Ltd. v. ABB India Ltd. 2018 (3) AKR 612;
- c) NCC Ltd. v. ABB India Ltd. SLP 16970/2018
- d) BEFESA AGUA and Ors. v. IVRCL Infrastructure and Projects Ltd. 2013 (3) CTC 414;
- e) Parwani Builders v. Konkan Railway Corporation Ltd. (1996) 85 CompCas 676 (Bom);
- f) Andhra Civil Construction Co. v. Board of Trustees of the Port of Bombay 1992 (2) Bom CR 132;
- g) DLF Industries v, Hongkong & Shenghai Bankiing Corp. 78 (1999) DLT 146;
- h) Ansal Properties and Industries v. Engg. Projects AIR 1988 Delhi 176;
- i) Hindustan Steel Works Construction v. Tarapore and Co. AIR 1996 SC 2268;
- j) NCC Ltd. v. SembcorpGayatri Power Ltd. 2018 (1) ArbLR 313 (AP);
- k) Nangia Construction India Pvt. Ltd. v. National Buildings Construction Corporation Ltd. 41 (1990) DLT 359;
- l) Humboldt Wedag India Pvt. Ltd. v. Dalmia Cement Ventures Ltd. 173 (2010) DLT 8 (DB);
- m) M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696

12. Before going into the merits of the matter, this Court has to decide the preliminary objections raised by the Defendant. The jurisdiction clause and

the arbitration clause in the Memorandum of Agreement dated 26th July, 2010, read as under:

â??m) GOVERNING LAW, CONSTRUCTION, LANGUAGE: This Agreement shall be governed by and interpreted for any and all purposes in

accordance with the internal laws of India, applicable to the contracts made and to be performed wholly within such state, without reference to

principles of conflicts of laws. The courts sitting in, or having principal jurisdiction over Mumbai shall have exclusive jurisdiction of all disputes

hereunder. Each Party hereto irrevocably agrees that service of process upon it by certified mail-return receipt requested, addressed to it at its

address set forth on the first page of this Agreement, shall constitute good and effective service for all purposes. The Parties understand the English

language and are fully aware of all terms and conditions contained herein. If any translation of this Agreement is made, the English language version

shall always continue to govern.

n) ARBITRATION: Any dispute or difference of any nature whatsoever or regarding any right, liability act, omission or account of any of the parties

hereto arising out of or in relation to this Agreement shall be referred to the sole arbitration of any Director on the Board of Wella or some officer of

the Company who may be nominated by him / her. Affinity will not be entitled to raise any objection to any such arbitrator on the ground that the

arbitrator is an officer of the Company or that has to deal with the matters to which this Agreement is related or that in the course of his duties as an

officer of the Company he had expressed views on all or any of the matters in dispute or difference. The parties to the Agreement, subject to the

provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or re-enactment thereof and the rules made thereunder and for

the time being in force shall apply to the arbitration proceeding under this clause.

13. There is no doubt that the Bank Guarantees have been issued by the Plaintiffs under the Memorandum of Agreement duly amended from time to

time. The text of the Bank Guarantee is also relevant and relevant extracts of the same are set out hereinbelow:

"We, the Bank at the request of the Salon and in consideration of the aforesaid, do hereby guarantee Wella of all sums upto the extent of

Rs. 15,50,00,000/- (Rupees Fifteen Crores Fifty Lakhs Only) which may be claimed by Wella to be due and payable by the Salon to Wella and

undertake to make payment to Wella all sums upto the extent of Rs. 15,50,00,000/- (Rupees Fifteen Crores Fifty Lakhs Only) which shall become due

or owing by the Salon to Wella in respect of the supply of Wella products immediately on demand by Wella without any demur or protest.

We, the Bank undertake to and agree with Wella for payment of all sums upto the extent of the said sum of Rs.15,50,00000/- (Rupees Fifteen Crores

Fifty Lakhs Only) as may be from time to time be claimed by Wella notwithstanding any dispute or disputes raised by the Salon under any terms of

amendatory agreement dated Oct 2015 or any other agreement executed between the Salon and Wella.

We, the Bank, hereby further undertake not to revoke this guarantee during its continuance except with the previous consent of Wella.

14. Though, there is no dispute to the proposition that a Bank Guarantee is independent of the main contract, the question as to whether the Bank

Guarantee could or could not have been invoked, depends on the interpretation of the underlying agreement itself. The invocation of the Bank

Guarantee is permissible, if the Defendant claims money to be due and payable by the Plaintiff. The question as to whether the money is due and

payable cannot be decided without reference to the MOU and the Agreements entered into between the parties. In fact, the submission of the

Plaintiffs, that the invocation is not in terms of the guarantee itself cuts both ways i.e., the Court has to, therefore, examine as to whether the amount

is due and payable. This obviously requires the Court to examine the obligations of the parties under the agreement and go into the merits of the

disputes.

15. Even the second submission on behalf of the Plaintiff, that the dispute has been resolved in view of the e-mail dated 15th November, 2018, would

also require adjudication. Thus, for deciding as to whether the invocation is as per the Bank Guarantee issued under the contract, or whether the

dispute has been settled or not, the adjudication cannot be done without reference to the underlying contract and the Agreements. The jurisdiction

clause is clear to the effect that the Courts in Mumbai itself shall have exclusive jurisdiction over all disputes between the parties. The

Bank Guarantee having been issued under the agreement, the same cannot be completely alienated.

16. In South East Asia Shipping Co. Ltd. (supra), the Supreme Court, while considering as to whether a suit for perpetual injunction from enforcing the

Bank Guarantee would lie in the Delhi High Court when the contract vested exclusive jurisdiction in the Bombay High Court observed as under:

“... It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law.

The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a

judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief

against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or

would arise. In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay,

performance of the contract was also to be done within the jurisdiction of the Bombay High Court; merely because bank guarantee was executed at

Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original

side of the Delhi High Court. The contention that the Division Bench was right in its finding and that since the bank guarantee was executed and

liability was enforced from the bank at Delhi, the Court got jurisdiction, cannot be sustained.â??

17. This judgment of the Supreme Court has been subsequently considered in a Division Bench judgment of this Court in *Hellenic Electricity*

Distribution Network Operator (supra). The learned Division Bench while considering the proposition, as to whether a Bank Guarantee is independent

to the main contract, has clearly held as under:

â??12. The principle of law that a bank guarantee is an independent contract between the issuing bank and the beneficiary and has no concern with

the main contract between the beneficiary and the party at whose instance the bank guarantee has been issued, with reference to territorial jurisdiction

of a Court, has to be understood in the context of jurisdiction with reference to the mother contract. The independence of a contract for guarantee

simply means that the dispute concerning the bank guarantee has to be resolved in terms of the bank guarantee i.e. the bank guarantee is the complete

contract between the bank issuing the guarantee and the beneficiary. But since the bank guarantee flows out of the mother contract the jurisdictional

issue has to be resolved in the context of the cause of action arising under the contract for the reason a guarantee is invocable, though in terms of the

guarantee, but in relation to the main contract. To wit. Instant guarantee is a performance guarantee. The performance of the contract by the plaintiff

has to be in terms of the contract. The bank guarantee simply states that a demand by the beneficiary, alleging non-performance, would require the

bank to pay under the bank guarantee.

13. In the decision reported as (1996)3 SCC 443 South East Asia Shipping Co. Ltd. Vs. Nov Bharat Enterprises Pvt. Ltd. & Ors. noting that the

contract between the parties was executed at Bombay and had to be performed at Bombay, it was held that merely because the bank guarantee was

executed by a bank at Delhi in terms of the mother contract would not constitute a cause of action at Delhi to lay a suit to injunct the bank from

paying under the guarantee and to restrain the beneficiary from enforcing the right under the guarantee. Concerning jurisdiction under the Consumer

Protection Act, in the decision reported as (1999) 8 SCC 357 Union Bank of India Vs. Seppo Rally OY the Supreme Court held that the consumer

forum at the place where the office of the party 'at whose instance the bank guarantee was furnished would have no jurisdiction to entertain a complaint

concerning the bank guarantee furnished by the branch of the bank from the place where the office of the party concerned was situated.

14. Concerning the assignment of the right under the contract, on hiving off the business of defendant No. 1 and the hived off business vested in

defendant No. 2, having noted that the same was under a notification issued by the Government of Greece, the learned Single Judge was obliged to

consider the effect of a legislative hiving off the business of defendant No. 1 to defendant No. 2 and the contract between plaintiff and defendant No.

1 relating to the business vested in defendant No. 2 on the issue of territorial jurisdiction. The learned Single Judge was also obliged to consider the

effect of the plaintiff filing a suit in a Court in Athens against defendant No. 1 and defendant No. 2 concerning the contract.

15. Whether the contract was validly assigned or not and whether defendant No. 2 could enforce the bank guarantee in its favour notwithstanding

beneficiary being defendant No. 1 is a matter of substance and has no concern with the issue of territorial jurisdiction. It is a dispute concerning the

contract and suffice would it state that whether it is a dispute concerning the contract or relating to a contract or arising out of a contract would make

no difference on the issue of territorial jurisdiction. Territorial jurisdiction has to be determined with reference to a cause of action arising under a

contract and if there is an exclusive jurisdiction clause vesting jurisdiction in one Court and ousting jurisdiction in others, the same has to be respected.

16. As we have noted hereinabove, apart from the exclusive jurisdiction clause vesting jurisdiction in the Courts of Athens, no part of cause of action

concerning the contract arose in Delhi or for that matter in India. Entire cause of action was in Athens. As held above, issuance of the bank guarantee

from Delhi is not a part of the cause of action and territorial jurisdiction cannot be determined with reference to the said fact.â??

18. A perusal of the above observations clearly shows that the question of territorial jurisdiction has to be decided with reference to the mother

contract, and not independently thereof. The Court has also observed that mere issuance of a Bank Guarantee from Delhi would not vest jurisdiction

in the Delhi High Court. In the said case since the exclusive jurisdiction was vested in Athens, the Court held that Delhi High Court had no jurisdiction.

A similar view was also taken by another Learned Single Judge of this Court in Alfa Therm (supra) where it was observed as under:

â??13. I find from the entirety of the facts in the present case that the parties had agreed to the exclusive jurisdiction of the Courts at Guwahati. The

terms of the invitation for bid were accepted by the plaintiff by making a bid. It is not the plaintiff's case that its bid was without agreeing to Clause

No. 46 (supra). The defendant no.2 is the Government of Assam. The invitation for bid was issued from Guwahati for works to be performed in

Guwahati and/ or in the State of Assam. In the circumstances, the Clause 46 aforesaid is to be read as excluding the jurisdiction of Courts at any other

place even if otherwise having jurisdiction. The jurisdiction of this Court is ousted for this reason alone and need is not felt to go into the question

whether this Court would have jurisdiction for the reason of the plaintiff as a bidder having furnished the bank guarantee of a bank within the

jurisdiction of this Court even through guaranteeing payment to defendant no.2 at Guwahati. It does not stand to logic that in such circumstances the

place of bank issuing the guarantee would have jurisdiction. The defendant no.2 while entertaining the bids is not concerned with the address of the

bank issuing the guarantee is assured at the place of residence of the defendant no.2 i.e. the guarantee is assured at the place of residence of

defendant no.2 i.e. Guwahati. It would be unfair to hold that territorial jurisdiction of places where the branch of the bank issuing the guarantee is

situated can be invoked qua the disputes relating to the said guarantee. In the present case, the plaintiff was free to arrange the bank guarantee from a

branch of the bank at any place and the defendant no.2 cannot be made to run to that place for contesting a suit. I also do not find any merit in the

plea of the invocation letter being issued to the defendant no.1 bank at Delhi. The invocation letter would naturally be addressed to the bank issuing the

bank guarantee. However, the core dispute is between the plaintiff and defendant No.2. The relief of injunction claimed is qua the defendant no.2

only. If this Court does not have the territorial jurisdiction to entertain the dispute qua the relief of declaration, the question of entertaining the lis even

if this Court were to have jurisdiction qua the relief of injunction against the defendant No.1 bank does not arise.â??

19. The above judgements were sought to be distinguished, by the Ld. Sr. Counsel for the Plaintiff, on the ground that the present suit is simply

seeking an injunction against the Bank Guarantee and no other reliefs as sought in the Alpha Therm case have been sought. The dispute in the present

case cannot be held to be outside the Memorandum of Agreement simply on the ground that the Bank Guarantee is independent of the main contract.

The question as to whether the amounts are due and payable are to be decided only under the MOU as also the Agreements under which the Bank

Guarantees have been issued. The submission that the invocation is not in terms of the Guarantee is also intertwined with the minutes of meeting dated

28th October 2018, as contained in the email dated 15th November 2018. If the disputes were in fact settled, could the invocation have been done in

the first place, is an issue to be decided on the substantive obligations of the parties, under the agreements as also under the settlement, and not merely

by reading the Bank Guarantee. The clause in the present contract is extremely clear i.e., that the Courts sitting in or having principal jurisdiction over

Mumbai, shall have â??exclusive jurisdiction of all disputes hereunderâ??. This clause is unexceptional and is absolute.

20. Judgments cited on behalf of the Plaintiffs relate to the applicability of the arbitration clause to a dispute relating to the Bank Guarantee. The

second set of cases cited by the Plaintiffs relate to the merits of the invocation i.e., as to whether it is fraudulent, and under which circumstances the

invocation can be granted.

21. Since on the preliminary objection of territorial jurisdiction, this Court is of the view that it does not have territorial jurisdiction, owing to clause

14(m) of the Memorandum of Agreement, the Court is not deciding the matter on merits, including the question as to the applicability of the arbitration clause, and the legality and validity of the invocation.

22. It is, accordingly, held that this Court lacks the territorial jurisdiction to entertain the present suit and the plaint is liable to be rejected for being presented in the Court of appropriate jurisdiction. The plaint is returned with no order as to costs. All pending application also stands disposed of.