
(2015) 02 BOM CK 0025

In the Bombay High Court

Case No : Notice of Motion (L) No. 2677 of 2014 in Suit (L) No. 1123 of 2014

E-City Entertainment (I) Pvt. Ltd.

APPELLANT

Vs

Imax Corporation

RESPONDENT

Date of Decision : 02-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2015) 2 ARBLR 107 : (2015) 2 BomCR 43

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : Iqbal Chagla, Milind Sathe, Senior Advocates, Riyaz Chagla, Pooja Kshirsagar, Hitesh Jain, Pooja Tidke, and Kshana Loya, i/b Almt Legal, for the Appellant; Veerendra Tulzapurkar, Senior Advocate, Sandeep Parikh, Rahul Mahajan, Amit Surve and Saloni, instr

Judgement

G.S. Patel, J.—This is E-City's application in an action for an anti-suit injunction and damages. E-City ("E-City") is part of the Essel Group of companies. Among their various concerns are interests in the cinema/cinema theatre business. IMAX is a Canadian Corporation, one that specializes in large-format films and projection systems. These have now come to be known by IMAX's name, IMAX. The application seeks to restrain IMAX ("IMAX") from executing or taking any steps in execution or implementation of certain arbitration awards; and, specifically, from proceeding with or seeking any reliefs in the execution / enforcement proceedings adopted by IMAX before the Supreme Court of New York.

2. Having heard Mr. Chagla, learned Senior Advocate for E-City and Dr. Tulzapurkar, learned Senior Advocate for IMAX at some length, and, with their assistance having considered the material on record, I am not persuaded that this is an appropriate case for the grant of reliefs sought.

3. Briefly, these are the facts. On 20th September 2000, the parties entered into an agreement. There is some difference as to whether this was a "Letter of

Intent", as E-City claims, or whether this was a "Master Agreement", as IMAX does. For our purposes, this makes no difference. Under the agreement, E-City was to take delivery of certain projection systems. According to IMAX, E-City committed breach of this agreement: it made an initial payment towards the lease of one system, but then failed to abide by its remaining obligations.

4. The agreement, whatever the name the parties choose to give it, had a dispute resolution clause. This provided for arbitration in accordance with ICC Rules. An Arbitral Tribunal was constituted. IMAX was the claimant. It sought damages. The Arbitral Tribunal made an award on liability in February 2006 against E-City. E-City was held to have been in breach of the terms of this agreement. This was followed by an award on damages on 24th August 2007. This was in the amount of over US\$ 9 million. There was also a final award of 27th March 2008, one that included interest, making the aggregate amount awarded against E-City in excess of US\$ 11 million. On 22nd July 2008, E-City filed Arbitration Petition (L) No. 525 of 2008 in this Court under Section 34 of the Indian Arbitration and Conciliation Act, 1996 ("the Arbitration Act"). That Petition was admittedly filed after a delay, and E-City then filed a Notice of Motion seeking that this delay be condoned. On 10th June 2013, a learned Single Judge of this Court allowed that Notice of Motion and held inter alia that the Petition was maintainable under Section 34. From that decision, IMAX filed Special Leave Petition No. 34009 of 2013 to the Supreme Court. On 19th November 2013, the Supreme Court issued notice on that Special Leave Petition and, in the meantime, stayed further proceedings in the Arbitration Petition.

5. IMAX then initiated proceedings before the Superior Court of Justice at Ontario, Canada for a confirmation of the foreign award. E-City opposed those proceedings. There was a full hearing on merits. No issue seems to have been raised about those proceedings being forum non conveniens. Even at that time, i.e., in 2011, E-City did point out that it had a pending petition in this Court under Section 34 of the Arbitration Act. This defence seems to have been rejected. E-City did not appeal this decision.

6. In continuation of those enforcement proceedings and now to give recognition to the Canadian judgment, IMAX initiated proceedings before the New York Supreme Court. Since E-City did not appear, default judgment was entered against E-City on 4th May 2012. This was followed by IMAX's application for execution of that default judgment. This execution was sought against the Essel Group, said to be a parent entity that controls, among others, E-City. In March 2014, E-City moved the New York Supreme Court to vacate the default judgment inter alia on the ground that service had not been properly effected. On 2nd July 2014, E-City's plea was partly allowed. IMAX then filed an amended execution petition and obtained an order of substituted service. Late last year, in December 2014, E-City then moved the Superior Court of Justice, Ontario, Canada for setting aside its earlier judgment)and which is the basis of the proceedings in New York).

7. This Suit was filed on 26th November 2014. The principal relief, as I have noted, is to restrain IMAX from proceeding with the execution or enforcement action before the New York Supreme Court.

8. There is, first of all, the question of this Court's jurisdiction. E-City obtained leave under Clause XII of the Letters Patent. This was on the basis that IMAX did not carry on business in India and, specifically, in Mumbai. It then filed a Chamber Summons for amendment in which it contended that IMAX did, in fact, carry on business both in India and in Mumbai. IMAX also filed a Notice of Motion for revocation of the leave granted under Clause XII. By an order dated 28th January 2015, I allowed E-City's Chamber Summons for amendment and dismissed IMAX's Notice of Motion for revocation of the Clause XII leave.

9. Mr. Chagla's submission today is that the necessary tests for the grant of an anti-suit injunction are all satisfied in this case. IMAX is amenable to the jurisdiction of this Court. He points out that IMAX has a website that mentions its business interests in India. There are references in IMAX's annual reports to its ventures in India and IMAX itself admits to earning income and holding property in India. Further, Mr. Chagla submits, the agreement of 28th September 2000 itself contains clauses¹ that prima facie indicates that IMAX does business in India. Once this is satisfied, he says, there is no restriction on this Court exercising its discretionary jurisdiction to grant the ad-interim injunction sought. Mr. Chagla relies on the decision of the Supreme Court in *Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd.*, In that decision, the Supreme Court set out in paragraph 24 the required determinative tests for grant of such an injunction. Paragraph 24 reads thus: 24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity respect for the court in which the commencement or continuance of action / proceeding is sought to be restrained must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (*forum conveniens*) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a *forum non-conveniens*.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction

of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a Defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

(Emphasis supplied)

10. With this, Mr. Chagla then turns to the second limb of his argument, viz., whether the ends of justice demand the grant of such an injunction. His submission, based on the decision of the Supreme Court in Fiza Developers and Inter-Trade P. Ltd. Vs. AMCI (I) Pvt. Ltd. and Another, is that the moment a petition under Section 34 is entertained (even if not admitted), there is an implied prohibition or restraint against the enforcement of the arbitral award, and it matters not where that enforcement is sought, whether in domestic Courts or those in foreign jurisdictions. The restraint, Mr. Chagla submits, is absolute. The fact that the petition has been held by the learned Single Judge to be

maintainable as a Petition under Section 34 of the Arbitration Act is sufficient for his purposes. It automatically results in such a restraint.

11. Finally, Mr. Chagla also submits that on any fair reading of the Affidavits in Reply, IMAX has in terms admitted that the award is unenforceable in India. If that be so, he submits, there is no reason why IMAX ought to be permitted to seek enforcement anywhere else; the more so when E-City's petition under Section 34 has been entertained here.

12. In response, Dr. Tulzapurkar makes two submissions. The first is that for the present purposes the question of jurisdiction must be kept open for the interim stage. Having granted E-City's Chamber Summons and rejected Dr. Tulzapurkar's Notice of Motion for revocation of leave, I believe this is the correct approach. I will, therefore, assume for the present that this Court does have jurisdiction. It is, however, made clear that all IMAX's contentions in that behalf are expressly kept open and are not to be construed to have been foreclosed by this order.

13. Dr. Tulzapurkar focuses his attention on the question as to whether the ends of justice demand for the grant of this injunction. He makes pointed reference to paragraph 24(2) of the decision in Modi Entertainment Network and says that it is necessary to assess, even at this stage, whether or not this Court is an appropriate forum having regard to the convenience of the parties. I believe the other portions of paragraph 24 also assist Dr. Tulzapurkar in this submission.

14. Dr. Tulzapurkar also points out that the agreement in question itself contain a jurisdiction clause. It said that the agreement was to be governed by and construed according to the laws of Singapore; that the parties had attorned to the jurisdiction of the Courts in Singapore; and all disputes would be settled by arbitration pursuant to the ICC Rules of arbitration. This, Dr. Tulzapurkar points out and in my view with some considerable justification, is therefore a foreign award, one that is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Dr. Tulzapurkar points out that the terms of that Convention and in particular Articles V and VI, reproduced below, require that such an award can only be set aside or suspended by a competent authority of the country in which or under the law of which that award was made. Fiza Developers and Inter-Trade Private Limited, he points out, was in the context of a domestic award and did not deal with a foreign award such as the present one. Further, he points out, and I think rightly, that a suit seeking a restraint against civil proceedings is, in law and in conception, materially different from an action that seeks a restraint against the enforcement of an arbitral award. As I understand it, Dr. Tulzapurkar's submission is that the Arbitration Act has no application whatever to the award in question. He also points out that E-City has contested these proceedings at every stage in every forum overseas and it is impossible to conclude on facts that any of these foreign jurisdiction are "inconvenient" or that any of them is a forum non conveniens, i.e., oppressive or vexatious when it comes to E-City.

15. But what is to be made of the order of this Court on the Notice of Motion in Arbitration Petition and of the Supreme Court order that followed? Mr. Chagla's submission is that once that Petition has been "entertained" by the order condoning the filing delay, a stay on enforcement, world-wide, follows automatically. Mr. Chagla might have been correct in this, but for the fact that this necessarily means that the order of the Supreme Court staying the arbitration proceedings (in the Special Leave Petition from the decision of the learned Single Judge of this Court) would essentially become an order without any meaning whatsoever. The Supreme Court's order says that "further proceedings in Arbitration Petition (L) No. 525 of 2008 before the High Court shall remain stayed." This means that E-City's arbitration petition remains inactive and dormant till the Supreme Court decides the Special Leave Petition. But I do not think this can possibly mean that the effect of the order on the Arbitration Petition nonetheless operates. This would render the Supreme Court order otiose.

16. I am also mindful of the fact that E-City has very seriously contested these proceedings in every single overseas jurisdiction. It has taken all manner of pleas before those Tribunals and Courts: it has complained of improper service; it has said that the arbitration proceedings were wrongly invoked; it has sought to make capital of the amalgamation between the present Defendant and another Canadian Corporation (IMAX Ltd., with whom the agreement was signed) and so forth. Its various defences have been rejected. It does not seem to have challenged the jurisdiction of the arbitral tribunal, the applicable law or the seat of arbitration at any stage. When IMAX adopted proceedings in Canada, these too were contested by E-City. It chose not to appeal though it has now initiated proceedings for a recall of the order of the Superior Court of Justice in Ontario, Canada. E-City has even appeared before the Supreme Court of New York when IMAX sought enforcement of the arbitral award.

17. It seems to me most inequitable that an Indian party that enters into a commercial transaction should be permitted to delay the enforcement of award passed by a properly constituted Tribunal indefinitely in this manner. These actions undermine the very basis of arbitration and arbitration law. There is no question of there being any equitable right or interest in favour of E-City. I do not think there is in IMAX's application in New York any sort of admission. What IMAX has said is that the indefinite and inordinate delay in our judiciary has impeded its legitimate attempts at enforcement. That is a very different thing from conceding that the award is unenforceable in India.

18. Even as a matter of public policy, I do not see how such an injunction can be granted. Our governments of the day continually promote investment in this country. It is not, I think, for courts to interfere in the legitimate working of international contracts and the enforcement of awards of properly constituted arbitral tribunals except in the narrowest of circumstances. What E-City suggests is, shorn of all the legalese, an extreme proposition: every losing party in a

foreign arbitration, with a foreign award against him, only has to lodge a petition under Section 34 of the Arbitration Act (and no matter that Section and the entire part in which it sits applies only to domestic awards) and there is an instantaneous and automatic global stay against injunction. If there is anything that is oppressive or vexatious, it is E-City's approach, not IMAX's; and the former's machinations do it, and us, no credit. Certainly they make out no case for the grant of any injunction of the kind sought.

19. Ad-interim injunction is refused. Notice of Motion to come up in the ordinary course.

20. All IMAX's contentions, including specifically as to jurisdiction, are kept open. IMAX will be at liberty to place a copy of this Court before the Courts in New York and Canada.

1 Clause 6, 10(iii) and 13 in particular.