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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ARB.APPEAL No. 17/2009

7th October, 2009

M/S. CHIRAWA INVESTMENT LIMITED & ORS. Petitioners

Through : Mr. Dushyant Dave, Sr. Advocate
With Mr. Ramesh Singh, Mr. A.T.
Patra, Ms. Aradhana Patra,
Advocates

versus

INDIABULLS FINANCIAL SERVICES LTD. AND ORS. Respondents

Through : Mr. Abhishek Manu Singhavi, Sr.
Adv. with Mr. Rishi Agrawal, Mr.
Bhagvan Swarup Shukla, Ms. Roma
Hameed, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

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JUDGMENT (ORAL)

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) against the order dated 23.7.2009 passed by the Arbitrator whereby the present appellants, who are arrayed as guarantors/respondents in the

claim petition filed before the Arbitrator, have been restrained from disposing of the immovable properties as stated in the said order and which properties though were mortgaged by the appellants but the mortgage deeds were not registered. Further, by the impugned order, the learned Arbitrator had restrained the appellants from selling, transferring or creating any third party interest in any manner in respect of the shares of Gujarat Heavy Chemicals Ltd. (GHCL) and Golden Tobacco Ltd. (GTL). By the same order, a restraint order has also been passed that none of the parties or their proxies shall exercise their voting rights in respect of the said shares till further orders.

2. The scope of hearing of an appeal against an ex parte injunction order passed is indeed very limited. The two basic aspects the court has to see is firstly whether the court lacks jurisdiction to pass such an order or secondly that on the averments made and the documents filed the injunction order could not have been passed.

3. Before I proceed in the matter I may note that I have heard senior counsel Mr. Dave appearing for the appellant at great length. During the course of hearing I even put it to the learned senior counsel that if I pass a detailed order making observations on merits on the

contentions as raised by him the same may possibly affect the decision by the Arbitrator in the hearing of the main injunction application, however, the learned senior counsel said, that is a risk he is willing to take.

4. The following facts are therefore relevant:

(i) The respondents 2 to 8 are the principal borrowers and the present appellants are guarantors, of the respondent No. 1 who has advanced a loan which is presently said to be due along with the interest in the sum of Rs. 293 crores approximately.

(ii) The ex parte order was passed on 23rd July, 2009 and the present appeal has been filed only on 5th October, 2009.

(iii) Besides the fact that the appeal has been filed after around two and half months of the impugned order, I may note that by the impugned order notice was issued for 24th August, 2009 to the present appellants and who were served the impugned order on 24th July, 2009 viz. on next date itself as conceded by the senior counsel for the appellant. In spite of having been served on 24th July, 2009, no steps have been taken at all till today for seeking variation or vacation of the ex-parte order dated 23rd July, 2009 on any of the grounds which

have been urged today before me by the appellant. In fact, the appellants after appearing on 24th August, 2009 took three weeks time for filing the reply but again did not file reply to the injunction application filed by the respondent No. 1 herein. Not only no reply was filed again when the matter was listed on 25th September, 2009, time was again taken for filing of the reply and the case is now adjourned to 9th November, 2009 and in the meanwhile the present appeal has been filed.

Though initially the appellant took up the stand that they had not appeared before the Arbitrator, however, on instructions this was clarified that duly authorized counsel Ms. Neelima Tripathi, Advocate had appeared on their behalf and had taken time for filing of the reply to the injunction application repeatedly.

5. The counsel for the appellants has strenuously urged two basic contentions before this Court. The first contention is that the appellants are not parties to the arbitration agreement and, therefore, the Arbitrator could not have passed an order against them. The second contention which has been raised is that whereas the loan was recalled in July 2008, the injunction application was only filed in July

2009 and, therefore, the learned Arbitrator according to learned senior counsel “ought not to have been in a tearing hurry” for passing the injunction order.

6. As already stated by me the scope of challenge to an ex parte order by means of an appeal is limited. I have also noted that if the appellants were so seriously prejudiced they should have immediately come up by means of an appeal, however, the admitted facts are that after having been served on 24th July, 2009 they neither filed any reply nor application for variation of the injunction order. In fact, as stated, repeated opportunities have been taken before the Arbitrator for filing the reply before the Arbitrator and which matter is now listed for 9th November, 2009. Interference by this Court with such discretionary orders which are passed is extremely limited and I do not find the present case a fit case for interference by this Court as the present appeal is grossly delayed and in fact an abuse of the process of law because repeated adjournments were taken and only on 5th October, 2009 this appeal has been filed.

7. Coming to the issue as to whether the appellants were parties to the arbitration agreement I may note the following clauses of the

original loan agreement as also the subsequent letter of authorization whereby the appellants became guarantors to the transactions and they also mortgaged the immovable properties and pledged shares in GHCL and GTL :-

“Group Accounts” means and includes the accounts as listed in the table for the group dealings in the Exhibit to this Agreement.”

“12. That in consideration of the Loan, the Securities are hereby pledged in favour of the Lender as an exclusive first charge to the Lender towards repayment of the principal amount of the loan, interests, costs and any other charges etc. due to the Lender whether payable under this Agreement or under any other agreements between the parties or even otherwise or towards Group Accounts. The Securities simultaneously with the signing of this Agreement, shall at the option of the Lender be marked as pledged at the option of the Lender in favour of the Lender in the depository records or as and when received in Designated Demat Account. Notwithstanding anything contained in this Agreement none of the Lender’s rights over the Securities shall be diluted or vitiated merely because of pledge not having been marked through depository system on Securities lying in the Designated Demat Account.”

“SUBJECT : LIST OF GROUP DEALING

<i>Details of Group Member</i>	<i>Account No.</i>
<i>Antarctia Investment Private Limited</i>	<i>74731</i>
<i>Comosum Investments Private Limited</i>	<i>7541</i>
<i>Carissa Investments Private Limited</i>	<i>77214</i>
<i>Dear Investment Private Limited</i>	<i>97329</i>
<i>Altar Investment Private Limited</i>	<i>269212</i>
<i>Dalmia Housing Finance Limited</i>	<i>271660</i>
<i>Oval Investment Private Limited</i>	<i>422795</i>

<i>Lhonak International Private Limited</i>	<i>424069</i>
<i>Swagathm Investment Limited</i>	<i>424070</i>
<i>Chirawa Investments Limited</i>	<i>424071</i>
<i>International Resources Limited</i>	<i>424072</i>
<i>Swastik Commercial Private Limited</i>	<i>424073</i>
<i>Divine Leasing and Finance Limited</i>	<i>424074</i>
<i>Sovereign Commercial Private Limited</i>	<i>424076</i>
<i>Harvatex Engineering & Processing Col. Ltd.</i>	<i>424110</i>
<i>Excellent Commercial Enterprises Limited</i>	<i>424112</i>
<i>Moderate Investment & Commercial Enterprises Limited</i>	<i>424111</i>
<i>Carefree Investment Company Limited</i>	<i>424075</i>
<i>Lakshmi Vishnu Investment Ltd.</i>	<i>424343</i>
<i>Mourya Finance Limited</i>	<i>424344</i>
<i>Hindustan Commercial Company Limited</i>	<i>424345</i>
<i>Gems Commercial Company Limited</i>	<i>424346"</i>

The aforesaid are the clauses of the original loan agreement executed between the respondent No. 1 and the respondents 2 to 8.

8. Subsequently, the present appellants as guarantors executed the documents dated 30th August, 2007 whereby they agreed to stand as guarantors and certain clauses of this agreement are relevant and reproduced below:

"1. That this letter has been signed by the authorized signatory/signatories of the group members of the borrowers who

are listed herein below. The members together with the Borrowers shall be collectively referred to as "Group Members". That the below mentioned accounts along with the Borrowers' Account shall collectively be termed as "Group Accounts" for all purposes of operations with the Lender.

<i>S. No.</i>	<i>Name of Group Member</i>	<i>Account No.</i>
1.	Chirawa Investment Limited	424071
2.	Sovereign Commercial Private Limited	424076
3.	Lhonak International Private Limited	424069
4.	Swagatham Investment Limited	424070
5.	Swastik Commercial Private Ltd.	424073
6.	Moderate Investment & Commercial Enterprises Limited	424111
7.	Harvatex Engineering & Processing Company Limited	424110
8.	Excellent Commercial Enterprises Limited	424112
9.	Hindustan Commercial Company Limited	424345
10.	International Resources Limited	424072
11.	Gems Commercial Company Limited	424346
12.	Lakshmi Vishnu Investment Limited	424343
13.	Mourya Finance Limited	424344
14.	Carefree Investment Company Limited	424075
15.	Divine Leasing and Finance Limited	424074
16.	Carissa Investment Private Limited	77514

17.	<i>Dear Investment Private Limited</i>	97329
18.	<i>Altar Investment Private Limited</i>	269212
19.	<i>Antarctica Investment Private Limited</i>	74731
20.	<i>Comosum Investment Private Limited</i>	75417
21.	<i>Dalmia Housing Finance Limited</i>	271660
22.	<i>Oval Investment Private Limited</i>	422795

2. That we hereby acknowledge, accept and confirm that the abovementioned are the members of the Borrowers and shall not dispute the inclusion of it/its/their account into the list of Group Accounts. The Group Member(s) (including the Borrower(s) are the promoter(s) of Gujarat Heavy Chemicals Limited and/or GTC Industries Limited and the Group Members are part of the same group and have been promoted by common promoter(s).

3. I/We declare and confirm that the Lender shall have the exclusive right at its sole discretion to adjust any collateral provided by or on behalf of any of the Group members. The collateral provided by or on behalf of any of the Group Members shall also be treated as security for each of the Group member and/or Borrower including any outstanding loan, the interest, additional interest, costs and expenses and any other amount payable pursuant to the loan granted to any of the Group members and/or Borrowers. The Lender shall be entitled to transfer, sell, dispose, encumber and/or assign, in any manner at the sole discretion of the Lender, the shares provided/to be provided as collateral by the Group Member(s). Further the Lender shall be entitled to attend and vote at, appoint proxies to attend and vote at, any general meetings of the shareholders of the company/companies whose shares are provided as collateral by the Group Companies in relation to such shares.

4. I/We further undertake that neither I/we nor any of the Group Members shall in future make any claims from the Lender in any

manner whatsoever towards any collateral adjusted/set off against the outstanding debit amounts in any of the above mentioned Group Accounts. I/we also undertake that any person claiming on behalf of any of the Group Members shall not be entitled to any such claim and such act shall be held to be null and void.

I/we declare and confirm that the Lender shall not release the collateral provided by or on behalf of any of the Group Members unless each of the Group members and/or Borrowers repays the entire loan amount together with the interest, additional interest, costs and expenses or any other outstanding dues whatsoever and howsoever payable.

Emphasis supplied”

9. A reading of the aforesaid clauses of the main loan agreement as also of the subsequent letter of authorization whereby the appellants became the guarantors makes it at least prima facie clear, subject to its being further held by the Arbitrator, during the course of the decision of the injunction application, that the terms used group accounts, group members and group dealings referred to both the appellants as also the principal borrowers 2 to 8 and it was therefore justified at least for the purpose of ex parte injunction, which was granted by the Arbitrator to be said that the present appellants are parties to the arbitration agreement. The effect of the terms ‘Group Accounts’, ‘Group Members’ & ‘Group Dealings’ causes a merger of the two documents being the original loan agreement and the subsequent

letter of authorization. It can also be prima facie said that by doctrine of incorporation the appellants/guarantors have become 'Group Members' and 'Group Accounts' under the original loan agreement containing the arbitration clause. I may note that the counsel for the respondent no. 1 during the course of hearing has filed before this Court agreements which have also been signed by the appellants holding themselves liable "as borrowers" which contains the arbitration clause, but, I am not taking this into consideration for the present because I understand these documents were not before the learned Arbitrator when he passed the ex parte order.

10. The learned senior counsel has relied upon the provisions of Section 2(1)(h) and Section 7 of the Arbitration and Conciliation Act, 1996 besides the commentaries on arbitration by Dr. Peter Binder & Russell and the judgment reported as *M.D. Army Welfare Association vs. Sumangal Services Pvt. Ltd.*, 2004 (9) SCC 619 to contend that the learned Arbitrator lacked jurisdiction to pass orders against the appellants who were not parties to the arbitration proceedings. There is no dispute as to this proposition of law, however, I have already

said that prima facie in view of the expressions “Group Accounts”, “Group Members” and “Group Dealing”, it cannot be said that the learned Arbitrator was wholly unjustified in passing the ex parte injunction order more so when huge dues running into approximately 293 crores were payable by the appellants and the respondents 2 to 8. Further, the clauses in the letter of authorization by which the appellants became the guarantors also makes it more than abundantly clear that the respondent No. 1 was entitled to attend the general meetings of the shareholders of the companies GHCL and GTL besides appointing proxies and so on. In any case, all these issues will be heard and finally disposed of during the hearing of injunction application which is now fixed for 9th November, 2009.

11. The second contention which was very strenuously urged by the learned senior counsel for the appellants was that the Arbitrator ought not to have been in hurry to pass the ex parte injunction order because the loan was recalled in July 2008 and therefore there was no urgency one year later in July 2009 to pass the ex parte injunction order. I, however, do not agree with this contention because issue

with regard to injunction is based on an apprehension which arises on day-to-day basis and, therefore, it is not possible to say that merely because there may not be an apprehension in July 2008, there is no valid apprehension in July 2009. Further, after the recall of the loan in July 2008 the present appellants have duly executed mortgage deeds in favour of the respondent No. 1. who may have been thereby lulled into complacency and consequently it may not have chosen to invoke arbitration proceedings and seek an ex parte order. As already stated the scope of hearing of the appeal under Section 37 of the Act against the ex parte order is extremely limited and this Court need not exercise its jurisdiction and discretion merely because it feels that it may hold a different view, although the Arbitrator has taken the other plausible view.

12. In view of the provisions of Section 35(2) read with Order XX-A of the Code of Civil Procedure that costs shall follow the event and if it does not follow the event the Court shall give reasons for not awarding costs besides also taking note of the observations in the judgment of the Supreme Court in *Salem Advocate Bar Association vs.*

UOI (2005) 6 SCC 344 in its para 37 with respect to awarding costs, I dismiss this appeal with costs quantified Rs. 5 lakhs which shall be paid by the appellants to the respondent No. 1 within a period of one month from today failing which it will entail simple interest @ 12% per annum till the date of actual payment.

13. With these observations, the present appeal is dismissed.

VALMIKI J. MEHTA, J

OCTOBER 07, 2009
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