

(2011) 09 MAD CK 0058
In the Madras High Court
Case No : O.S.A. No. 295 of 2011

IVRCL Infrastructure and Projects Limited, IVRCL Assets and Holdings Limited and Chennai Water Desalination Plant

APPELLANT

Vs

BEFESA AGUA, SAU

RESPONDENT

Date of Decision : 21-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3
Companies Act, 1956 — Section 397

Citation : (2011) 09 MAD CK 0058

Hon'ble Judges : R. Banumathi, J;B. Rajendran, J

Bench : Division Bench

Advocate : R. Murari, for the Appellant; Vineet Subramaniam, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—This Intra Court Appeal is filed challenging the order of exparte interim injunction granted in O.A. No. 679 of 2011

(18.8.2011) u/s 9 of the Arbitration and Conciliation Act. With consent of the Learned Counsel appearing for the Appellants and the Respondent,

the main appeal itself was taken up for final disposal.

2. The 1st Appellant and Respondent Company having its Head Office at Spain have entered into a joint venture for the purpose of construction,

start up maintenance during operation period of 25 years of Desalination Plant. After award of International Tender by Chennai Metropolitan

Water Supply and Sewerage Board (CMWSSB), pursuant to the joint venture, the shareholders agreement was entered into between the 1st

Appellant and the Respondent Company on 31.8.2005. The Respondent is a

shareholder holding a total of 4,32,45,804 equity shares of value of Rs. 10 each representing the total value of Rs. 43,24,58,040/-. Appellants 1 and 2 are joint venture partners together holding 75 percent share in the 3rd Appellant Company. To implement the project, parties have entered into various agreements on 5.1.2007 and as per these agreements, 3rd Appellant has to produce 100,000 cubic metres of potable water in accordance with the requirements of the Bulk Water Purchase Agreement that was entered into by the 1st Appellant with CMWSSB. Due to various reasons, the target of the project could not be achieved and on extension by CMWSSB, the target was later achieved on 25.07.2010. Certain disputes have arisen between the 3rd Appellant and CMWSSB, which were referred to Dispute Resolution Board and it is stated that the disputes are now pending arbitration.

3. Alleging acts of oppression and mismanagement, Appellants 1 and 2 have filed Company Petition in C.P. No. 32 of 2011 before the Company

Law Board under Sections 397 and 398 of the Companies Act on 24.3.2011. In the said Company Petition, Respondent entered appearance and

took time for filing counter to C.P. No. 32 of 2011 and the matter was adjourned by four weeks thereafter to 24.4.2011. The Appellants have not

filed the counter; but filed C.A. Nos. 95-97 of 2011 including the application u/s 45 of the Arbitration and Conciliation Act for referring the dispute

to the arbitration before International Chamber of Commerce. Appellants 1 and 2 have filed their counter in those applications and in the Company

Law Board, the matter came up on 27.06.2011 and was posted to 02.08.2011 for hearing the C. As and C.P. On 27.7.2011, the Respondent

filed other applications in C.A. Nos. 175-178 of 2011 seeking certain information like: (i) copies of notices, Agenda, minutes of all the Board

meetings; (ii) copies of Balance Sheet, income statement and other documents.

4. The Respondent is also said to have filed Company Appeal No. 14 of 2011 before the High Court seeking stay of the order of the Company

Law Board dated 5.7.2011 allegedly on the basis that the Respondent should not be required to file counter and the said Company Appeal No.

14 of 2011 is pending. The Appellants have filed a detailed counter pointing out that the said Company Appeal was not maintainable. It is stated

that thereafter the Respondent chose to withdraw the appeal after filing and

obtaining orders in O.A. No. 679 of 2011.

5. In respect of the Project agreements and also the shareholders agreement, the Respondent is also said to have made two references to the ICC

interalia seeking to pass an award that the Appellants should respect and adhere to the express terms of Shareholders Agreement but not limited to

the ongoing duty to

6. Even while matters are so pending before the Company Law board and the Respondent was contesting the Company Petition and also filed

number of applications, the Respondent filed Petition u/s 9 of the Arbitration Act seeking Interim Injunction restraining the Appellants 1 to 3 from

acting in breach of their obligations under the Shareholders Agreement dated 31.8.2005 and other reliefs. furnish information or documentation to

the claimant.

7. Observing that the Respondent has made out a prima facie case, by the impugned order, learned single Judge granted exparte interim injunction

holding as under:

8. As per Article 10.8 of the Shareholders Agreement, notwithstanding any other provisions, the party may seek injunctive relief or specific

performance with regard to the rights available under the Shareholders Agreement, during the pendency of Arbitration Proceeding. According to

the learned senior counsel appearing for the applicant even the objections raised and the same were not recorded in the Minutes of the Meeting of

the Board of Directors for the reasons best known to them.

9. Considering the facts and circumstances, supported by the materials available on record and the arguments advanced by the learned senior

counsel appearing for the applicant, I am of the view that there is a prima facie case made out by the applicant and the balance of convenience is

also in favour of the applicant and if interim injunction is not granted, it may cause irreparable legal injury to the applicant, as contended by

the Learned Counsel appearing for the applicant and therefore I find it just and reasonable to grant interim injunction, as prayed for in the

application for a period of three weeks.

10. The applicant is directed to comply with the provisions under Order 39 Rule 3 CPC.

8. Challenging the impugned order, the Learned Counsel for Appellant Mr. R. Murari has contended that the Company Law Board, a judicial

authority set up for the purpose of adjudicating disputes between the shareholders on the grounds of oppression and mismanagement, has already

seized up the matter and Respondent also filed number of applications submitting to the jurisdiction of the Company Law Board to decide the issue

and while so not disclosing filing of applications before Company Law Board, the Respondent has filed an application u/s 9 of the Arbitration and

Conciliation Act covering essentially matters in respect of which it had moved an application before the Company Law Board. It was further

submitted that when the matter is pending adjudication before the Company Law Board, the application u/s 9 is glaringly an after-thought and the

learned Judge ought to have seen the malafide conduct of the Respondent, who started trail of correspondence only for the purpose of the

application u/s 9 of the Arbitration and Conciliation Act. In so far as the maintainability of the appeal against the exparte interim injunction,

the Learned Counsel for Appellant has submitted that the interim order granting exparte interim injunction affect the vital and valuable rights of the

Appellants causing a serious prejudice to them and therefore the appeal is maintainable under Clause 15 of the Letters Patent.

9. The appeal is opposed by the Respondent mainly on the ground that as against the exparte interim injunction the appeal is not

maintainable. Learned Counsel for Respondent would submit that exparte interim injunction was granted only till 8.9.2011 and Order 39 Rule 3 has

been complied with and the Appellants, having entered appearance in O.A. No. 679 of 2011, ought to have taken steps for vacating the exparte

interim injunction before the single Judge and the appeal is not maintainable. The main objection of the Learned Counsel for Respondent is that as

against an exparte interim injunction, an appeal is not maintainable under Clause 15 of the Letters Patent appeal, as such an order cannot be said to

be a "judgment" within the meaning of Clause 15 of the Letters Patent. In support of his contention, he placed reliance upon several decisions of

the Supreme Court as well as the High Court.

10. Clause 15 of the Letters Patent reads as follows:

15. Appeal from the Courts of original jurisdiction to the High Court in its

appellate jurisdiction.-

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of a revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinafter provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made (on or after the first day of February, 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.

11. The scope and meaning of the word "judgment" in Clause 15 of the Letters Patent came up for consideration before the Honourable Supreme court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, wherein the Supreme Court has held as under:

113. The intention, therefore, of the givers of the letters patent was that the word "judgment" should receive a much wider and more liberal interpretation than the word "judgment" used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word "judgment" has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) A final judgment.? A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided...

(2) A preliminary judgment.? This kind of a judgment may take two forms ? (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the Defendant or the party opposing on the ground that the suit is not maintainable?

(b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the Defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice u/s 80 and the like...

(3) Intermediary or interlocutory judgment.? Most of the interlocutory orders which contain the quality of finality are clearly specified in Clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable.

There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding.

Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. As such an order vitally affects a valuable right of the Defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench.

.....

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. ?

(Underlining Added)

12. The Order, which is appealable under Order 43 Rule 1 CPC can be held to be appealable under Clause 15 of Letters Patent. From the above

judgment of the Supreme Court it is clear that even on an interlocutory order, which possesses the characteristics of finality and may adversely

affect the valuable right of the parties and which works serious injustice to the parties concerned, can be considered as ""judgment"" to be

appealable under Letters Patent. In the above Judgment, the Supreme Court summarised various illustrations of such interim orders, which may be

treated as "Judgment" within the meaning of Clause 15 of the Letters Patent. It is clear from the above judgment of the Apex Court that such

interim orders could be ""judgments"", which decide the matters of moment and affect the vital and valuable rights of the parties and which work a

serious injustice to the parties. The ratio of the above judgment was quoted with approval by the Hon"ble Supreme Court in Employer in Relation

to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another, .

13. The question whether interlocutory orders are appealable under Clause 15 of the Letters Patent came up for consideration before the Division

Benches of this Court in the case of R. Rajagopal @ R.R. Gopal @ Nakkheeran Gopal, Editor, Printer and Publisher of Nakkheeran (Bi-weekly),

Nakkheeran Publications, Nakkheeran Printers and Binders and A. Kamaraj, Associate Editor, Nakkheeran (Bi-weekly), Nakkheeran

Publications Vs. J. Jayalalitha and Mrs. N. Sassikala, , and Green Peace Constructions Pvt. Ltd. Vs. R. Shivakumar, G. Nalini and The Manager

Bank of Baroda, . In Nakkheeran's case, an exparte order of injunction was under challenge in the Appeal. In Green Peace Constructions" case,

interim order of attachment was under challenge. In both the cases, relying upon Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , the

Division Benches of this Court have held that interlocutory orders could be ""judgments"", which decide the matter of moment or affect vital or

valuable right of the parties, which work serious injustice to the parties. However, in the facts and circumstances of those cases, it was held that the

interim injunction/order of attachment cannot be considered to be one of affecting vital and valuable rights of the Appellant finally and in the facts

and circumstances of those cases, the Division Benches held that the appeal under Clause 15 of the Letters Patent was not maintainable.

14. Applying the law declared by the Apex Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , the facts of the present case are to

be considered. In the joint venture company, Appellants 1 and 2 hold 75 percent share and the Respondent is a shareholder to the extent of 25%

holding a total of 4,32,45,804 equity shares of par value of Rs. 10/-each representing a total value of Rs. 43,24,58,040/-. As pointed out earlier,

because of the differences between the parties alleging oppression and mismanagement, the Appellants have filed Company Petition ? C.P. No. 32

of 2011 in March 2011 under Sections 397 and 398 of the Companies Act seeking for the following reliefs:

1. declare that Joaquin Marin Fernandez De Pierola and Carlos Cosin Fernandez, Directors of BEFESA Infrastructure India Private Limited,

Chennai by reason of their several actions are unfit to act as directors of the Chennai Water Desalination Limited.

2. Direct the BEFESA Agua, SAU, Spain to transfer in favour of IVRCL Infrastructure and Projects Limited, Hyderabad 2,59,47,483 shares held

by it in the Chennai Water Desalination Limited at a value equivalent to the fair value of shares as determined by the Board as at 15.3.2010 and for

this purpose to pass suitable directions for the appointment of an independent valuer to arrive at a fair value of the aforesaid 2,59,47,483 shares

for the purposes of such transfer.

3. Direct the setting aside of the Shareholders Agreement dated 31.08.2005 between the IVRCL Infrastructure and Projects Limited, Hyderabad

and the BEFESA Agua, Spain and consequently direct the BEFESA Agua, Spain and/or its affiliates are not entitled to exercise any rights under

such Shareholders Agreement.

4. Surcharge BEFESA Agua, Spain, BEFESA Infrastructure India Pvt. Ltd., Chennai and Joaquin Marin Fernandez De Pierola, and Carlos Cosin

Fernandez, the Directors of BEFESA Infrastructure India Pvt. Ltd. in accordance with Section 406 of the Companies Act and direct the said

Respondents jointly and severally to make good to the Chennai Water Desalination Limited the losses caused by them to the Company and as

determined in such surcharge proceedings.

15. In the Company Petition, Appellants have also sought for the following interim reliefs:

1. Restrain BEFESA Agua, Spain from exercising any rights in respect of 2,59,47,483 shares held by them in the Chennai Water Desalination

Limited.

2. Restrain the BEFESA Agua, Spain, BEFESA Infrastructure India Pvt. Ltd., Chennai and Joaquin Marin Fernandez De Pierola, and Carlos

Cosin Fernandez, the Directors of BEFESA Infrastructure India Pvt. Ltd. or any of the affiliates of the BEFESA Agua, Spain from exercising any rights under the Shareholders Agreement.

3 Restrain Joaquin Marin Fernandez De Pierola, and Carlos Cosin Fernandez, the Directors of BEFESA Infrastructure India Pvt. Ltd. from functioning as directors of the Company.

16. The Company Petition filed in March 2011 was adjourned by 4 weeks to 24.4.2011. In the Company Petition, the Respondent entered

appearance and filed various applications in C.A. Nos. 95-97 of 2011 including an application u/s 45 of the Arbitration and Conciliation Act. The

Appellants 1 and 2 have filed counter in those applications and the matter came up before Company Law Board on 27.6.2011 and was posted to

2.8.2011 for hearing of Company Applications and the Company Petition. By its Order dated 5.7.2011, the Company Law Board granted liberty

to the Respondent to file interim counter. On 27.7.2011, the Respondent filed applications in C.A. Nos. 175-178 of 2011 seeking information

alleging that the information furnished was not provided, which Respondent claimed as necessary for defending the Petition.

17. Only after filing of those applications in the Company Petition and the same were pending, on 17.8.2011, the Respondent filed the Petition u/s

9 of the Arbitration Act substantially making the same allegations and seeking interim injunctions as under:

(i) Interim Injunction restraining the Appellants 1 to 3 from acting in breach of their obligations under the Shareholders Agreement dated

31.8.2005;

(ii) Interim Injunction restraining the Appellants 1 to 3 from taking any action to restrict in any manner exercise of Respondents right under the

shareholders agreement dated 31.8.2005.

18. In paragraph No. 25 of the Petition, Respondent has averred that Respondent is entitled to an order of mandatory injunction protecting its

rights under the Shareholders Agreement. The interim injunction sought for appears to be a mandatory injunction couched in the form of a

prohibitory injunction. The relief u/s 9 is intended only as a protective measure and u/s 9 of the Arbitration and Conciliation Act, the Respondent cannot seek for a mandatory injunction. More so, an ex parte mandatory injunction. By a careful reading of the reliefs, the reliefs sought for in the Petition u/s 9 of the Arbitration Act are exactly the issues raised in the Company Law Board. It is in these circumstances, the question whether the impugned ex parte interim injunction affects the valuable rights of the Appellants to maintain this appeal is to be considered.

19. At the time when Petition u/s 9 of the Arbitration and Conciliation Act was filed, the Respondent was fully aware of the Company Petition and was also vigorously pursuing the matter before the Company Law Board. As pointed out earlier, the Respondent has taken out number of applications before the Company Law Board and have also obtained the order on 5.7.2011 for filing interim counter. As pointed out earlier, the Respondent has also filed applications in C.A. Nos. 175-178 of 2011 seeking information allegedly not provided, which the Respondent claimed, were necessary for defending the Petition by filing the counter. In the meanwhile, the Respondent has also filed a Company appeal No. 14 of 2011 before the High Court seeking stay of the order of the Company Law Board dated 5.7.2011 allegedly on the basis that they should not be required to file a counter and interim orders were also granted in that matter. The Appellants filed a detailed counter therein pointing out that the said appeal in C.A. No. 14 of 2011 was not maintainable. However, thereafter the Respondent chose to withdraw the said Appeal after filing and obtaining orders in O.A. No. 679 of 2011. When the matter is thus seized up before the Company Law Board and when the Respondent is also vigorously pursuing the matter before the Company Law Board, the question falling for consideration is whether the Respondent is justified in invoking the jurisdiction u/s 9 of the Arbitration Act.

20. Even though the Respondent had filed number of applications before the Company Law Board including C.A. Nos. 175-178 of 2011 seeking certain information, the Respondent has not chosen to mention the same in the Petition filed u/s 9 of the Arbitration Act. In Paragraph 20 of the Petition u/s 9 of the Arbitration and Conciliation Act, the Respondent has mentioned about C.P. No. 32 of 2011 before Company Law Board and

that the Respondent is defending the Company Petition and that the Respondent has sought reference of the said Company Petition to Arbitration

in view of the arbitration clause contained in the shareholders agreement. Except vaguely mentioning about the pendency of the Company Petition,

the Respondent has not stated about the applications filed by the Respondent before the Company Law Board and other Company Appeal (C.A.

No. 14 of 2011) and O.A. No. 679 of 2011 preferred by the Respondent challenging the order/proceedings before the Company Law Board.

21. Taking into consideration the pendency of the Company Petition before the Company Law Board from March 2011 and the fact that the

Respondent is vigorously pursuing the matter before the Company Law Board, in our considered view, the exparte interim order granted in the

Section 9 application substantially affects the valuable rights of the Appellant. In our considered view, the exparte interim order has the effect of

stalling the proceedings before the Company Law Board and therefore has the trappings of "judgment" within the meaning of Order 43 Rule 1

CPC and therefore the appeal under Clause 15 of the Letters Patent is well maintainable. Since the exparte interim order substantially affects the

valuable rights of the Appellants and also has the effect of stalling the proceedings of the Company Law Board the, exparte interim order dated

18.8.2011 granted by the learned single Judge in O.A. No. 679 of 2011, which was subsequently extended on 13.9.2011 has to be vacated.

22. The grievance of the Respondent is that the Appellants are convening meetings of the Board without adequate notice and despite

Respondent's protest, Appellants have gone ahead with such meetings and that such meetings are wholly in violation of the mandatory provisions

of the shareholders agreement regarding notice, quorum and affirmative votes required in respect of valid Board meetings and there is serious

breach of law and of the Shareholders Agreement. Per contra, Learned Counsel for Appellants has submitted that all those points are squarely the

issues raised before the Company Law Board. Learned Counsel for the Appellants would further contend that the Order u/s 9 of the Arbitration

and Conciliation Act is only intended as a measure of protection and no mandatory injunction could be granted thwarting the process of judicial

authority/Company Law Board.

23. Since we are relegating the parties to go before the single Judge in Section 9 application, we do not propose to examine the merits of the arguments.

24. In the result, the appeal is allowed and the exparte interim injunction dated 18.8.2011 and the subsequent extension order dated 13.9.2011

made in O.A. No. 679 of 2011 stands vacated. We request the learned single Judge to take up the Section 9 application in O.A. No. 679 of

2011 and dispose of the same on its own merits. However, there is no order as to costs. Consequently, the connected M.P. No. 1 of 2011 is

closed.