

(2013) 12 BOM CK 0160

In the Bombay High Court

Case No : Appeal From Order No. 1341 of 2013 and Civil Application No. 1604 of 2013

KSL and Industries Limited

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2014) 2 MhLj 542

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Ajit Anekar and Mr. Yogendra Singh holding for Auris Legal, for the Appellant; Pankaj Vijayan instructed by Intra Legal, for the Respondent

Judgement

Anoop V. Mohta, J.—Heard the learned Counsel appearing for the parties for ad-interim anti-suit injunction. The Appellants-Original Plaintiffs have challenged impugned Order dated 25.11.2013 whereby the learned Judge, City Civil Court, Greater Mumbai, refused to grant any ad-interim relief in an anti-suit injunction filed by the Appellants-Plaintiffs in respect of the proceeding instituted by the Respondent-Defendant- Punjab National Bank in High Court of Hong Kong Special Administrative Region Court of First Instance being Action No. 1888 of 2013 for recovery of US \$11,448,985.28.

2. At this stage, the question is whether Indian Court can pass any anti-suit injunction/order. Pursuant to the writ of summons, the Appellants-Plaintiffs forwarded the acknowledgement within the time prescribed. Now the next steps is to file defence within next 28 days. The last date of filing of defence is on or about 26 December 2013, failing which, the consequenced is foreign decree/judgment to follow. In view of the provisions of Sections 13, 14 and 44A of the CPC (CPC), such decree/judgment is executable in India as being Hong Kong reciprocating country.

3. After going through the documents and considering the rival submissions of the parties, specially in the background that none appeared for Respondent in

the Trial Court though notice was given by the Appellants and here in this court the Respondent is represented through an Advocate, but there is no reply and/or affidavit filed opposing the ad-interim injunction so sought. The time is sought for filing reply. The matter is accordingly adjourned to 23 December 2013. To be placed high on board.

4. The issue is still remain, whether to pass ad-interim relief as sought by the Appellants even in this background. Both the parties have read and referred judgment of Supreme Court - Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., and other judgments in support of their respective case: the Appellants for granting ad-interim relief and Respondent for opposing the same, basically for want of jurisdiction of Indian Court to pass such injunctive order pending the proceedings at Hong Kong Court. The prayers in the Notice of Motion and in the suit are basically against the Respondent not to take further steps against the Appellants-Plaintiffs in the proceedings so initiated pending before the Hong Kong Court. Similar prayer is made in the Civil Application. It is therefore clear that the Appellants-Plaintiffs are not seeking stay of any proceedings initiated at Hong Kong Court. The prayer is only against the Respondent-Bank from taking any further steps in the matter.

5. The submission is revolving around Section 41(b) of Specific Relief Act, whereby the Court cannot grant any injunction having effect of restraining any person/party from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. The word "Court" is well settled. The provision of the Specific Relief Act so read and referred covers and governs the case/proceedings initiated in India. There is no specific bar, that Indian Court cannot pass, at any point of time, any injunction and/or such anti-injunction order in a suit or proceeding pending in the foreign countries. The Apex Court in Modi Entertainment Network (supra) has considered this aspect, specially in para-9 in the following words:

9. The Courts in India like the Courts in England are Courts of both law and equity. The principles governing grant of injunction- an equitable relief- by a Court will also govern grant of anti-suit injunction which is but a species of injunction. When a Court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another Court including a foreign Court, it is called anti-suit injunction. It is a common ground that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because Courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another Court.

6. The basic requirement even as per above judgment, is that the facts and circumstances is required to be considered by the Court while passing such anti-suit injunction. There is no total bar. In the present case, admittedly the

transaction/document executed after due discussion with Respondent-Bank in India. Their head-office is at New Delhi and the branch office with whom the Appellants-Plaintiffs entered into transaction/agreements having their branch office is at Mumbai. As the requirement is of dollars, therefore after due discussion the transaction/document executed by the Punjab National bank with Hong Kong branch, the guarantee executed by Appellant No. 2 with Respondent-Hong Bank.

The governing law and jurisdiction clause is as under:

This guarantee shall be governed by the law of Hong Kong in all respects and the Guarantor hereby submits to the non-exclusive Jurisdiction of the courts of Hong Kong. Nothing in this guarantee precludes you from bringing any suit, action or proceedings ("Proceedings") in any other jurisdiction nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction

7. From the plain reading of this clause, it is very clear that parties agreed that in all aspect the guarantor submits to the "nonexclusive jurisdiction of the courts of Hong Kong". It is further agreed that nothing in this guarantee precludes the parties from bringing any suit or proceeding in any other jurisdiction. This itself means that the parties have not agreed for the specific court jurisdiction. On the contrary, this clause itself permits and provides an option to the parties to fight and/or invoke the proceedings in any court available. The contract and/or agreement and further proceedings may be governed by law of Hong Kong, but that itself, in my view, no way needs that the other side and/or anyone else can not raise objection with regard to the jurisdiction of the courts of Hong Kong, basically when there is no exclusive jurisdiction clause of any particular court. The principle of "cause of action or part of cause of action" as contemplated in India law just cannot be overlooked.

8. The Appellants have filed the anti-suit injunction having its registered office in Mumbai. The properties, movable and the immovable are situated at various places of India including Mumbai. There are correspondences on record to show that the parties have exchanged the documents from their respective offices in Mumbai.

9. The Court, at this stage, is not concerned with the merit of the respective claims of the matter. The Court needs to consider the same in accordance with law. In a suit so filed, the learned Judge has refused to grant ad-interim order by holding that Indian Court has no jurisdiction to pass any order in the pending action so initiated by the Respondent in Hong Kong Court, which in my view is not acceptable at this stage of the proceedings, especially when the averments so made in the plaint and the supporting affidavit remained uncontroverted. Though notice was given to the Respondent-Defendant, they failed to appear. The plain reading of the plaint if we take note of, considering the law even as read and referred by the learned Counsel for the parties, especially in the case of

Modi Entertainment Network (supra). There is no exclusive jurisdiction given to the Hong Court in view of non-exclusive jurisdiction clause itself. The Apex Court has considered the same. As there is no total bar, I am inclined to observe in the present facts and circumstances of the case, at this ad-interim stage, this Court has jurisdiction to pass restraint order against the Respondent-Bank who is definitely Indian entity and falls within the ambit of Section 2(v) of Foreign Exchange Management Act, 1999 (FEMA) i.e. "the person resident of India".

10. The CPC in India, in normal situation, permits and provides the person like Respondent to file a suit where the Defendants' registered office and/or property and/or place where they do the business. The purpose is always to provide full opportunity to all parties. Having once agreed such non-exclusive clause, and knowing fully the place of business of the Appellants-Plaintiffs in Mumbai, so also situation of their movable and immovable properties, out of the choice so available, the Respondent for whatever may be the reason, chosen Hong Kong court as Court for filing their claim. It is permissible for the Court to consider the position of Indian law and so also "the doctrine of convenience", which at ad-interim stage, just cannot be concluded without giving an opportunity to both the parties, to put their rival contentions with regard to the jurisdiction and/or continuation of such proceedings in Hong Kong Court.

11. Once option is given, the Appellants are entitled to file suit and/or initiate proceedings of their choice. But if the case/defence is made out, the Court in India can consider the objections so raised, in view of specific clause so referred above. The Supreme Court in "Modi Entertainment Network (supra) so referred and relied by the learned counsel for the Respondent along with others, was in a situation where the parties have agreed for neutral forum/Court though there was non-exclusive clause. In this background therefore to say that the Indian Court has no jurisdiction at this ad-interim stage of the proceeding, is incorrect.

12. The learned Counsel appearing for the Respondent-Bank has relied on judgment of Punjab-Haryana High Court in Rakesh Kumar Vs. Ms. Ashima Kumar, wherein the following observations are made:

that the Foreign Court cannot be treated as a Court subordinate to the Panchkula Court. Therefore, in terms of Section 41(a) and (b) of the Specific Relief Act, 1963, injunction cannot be granted.

13. We consider at this stage the facts and circumstances of this case apart from the non-exclusive clause so referred above. The Appellants and the Respondent-Defendant have definitely legal entity within the jurisdiction of this Court. The suit filed by the branch of Punjab National Bank at Hong Kong is the issue. The filing of the suit at Hong Kong therefore in the background required to be tested and so also the proceeding so initiated based upon the same. The Respondent-Bank therefore, in my view, is amenable to the personal jurisdiction of this Court, also for the following averments (para-26) in the plaint:

The Decree/Award that may be passed will have to be enforced in Mumbai. The

Plaintiffs are based in Mumbai, their assets are situated in Mumbai and elsewhere in India. Further, the ECB Loan was utilized in Mumbai; part payment of any amount of Rs. 7.50 Crore (Approx) of the ECB Loan was made by the Plaintiffs in Mumbai and the same was credited to the Defendant's account in Mumbai; and the restructuring of the loan was taken up by the CDR Empowered Group in Mumbai and the request for keeping the loan outside the purview of CDR was made in Mumbai. Therefore, substantial part of the cause of action for the present Suit has arisen in Mumbai. The Defendant has its branch/office within the territorial jurisdiction of this Hon''ble Court and as such this Hon''ble Court exercises personal jurisdiction over the Defendant. Further, this Hon''ble Court is a Court having natural jurisdiction over the parties and in respect of the disputes involved in the suit. Therefore, this Hon''ble Court has territorial as well as pecuniary jurisdiction to receive, entertain and try the present Suit.

14. The injunction if not granted against the Respondent-Defendant, would cause great injustice and hardship as such foreign judgment in view of the provision of Section 44-A of CPC, the Appellants-Plaintiffs have no option, but to face foreign judgment which is executable in India. The issue of jurisdiction even otherwise can be agitated by any party in the proceedings. There is no total bar and therefore to file such suit in India, whether maintainable or not, required to be decided after hearing both the parties.

15. Therefore, considering the aspect of convenience of the parties and undisputed position on record, without touching to the merits of the matter, such proceedings initiated at Hong Kong Court whether oppressive or vexatious and/or forum non convenience, is again a matter which just cannot be decided in such fashion without even waiting for reply of the Respondent-Defendant.

16. Therefore, taking overall view of the matter at this stage, I am inclined to restrain the Respondent-Defendant from taking any further steps in respect of pending proceeding i.e. Action No. 1888 of 2013 pending before the Hong Kong Special Administrative Region Court of First Instance till the next date. Stand over to 23 December 2013. To be placed high on board for final disposal.