

(2010) 10 MAD CK 0104
In the Madras High Court
Case No : O.S.A. No. 232 of 2010

Robust Hotels [P] Ltd., Avali Srinivasan, Arun Kumar Saraf
and Amit Saraf

APPELLANT

Vs

E.I.H. Limited, an existing Company, incorporates within the
meaning of the Companies Act, 1956 and Others

RESPONDENT

Date of Decision : 22-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2010) 5 LW 544

Hon'ble Judges : K.K. Sasidharan, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : A.L. Somayaji, for K. Manishankar, for the Appellant; Siddhartha Mitra for Karthick Seshadri, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This Letters Patent appeal is directed against the fair and decretal order dated 23 March 2010 in A. No. 6722/2009

in C.S. No. 257/2005 whereby and whereunder, the appellants were impleaded as parties to the civil suit at the instance of respondents 1 and 2.

2. The suit in C.S. No. 257/2005 was instituted by respondents 1 and 2 against respondents 3 to 9 praying for a decree of declaration and

injunction with respect to Technical Services and Project Consultancy and Royalty Agreements executed between respondents 1 and 2 on the one

hand and the third respondent on the other.

Plaint Averments:-

3. Respondents 1 and 2, as plaintiffs, in their plaint, contended that they have entered into an agreement with the third respondent which was in the

nature of a Project Consultancy Agreement and another agreement known as "Royalty agreement". Those agreements were executed on 26

October 1988. As per the said agreement, the first respondent agreed to provide its technical knowledge, skill and professional services required

for operating a Hotel at Mount Road, Madras, to be constructed by the third respondent. There was a provision in the said agreement whereby

and whereunder, the third respondent agreed that they would maintain full ownership of the Hotel throughout the period of agreement and they

would disclose the existence of the agreement and operator's vested interest in the hotel to any lender/s, leasing Company/ies, financial institution/s

and or Bank/s having or proposing to take any lease, mortgage, charge or other security over the Hotel or any part thereof and shall obtain from

such institution/s in writing a confirmation of existence of the agreement and that the agreement would be binding upon the institutions. The project

undertaken by the third respondent for construction of the hotel underwent several times extensions and cost overruns, including change in the

scope of the project by way of inclusion of a commercial complex and increase in the number of rooms. The project was re-appraised by the

Tourism Finance Corporation of India during September, 1996 and the total hotel project cost was increased to Rs. 192 crores. The third

respondent obtained loans from Tourism Finance Corporation of India and ICICI Bank for the construction of the hotel complex.

4. The agreement executed between respondents 1 and 3 were subsequently amended by way of supplementary agreements. The first respondent

also advanced a total sum of Rs. 15.12 crores on various dates and an agreement was executed evidencing such payment. The fourth respondent

on 4 February, 2002, executed an irrevocable and continuing guarantee in favour of the first respondent.

5. In the meantime, the first respondent came across an advertisement issued in the Economic Times, dated 24 July 2002, by the Tourism Finance

Corporation of India Ltd., inviting offers for takeover/joint ventures and/or sale of a five star deluxe category hotel project having 405 rooms along

with food and beverage outlets and other facilities under construction on a plot of land admeasuring 16680.70 sq. meters with built up area of

55058 sq. mtrs at Mount Raod, Chennai, on "as is where is" basis by way of transfer of controlling interest in the Company owning the project.

Immediately, the first respondent wrote a letter dated 18 September 2002 to the Tourism Finance Corporation of India informing them that they have entered into a Technical Services Agreement with the third respondent for operation of the hotel and advanced a sum of Rs. 15.12 crores for completion of the project. In the said letter, it was also indicated that till the repayment of the amount, the first respondent would have the exclusive right to operate the hotel in view of the technical services agreement. The first respondent further informed that all intending bidders should be informed about the said agreement and especially the fact that the Technical Services Agreement would remain subsisting and operative, till such time the sum of Rs. 15.12 crores together with interest was refunded by the third respondent to the first respondent. Subsequently, the first respondent informed the fifth respondent also about the execution of the said agreement.

6. The fifth respondent as per their communication dated 28 December 2004, informed the first respondent that it had acquired the financial assets of the third respondent together with the underlying security interest from the sixth respondent in terms of the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The first respondent through their Solicitors informed the other respondents 5 and 9 about the subsisting agreement. When the first respondent found that respondents 5 and 7 wrongfully intending to proceed to act in breach of obligation, they filed the suit.

7. Respondents 1 and 2 in their suit in C.S. No. 257/2005 prayed for a judgment and decree:

(a) Declaration that the Technical Services agreement dated 26 October, 1988 and the Project Consultancy agreement and Royalty agreement both dated 26 October, 1988 and the agreements dated 12 January, 2000, 10 June 2000 and 4 February 2002 are valid, legal and subsisting and are binding and enforceable on the defendants 3 to 7 and / or its assigns.

(b) Permanent injunction restraining the defendants 3 to 7 whether by itself its servants, agents and or/assigns or otherwise howsoever from selling, encumbering, and/or disposing of in any manner howsoever, the Schedule property of the defendant No. 1 situated at Mount Road, Chennai, in favour of any persons without disclosing and/or recognizing the rights of the

plaintiff to operate and manage the hotel as provided for under the Technical Services agreement dated 26 October, 1988 and the Project Consultancy agreement and Royalty agreement both dated 26 October 1988 and the agreements dated 12 January 2000, 10 June 2000 and 4 February 2002.

8. Respondents 1 and 2 filed an interlocutory application for injunction in O.A. No. 300/2009 to restrain the respondents 5 to 9 or their agents and

servants from dealing with, disposing of, selling and/or encumbering in any manner howsoever the hotel unit of the third respondent in favour of any

person without disclosing the right of respondents 1 and 2 and for an interim mandatory injunction directing respondents 5 to 9 whether by itself, its

servants, agents and/or assigns to disclose the existence of the Technical Services Agreement dated 26 October 1988 and the agreements dated

12 January 2000, 10 June 2000 and 4 February 2002 entered between respondents 1 and 2 and respondents 3 and 4. The said application was

allowed and the learned Judge issued an order of interlocutory injunction.

9. While the matters stood thus, respondents 1 and 2 filed two applications. Application in A. No. 6722/2009 was filed to implead the appellants

as defendants 8 to 12 in the suit and to permit the consequential amendment to the plaint.

Interlocutory Application:

10. In the affidavit filed in support of the application in A. No. 6722/2009, it was the contention of respondents 1 and 2 that the appellants by

carrying on the development of the property at Mount Road, Chennai, which was originally constructed by the third respondent with whom they

have entered into a technical agreement has acted in a manner contrary to the vested rights as agreed to in the Technical Services Agreement dated

26 October 1998 and the subsequent agreements dated 12 January 2000 and 4 February 2002. The reliefs claimed against the respondents 3 to 7

would bind the appellants who have purchased the property from the respondents 5 and 6 under the SARFAESI Act, 2002 and neither can the

appellants and 10th respondent operate the hotel property previously belonging to the third respondent in a manner that is contrary to their legal

rights under the agreement. Respondents 1 and 2 further contended that the appellants are necessary parties to the proceedings in view of the relief

claimed by them in the suit.

11. The appellants on receipt of notice entered appearance and filed their counter in A. No. 6722/2009. According to the appellants, they were

not bound by the agreement executed between respondents 1 and 2 with respondents 3 and 4 and as such, no relief could be claimed against

them. It was their further contention that the agreement dated 4 February 2002 executed by respondents 3 and 4 clearly established that the right

of the first respondent was only to seek refund of the sum of Rs. 15.12 crores together with interest, failing which, to invoke the irrevocable

guarantee given by the fourth respondent. According to the appellants, the agreement does not contain a provision that the Technical Services

Agreement, Project Consultancy Agreement and Royalty Agreement would continue to bind the subsequent purchasers of the hotel unit. The

appellants maintained that they have purchased the property from a secured creditor and as such, the very property was given to them free of all

encumbrances and therefore, they are neither necessary nor proper parties to the suit.

12. The learned single Judge found that as per order dated 18.03.2005 in O.A. No. 300/2009, this Court granted an interim injunction restraining

the secured creditors from assigning the hotel unit in favour of any person without disclosing the rights of respondents 1 and 2 to operate and

manage the hotel in terms of Technical Services/Project Consultancy and Royalty Agreement and therefore, the appellants are necessary parties.

The learned single Judge opined that impleading of the parties would enable the Court to decide the matter effectively. Accordingly, the application

was allowed. Feeling aggrieved, the appellants have filed this appeal invoking Clause 15 of the Letters Patent.

Submissions:-

13. The learned senior Counsel for the appellants would contend thus:

(a) There is absolutely no privity of contract between the appellants and respondents 1 and 2 and as such, the appellants are neither proper nor

necessary parties to the suit;

(b) The transaction in question is purely a contractual matter between respondents 1 and 2 on the one hand and respondents 3 and 4 on the other

side. The appellants have not played any role in the suit transaction and as such,

no liability could be fastened on them.

(c) Even if the suit is decreed, respondents 1 and 2 would only be entitled to recover a sum of Rs. 15.12 crores from respondents 3 and 4.

Therefore, there was no necessity for impleading the appellants as parties to the suit.

(d) The Hotel property was purchased by the appellants pursuant to a proceeding initiated against respondents 3 and 4. Appellants were given

sales certificate which would prima facie show that the sale was free from encumbrances. Therefore, no liability could be fastened on the appellants

at the instance of third parties like respondents 1 and 2.

(e) The order in O.A. No. 300/2009 does not prohibit sale of the property by financial institutions. The said order only directs the secured

creditors to disclose the existence of the agreement between the parties. Therefore, no vested right was created on account of the order in O.A.

No. 300/2005.

14. The learned senior counsel for respondents 1 and 2 would contend thus:-

(1) The very appeal preferred against the order in O.A. No. 6722/2009 is not maintainable as the order was not a judgment within the meaning of

Clause 15 of the Letters Patent.

(2) The appellants were well aware of the existence of agreement between respondents 1 and 2 and respondents 3 and 4. They have purchased

the property with full knowledge of the agreement. Therefore, they are necessary parties to the suit.

(3) Respondents 1 and 2 prayed for a Judgment and Decree of declaration against respondents 5 to 9 including their assignees. The appellants

have purchased the property pending suit and as such, they are necessary parties to the suit.

(4) The appellants were not prejudiced on account of their impeading. On the other hand, the Trial Court would be in a position to pass a

comprehensive decree in the presence of the appellants as they have stepped into the shoes of the secured creditors.

Analysis:-

15. The prayer in the suit originally was against respondents 5 to 9 including their assignees. Respondents 1 and 2 specifically sought a declaration

that the Technical Services Agreement dated 26 October 1988 and the Project Consultancy Agreement and Royalty agreement dated 26 October

1988 and the subsequent agreements dated 12 January 2010, 10 June 2000 are valid, legal and subsisting and are binding and enforceable on

respondents 5 to 9 or its assignees. They have also prayed for a decree of injunction restraining respondents 5 to 9 from disposing or assigning the

property in favour of any persons without disclosing or recognizing their right to operate and maintain the hotel as provided under the agreement.

16. Respondents 5 to 9 were parties to the suit. The relief was against them. The learned single Judge as per order dated 18 March 2005 in O.A.

No. 300/2009 granted interim injunction restraining respondents 3 to 9 or their agents and servants from assigning or disposing the property in

favour of any person without disclosing the rights of respondents 1 and 2 to operate and manage the hotel in terms of the agreements. Respondents

3 to 9 were fully aware of the said order. Respondents 1 and 2 on their part, approached the Tourism Finance Corporation of India and informed

them about the pendency of the agreement. There were series of correspondence to that effect and those correspondence were referred to in the plaint.

17. Respondents 3 to 9 were bound to inform the prospective purchasers about the agreement executed between the respondents 1 and 2 on the

one hand and respondents 3 and 4 on the other. The appellants have not purchased the property by way of a public auction. They have

approached the secured creditor directly and by way of private negotiation, the property was purchased. Now the appellants are pleading as if

they were ignorant of the encumbrance. The contention is too strange to believe. No prudent purchaser would buy the property for such a huge

amount without getting full particulars and that too when the sale consideration was several crores of rupees. The Finance Corporation was bound

to disclose the encumbrance as per the order passed by this Court. The injunction granted by this Court cannot be defeated by not giving public

sale notice and coming up with a contention that there was no occasion to disclose the agreement as there was no public auction. Since it was a

private sale, the appellants should be deemed to have had the knowledge about the details of the property and the subsisting agreement, besides

encumbrance on the property.

18. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 contains provision indicating the

manner in which the property has to be sold. Rule 8 (6)(a) provides that the description of the immovable property to be sold, including the details

of the encumbrance known to the secured creditor shall be put on public notice in two leading newspapers, one in vernacular language, having

sufficient circulation in the locality. Therefore, even as per the statute, the secured creditor was bound to disclose the details of the encumbrance. In

case the property was sold with encumbrance, the purchaser has to clear the encumbrance and only on such clearance, the property would be

delivered to them by the secured creditor. The appellants having purchased the property by way of public sale without any attempt to ascertain the

encumbrance, cannot be heard to say that they were not aware of the encumbrance or that they are not necessary parties to the suit, even though

their principals were already parties to the suit. In case the secured creditor has issued a public notice containing information about the

encumbrance, the purchasers would be bound by it. The same yardstick has to be issued in the case of the appellants also as they have taken a

risk by purchasing the property by way of private sale.

19. Respondents 5 to 9 were parties to the suit. The prayer was for a declaration that the agreement would be binding on them also. By selling the

property to the appellants, they cannot be heard to say that the very suit has become infructuous and that they are unnecessary parties to the suit.

Respondents 3 to 9 would not be interested hereafter to contest the matter. The appellants, in effect, stepped into the shoes of respondents 3 to 9.

In order to consider the question as to whether a decree of declaration could be granted and thereafter the agreements are legal and subsisting,

appellants are also necessary parties. In fact, the plaint was amended and a new prayer to declare that the agreements are valid, legal and

subsisting and are binding and enforceable on respondents 5 to 9 and the appellants was incorporated. Declaration granted in the case would

ultimately affect the appellants also. Therefore, they are necessary parties to the suit.

20. A proper and necessary party to a suit is a party whose presence and

participation is absolutely necessary for a final adjudication of the lis. It is immaterial as to the extent of relief sought for against it or the subject of controversy involved in the suit. In case it is demonstrated that any decision made in the suit would prejudicially affect the interest of a particular person, he should be treated as a necessary party.

21. Rule 10(2) of the CPC is nothing but incorporation of the principles of natural justice. In case the Court is satisfied that a person is a necessary party to enable it to adjudicate upon and settle all the questions involved in the suit, Court has no other alternative than to order impleading of such party. The Court has to take overall view of the matter for the purpose of arriving at a definite conclusion one way or the other. Court exercises wide discretion in such matters. It is true that such discretion should be exercised in a reasonable manner. The discretion should be exercised in accordance with the settled legal principles. The Court should arrive at a decision at the initial stage itself as to whether the proposed party is a necessary party in whose absence, no effective decree could be passed. While considering the issue regarding impleadment, the bona fides of the party filing such application to implead and the stage of the suit are also relevant factors. But delay cannot be the sole determining factor to decide such application, in view of the express provision, which says that the party could take steps for impleading at any stage of the suit.

22. Impleading of a new party is not automatic. In case the plaintiff files an application to add defendant, notice should be issued to the proposed defendant and he should be heard before impleadment. It is not sufficient to hear him after impleading. The proposed party should be heard in opposition to the application for impleadment.

The Authorities:-

23. In Razia Begum Vs. Sahebzadi Anwar Begum and Others, , the Supreme Court observed that where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy. The Supreme Court said:

14. As a result of these considerations, we have arrived at the following

conclusions:

(1) That the question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of

the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it

may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited

sense in which it is used in Section 115 of the Code;

(2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a

commercial interest, in the subject-matter of the litigation;

(3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be

relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to

adjudicate upon the controversy.

24. In *Amit Kumar Shaw and Another Vs. Farida Khatoon and Another*, , Supreme Court indicated that Order 1 Rule 10 CPC is to discourage

contests on technical pleas. The observation reads thus:

9. The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited.

The power to strike out or add parties can be exercised by the court at any stage of the proceedings. Under this rule, a person may be added as a

party to a suit in the following two cases:

(1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or

(2) when, without his presence, the questions in the suit cannot be completely decided.

10. The power of a court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The

question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable

legal right.

25. In *Bhogadi Kannababu and Others Vs. Vuggina Pydamma and Others*, ,

Supreme Court held that the order allowing impleadment does not affect the merits of the claim of the parties. The relevant paragraph reads thus:

11. It is true, as noted hereinabove, that in an application for impleadment under Order 1 Rule 10 CPC, the court would only decide whether the presence of the applicant before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the proceedings.

26. The learned senior counsel for respondents 1 and 2 raised the question of maintainability of the appeal. Since the appeal was admitted earlier and the matter has come up for final hearing, we are not considering the said issue and the question of law is left open to be decided in an appropriate proceeding.

27. In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, the Supreme Court considered the circumstances wherein an appeal under

Clause 15 of the Letters Patent could be filed. The observation reads thus:

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. Similarly, orders

passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance

on this score can be corrected by the appellate court in appeal against the final judgment.

(emphasis supplied).

28. Respondents 5 to 9 are no longer interested in the said proceedings on account of the assignment of the property in favour of the appellants. In

fact, respondents 5 to 9 remained ex-parte. The appellants alone contested the proceedings. Since the suit is for a comprehensive relief of

declaration that the agreements relating to Technical Services, Project Consultancy and Royalty are valid, legal and subsisting and are binding and

enforceable on respondents 5 to 9 or its assignees, and in view of the subsequent purchase of the property by the appellants, they are necessary

parties to the suit and their participation in the suit would enable the Court to adjudicate the issue in a better manner. The interlocutory injunction

granted by this Court as per order dated 18 March 2005 in O.A. No. 300/2009 was to keep the purchaser informed of the pendency of the

agreement. The said order was given a go-bye by respondents 5 to 9. The appellants also pleaded ignorance of the order passed by this Court as

well as the subsisting agreement between the parties. The property was assigned in favour of the appellants during the pendency of the suit and as

such, they are necessary parties to the suit. These aspects were considered by the learned single Judge and notwithstanding the objection raised by

the appellants, they were impleaded. The said order was clearly a discretionary order and it was in accordance with the settled judicial principles.

We do not find any error or illegality in the said order warranting our interference in an appeal under Clause 15 of the Letters Patent.

29. In the result, the Letters Patent Appeal is dismissed. No costs. Consequently, M.P. No. 1/2010 is also dismissed.