(2011) 04 BOM CK 0104

In the Bombay High Court

Case No : Application No. 538 of 2010 in Company Petition No. 369 of 2010

Willis Europe B.V. APPELLANT

Vs

Willis India Insurance Brokers (P) Ltd. RESPONDENT

Date of Decision : 11-04-2011

Acts Referred:
Companies Act, 1956 — Section 433, 591, 591(1), 592, 599

Citation : (2011) 3 BomCR 574 : (2011) 113 BOMLR 1842 : (2011) 107 SCL 232

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

Bench : Single Bench

Advocate : I.M. Chagla, Virag Tulzapurkar, s, Nikhil Sakhardande, Tejas Karia, Tapan Deshpande and Nitesh Jain, instructed by Amarchand and Mangaldas, for the Appellant; F. Dvitre, N.H. Seervai, M.S. Doctor and Ranbir Singh, instructed by Bachubhai Munim and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.J. Vazifdar, J.—This is the first Respondent''s application for having the petition rejected as being barred by law. The other prayers were not pressed.

2. The applicant is Respondent No. 1 to the petition and the Respondent is the Petitioner. After the application was filed, pursuant to an order dated 7th October, 2010, Bhaichand Amoluk Consultancy Private Limited (BACPL) was impleaded as Respondent No. 2 to the petition. Respondent No. 2 has supported this application. I will, for convenience, refer to the parties as they are arrayed in the petition.

3. The Petitioner is a company, incorporated under the laws of Netherlands and has its registered office at Amsterdam, Netherlands, and it''s principal place of business in the United Kingdom. Respondent Nos. 1 and 2 are companies incorporated under the Companies Act, 1956. The Petitioner and Respondent No. 2 hold 24 per cent and 76 per cent respectively of the issued subscribed and paid up equity capital of Respondent No. 1.

4. The Respondent''s contention is that the Petitioner, a foreign company, within the meaning of Section 591(1)(a) of the Companies Act, 1956, has established a place of business in India, but has failed to comply with the provisions of Section 592 and is, therefore, not entitled to institute the above petition in view of Section 599 thereof.

Sections 591 and 599 read as under:

591. Application of Sections 592 to 602 to foreign companies.-(1) Sections 592 to 602, both inclusive, shall apply to all foreign companies, that is to say, companies falling under the following two clauses, namely:

(a) companies incorporated outside India which, after the commencement of this Act, establish a place of business within India; and

(b) companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of this Act.

(2) Notwithstanding anything contained in Sub-section (1), where not less than fifty per cent of the paid up share capital (whether equity or preference or partly equity and partly preference) of a company incorporated outside India and having an established place of business in India, is held by one or more citizens of India or by one or more bodies corporate incorporated in India, or by one or more citizens of India and one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall with such of the provisions of this Act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India.

599. Company''s failure to comply with Part not to affect its liability under contracts, etc.-Any failure by a foreign company to comply with any of the foregoing provisions of this Part shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until it has complied with the provisions of this Part.

I have come to the conclusion that the Petitioner has not established a place of business in India. In view thereof, I have not dealt with the Petitioner''s further submission that the provisions of Section 599 are not attracted in the present case, which is a petition for winding up Respondent No. 1 u/s 433(f).

5(A) Respondent No. 1 was incorporated under the provisions of the Companies Act, 1956 on 31st October, 2000, as a joint venture company between Willis Asia-Pacific Ltd. and Respondent No. 2 for the purpose of carrying on business as a composite broker as defined under the Insurance Regulatory & Development Authority (Insurance Brokers) Regulations, 2002, and for providing general risk management consultancy to clients resident in India. One Mohamed Rayees and one K.B. Suresh were the only share holders of the company. Mr. DeVitre placed strong reliance on the averment in paragraph 3 of the petition to the effect that the company was incorporated on 31st October, 2000, as a joint-venture between the Petitioner and Respondent No. 2 for the purpose of carrying out the said business. The reference to the Petitioner is an obvious error for Willis Asia-Pacific Ltd. as I will indicate later. The Petitioner and Willis Asia-Pacific Ltd. are part of the Willis Group.

(B) The Petitioner and Respondent No. 2 entered into a Joint Venture Agreement (JVA) dated 20th March, 2003. In view of the then prevailing cap of foreign direct investment in the insurance sector, the Petitioner subscribed to only 26 per cent of the equity shares in the company and Respondent No. 2 subscribed to the remaining 74 per cent equity shares of the company. I will refer to the relevant clauses of the JVA, while dealing with the submissions.

6. Mr. DeVitre''s case is this. The Petitioner is a foreign company incorporated outside India. It has established a place of business in India by incorporating Respondent No. 1 on 31.10.2000; by in any case being part of the Willis Group which incorporated Respondent No. 1 in India through Willis Asia-Pacific Limited; by, in any case, acquiring 26% of the equity shares of Respondent No. 1 in March 2003 and under the joint venture relied upon by the Petitioner, having management rights viz. of appointment/removal of the MD/Chairman/CFO and ensuring adherence to its policies in matter of accounts and business management. The Petitioner carried on its own business in India prior to establishing Respondent No. 1 and by using Respondent No. 1 as a vehicle for the same after its incorporation. In doing so, the Petitioner established a place of business in India being Respondent No. 1.

7. Mr. DeVitre clarified that it was not his case that every shareholder is deemed to establish a place of business where the company in which he holds the shares has established its place of business.

Indeed, a company''s place of business is not necessarily deemed to be the place of business of its shareholders. The question is whether in the facts of this case, the Petitioner ought to be held to have established its place of business at the first Respondent''s place of business.

8. The Petitioner and Respondent No. 2 hold 26% and 74% of the equity shares of Respondent No. 1. It is nobody''s case that the Petitioner controls, in any manner, the shares held by Respondent No. 2 in Respondent No. 1. Respondent No. 1 is not the Petitioner''s alter ego. I went through the formality of asking Mr. DeVitre if he contended otherwise. As would be expected, his answer was in the negative. It cannot possibly be contended otherwise by Respondent No. 2 for if it did, it must permit the Petitioner to be in management and control of Respondent No. 1. This, Respondent No. 2, admittedly, does not agree to. The fact that the Petitioner is required to file this petition establishes the same. If it was otherwise, it would not have been necessary for the Petitioner to file this

petition. Even in that case, if the Petitioner wanted to wind up the company, all it had to do was to adopt the procedure for voluntary winding up.

9. It must follow then that the Petitioner subscribed to the shares of Respondent No. 1 only as an investor in the business of Respondent No. 1. That it carries on the same type of business abroad makes no difference. It may well introduce clients to Respondent No. 1. This, Respondent No. 2 may also do. Indeed, Respondent No. 2 contends that in order to identify its participation and to take advantage of its good will, the name of the company was changed to Willis B.A. India Private Limited with effect from 31st March, 2003; that since the commencement of the joint venture business and to date, on account of its goodwill and business connections it introduced, brought into the joint venture, business constituting almost 80 per cent of the turnover of the company as against the Petitioner contributing only about 20 per cent of the turnover and that once the business of Respondent No. 1 was established substantially on account of its goodwill and business connections, the name of the first Respondent was changed to its present name, Willis India Insurance Brokers Private Limited, in the year 2006.

Respondent No. 1 may well benefit by the use of the Petitioner''s group name "Willis" as a part of its corporate name.

Under the provisions of the JVA, the Petitioner and Respondent No. 2 may bring to bear their experience, expertise and connections in the field to ensure the efficient running/management and growth of Respondent No. 1.

10. The valuable inputs of the Petitioner and Respondent No. 2 are, however, only to enhance the first Respondent''s business. It is, nevertheless, the business of Respondent No. 1 and not of the Petitioner and Respondent No. 2 who are but investors therein by having subscribed to its shares. Much more is required to go the step further to hold that the business of Respondent No. 1 is the business of the Petitioner and that the place of the first Respondents business is accordingly the place where the Petitioner has established its business. Each of the parties to this petition is a separate legal entity. Respondent No. 1, not being the alter ego of either the Petitioner or Respondent No. 2, Mr. DeVitre''s submission is unfounded.

11. Faced with this, Mr. DeVitre relied upon the provisions of the JVA to indicate that the Petitioner''s rights, by virtue thereof went beyond the ordinary rights of a share holder and that it follows, therefore, that the Petitioner, in fact, carries on business through Respondent No. 1.

12. I am not concerned here with a foreign company that holds 75 per cent or more of the equity shares of an Indian company. I refrain, therefore, from expressing any opinion about such a foreign company. In the present case, the Petitioner does not have control, much less absolute control over Respondent No. 1. Under the JVA, the Petitioner only has certain rights in addition to the rights it would normally have, proportionate to the shares held by it in Respondent No. 1.

13. Mr. DeVitre, in this regard firstly relied upon clauses 6.3, 6.13, 6.16 and 11 of the JVA, which read as under:

6.3 Subject to Clause 6.4, the parties shall procure that from the Effective Date, the number of Directors, excluding any alternate Director appointed in accordance with Clause 6.9 shall be five of whom two shall be Willis Directors and three shall be BA Directors.

....

6.13 No resolution may be passed at a Board meeting unless at least one Director appointed by each of Willis and BA is present and a majority of Directors vote in favour including at least one Willis Director.

....

6.16 The Willis Directors may appoint and remove persons to the offices of CEO/ Managing Director, CFO, Chairman and Chairman of the Executive Committee, and the BA Directors may appoint and remove a person to the office of Vice-Chairman, and the Board may appoint one or more of their number to any other executive office, and may enter into an agreement with any Director for his employment by the Company on terms approved by the Shareholders. The parties hereby agree that J. Vora shall be the initial Vice-Chairman of the Company and the initial Chairman of the Executive Committee

....

11. RESERVED MATTERS

Any decision relating to any of the following matters shall require the vote in favour of Shareholders representing seventy five percent (75%) of the total issued equity share capital of the Company at a general meeting of the Company properly convened and held:

11.1.1 any change in the memorandum and articles of association or in the capital structure of the Company or the issue of further Shares or the creation of any options to subscribe for or acquire Shares;

11.1.2 the issue by the Company of any debenture or loan stock (whether secured or unsecured) or the creation of any mortgage, charge, lien, encumbrance or other third party right over any of the Company''s material assets or the giving by the Company of any guarantee or indemnity to or becoming surety for any third party;

11.1.3 any arrangement for any joint venture or partnership or for the acquisition of the whole or substantially the whole of the assets and undertaking of the Company or an acquisition by the Company of any part of the issued share capital or of the assets and undertaking of another company;

11.1.4 any change in the nature of the Business;

11.1.5 the merger, acquisition or winding up, other than in accordance with Clause 16.4, of the Company;

11.2 Any decision in relation to any of the following matters shall require the vote in favour of a majority of the Directors at a Board meeting properly convened and held including the affirmative vote of at least one Willis Director and at least one BA Director, provided that the affirmative vote or at least one BA Director shall not be required in the event that BA Shares comprise less than fifty percent (50%) of the total issued equity share capital of the Company:

11.2.1 approval or amendment of annual operating plans or budgets or any activity outside the scope of the annual budget of the Company;

11.2.2 the making of any loan by the Company or the creation, renewal or extension of any borrowings by the Company in excess of USD 100,000 (or equivalent) in the aggregate in any 12 month period, other than from its bankers in the ordinary and usual course of business;

11.2.3 the appointment, remuneration, compensation, transfer and discharge of any employee earning in excess of USD 50,000 (or equivalent) per annum;

11.2.4 the acquisition or construction or lease of items of tangible or intangible property involving an estimated expenditure of USD 50,000 (or equivalent) or more in each individual case;

11.2.5 any transaction by the Company with any Shareholder or any associated company of the Shareholder other than in the ordinary course of business;

11.2.6 any obligation of the Company which could involve the payment by it, in cash or otherwise, of amounts in excess of USD 50,000 (or equivalent) in the aggregate in any 12 month period;

11.2.7 the assignment, sale or other disposal in any 12 month period of any asset or related group of assets of the Company having a net book value in aggregate of USD 50,000 (or equivalent) or more;

11.2.8 the granting or entering into any licence, agreement or arrangement concerning any part of the name of the Company or any of its intellectual property rights;

11.2.9 entering into the occupation, purchase, sale, transfer, lease or licence of any freehold or leasehold property;

11.2.10 appointing any committee of the Board of delegating any of the powers of the Board to any committee.

11.2.11 any change in the Company''s auditors, bankers, accounting reference date or bank mandates;

11.2.12 the establishment of any retirement benefit scheme in relation to the Company''s employees, or the making of any contribution to any third party scheme for the provision of retirement benefits;

11.2.13 the making, granting or allowing of any claim, disclaimer, surrender, election or consent for taxation purposes;

11.2.14 establishing any bonus, profit sharing share option or other incentive scheme for director or employee of the Company.

14. Under Clause 6.3 of the JVA, the Petitioner is entitled to appoint two Directors and Respondent No. 2 is entitled to appoint three Directors, despite the fact that the Petitioner holds only 26% of the equity shares. Further, under Clause 6.13 of the JVA, no resolution may be passed at a Board meeting unless at least one Director appointed by each, the Petitioner and Respondent No. 2 is present and the majority of Directors vote in favour of the resolution, including at least one of the Petitioner''s Directors. Clause 6.16 authorizes the Petitioner to appoint and remove certain directors and officers, a right which otherwise vests in the majority of the Board of Directors or the shareholders. Clause 11.1 ensures that decisions relating to the matters specified therein are not taken even in the absence of the Petitioner at a general meeting of the company as it requires a positive vote of shareholders representing 75 per cent of the equity shares and not merely a positive vote of 75 per cent of the equity shares of members present and voting at the general meeting. As the Petitioner holds 26 per cent of the shares, a decision on these subjects cannot be taken without its agreeing to it.

15. These rights, however, do not confer upon the Petitioner even the right of a share holder with a simple majority. Much less, do they confer upon the Petitioner, an absolute right of management of Respondent No. 1. They, in fact, indicate the contrary. They recognize the Petitioners status as a minority shareholder necessitating safeguards against Respondent No. 2, the majority shareholder acting contrary to the wishes of the minority on certain aspects considered fundamental, crucial and of vital importance by the parties.

There is no merger of identities of either the Petitioner or Respondent No. 2 on the one hand and Respondent No. 1 on the other as a consequence of these provisions. The Petitioner is, despite these provisions in the JVA, but an investor in Respondent No. 1. The Petitioner cannot, therefore, be said to have established its place of business where the Respondent No. 1 has established its place of business.

16. Nor do I find Mr. DeVitre''s reliance upon Clause 10 of the JVA to be of any assistance to him. Clause 10 reads as under:

10. RISK MANAGEMENT, BUDGETS AND FINANCIAL INFORMATION.

10.1 The Shareholders shall procure that the Company will establish, maintain and duly administer an internal control system, in accordance with Willis Group rules in operation from time to time, comprising policies, processes and such other features as are necessary or advisable to help ensure:

10.1.1 the Company''s effective and efficient operation by enabling it to manage significant business, operational, financial, compliance and other risks to achieving the Company''s objectives;

10.1.2 the quality and timeliness of the Company''s internal and external reporting; and

10.1.3 compliance by the Company with the Willis Operating Procedures, the Willis Exposure Model, and the rules of the Willis Retail Network, in each case in operation from time to time, together with any applicable laws and regulations binding on it and compliance by the Shareholders with any applicable laws and regulations binding on any of them.

10.2 Subject to any applicable local laws and regulations, the parties intend that the Company will be covered under the Willis Group Limited professional indemnity insurance policy and it shall comply with Willis Group policies and procedures in respect of errors and omissions and shall pay a reasonable share of premium on the basis of an equitable allocation across all companies covered by the policy and taking account of the total premium income of the Company, retained brokerage and the number of employees. The Company will procure a local professional indemnity insurance policy where necessary to ensure compliance with local legal requirements.

10.3 The Shareholders shall procure that the Company will provide such information and such access at all reasonable time to persons or premises as any of the Shareholders shall reasonably require in order to:

10.3.1 satisfy itself that the provisions of Clause 10.1 are being implemented; and/or 10.3.2 allow it to comply with any obligations to which it is subject under the laws and regulations referred to in Clause 10.1.3.

10.4 The Shareholders shall procure that the Company will prepare and deliver to them in a format and within a timeframe which complies with Willis Group standards in operation from time to time.

10.4.1 a monthly financial statement and unaudited management accounts for the Company;

10.4.2 a quarterly report from the Board on the financial position and affairs of the Company;

10.4.3 draft annual accounts of the Company in a form substantially approved by the Auditors;

10.4.4 annual audited accounts of the Company; and 10.4.5 full details of any actual or prospective material change in the Business or the financial position or affairs of the Company.

10.5 The Shareholders shall procure that the Managing Director, under the superintendence and guidance of the Board, will prepare and deliver to them a proposed annual budget and cash flow forecast for the next financial year and such other information relating to the financial position and affairs of the Company as each Shareholder may from time to time reasonably require prepared in each case in accordance with Willis Group practice in operation from time to time.

10.6 The Shareholders shall approve, subject to any amendments which they deem appropriate, the annual budget for the Company''s financial year and communicate the annual budget to the Board and the Managing Director in accordance with Willis Group practice in operation from time to time.

10.7 The Shareholders shall procure that the Board will review the annual budget during the course of each financial year of the Company. The Board may propose changes to the Shareholders to which the Shareholders shall respond within 30 Business Days of receipt of each proposal.

10.8 The Shareholders shall procure that the Company shall immediately inform Willis of any technical, legal or administrative event which has already occurred or is threatened or likely to occur and which may materially prejudice the financial or economic situation of the Company.

17. The clause merely provides for the mode in which the business is to be carried on. The Directors and/or share holders of a company can always decide about the manner in which business may be carried on. This is not relatable to the extent or value of shares held by a shareholder or a group of shareholders. That cannot, by any stretch of imagination, indicate anything even on the question of management control. Among the many objectives of a party entering into a JVA is to draw upon the management techniques/skills and business models of the other.

18. Mr. DeVitre relied upon Clause 4.3 of the JVA as an admission of the Petitioner having conducted business in India. Clause 4.3 reads as under:

4.3 The parties agree that existing business conducted by Willis and BA in relation to clients resident in India shall upon renewal be conducted by the Company.

19. The clause, at the highest, establishes that the Petitioner conducted business in India. It does not support the contention that the Petitioner did so by establishing a place of business in India. It is significant to note that Section 591(1)(a) applies not to companies that carry on business in India, but to companies that establish a place of business in India.

20. Mr. DeVitre relied upon the first sentence of paragraph 3 of the petition which reads as under:

The Company was incorporated under the provisions of the Act on or around 31.10.2000 as a joint venture company between Willis and BA for the purpose of carrying out business as a composite broker as defined under Insurance

Regulatory and Development Authority (Insurance Brokers) Regulations 2002 ("the Regulations") and for providing general risk management consultancy to clients resident in India.

He clarified that according to the Respondents, the statement is incorrect. He, however, relied upon it as an admission by the Petitioner that Respondent No. 1 was incorporated on 31st October, 2000, as a joint venture company between the Petitioner and Respondent No. 2.

21. Firstly, in view of what I have held earlier, the mere fact that the Petitioner is a party to the joint venture would make no difference to the question under consideration. It would not justify a conclusion that the Petitioner being a party to the joint venture is deemed to have established its place of business where the joint venture company has its place of business.

22. Secondly, this statement is obviously an inadvertent error. The company was incorporated, not by the Petitioner, but by another member of the Willis Group viz. Willis Asia-Pacific Limited. This contention in the affidavit in reply to the above Company Application is virtually admitted in paragraph 7 of the first Respondent''s affidavit in rejoinder . In any event, this is an objective fact and could easily have been established to the contrary by the Respondents.

23. Let me now assume that Willis Asia-Pacific Limited had established a place of business in India. From the mere fact that an entity, a company or a firm, in a group of companies establishes a place of business, it does not follow that, that place of business is also to be considered as a place of business established by every other member of that group, be it a company, firm or otherwise.

24. I hasten to add that I am not concerned here with a case where the Indian company under consideration is a 100% subsidiary of the foreign company. Nothing, however, has been shown to establish that the Petitioner is a 100 per cent subsidiary of Willis Asia-Pacific Limited. However, in the facts of this case, it would make no difference even if Willis Asia-Pacific Limited was the beneficial owner of 100 per cent of the Petitioner''s shares and of the first Respondent''s shares when it was incorporated on 31st October, 2000. Moreover, in the facts of this case, it would make no difference even if the Petitioner is deemed to have established a place of business in India by virtue of owning or being beneficially entitled to 100 per cent of the shares of Respondent No. 1 when it was incorporated on 31st October, 2000. Ultimately, from about 20th March, 2003, the Petitioner and Respondent No. 2 were the shareholders of Respondent No. 1. What is relevant is the shareholding when the petition was filed. At that time, neither the Petitioner nor any member of the Willis Group had established a place of business in India for the reasons already stated.

25. The judgment of a learned single Judge of the Delhi High Court in Tumlare Software Services Private Limited India and Anr. v. Magic Software Services, 92 (2001) Delhi L T 572, relied upon by Mr. Chagla is, however, not relevant to the facts of the present case. The learned Judge held that for the bar u/s 599 to

operate, the company must have a specified or identifiable place at which it carries on business and that at the time of signing the contract, it must have a permanent location from where it habitually and regularly carries on business. The question there was whether by merely appointing a constituted attorney, a company could be said to have established a place of business. The learned Judge held in the negative. The question in the present case is entirely different as is evident from the above discussion.

26. The application is, therefore, liable to be rejected on the ground that as the Petitioner has not established a place of business in India, the provisions of Section 599 do not apply to the present case.

27. Mr. Chagla also submitted that the bar u/s 599 does not apply to a proceeding u/s 433(f) of the Companies Act. In view of what I have held above, it is not necessary to consider this submission.

28. In the circumstances, the Company Application is dismissed. There shall, however, be no order as to costs.