

(2006) 01 BOM CK 0027

In the Bombay High Court

Case No : Company Petition No. 339 of 2005 and Company Application No. 429 of 2005

Malaysian International Trading Corpn.

APPELLANT

Vs

Mega Safe Deposit Vaults (P.) Ltd.

RESPONDENT

Date of Decision : 27-01-2006

Acts Referred:

Citizenship Act, 1955 — Section 5(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Companies Act, 1956 — Section 433, 434
Contract Act, 1872 — Section 135
Evidence Act, 1872 — Section 45, 57(1), 84

Citation : (2006) 3 BomCR 109 : (2006) 68 SCL 52

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Virendra V. Tulzapurkar and K.G. Munshi, for the Appellant; I.M. Chagla and Lyn Pereira, for the Respondent

Judgement

S.J. Vazifdar, J.—This is a Petition under Sections 433 and 434 of the Companies Act, 1956 seeking an order winding up the Respondent company. According to the Petitioners, the company is indebted to them in the sum of Rs. 5,15,18,551.82.

The Petitioner's claim arises under a guarantee dated 31-10-2003 (Exhibit "C" to the Petition) issued by the company. By the said guarantee, the company unconditionally guaranteed and undertook to the Petitioner that its subsidiary, Mega Visa Marketing and Solutions Ltd. (hereinafter referred to as "MV Ltd." - the Respondent in Company Petition No. 340 of 2005) would comply with and fulfil all the payment requirements and stipulations as per an agreement dated 20-9-2002 entered into between MV Ltd. and the Petitioners. The company agreed to guarantee the due and complete payment performance of the said agreement by MV Ltd. The guarantee was to be governed by and construed in accordance with the Laws of Malaysia. The guarantee was to stand discharged

only upon the fulfilment of all the terms and conditions of the agreement.

2. The said agreement dated 20-9-2002 was entered into between Petitioner No. 1 and MV Ltd. clauses 1.1, 1.5 and 3 whereof read as under :

1.0 Principal matters

1.1 Parties agree to form a JMT to share market information, and to jointly discuss and develop marketing strategies, to jointly market and trade the Products, including making joint pricing decisions and also its logistics arrangements and other administrative arrangements related thereto. Where appropriate and as mutually agreed, the Parties shall also jointly develop sourcing strategies and plans for the Products.

1.2 ...

1.3 ...

1.4 ...

1.5 For the sales of the Products to countries other than India, both Parties shall have the option to proceed under this JMTA arrangement or on their own or with other third parties. Both Parties shall keep each other informed of such arrangements.

2.0 ...

3.0 Consolidation

3.1 For the purpose of consolidation, the accounts under this JMTA shall be consolidated by the parties every calendar quarter.

3.2 Unless otherwise agreed by both parties, all payment from Mega Visa shall be made by its wholly owned subsidiary, Megavisa Solutions (Singapore) Pte. Ltd. Mega Visa shall be jointly and severally held responsible with Mega Visa Solutions (Singapore) Pte. for the full performance of payments towards MITCO.

Clause 1.0 of Part I of the said agreement reads as under :

1.0 Profit or loss sharing

Total amount of profit or loss shall be shared on a 50 : 50 basis between the Parties irrespective of whether MITCO or Mega Visa invoices the customers, or whether MITCO, Mega Visa or MITCO jointly with Mega Visa is the seller.

3. The agreement was admittedly assigned by Petitioner No. 1 to Petitioner No. 2 by an assignee agreement dated 1-8-2003. There is no dispute regarding or based on the assignment. The reference therefore to the Petitioner/Petitioners in this judgment will include reference to both the Petitioners.

4. By a letter dated 10/11-6-2004 (Exhibit "D" to the Petition) MV Ltd. and Mega Visa Solutions (Singapore) Pte. Ltd. acknowledged their indebtedness under the

agreement dated 20-9-2002 in the sum of USD 10,89,288.53. They further requested Petitioner No. 2 to extend the time for payment till 30-9-2004. Petitioner No. 2 at the foot of the letter endorsed that it acknowledged and agreed to the same. In view of the contentions raised by Mr. Chagla, the learned Senior Counsel appearing on behalf of the company, I will set out the letter in extenso. It reads as under:

Dear Sir,

Re : Extension of time towards outstanding payments

Reference is made to Joint Marketing Agreement dated 20-9-2002 and Assignment Agreement dated 1-1-2003 (Contract Reference No. ML/ 305/03/JMT/ Mega Visa) between MITCO Labuan Co. Limited and Mega Visa Marketing & Solution Ltd.

Pursuant to the above mentioned Agreements, we the undersigned, the director of Mega Visa Solutions (Singapore) Pte. Ltd. and directors of Mega Visa Marketing & Solutions Ltd., do hereby acknowledge that our companies are jointly and severally owe MITCO Labuan Co. Limited the following amount.

----- Invoice No.		Amount
Due	Due Date	-----
9306030024	USD 2,055,000.00 10-11-2003	9306030016 USD 2,051,422.80
12-11-2003	9306030025 USD 2,067,581.52 4-12-2003	9306030241 USD
1,793,326.63	8-1-2004 9306030261	USD 1,480,500.00 20-1-2004
9306030281	USD	1,444,457.58 8-2-2004
-----		Total USD
10,892,288.53		-----

We seek your kind consideration to extend the time towards the payment of the above invoices until 30-9-2004.

Petitioner No. 2 at the foot of the letter endorsed that it acknowledged and agreed to the same.

The account was thus stated and settled between the parties to the agreement dated 20-9-2002, Petitioner No. 2 (the assignee of Petitioner No. 1) and MV Singapore.

5. It is important to note that the letter dated 10/11 -6-2004 was signed inter alia by one Ajay Mittal, the Chairman of MVL. It is also important to note that Mega Visa Solutions (Singapore) Pte. Ltd. (hereinafter referred to as the "Mega Visa Singapore") is also a signatory to this document.

6. Mr. Chagla submitted that the Petitioner's claim was bona fide disputed by the company for the following reasons :

(i) The Petitioner's claim is not under the agreement dated 20-9-2002.

(ii) The company is discharged as a guarantor in view of the Petitioners having

agreed to extend the time for payment by the principal debtor, MV Ltd.

(iii) The Petitioners claim is not sustainable as they have not proved the relevant Malaysian Law which governed the rights of the parties and the guarantee.

(iv) An account of the Petitioner's dues under the agreement dated 20-9-2002 was not rendered by the Petitioners.

Re: I. The Petitioner's claim is not under the agreement dated 20-9-2002 :

7. Mr. Chagla submitted with reference to clause 3.2 of the agreement dated 20-9-2002 that the Company is liable only in respect of the transactions carried out under the agreement. In other words, the company is not liable as a guarantor in respect of the dues of the Petitioners under any independent transactions between the Petitioners and Mega Visa Singapore.

I agree.

8. The question therefore that falls for consideration is whether the said dues were in respect of transactions under the agreement dated 20-9-2002. There is little, if any, doubt that they are.

9. (a) Firstly, this is clear from the express language of the letter dated 10/11-6-2004 acknowledging liability, which I have extracted in extenso. There is not even a suggestion therein that the dues are in respect of transactions independent of the agreement. The language positively indicates the contrary. The first paragraph refers to the said Joint Marketing Agreement dated 20-8-2002. The acknowledgement of the quantum of the debt in the second paragraph is prefaced by the words: "Pursuant to the abovementioned agreement....." meaning thereby, the said agreement dated 20-9-2002.

(b) The letter was signed by both MV Ltd. and Mega Visa Singapore. Nowhere in the correspondence has it ever been contended or suggested that the said acknowledgement was not of the dues in respect of transactions under the agreement.

10. Correspondence ensued between MV Ltd. and Mega Visa Singapore on the one hand and the Petitioners on the other, in the course of which, the Petitioners repeatedly called upon them to make payment of the admitted amounts. Every letter/message by or on behalf of the Petitioner, without exception, referred clearly to the said agreement and/or the letter dated 10/11-6-2004. Not once did MV Ltd. or Mega Visa Singapore deny their liability. They in fact, clearly admitted their liability and the fact that the same was under the said agreement dated 20-9-2002.

11. Two further references should put the point beyond the pale of controversy:

(a) (i) The Petitioner's Advocate's notices dated 2-11-2004 and 8-11-2004 demanding payment expressly stated that the dues were "....under a Joint Marketing and Trading Agreement dated 20-9-2002 ("the JMTA")". The letter

dated 8-11-2004 was copied to the said Ajay Mittal as well as his wife, both of whom are Directors not only of MV Ltd. but also of the Respondent Company.

(ii) Mega Visa Singapore, by a letter dated 17-11-2004 in reply to the said letter dated 8-11-2004 did not dispute that the amounts were payable under the said agreement. They merely expressed their inability to make full payment at that stage.

(b) (i) Ultimately, a statutory notice dated 16-11-2004 was addressed by the Petitioner's Advocate to the company as well as to MV Ltd. and Mega Visa Singapore and the Directors viz,, Ajay Mittal and Archana Mittal. The said notice too stated that the dues were under the said agreement. Not one of the above submissions made by the Petitioners as well as their Advocates was denied.

(ii) In reply to the statutory notice, the companies Advocate addressed letters dated 9-12-2004 and 21-12-2004 on behalf of the company as well as MV Ltd. The defence under consideration was not even remotely referred to.

12. That the amount claimed by the Petitioner are due in respect of transactions under the agreement dated 20-9-2002 is established beyond any doubt. Mr. Chagla's first contention is therefore rejected.

Re: II. The company is discharged as a guarantor in view of the Petitioners having agreed to extend the time for payment by the principal debtor, MV Ltd.:

13. Mr. Chagla submitted that assuming that the Malaysian law is the same as the Indian law, the company is discharged as a guarantor in view of Section 135 of the Indian Contract Act, which reads as under :

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.--A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

[Emphasis supplied]

14. I will assume that the letter dated 10/11-6-2004, granting extension of time for payment to MV Ltd., the principal debtor, would in the absence of anything else have discharged the company as a guarantor.

15. However, in my view, the company impliedly if not expressly assented to the extension of time granted by the Petitioners to MV Ltd. for making payment. This is clear for various reasons. Even assuming that each of these reasons by themselves would not establish consent, taken together, I have little doubt that there was consent on the part of the Respondent company to the extension.

16. MV Ltd. is a subsidiary of the Respondent Company. The said Ajay Mittal and his wife Mrs. Archana Mittal are Directors of the company as well as of MV Ltd. Every letter/message was addressed to either or both of them. Ajay Mittal is a

signatory to the letter dated 10/11-6-2004. This, Mr. Chagla submitted only established knowledge, not consent. I will presume this is so. The matter however does not end here.

17. It is pertinent to note that in its affidavit in reply the company has gone to the extent of denying even knowledge of the letter dated 10/11 -6-2004. A case which Mr. Chagla, with his characteristic restraint, refrained from advancing.

18. MV Ltd., the principal debtor is a subsidiary of the Respondent Company, the guarantor. The correspondence was addressed to two of the directors of the company. There is not even a suggestion that there are any other directors though that may have made little difference in the facts of this case.

19. Even after the statutory notice was addressed to the company itself, it raised no objection to and expressed no surprise about the variation. Indeed, as noted above, MV Ltd. and the company replied by a common notice addressed by their Advocates. Surely, if the Company had not consented to the variation, some element of surprise or objection thereto would have been expressed. There was none.

In these circumstances, a conclusion that the company had consented to MV Ltd. having granted time for payment by letter dated 10/11 -6-2004 is irresistible.

20. Mr. Chagla submitted that there was no pleading regarding the case of consent. It is true that the pleading on the point is not entirely satisfactory. The petition itself does not plead consent expressly. Much of what is stated in the rejoinder is irrelevant on this point.

21. However, the company in its affidavit in reply denied having consented to the extension of time for payment. The Petitioner in its rejoinder denied the defences regarding the extension generally. The denial to the companies case of it not having consented was thus put in issue. The documentary and other evidence in this regard is on record. The parties were aware that the point was in issue and addressed me on the same. A lacuna, if any, of this nature, can easily be filled by an amendment or an additional affidavit, especially when the proceeding is a petition under Sections 433 and 434 of the Companies Act.

Re: III. The Petitioners claim is not sustainable as they have not proved the relevant Malaysian Law which governed the rights of the parties and the guarantee.

22. Mr. Chagla submitted that the Petitioner's claim is not maintainable as they had failed to establish the Malaysian law pertaining to the said guarantee. He based this submission in view of Clause 8 of the said guarantee which reads as under:--

8. The Guarantor agrees that this Guarantee shall be governed by and construed in accordance with the Laws of Malaysia.

23. The submission is not well founded. Neither the Petitioners nor the Company

have adduced evidence of the Malaysian law on the point. Foreign law is a question of fact. If no evidence is adduced regarding foreign law normally the presumption is that it is the same as the Indian law on the point in consideration. This is established by a long line of decisions including judgments of the Privy Council, the House of Lords and the Court of Appeal only two of which I shall shortly refer to. Mr. Chagla's submission is based on the erroneous proposition that when parties agree that the contract between them will be governed by the law of a country other than India, it is for the party making the claim firstly to establish what the law of that country is and then to establish that based upon the same its claim ought to be granted. The judgments also negate this proposition. In both the judgments to which I shall now refer, the presumption I have referred to was applied in favour of the plaintiffs who succeeded in obtaining the reliefs they had prayed for.

24. In *The Parchim*, 1918 AC 157, the Privy Council held, at page 161, as under:--

No doubt the municipal law with reference to which the parties enter into the particular transaction is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to municipal law other than English, and it be further proved that the municipal law is different in any material respect from the English law, this will of course be taken into account in determining their intention. But having regard to the presumption that unless the contrary be proved the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable.

[Emphasis supplied]

The observations that follow do not either dilute or qualify the ratio in the sentence emphasised. They merely provide the rationale for the presumption. Nor do I read the ratio of this judgment as being confined to cases in England alone. Their Lordships continued thus :

An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance or principle. For example, in countries where the civil law is more directly the basis of modern law than it is in this country, somewhat greater importance may be attached to risk as an indication of property. Or, again, the inference to be drawn from the possession of a bill of lading endorsed in blank may be somewhat stronger than it is in our law.

Their Lordships therefore are of opinion that in the present case the English municipal law, including the Sale of Goods Act, 1893, was rightly applied in determining the character of the cargo at the date of capture.

25. The judgment being of the Privy Council, is binding on me. There are a long line of decisions in England which have adopted the same principle. Halsbury's Law of England, Vol. 8(3) summarises them in paragraph 28 as follows:

(4) PROOF OF FOREIGN LAW

28. Need for proof.--Generally, foreign law is a question of fact which must be specifically pleaded by the party relying upon it, and must be proved to the court. In the absence of satisfactory proof, the court will apply English law. Thus the onus of proof of foreign law lies on the party relying on it.

26. I will refer to only one of the judgments discussed in Halsbury. The case of *The Parchim* was followed by the House of Lords in *Dynamit Actien-Gesellschaft (Vormals Alfred Nobel Co.) v. Rio Tinto Co. Ltd.* 1918 A.C. 292. The judgment also establishes that it matters not whether the presumption is relied upon by the Plaintiff or the Defendant. Lord Dunedin held:--

My Lords, I have rested my opinion on what I consider the broader and more satisfactory ground. But, were it necessary so to decide, I am clear that it is for those who say that the German law is different from the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English.

[Emphasis supplied]

Lord Atkinson in his concurring judgment held at page 300 as follows:--

Mr. composition complained that he had not been given an opportunity of proving what was the proper construction of these four contracts according to the law of Germany. In the absence of that proof it must be assumed to be similar to the law of England, but even if one makes to him the very largest concession he can expect or demand, and assumes, what is extremely unlikely, that the law of Germany, and the State policy of Germany upon which the law is founded, does not in any way or to any extent prohibit trading with Germany's enemies, I think the above cited authorities clearly establish that, even if it were so, a British subject, once war breaks out, is bound not to trade with Great Britain's German enemies, the contracts binding him to do so become as to him illegal and void, and that the Courts of this country will not enforce them.

[Emphasis supplied]

Lord Parker of Waddington also in his concurring judgment held as follows:

The only substantial difference between this case and that of *Ertel Bieber & Co. v. Rio Tinto Co.*, which Your Lordships have just decided, is that the contract to which this case related, and under which ore was sold by the respondents to the appellants to be delivered over a series of years, was a contract in the German language and was entered into in Germany, so that it is argued that it must be construed and the rights and liabilities of the parties thereto determined according to German law. It appears that an application was made on behalf of

the appellants to Sankey J. to adjourn the trial of the action in order to allow time to procure evidence of German law. This application was refused, leave being given to renew it when the action came on for hearing. The application was not in fact renewed, counsel for the appellants contending that the onus of proving what the German law was rested on the respondents. In my opinion this contention was erroneous. Until the contrary be proved, the general law of a foreign State is presumed to be the same as the law of this country. The point was recently considered by the Judicial Committee of the Privy Council in the case of *The Parchim*. (2) it follows that the onus of proving that the German law differs from the law of this country rested with the appellants, and the appellants not having discharged this onus the presumption holds good.

[Emphasis supplied]

27. Mr. Chagla however relied upon the judgment of the Supreme Court in *Hari Shankar Jain Vs. Sonia Gandhi*, . Paragraphs 26 and 27 of the judgment read as under :

26. The two appellant election petitioners have at several places in their election petitions made certain averments relating to Italian law based whereon they have tried to build a case that the respondent could not have renounced the Italian citizenship and become a citizen of India when she applied for and was issued a certificate of citizenship u/s 5(1)(c) of the Citizenship Act. We have carefully perused the averments made in the two election petitions in this regard and we are definitely of the opinion that the averments are bald allegations without any basis thereof and do not amount to pleading material facts which may warrant any enquiry into those allegations.

27. Italian law is foreign law so far as the courts in India are concerned. u/s 57(1) of the Indian Evidence Act, 1872, the court shall take judicial notice of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein. Sections 45 and 84 of the Evidence Act permit proof being tendered and opinion of experts being adduced in evidence in proof of a point of foreign law. Under Order 6 Rule 2 of the Code of Civil Procedure, 1909, every pleading shall contain a statement in concise form of material facts relied on by a party but not the evidence nor the law of which a court may take judicial notice. But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, it should be pleaded like any other fact, if a party wants to rely on the same (see *Mogha's Law of Pleadings*, 13th Edn., p.22). In *Guaranty Trust Co. of New York v. Hannay & Co.* it was held that: "Foreign law is a question of fact to an English court... the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive." In *Beatty v. Beatty* it was held that the American law in English courts must be proved by the evidence of experts in that law. In *Lazard Bros. and Co. v. Midland Bank Ltd.* Their Lordships of the Privy Council observed that what the Russian Soviet law is, is a question of fact, of which the English Court cannot take judicial cognizance, even though the foreign law has already

been proved before it in another case. The court must act upon the evidence before it in that actual case. The statement of law by Halsbury in Laws of England (3rd Edn., Vol. 15, para 610 at p. 335) is that the English courts cannot take judicial notice of foreign law and foreign laws are usually matters of evidence requiring proof as questions of fact.

28. The judgment of the Privy Council in the case of the Parchim is binding on me. I do not find the judgment of the Supreme Court as having overruled it even impliedly. The judgment of the Supreme Court in fact is against Mr. Chagla. It is in any event clearly distinguishable. In that case, the Appellants sought to establish that the Respondent could not have renounced her Italian citizenship and, therefore, could not become a citizen of India. They in fact sought to prove the Italian law as is evident from paragraph 26 of the judgment. In these circumstances, it was necessary for the Appellants to establish what the Italian law was. There can be no Indian law as to when a Citizen of a foreign country can renounce his or her citizenship of that country. The Indian Legislature has nothing to do with this question. The question of the presumption I have referred to, cannot arise in such cases.

It was the petitioner who contended that the laws of Italy did not permit Mrs. Sonia Gandhi to renounce her Italian citizenship. It is pertinent to note that it was not even contended by the petitioners therein that there was any presumption based on Indian Law they were relying upon.

29. The third contention raised by Mr. Chagla is thus rejected.

Re : IV. On account of the petitioner's dues under the agreement dated 20-9-2002 was not rendered by the petitioners :

30. Mr. Chagla then submitted that the petition is silent regarding "costs and expenses" which were to be apportioned between the parties as provided in clause 2 of Part I to the said agreement. The submission does not constitute a defence to the petitioner's claim for two reasons. Firstly, the statement of accounts in the letter dated 10/11-6-2004 is clear. There is no reservation regarding any liabilities of the petitioner. Nor has the company at any stage stated that there were any amounts due and payable by the petitioners to MV Ltd. and/or Mega Visa Singapore in that regard. This point was not raised at any stage in the correspondence either. It is clearly an afterthought and is therefore, rejected.

31. In the circumstances, the petition is admitted and to be advertised in Free Press Journal, Nav Shakti and Maharashtra Government Gazette.

32. The petitioners are directed to deposit costs of Rs. 2,000 within four weeks from today.

33. Mr. Chagla makes a statement that the company will not dispose of any of its immovable properties without the leave of the Court. The statement is accepted. Company Application No. 429 of 2005 is accordingly, disposed of.

34. The order is stayed for a period of eight weeks from today to enable the Respondents to challenge the same.

The Petition is made returnable in due course.