(2009) 07 GUJ CK 0091

In the Gujarat High Court

Case No : Special Civil Application No. 6352 of 2009

Destiny Investment Inc. APPELLANT

Vs

Adani Port Ltd. and Another RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 21 Rule 43, Order 7 Rule 11
Constitution of India, 1950 — Article 227

Citation : (2009) 07 GUJ CK 0091

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Prashant Pratap and R.J. Oza, for the Appellant; Mihir J. Thakore Devang S. Nanavati, V.D. Nanavati and Anal Shah for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Abhilasha Kumari, J.—Rule. Mr. Devang S. Nanavati, learned advocate, waives service of Notice of Rule on behalf of respondent No. 1. In the peculiar facts and circumstances of the case and with the consent of learned Counsel for the respective parties, the petition is being heard and disposed of, finally.

2. This petition has been filed invoking the jurisdiction of this Court under Article 227 of the Constitution of India with a prayer to issue a Writ of Certiorari or a Writ of Mandamus or any other appropriate Writ or order, quashing and setting aside the order dated 03.06.2009 passed by the Incharge 2nd Additional Senior Civil Judge, Bhuj-Kutchh and further order dated 11.06.2009 passed by the 2nd Additional Senior Civil Judge, Bhuj, below application Ex.6 in Execution Petition No. 8 of 2009, whereby the order dated 03.06.2009 has been confirmed.

3. Briefly stated, the case of the petitioner is that, the petitioner-Company is an independent legal entity incorporated in the Marshall Islands, having its office at Majuro, Marshall Islands. It is stated in the petition that the owner and sole

shareholder of the petitioner-Company is Mrs.Charikleia Chala and that the petitioner is not associated with Seabirds Maritime S.A. in any manner and the said Mrs. Charikleia is neither a Director nor shareholder of Larus S.A. or Seabirds Maritime, S.A. According to the petitioner, it is the registered owner of vessel M.V. Niki and the registration certificate dated 30.07.2007 of the said vessel, has been issued by the Panama Maritime Authority of the Republic of Panama.

4. The grievance of the petitioner is that its vessel M.V. Niki, has been ordered to be attached and the Bank Guarantee has been directed to be furnished by the executing Court, before which execution proceedings in respect of an exparte decree dated 30.03.2009 in favour of respondent No. 1 in Special Civil Suit No. 57 of 2003, are pending.

5. For the sake of clarity, it would be necessary to briefly advert to the factual background of the case. A suit was filed by the respondent No. 1 - Company, being Special Civil Suit No. 57 of 2003 against the respondent No. 2, for damages and recovery of Rs. 1,93,05,280/- with interest at the rate of 18% per annum, till actual realization and costs. It is the case of the respondent No. 1 - plaintiff in that suit that the respondent No. 2 - defendant is the owner of vessel M.V. Tolmi and owing to the delay in loading the cargo by respondent No. 2, which resulted in delay to other vessels waiting to get berth at Mundra Adani Port, the plaintiff has been exposed to various claims for demurrage and the respondent No. 2 are liable to pay for the loss suffered by the respondent No. 1. The respondent No. 2 (defendant in that suit) though duly served, did not put in appearance or file a written statement, therefore, the suit proceeded exparte. The suit was partly-allowed by an exparte judgment and decree dated 30.03.2009, and the defendant (respondent No. 2) was directed to pay the outstanding amount of Rs. 1,93,05,280/- to the plaintiff (respondent No. 1) along with interest at the rate of 6% per annum from the date of the suit, till the actual realization of the amount.

6. A petition for execution of the said decree came to be filed by respondent No. 1 - decree holder, in the Court of Principal Senior Civil Judge at Bhuj, Kutchh, on 29.05.2009, under Order 21, Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ''the Code'') which came to be registered as Special Execution Petition No. 8 of 2008. An application at Ex.6, was filed in the Execution Petition under the provisions of Order 21, Rule 43, of the Code, on 29.05.2009, along with the schedule of property, and it was prayed that the property, namely ship M.V. Niki be attached. The Master of the said vessel filed objections to the application, stating that the vessel M.V. Niki is not owned by the judgment-debtor, i.e. Larus S.A., and the owner of the said vessel is Destiny Investment Inc., i.e. the petitioner herein, hence, the Court cannot pass an order of attachment of M.V. Niki. After hearing the learned Counsel for the parties and considering the material on record, the executing Court, by interim order dated 03.06.2009, came to the conclusion that the ship, M.V. Niki, is owned by the

beneficial owner of respondent No. 2, which is a subsidiary company of Seabirds Maritime S.A. and is thus under the group ownership of Seabirds Maritime S.A. The judgment-debtor (respondent No. 2) is a subsidiary Company of the said group and as it is clear that the vessel is under the control of the judgment-debtor, attachment of the vessel M.V. Niki was ordered for one week. It is observed in the said order that further orders will be passed after hearing the parties. Thereafter, by order dated 11.06.2009, passed below Ex.6, in Execution Petition No. 8 of 2009, order dated 03.06.2009 came to be confirmed and the vessel M.V. Niki has been ordered to be attached. It is observed in the said order that if the objector wants to move the vessel from the Port, he shall have to furnish a Bank Guarantee of the decretal amount. The Court is informed that the Bank Guarantee has since been furnished and the vessel has been permitted to sail. It is this order that is impugned in the present petition.

7. Mr. Prashant Pratap, learned advocate with Mr. R.J. Oza, for the petitioner, has made the following submissions:

(a) The exparte decree dated 30.03.2009 obtained by respondent No. 1 (original plaintiff) against respondent No. 2 (original defendant) is sought to be executed by attachment of the petitioner''s vessel M.V. Niki, at the port of Mundra, even though the said vessel is owned by the petitioner which is an independent entity, having nothing to do with the judgment-debtor. There are no pleadings in the application for attachment, on the basis of which the petitioner''s vessel is sought to be attached. The stand of respondent No. 1, that the respondent No. 2 (judgment-debtor) is a subsidiary of Seabirds Group and is the manager, operator and D.O.C. of Seabirds Maritime S.A. and the petitioner is also a part of the Seabirds Group and under the same beneficial ownership, is not pleaded in the application. On the contrary, the documents produced by respondent No. 1 (original plaintiff) show that the owner of the vessel is the petitioner and in the absence of proper pleadings or material on record, the attachment of the vessel of the petitioner is wrongful, and unsustainable in law.

(b) The contention of the respondent No. 1 that the respondent No. 2 and the petitioner are part of Seabirds Group and consequently, the corporate veil ought to be lifted is untenable as it has not been pleaded that the present is a case of fraud, warranting the lifting of the corporate veil. Bare oral submissions sans pleadings cannot be taken into consideration as has been done by the Court below, nor could the vessel of the petitioner be ordered to be attached to satisfy a claim against the judgment-debtor.

(c) The premise on which the trial Court has proceeded that the petitioner-Company operates under the group ownership of Seabirds Maritime S.A. and the respondent No. 2 is also a subsidiary Company of Seabirds Maritime, S.A., and, therefore, the vessel is under the beneficial control of the same group, is unsupported by material on record. The trial Court ought not to have travelled beyond the pleadings of the parties and submission made across the Bar to lift the corporate veil or regrading the beneficial ownership of the vessel by respondent No. 2 (judgment-debtor) ought not to have been considered, leave alone, accepted by the trial Court.

(d) That the respondent No. 1 has relied upon certain documents downloaded from the Internet, the authenticity of which is disputed. These documents are of no value, and could not be looked into, but should have been summarily discarded by the trial Court. Any order passed on the basis of such documents cannot be sustained in law. Even assuming, though denying, that the said documents are worthy of consideration, the said documents only show that the petitioner is the owner of M.V. Niki.

(e) The objections filed by the petitioner before the trial Court have not been disputed or denied, as no reply has been filed thereto. The trial Court ought to have accepted the specific stand of the petitioner that it has no connection or relation whatsoever, with Seabirds Maritime S.A. The petitioner is an independent legal entity, incorporated in the Marshall Islands and is not a subsidiary Company of Seabirds Maritime, S.A. or the judgment-debtor, nor is it the sister concern or sister Company of the judgment-debtor. The owner and sole shareholder of the petitioner-Company is Mrs. Charikleia Chala, who is neither a Director nor a shareholder of Larus S.A. (respondent No. 2) or Seabirds Maritime, S.A.

(f) Though the executing Court may not go behind the decree, it can certainly consider the manner in which the decree has been obtained. The suit is filed in 2003 by respondent No. 1 against respondent No. 2 and summons are sought to be served on the Master of the vessel M.V. Tolmi at Mundra Port, even though the plaintiff (respondent No. 1) who is the owner of the Port, is fully aware that the vessel M.V. Tolmi is not owned by Larus S.A. (respondent No. 2). In these circumstances the Master of the vessel M.V. Tolmi has rightly refused to accept service as he is not the agent of Larus S.A. and this has been treated as good service by the trial Court. The service has allegedly been effected in 2003 whereas the exparte decree has been passed in 2009, i.e. after six years and there is nothing on record to show that the plaintiff (respondent No. 1) ever informed the respondent No. 2 of the suit proceedings or made any attempt to execute the decree against respondent No. 2, which gives rise to an apprehension that the decree has been obtained by misleading the Court.

(g) The impugned order deserves to be quashed and set aside on the ground that merely on the basis of a plea made by the respondent No. 1 that the judgment-debtor is a subsidiary of Seabirds Group, and the petitioner is also a part of that group, the petitioner''s vessel has been attached in respect of a claim against another Company in the same group. Even assuming, while denying, that the petitioner is part of Seabirds Group, such an order could not have been passed. Each Company is a separate corporate legal entity and the estate of one Company cannot be attached to secure a claim against another Company, even if the Companies are part of the same Group though denied.

(h) The stand taken by the respondent No. 1 that the impugned order is an interim order of attachment and the trial Court has not finally decided the issues involved cannot be accepted, as the petitioner has suffered a loss of Rs. 1.25 crores on account of detention of its vessel. The petitioner has been forced to furnish a Bank Guarantee in the sum of Rs. 2.6 crores and merely because the petitioner has furnished such a Bank Guarantee, there is no reason why it should continue to remain in place.

(i) The reliance placed by the respondent No. 1 on the judgment of the Supreme Court in Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, is completely misplaced as that was a judgment in respect of an application for rejection of the plaint under Order 7, Rule 11(a) of the Code where it was specifically pleaded by the plaintiff that the vessel is a sister ship owned and possessed by the second defendant, who is beneficial owner of the vessel, whereas, in the present case, there are no pleadings against the petitioner.

(j) The impugned order is ex-facie erroneous and bad in law and it is a fit case where the respondent No. 1 should be put to terms and be directed to secure the claim of the petitioner to the extent of Rs. 1.25 crores, being the loss sustained by it on account of the detention of its vehicle.

8. On the strength of the above submissions, the learned Counsel for the petitioner has prayed that the petition be allowed and the impugned orders be quashed and set aside.

9. Strongly refuting the arguments advanced by the learned Counsel for the petitioner, Mr. Mihir J. Thakore, learned Senior advocate with Mr. Devang S. Nanavati, learned Counsel for the respondent No. 1, has contended that:

(1) The impugned orders passed by the trial Court do not suffer from any legal infirmity as the Court below is vested with the power to order attachment of any immovable property in possession of the judgment-debtor under Order 21, Rule 43 of the Code. It cannot be disputed that the ship is an immovable property and in the present case, the vessel M.V. Niki was the only movable property in the possession and control of the judgment-debtor in India and, therefore, the Court below has jurisdiction to attach the said vessel, in execution of the decree. Attachment of a ship in execution of a decree is different from arrest of a ship under admiralty law and as the civil court has jurisdiction to attach a ship in execution proceedings, the said order does not deserve to be interfered with. In support of the above contention, learned Counsel for the respondent No. 1 has relied upon M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa,

(2) The respondent No. 1 has made the necessary averments in paragraph-2 of its application under Order 21, Rule 43 of the Code and it is not correct to say that there are no pleadings in this regard. It has been clearly stated in the said application that the respondent No. 2 is a subsidiary Company of Seabirds Maritime, S.A., as is the petitioner, therefore the vessel can be attached. The

contents of the application are supported by necessary affidavit/verification, as required by law, and necessary documentary evidence has been produced along with the application which indicates that the judgment-debtor has a beneficial interest in the vessel, M.V. Niki. The web extract of the Lloyd''s Register-Fairplay Limited, produced by the respondent No. 1 along with the application, shows that Larus S.A. (respondent No. 2 - judgment-debtor) is a sister concern of Destiny Investment Inc. (petitioner) and both, the petitioner and respondent No. 2, are subsidiary Companies of M/s. Seabirds Maritime, S.A. Mere insufficiency of pleadings is not a ground for invoking the extra-ordinary jurisdiction of the Court under Article 227 of the Constitution of India. Reliance is placed on Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, and Virendra Kashinath Ravat and Another Vs. Vinayak N. Joshi and Others, in support of this contention.

(3) That the documents produced by respondent No. 1 along with application reveal that respondent No. 2 is a Group owned Company and operates the vessels of other Group owned Companies including that of the petitioner and that Larus S.A. is a subsidiary Company of Seabirds Maritime, S.A., as is the petitioner. The vessel M.V. Niki, which is registered in the name of the petitioner, is, in effect, under the Group ownership of Seabirds Maritime, S.A. The respondent No. 2 being a sister-concern of the petitioner, is the beneficial owner of the vessel M.V. Niki, therefore, the Court is entitled to lift the corporate veil and pay regard to the economic reality. The impugned orders dated 03.06.2009 and 11.06.2009 passed below application Ex.6 are interim orders. The proceedings are pending before the trial Court and it is still open for the parties to adduce necessary evidence, in support of their respective case, and no ground for interference of this Court under Article 227 of the Constitution is made out. In support of this submission, reliance is placed on Tata Engineering and Locomotive Co. Ltd. Vs. State of Bihar and Others, In Re: Sant Ram, and Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and Anr. (supra).

(4) That the jurisdiction of the High Court under Article 227 of the Constitution is not appellate in nature, and the Court is not bound to correct all orders of the subordinate Court, as though sitting in Appeal. The impugned orders are just and proper on the facts and in the circumstances of the case. However, even a mere wrong decision is not enough to attract the jurisdiction of the Court under Article 227. The learned Senior Advocate has relied upon the decision in Mohd. Yunus Vs. Mohd. Mustaqim and Others, in support of the above contention.

(5) Without prejudice to the above submissions, it is relevant to state that the petitioner has already submitted to the interim order dated 11.06.2009 of the Court below and has got the ship released by furnishing the Bank Guarantee in terms of the said order. As the ship has been released, no hardship is likely to be caused to the petitioner as the matter is still pending before the Court below, and in the event the petitioner succeeds in establishing its case, the Bank Guarantee

would not be encashed.

(6) It is well-settled that the petitioner''s claim for damages is not maintainable in a writ petition under Article 227 of the Constitution of India and in view of the above submissions, the petition may be dismissed.

10. I have heard the learned Counsel for the respective parties at length, perused the contents of the impugned orders, averments made in the petition, as well as other material on record.

11. The main contention raised by the petitioner is that the petitioner is an independent legal entity and is not a subsidiary Company of Seabirds Maritime, S.A. or the judgment-debtor, and is not a sister concern or sister Company of the judgment-debtor, therefore, its vessel M.V. Niki cannot be attached in execution proceedings, to satisfy a claim against the judgment-debtor.

12. In passing the impugned order, the Court below has considered the documents produced by the respondent No. 1, namely a web extract of Lloyd''s Register-Fairplay Limited and has, at that stage, come to the conclusion that the judgment-debtor has a beneficial interest in the vessel M.V. Niki, which is under the management and control of respondent No. 2 - judgment-debtor. It has also been noted by the Court below that the respondent No. 2 is a group-owned Company and operates the vessels of other group-owned Companies and is a subsidiary Company of Seabirds Maritime, S.A. The petitioner is also under the Group ownership of Seabirds Maritime, S.A. and the judgment-debtor is its sister-concern. The judgment-debtor is, therefore, the beneficial owner of the said vessel, which is ordered to be attached. The Court below has come to this finding on the basis of evidence on record, in the form of documents and certificate of entry, in which the judgment-debtor is described as a co-assurer and Manager. It has been clearly observed in the impugned order that the petitioner has not produced any other documents in support of its stand, except for a registration certificate. Ultimately, after hearing the respective parties and considering their submissions, the trial Court has confirmed order dated 03.06.2009, and ordered attachment of the ship - M.V. Niki, while observing that if the petitioner is desirous of moving the vessel from the port, it shall furnish a Bank Guarantee of the decretal amount. This has been done and the ship has set sail. This Court does not find any force in the submissions advanced by the learned Counsel for the petitioner, as the impugned order is a well-reasoned one, having been passed after considering the available material on record. The petitioner has not produced any material to advance its case, or to refute the material produced by the respondent No. 1.

13. The other contention raised by the learned Counsel for the petitioner that there are no specific pleadings in the application for attachment of its vessel, filed by respondent No. 1, does not carry much weight. The trial Court has taken into consideration the averments made in the said application, wherein it is mentioned that the vessel M.V. Niki, is owned by the subsidiary Company of the

respondent No. 2, namely Seabirds Maritime, S.A., whose Manager, Operator and D.O.C. is the judgment-debtor. The pleadings may be brief and not very happily worded but it cannot be said that they are entirely absent. Ultimately, it is for the trial Court to decide the matter on the basis of evidence adduced by the respective parties.

14. In Virendra Kashinath Ravat and Anr. v. Vinayak N. Joshi and Ors. (supra), it has been held that insufficiency in pleadings is not a premise on which interference by the High Court, in exercise of jurisdiction of superintendence under Article 227 of the Constitution, is warranted. The veracity or authenticity of the documents produced by respondent No. 1 is for the trial court to look into and as the matter is still open, the parties can lead evidence in support of their respective stands.

15. The contention of the learned Counsel for the petitioner that the respondent No. 1 should be put to terms and be directed to secure the claim of the petitioner to the extent of Rs. 1.25 crores, cannot be accepted as these are not the proper proceedings to adjudicate upon such a claim.

16. The learned Counsel for the respective parties have cited various judgments and made lengthy submissions, for the guidance of this Court. However, as this Court does not consider it proper to discuss the merits of the case at this stage, the judgments cited and contentions raised are not being dealt with in detail. The final decision is yet to be arrived at by the trial Court. The findings already recorded in the impugned order are findings of fact, based upon available material on record. At this stage, there is no justification or reason to interfere with the impugned order which contains clear and cogent reasons, based on material on record. If the petitioner is successful in establishing its case by adducing evidence, the Bank Guarantee will not be encashed, but in case the order of attachment of the vessel is lifted, respondent No. 1 would be left with no effective remedy. It is well settled; while exercising supervisory jurisdiction under Article 227 of the Constitution, the Court may not sit as an appellate Court or undertake the exercise of reweighing or reevaluating the evidence on record.

17. In B.K. Muniraju Vs. State of Karnataka and Others, the Supreme Court has held as under:

24. It is clear that whether it is a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. It is also clear that the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

18. In Mohd. Yunus v. Mohd Mustaqim and Ors. (supra), the Supreme Court has

held in paragraph-7 that:

The supervisory jurisdiction conferred on the High Courts under Article 227 is limited to seeing that an inferior court or tribunal functions within the limits of its authority, and not to correct an error apparent on the face of the record, much less an error of law. A mere wrong decision without anything more is not enough to attract jurisdiction under this article.

....

In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision.

19. Guided by the principles enunciated hereinabove, this Court finds that the impugned order does not suffer from any legal infirmity, manifest error of jurisdiction or perversity, so as to warrant interference.

20. For the reasons stated hereinabove, the petition fails, and is, dismissed. Rule is discharged.

