

(2009) 06 MAD CK 0179

In the Madras High Court

Case No : O.A. No's. 319 and 320 of 2009 and Application No's. 1693 and 1694 of 2009 in C.S. No. 291 of 2009

MARG Limited, (Formerly MARG Constructions Ltd.) and
Karaikal Port Private Limited

APPELLANT

Vs

Creative Infrastructure (A Partnership Firm) and Creative Port
Development Private Limited
Creative Infrastructure (A
Partnership Firm) Vs MARG Limited, (Formerly MARG
Constructions Ltd.) and Others

RESPONDENT

Date of Decision : 08-06-2009

Acts Referred:

Constitution of India, 1950 — Article 19

Citation : (2009) 06 MAD CK 0179

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : V. Raghavachari, for J. Sivanandaraj, for the Appellant; Vijay Narayanan for K. Moorthy, for the Respondent

Final Decision : Allowed

Judgement

M. Jeyapaul, J.—Original Application No. 319 of 2009 is filed seeking an order of temporary injunction restraining the respondents and their agents from interfering or obstructing with the peaceful implementation, completion, commercial commissioning and functioning of the Karaikal Port Project by the applicants.

2. Original Application No. 320 of 2009 is filed seeking an order of temporary injunction restraining the respondents and their agents from directly or indirectly publishing any statement whether orally or in writing or otherwise in any manner which defames, derogates or denigrates the applicant's reputation and its projects.

3. Application No. 1693 of 2009 is filed to vacate the order of interim injunction granted on 13.4.2009 in O.A. No. 319 of 2009 in C.S. No. 291 of 2009

4. Application No. 1694 of 2009 is filed to vacate the order of interim injunction granted on 13.4.2009 in O.A. No. 320 of 2009 in C.S. No. 291 of 2009

5. To avoid confusion and also for the sake of clarity, the applicants in O.A.Nos.319 and 320 of 2009 are referred as applicants and the respondents therein are referred as respondents.

6. The case, in brief, of the applicants, as reflected in the affidavit filed on their behalf is as follows:

a) The first applicant is an infrastructure development company listed on the Bombay Stock Exchange. It is, inter alia, engaged in the development of I.T. Parks, Malls, Special Economic Zones Fishing Harbours, Airports, Integrated Townships. The first applicant won several awards. It was adjudged and awarded by the 2008 Annual Construction World with the prestigious "Fastest Growing Construction Company (Medium Category)" Award. The first applicant also has been engaged in several Corporate Social Responsibility initiatives.

b) The first applicant was awarded with the concession by the Government of Pudhucherry to construct, develop, own and operate a Greenfield Port at Karaikal. The concession agreement required the first applicant to incorporate a special purpose company for developing, building and maintaining the Karaikal Port. The second applicant is the special purpose company formed by the first applicant. The first applicant had been able to build and enjoy a strong and reputable goodwill among its several stake holders. It enjoys support, patronization and endorsement from all concerned.

c) The second and third respondent approached the first applicant and represented that they possessed the technical expertise, qualification, skill and experience in their previous employment. The first respondent M/s.Creative Infrastructure, is a partnership firm formed by second and third respondents. The first applicant inducted the second and third respondents as Additional Directors on its Board of Directors on 9th February 2002. The second and third respondents have been party and privy to very important, confidential, trade, technical and other business secrets and information. They are supposed to maintain utmost confidentiality and not to divulge or reveal any such business secrets to promote their personal ends. They are bound by the fiduciary obligation not to act in a manner detrimental to the interest of the first applicant.

d) On 31.5.2005, the Government of Pudhucherry called upon interested persons to submit their "Expression of Interest" to develop a Greenfield Port at Karaikal on BOOST basis. The first applicant submitted its "Expression of Interest" on 20.6.2005. The Detailed Project Report (DPR) for the said project was prepared by Larsen & Toubro Ramboll Consulting Engineers Limited. The concession for the said project was awarded by the Government of Pudhucherry to develop a Greenfield Port at Karaikal. The said agreement was signed by the applicant with the Government of Pudhucherry on 25.1.2006. In terms of the said concession agreement, the first applicant incorporated a special purpose company, the

second applicant herein on 16.2.2006. The second and third respondents were privy and party to such decisions taken in the Board Meeting of the first applicant. The second and third respondents, who floated the fourth respondent-company, stealthily formed a consortium alongwith other companies and got awarded with the Machilipatnam Port Project. On 30.3.2007, the first applicant unsuspectingly accepted the resignation submitted by the second and third respondents from the first applicant Company.

e) On 28.7.2007, the first respondent wrote a letter to the Secretary (Ports), Government of Pudhucherry informing them that they were no longer associated with the Karaikal Port Project. The first respondent also made various unfounded, uncorroborated and untenable allegations against the first and second applicants in relation to the implementation of the Karaikal Project. The first respondent also called upon the Government of Pudhucherry to terminate the concession awarded to the first applicant.

f) On 1.12.2008, through one Mr. P.Baskar, some vital trade and business related information were sought from the Government of Pudhucherry concerning the implementation of Karaikal Project by the applicants.

g) On 16.12.2008, the first respondent called upon the applicants to allot in their favour 26% of the second respondent's shareholding. Various unfounded allegations have been made therein by the respondents.

h) On 17.2.2009, the respondents wrote a letter to the Minister of Ports, Chief Secretary and the Secretary, Department of Ports of the Pudhucherry wielding unsustainable, meritless and untrue allegations.

i) On 9.4.2009, again, the respondents addressed a letter to the Government of Pudhucherry and its functionaries, SEBI making false and reckless allegations against the applicants. The respondents shall be restrained from tarnishing and lowering the goodwill of the applicants their promoters and projects. Hence, the relief as sought for.

7. The counter case of the respondents as reflected in their applications seeking to vacate the orders of interim injunction reads as follows:

a) The first respondent firm was formed in the year 2002 with two partners viz., Ramani and Rangarajan, third and second respondents herein with equal stake. They have been in the Port Development business ever since then. The partners of the first respondent are technopreneurs from I.I.T., Madras. They have got extensive experience in the development of Ports through private investment in India. The first respondent's past experience in the Port Sector was highlighted to the Government of Pudhucherry for the development of Karaikal Port.

b) The first applicant was originally in the business of Real Estate/Building Wind Mill Erection. They have absolutely no knowledge or clue or prior experience or expertise in the Port Sector. The first respondent, as an associate, initiated the concept of developing Deep Water all weather Port at Karaikal with the

Government of Pudhucherry. The first respondent organized a consortium consisting of the first applicant, the first respondent and others. In the Expression of Interest, it has been made clear that the strength and resources of Creative Infrastructure would be drawn upon by MARG Constructions as an associate in the areas of business development, concept design of Port, financial engineering, project development and management including financial closure. Formal presentation of Expression of Interest was prepared and made to the High Power Committee by respondents 2 and 3.

c) Letter of indent (LOI) was issued to the applicant being the lead member of the consortium based on the presentation of the Expression of Interest. The Detailed Project Report (TPR) was prepared by the first respondent along with M/s. Larson and Toubro Ramboll, Chennai having taken the entire responsibility. The Government of Pudhucherry, upon approving the DPR, entered into the BOT Concession Agreement with the Consortium represented by the first applicant on 25th January 2006. The first respondent had been demanding their right and willingness to participate in the equity of the company upto 26% as Port Expert Associates. It appears that the first applicant and their group companies and its promoters alone held 100 shares of the second applicant. Various major responsibilities were carried out successfully by the first respondent in association with the first applicant. Substantial work was carried out by the first respondent on trust and belief that the first respondent would be allowed to participate with stake upto 26% equity in the said project. Only in order to secure their rights, the first respondent has been corresponding with the Government of Pudhucherry. Statements of facts would not amount to defamation. Only the facts are communicated to the Government and other authorities by the first respondent.

d) The respondents did not participate as employees of MARG Limited but as contributor of technical expertise. The respondents had resigned from the first applicant Company in October 2006 itself. Being a party to the project, the first respondent is entitled to seek for information from the Government of Pudhucherry. Freedom of expression is guaranteed under Article 19 of the Constitution of India. Further, as citizens of the country, they are entitled to know as to how the tax payers' money is spent. The respondents, therefore, pray for dismissal of the applications filed by the applicants.

8. There is no dispute to the fact that the second and third respondents were inducted as Additional Directors on the Board of the first applicant Company on 9th February 2002. The first respondent M/s. Creative Infrastructure was shown as one of the associates in the Expression of Interest projected by the first applicant before the Government of Pudhucherry for the purpose of clinching an award of developing the Greenfield Port at Karaikal. The Government of Pudhucherry having been satisfied with the Detailed Project Report, awarded the first applicant with the concession to construct, develop, own and operate a Greenfield Port at Karaikal. It is found that the concession agreement dated

21.5.2006 was entered into by the Government of Pudhucherry with the first applicant. The associates shown in the Expression of Interest were neither parties nor signatories to the Concession Agreement. There is a clause in the Concession Agreement to incorporate a special purpose company. As per such a clause in the agreement, the first applicant has incorporated the second applicant as a new company for the purpose of performing the project.

9. There is no dispute to the fact that the first applicant participated with the Expression of Interest for clinching the proposed project of building a Port at Machilipatnam at the time when the second and third respondents were Additional Directors of the Board of the first applicant. It is demonstrated that the second and third respondents, clinched the aforesaid deal forming a consortium with other Companies even when they were Additional Directors of the first applicant. It appears that the aforesaid unhappy development has led to the resignation of the second and third respondents from the Board of the first applicant Company. Though the resignation was submitted by the second and third respondents on 23.10.2006, the first applicant had accepted the same on 30.3.2007. The aforesaid facts and circumstances would go to show, prima facie, that the second and third respondents had generated clash of business interest even when they were part of the first applicant Company.

10. It is true that the second and third respondents, through the first respondent, associated with the first applicant for the purpose of clinching the project with the Government of Pudhucherry. It appears that the first applicant had decided to distance itself from the association of the second and third respondents through the first respondent immediately after the clash of business interest surfaced in participating in the bid for the Port Project at Machilipatnam.

11. Learned Senior Counsel appearing for the applicants would submit that if at all the respondents have contributed for the development of the Greenfield Project at Karaikal and are entitled to 26% of the shareholding as per their case, they will have to seek appropriate remedy before the civil forum. It is his submission that the respondents are not supposed to enter into vilification campaign as against the applicant damaging the goodwill and reputation built up for quite a long time by the applicants.

12. Learned Senior Counsel appearing for the respondents would submit that the rightful share of the respondents which was denied by the applicants are vociferously projected by the respondents to various authorities concerned. The true disclosure made by the respondents as against the activities of the applicants will not amount to defamatory statements, it is contended.

13. Let us now refer to the various communications emanated from the respondents touching upon the integrity, reputation and goodwill of the applicants. On 28.7.2007, the first respondent has written a letter to the Secretary (Ports), Government of Pudhucherry informing them that they were no longer associated with the Karaikal Project. This is really a fair information share

by the respondents with the Government of Pudhucherry, who should not be under the impression that the respondents also are associated in execution of the Greenfield Port Project at Karaikal as per the Expression of Interest projected by the first applicant. But, quite surprisingly, it is found that the first respondent, having made serious allegations against the applicants, called upon the Government of Pudhucherry to terminate the concession awarded to the first applicant and to withdraw the project from the second applicant.

14. At this juncture, the learned Senior Counsel appearing for the applicant produced a copy of the counter filed by the Government of Pudhucherry in W.P. No. 6881 of 2009 instituted by M/s.Creative Infrastructure, the first respondent herein, wherein the Government of Pudhucherry dragged its feet from the "purely private dispute" between the applicant and the respondent. In fact, the Government of Pudhucherry has made a comment that the progress registered so far was impressive considering that the schedule and timelines and other parameters for development of the Port. The Government of Pudhucherry has refused to be drawn into the controversies which have arisen between the applicant and the respondents, dubbing various allegations/complaints addressed by the respondents to the Government of Pudhucherry as frivolous and mischievous.

15. Again on 1.12.2008, it appears that the respondents, through one Mr. P.Baskar, sought for vital trade and business information from the Government of Pudhucherry invoking the provision under the Right to Information Act. The integrity and competence of the first applicant was made an issue in the said communication emanated from one Mr. P.Baskar, who had apparently acted on behalf of the respondents in the guise of gathering information under the Right to Information Act.

16. The first respondent had sent a communication dated 16.12.2008 to the first applicant seeking to allot in their favour 26% of the second applicant's shareholding. The said letter is found to be in a threatening posture. The first respondent has cautioned the first applicant to avoid any unpleasant consequence. The copy of the said letter has been sent to the Minister for Ports, Government of Pudhucherry, Chief Secretary, Government of Pudhucherry and Secretary, Department of Ports, Government of Pudhucherry.

17. On 17.2.2009, a scathing attack has been made by the first respondent as against the manner of functioning of the first applicant. The said letter was communicated to the Minister of Ports, Chief Secretary and the Secretary, Department of Ports, Government of Pudhucherry. With ulterior motive, the said letter was marked to the lead banker of the applicant and the Home Minister of Government of Tamil Nadu and the Commissioner of Police, Chennai. It has been alleged therein that false statements/warranties in the concession agreement had been offered by the first applicant. In the counter filed by the Government of Pudhucherry in the writ petition filed by the first respondent, the Government of Pudhucherry has not come out with such a stand. If at all any false submissions/

warranties had been made by the first applicant to the Government of Pudhucherry, it is for the Government of Pudhucherry to initiate action as against the first applicant, but, here in this case, the Government of Pudhucherry has, in fact, paid encomium for the efforts taken to complete the project in time by the first applicant, in the counter they have filed in the writ petition.

18. An irresponsible allegation also has been made as though the applicants have violated the trust reposed by the Government of Pudhucherry. Again, the competency in completing the project of MARG was questioned by alleging that incomplete Port may be thrown upon by MARG. The first respondent has also stated that the first applicant may have got the Government verifications avoided through their misrepresentations and suppression of facts. The first applicant was charged with fraud and breach of trust against the trust reposed on it by the Government of Pudhucherry. It has been hypothetically alleged that phase I of the project will not be completed in all respects within the scheduled time as stipulated in the concession agreement. Again, the quality of work of the first applicant was challenged by saying that dredging would not have been achieved as per the approved DPR. The capacity of the applicants to procure equipments was questioned by the first respondent in the said communication. It is alleged that various guarantees given during the environment meetings have not been adhered to by the first applicant. A serious allegation has been made that some compromises have been made in about 50% of the investments promised in the approved DPR. There is a warning that incalculable damages may also result from the shortcomings at the environmental front. There is an allegation of incompetency and inefficiency on the part of the first applicant in completing the project by the first applicant. Misuse of public money by MARG has been further alleged. The first respondent has also come out with a statement that false warranties were also given by MARG, the first applicant. The financial propriety also was challenged in the said communication. In desperation, the first respondent has alleged that there is "potential life threatening illegal acts" committed by MARG Limited and its owners. The first applicant was classified as a "wrong doer" committing "illegal act" against the interest of the Government of Pudhucherry.

19. Without an iota of material to substantiate the aforesaid allegations, the first respondent has come out with such a wild allegation bringing disrepute to the business venture of the first applicant. The said communication has been mischievously despatched to various authorities as referred to above. There is a mala fide intention on the side of the respondents to malign the image of the first applicant in the minds of the authorities concerned. The Government of Pudhucherry has certified the progress made by the first applicant in executing the project awarded. Therefore, all the aforesaid allegations are found to be malicious and defamatory, circulated by the respondents only with a view to damage the business reputation of the first applicant. If such allegations are freely made by the first respondent, the business venture of the first applicant will be completely ruined.

20. To top it all, the respondents have again addressed a letter dated 9.4.2009 to the Government of Pudhucherry and its functionaries and SEBI. The allegations in the aforesaid nature have been reiterated in the said communication also. Of course, Article 19 of the Constitution of India guarantees freedom of expression of every citizen. But, such defamatory allegations, which would result in ruining the business venture, cannot be permitted by the court of law.

21. Documents were produced to establish that in a similar case relating to the very same respondents, the Company Law Board has restrained them from making any correspondence to various Government Agencies in respect of Machilipatnam Project pending disposal of the case.

22. Having been frustrated over the non-association of the first respondent in the project work taken by the first applicant, it appears that the first respondent, who had not entered into any profit sharing agreement with the applicants, has indulged in vilification campaign to bring a disrepute to the reputation and goodwill of the first applicant. The malicious intent is reflected in the communication to various authorities referred to above. No material has been produced to substantiate the aforesaid wild allegations made as against the first applicant. The first applicant has to be permitted to complete the Karaikal Port Project in a peaceful manner without any obstructions from any quarters.

23. The court finds that the applicant has made out a prima facie case. If the respondents are not restrained by an order of injunction, the reputation and goodwill of the respondents would be completely damaged and the applicants may not be in a position to complete the project peacefully. The balance of convenience is also found in favour of the applicant. Therefore, the orders of injunction granted in Original Application Nos. 319 and 320 of 2009 are made absolute and those applications are allowed. Consequently, Application Nos. 1693 and 1694 of 2009 stand dismissed. There is no order as to costs.