

(2003) 12 BOM CK 0047

In the Bombay High Court

Case No : Chamber Summons No's. 839 to 842 and 843 of 2003 and Execution Application No. 86 of 2003

Ankit Securities and Finance Co. (P.) Ltd.

APPELLANT

Vs

Birla Investment Services

RESPONDENT

Date of Decision : 08-12-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Depositories Act, 1996 — Section 10

Citation : (2004) 5 BomCR 436 : (2004) 122 CompCas 30 : (2004) 4 CompLJ 385 : (2004) 50 SCL 734

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : L.K. Tripathi, Inda Prakash, A.R. Lambay, Poonam Naik and D.T. Palekar, for the Appellant; Madhur Rai, for the Respondent

Judgement

D.Y. Chandrachud, J.—This group of Chamber Summons has been moved before the Court by the wife, daughter-in-law, daughter and sons of the proprietor of the Judgment Debtor. The relief which has been sought in the Chamber Summons is that the Execution proceedings instituted by the Decree Holder be dismissed or stayed and that the warrant of attachment be quashed and set aside.

2. The Petitioner is a member of the National Stock Exchange. On 15th January, 2000, a Member-Constituent agreement was entered into between the Petitioner and the Respondent. Disputes arose between the parties in relation to the claim of the Petitioner for the payment of its dues and the matter came to be referred to arbitration under the rules, regulations and bye-laws of the National Stock Exchange. The Petitioner invoked proceedings in arbitration on 28th April, 2001. On 14th May, 2002 an award was passed in favour of the Petitioner in a total amount of Rs. 38,23,758 together with interest thereon at the rate of 15% p.a. from 28th April, 2001 till the date of payment. Apprehending that on receipt of the award, an effort would be made by the Respondent to alienate its properties

and assets, the Petitioner filed a Petition u/s 9 of the Arbitration and Conciliation Act, 1996 ("the Act"). On 6th June, 2002, an ad interim order was passed by S.A. Bobde, J. in respect of the operation of the depository account of the Respondent. The Respondent instituted a petition in this Court for setting aside the arbitral award u/s 34 of the Act. By a judgment and order dated 13th January, 2003 F.I. Rebello, J., dismissed the Petition filed by the Respondent. Upon the dismissal of the Petition u/s 34, the petition that was filed u/s 9 was also disposed of continuing the ad interim order for a period of four weeks. The Learned Single Judge, however, directed that all objections which were raised by the Respondent were left open for consideration before the forum which the Petitioner may move.

3. An appeal was filed against the order of the Learned Single Judge dismissing the Arbitration Petition. The appeal was admitted on 25th March, 2003. A Notice of Motion (N.M. 777 of 2003 in Appeal No. 223 of 2003) was taken out on behalf of the Appellant therein for an order of stay. The Motion was made absolute in terms of prayer Clauses (a) and (b), subject to the appellant depositing 50% of the amount awarded in the Court and furnishing a Bank guarantee for the balance within a period of two months from that date. The Petitioner herein was permitted to withdraw the amount upon deposit subject to furnishing security to the satisfaction of the Prothonotary and Senior Master. The Division Bench, however, clarified that in case the amount was not deposited or a Bank guarantee was not furnished, the stay shall stand vacated and the Respondent to the Appeal (the Petitioner herein) will be entitled to execute the award. There is no dispute about the fact that the condition subject to which an order of stay was granted by the Division Bench was not complied with as a result of which the stay stands vacated and the Petitioner herein would be entitled to execute the award in terms of the order of the Division Bench. That is how proceedings in execution have been adopted.

4. There are before the Court five Chamber Summons. The Court is informed by Counsel on both sides that the facts of each of them are similar and that it would, therefore, be necessary to advert to those of the first Chamber Summons as and by way of illustration. Chamber Summons 839 of 2003 is by the daughter of the proprietor of the Respondent against whom an award has been passed by the arbitral Tribunal of the National Stock Exchange. In the affidavit in support of the Chamber Summons, the applicant states that she has purchased shares of two Companies worth Rs. 20,687.50 in August 2001 from the Respondent, but they have remained to be transferred to the D-Mat account of the applicant. Thereafter, it has been alleged that commencing from January 2002, the applicant continued to purchase and sell shares through the Respondent and made net purchases of shares of various Companies in the amount of Rs. 2,44,851.50. According to the applicant, the Respondent stated on enquiry that instructions to transfer these shares to the applicant were issued immediately after the purchase of the shares, but neither the Stock Holding Corporation, nor Ankit Securities and Finance Company Pvt. Ltd. who were acting as depositories

complied with the transfer instructions. At this stage, what is material is that the affidavit in support is entirely silent in regard to the underlying contract notes on the basis of which transactions were concluded or in regard to the payment of consideration for the purchase of the shares.

5. There is no dispute about the fact that the attachment which has been levied in the present case is in respect of four D-Mat Accounts of the Respondent. In respect of three of those accounts, the depository is Stock Holding Corporation of India Ltd. while in the case of one account the depository is Ankit Securities Ltd. which is claimed to be a sister concern of the Petitioner, Counsel appearing on behalf of the applicant urges that in February 2003, the applicant instituted a declaratory suit in the Civil Court at Muzaffarpur (Suit No. IS 8 of 2003) after which the warrant of attachment came to be issued in 2003. Counsel urged that the suit which has been instituted by the applicant is prior in point of time and therefore, the proceedings in execution are liable to be stayed u/s 10 of the Code of Civil Procedure, 1908. Substantial arguments in each of the Chamber Summons have been urged before the Court not by the applicant, but by Counsel for the Respondent who urged that the Respondent has placed on the record sample delivery instructions as well as a statement of delivery instructions that were issued by the Respondent for effecting delivery of shares in the D-Mat Accounts, inter alia to the applicant to the Chamber Summons. According to Counsel, on 7th September, 2001, Ankit Securities and Finance Company Pvt. Ltd., the depository participant, however, declined to effect transfer on the ground that the payments due to it on account of depository services rendered were still outstanding. Counsel, therefore, urged that prior to the order that was passed on 6th June, 2002 by this Court in the petition u/s 9, delivery instructions had been issued by the Respondent for the delivery of shares to the applicant. Therefore, the submission was that valid transactions were entered into by the Respondent with the applicant which would warrant the lifting of the order of attachment. Counsel further urged that in any event one of the accounts with Stock Holding Corporation Ltd., (DP Account 1054059) stands in the joint names of the sole proprietor of the Respondent and his son Mr. Lalitkumar Birla. Relying upon the judgment of a Division Bench of this Court in *Narandas Munmohandas and Others Vs. The Indian Manufacturing Co. Ltd.*, it was urged that the warrant of attachment has to be lifted at least in respect of this account since the D-Mat shares reflected therein stand in the joint names of the proprietor of the Respondent and his son.

6. While considering as to whether any case has been made out for lifting the attachment, it would at the outset, be necessary to note that the case on the basis of which all the applicants have approached this Court is that the shares in question have been purchased by them. In the case of all the applicants, the transactions are alleged to have taken place on 31st August, 2001 and thereafter, on 11th January, 2002 of thereabout. The applicants are all closely related to the proprietor of the Respondent being respectively his wife, a daughter, sons and a daughter-in-law. If the applicants were indeed to be bona

fide purchasers of these shares for value, the first thing that one would expect is a disclosure of the underlying contract notes and details of the payment of consideration by the applicants. In the present case, the record is completely silent in regard to the payment of any consideration whatsoever which is the sine qua non for a valid transaction of the purchase and transfer of shares.

7. In the affidavit in reply to the Chamber Summons, the Petitioner has submitted that the case put forth of a purchase of shares by the applicants is bogus and fictitious inasmuch as shares purchased by the applicants at the end of August 2001 and/or in January 2002 through the Respondent should have been delivered by the Stock Exchange on any day after the date of the execution of the transaction. In the present settlement cycle, shares should have been delivered by the Stock Exchange three days after the transfer. However, in the present case, shares purported to be purchased by the applicants through the Respondent were already lying in the personal account of the Respondent prior to 31st March, 2001 or, as the case may be, January 2002. Hence, it has been submitted, and in my view with justification, that the shares which were lying in the personal D-Mat accounts of the Respondent can in no way be connected with or concern any alleged transactions of the applicants. But above all, as already noted, there is absolutely no independent record of the existence of the transactions on the basis of which the applicants claim right, title and interest in respect of the shares; the applicants have completely failed to establish that any consideration had flowed from them in respect of the alleged purchase of the shares.

8. The Respondent has come before the Court with an explanation which is ex facie untenable and unfounded. The Respondent claims that during the course of his broking/sub-broking activities during the period 1998--2001, a number of transactions were entered into by him on behalf of various clients through the Petitioner or through other members of the Bombay Stock Exchange or National Stock Exchange. According to him, several clients had asked him to make continuous adjustments in respect of shares sold by them out of shares purchased by them through the Respondent and to credit the proceeds of the sale in their account with the Respondent. As and when purchase orders were placed by clients these were executed and the cost of purchase was adjusted against the outstanding credit balance. The Respondent, however, claims that sometimes he did not have ready funds for the purchase of shares in which case he used to hand over his own shares and issue a transfer instruction to the depository participant to transfer such shares from his D-Mat account to the account of the purchasing client. Alternatively the Respondent would keep shares in his own D-Mat account for future sales if so desired by the client.

9. This explanation is ex facie false and cannot be accepted for more than one reason. The Respondent is neither a broker nor a sub-broker registered on the Bombay Stock Exchange or the National Stock Exchange. His own case is that he is registered with the Maghadh Stock Exchange at Patna. The Central

Government has framed Rules in exercise of powers conferred by Section 29 of the SEBI Act, 1992 which are called the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Rules, 1992. Rule 3 provides that no stock broker or sub-broker shall buy, sell or deal with any security unless he holds a certificate granted by the Board under the Regulations, similarly there are regulations known as the Securities and Exchange Board of India (Stock Broker and Sub-broker) Regulations, 1992. Regulation 11 provides that it shall be compulsory for all members/brokers to keep monies of the client in a separate account and their own monies in a separate account. The respondent was neither a broker nor sub-broker registered with the BSE or NSE. The shares which have been attached were in the D-mat accounts of the respondent. Despite the attempt of learned counsel appearing on behalf of the respondent to establish that there were valid transactions, neither the applicants nor the respondent have been able to establish the essentials of a valid transaction for the purchase and sale of shares. No payment of consideration has been shown to the court. An Income Tax Return would not by itself establish the existence of a valid transaction in pursuance of which the applicants became owners of the shares. The shares stand in the D-mat account of the Respondent and it is impossible to hold that any of the applicants held a valid title to the shares. In the circumstances, I am of the view that the applicants have been unable to demonstrate before the Court that the shares in respect of which an attachment has been levied, are shares to which the applicants are entitled under a bona fide or valid transaction for the purchase of shares. The shares were the subject-matter of an injunctive order which was passed by Bobde, J. as far back as in June 2002. The Chamber Summons has been instituted only belatedly, sometime in July 2003.

10. In the context of the present case, it would be instructive to have regard to the relevant provisions of the Depositories Act, 1996. Section 9(1) of the Act provides that all securities held by a depository shall be dematerialized and shall be in a fungible form. The expression "fungible" is defined in Webster's Third New International Dictionary (1993 Edition page 922) as being "of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation". A related meaning is that "which is capable of mutual substitution". Under Sub-section (1) of Section 10 notwithstanding anything contained in any other law for the time being in force, a depository shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of a security on behalf of a beneficial owner. However, under Sub-section (2) a depository as a registered owner shall not have any voting rights or any other rights in respect of securities held by it. Section 10(3) provides that the beneficial owner shall be entitled to all the rights and benefits and be subjected to all the liabilities in respect of his securities held by a depository. u/s 11, every depository shall maintain a register and an index of beneficial owners in the manner provided in sections 150, 151 and 152 of the Companies Act, 1956. fungible is the essence of the security held by a

depository. Such securities are held in a dematerialized form. In the present case, the applicants have not been able to establish either with reference to the provisions of the Depositories Act, 1996 or on the basis of any cogent evidence that they are entitled to a beneficial ownership in respect of the shares or that they had acquired any interest therein on the basis of a valid transaction of sale or purchase.

11. The Chamber summons is maintainable in view of the provisions of Order 21 Rule 58 of the Code of Civil Procedure, 1908. Order 21 Rule 58 provides that where any claim is preferred to or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained therein. Sub-rule (2) of Rule 58 provides that all questions including questions relating to right, title or interest in the property attached arising between the parties to the proceedings or their representatives and relevant to the adjudication of the question or objection shall be determined by the court dealing with the same and not by a separate suit. Under Sub-rule 3, the court may allow the claim or objection and release the property from attachment in whole or in part; disallow the claim or objection; continue the attachment subject to mortgage, charge or other interest or pass such order as it deems fit in the circumstances of the case. Rule 4 provides that upon the adjudication of a claim or objection the order made shall have the same force as if it were a decree and be subject to the same conditions as to appeal.

12. In the circumstances, there can be no dispute about the position that this Court has the jurisdiction to entertain a claim or as the case may be, an objection in relation to the shares in question.

13. Insofar as DP Account No. 10545059 in Stock Holding Corporation of India Ltd. is concerned, which stands in the joint names of the proprietor of the Respondent and his son, Counsel appearing on behalf of the Petitioner states that in order to obviate the contention urged in respect of this account on behalf of the applicants, the petitioner shall not take steps in respect of the shares lying therein save and except with the prior permission of the Court. Counsel for the petitioner states before the Court that the petitioner shall, in the first instance, take steps for the recovery of its outstanding dues in respect of the shares in the other three accounts which admittedly stand in the name of the respondent and that in the event that the proceeds are not sufficient to meet the decretal dues, the petitioner shall not take further steps save and except with the prior permission of the court in appropriate proceedings. Counsel for the applicants and the respondent state that at this stage, the aforesaid concession will meet the ends of justice. However, on their request it is clarified that all the contentions of the parties in respect of the entitlement of the petitioner to move in respect of the joint account are kept open to be urged in appropriate proceedings.

14. In so far as the immovable properties of the applicants at Muzaffarpur are concerned, it has not been necessary for the Court to go into that aspect of the matter since Counsel for the petitioner has stated that no attachment has been sought or levied in respect thereof. .

15. Subject to the aforesaid clarification in regard to D.P.A/c 10545059, the Chamber Summons shall stand dismissed.

16. Status quo to be maintained for a period of six weeks from today.

17. Parties be given copies of this order duly authenticated by the Associate/ personal Secretary of this Court.