IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 1ST DAY OF JUNE 2015

THE HON'BLE MR. JUSTICE R.SUBBIAH

A.No.6373 of 2014
in
C.S.D.No.34580 of 2014

J.S.Shekar,
Sole Proprietor,
lead Hospitality,
No.1, Ground Floor,
34th Street, 4th Avenue,
Ashok Nagar,
Chenani 600 083. ..Applicant/Plaintiff

-Versus-

1.BRISC-CARR GROUP INC.,
P.O.Box 235, Mallory Town,
ON, Canada KOE 1R0.

2.C.Vijay Shankar,
Director,
BRISC-CARR GROUP INC.,
1,Yonge Street,
Suite, 1801,
Toronto, Ontario,
MSE 1W7.

3.Meena Sing,
Director,
BRISC-CARR GROUP INC,
P.O.Bod 235, Mallory Town,
ON, Canada KOE 1RO. ..Respondents/Defendants

Application praying that this Hon'ble Court be pleased to grant leave to the plaintiff to sue the defendants who are living and carrying on business outside the Jurisdiction of this Court.

This Application coming on this day before this court for hearing the court made the following order:

This application has been filed under Order XIV Rule 8 of CPC and under Order III Rule 1 of the Original Side Rules r/w Clause 12 of Letters Patent, seeking to grant leave to file the above suit against the defendants, who are residing at Canada.

2.The case of the applicant/plaintiff, in brief, is as follows_

2-1.The applicant established a sole-proprietorship firm by name LEAD HOSPITALITY to provide technical solutions to the services industry, including soft skills and strategic skill sets and also providing consultancy and training services in India. The 1st respondent-company is a federally incorporated company in Canada to provide premium online training to build employable skills and increase productivity and the respondents 2 & 3 are its Directors. The respondents 2 & 3 were looking for a suitable person in India to promote their product and during the year 2011, the 2nd respondent approached the applicant through a common reference of an NGO, to present a customer service training through online training program which he wanted to promote in India for the hospitality industry. Subsequently, various email

correspondences took place between the applicant and the respondents 2 & 3. The respondents 2 & 3 assured that a 'Preferred Placement Partner' agreement with a placement firm in Mumbai with All India reach will be entered during the month of August-2011. The respondents 2 & 3 assured that the agreement will give the plaintiff the option to enter into an placement agreement with the placement firm and the placement firm will provide resume building tips and work to place the learners and on successful placement, the placement firm will intimate the licensee and remit 25% of the placement fee directly to the licensee. However, the said agreement was not entered into between the parties. After various discussions and email correspondences between the applicant and the respondents 2 & 3, a Memorandum of Understanding (MOU) was entered into between the applicant's company and the 1st respondent-company on 14.12.2012 at Chennai and the 3rd respondent signed on behalf of the 1st respondent. On the same day, a Licence Agreement was also entered between them at Chennai. The objective and plan of the association for the plaintiff was to purely 'sell the ready-made online training programme to the market and earn the due profit or commission'. As per the Memorandum of Understanding, dated 14.12.2012, the 1st respondent will design and implement and administer self learning online solutions, while the applicant's company will establish suitable channels and effect sales. As per the License Agreement, dated

14.12.2012, the Licensor had developed and designed an online learning solution to train individuals desiring to join the retail industry in India as Frontline Sales Associates or working in customer service positions in retail organizations. As per the Licence Agreement, the plaintiff has to pay CAD $ 10,000 (Ten Thousand Canadian Dollar) for 250 accounts on signing the above said License Agreement. Accordingly, on 09.01.2013, the applicant transferred the amount equivalent to CAD $ 10,000 (Ten Thousand Canadian Dollar) through his banker Andhra Bank, T-Nagar Branch, Chennai.

2-2.After entering into Memorandum of Understanding and License Agreement with the respondents, the applicant took various efforts to promote the product at all levels, that is to say from NGOs in India to retail outlet companies and also schools dropouts, graduates and other individuals. Inspite of the applicant's good efforts, none of them had shown any interest or satisfaction about the product and the same was informed to the respondents 2 & 3. After thorough study of the market, the applicant came to know about RAI (Retail Association of India), which is the core retail members club, is having over 7000 large establishments under its membership in India. During the month of January, 2013, the applicant in good faith suggested to the respondents to take RAI license

to make it as a platform to market the product. After several rounds of debates on its usefulness and value, the respondents 2 & 3 finally decided to take it forward. The RAI was organizing a two day event at Mumabi showcasing retail services and offered a platform to make a presentation and have stall there, where hundreds of their members would be present. The deadline for participation was to end within a week of the above said discussion. The applicant informed the respondents 2 & 3 that participation in the event would generate enquiries and only an endorsement by RAI could make the product acceptable to the buyers; once it is done, the respondents and/or applicant could participate in the exhibition and sell well in the exhibition. For that, RAI had to view the online program and run it through their panel, for approval.

2-3.During the Mumbai exhibition, the applicant met several retailers and other potential buyers, who went through the demos, and further requested for demos to be sent directly to them for evaluation and the same was conveyed to the 2nd respondent. The retailers were keen that the product be approved by RAI. Therefore, in order to sell the product in the retail market the RAI approval was inevitable. Since the 2nd respondent could not arrange for funds immediately, the applicant had to convince RAI to give installment options. Further, the applicant took special efforts to speed up the decision process and

convinced the RAI management to approve the online program well in time. Finally, RAI gave the payment option in three installments ie., 5 + 2.5 + 2.5 lakhs. As the respondents were delaying their decision and given the limited time, the applicant having no other alternative paid a sum of Rs.5 lakhs to RAI in good faith on behalf of the 1st respondent-company so that they could use the approved logo in their promo materials. The above payment to RAI was made with consent and knowledge of the respondents and on a specific understanding that the same would be reimbursed or adjusted towards purchase of lincenses.

2-4.Over a period of time, when things were not moving, the 2nd respondent tried to approach the NGOs in India to obtain their email IDs and details, for conducting an online awareness program, with an intention of obtaining detabase of NGOs. The 2nd respondent also promised to send the details of that exercise and told the applicant that they would definitely push for taking up the training programs. The applicant however has not heard anything on meeting potential clients and pushing RAI to make the applicant as part of their lecture to the Industry. The applicant had done all works as part of branding and promoting the 1st respondent's product. In the meantime, the applicant was shocked to know that the 2nd respondent had been having a series of meeting with RAI people and

making full use of the member status and all that were done without the knowledge of the applicant. The above act of the 2nd respondent certainly is in the violation of the terms of MOU and License Agreement. The product was not of quality that was promised by the respondents 2 & 3 and the product never delivered desired result and there was no updating of quality and further, none who took the program, found jobs. The act of the respondents 2 & 3 left the applicant with no other option except to terminate the License Agreement. Accordingly, on 12.09.2013 the applicant had sent a letter of termination through email to the respondents 2 & 3, calling upon them to re-deposit the balance amount of Rs.5,51,200/- out of Rs.5,63,700/- which was deposited by the applicant, after deducting the procured licenses worth Rs.12,500/- as clause 7.3 of the License Agreement dated 14.12.2012 contemplates repayment of the amount of contract value pending use if the termination is on account of breach by the licensor and further, a sum of Rs.7,50,000/- paid to RAI as per the MOU dated 01.02.2013, more so as the respondents very clearly and evidently used the RAI approval license to brand and promote their program and also used the network of RAI extensively, without informing the applicant. The respondents were found to continue to correspond and communicate with RAI members even after the termination. According to the applicant, the respondents are liable to pay a total sum of Rs.26,60,200/- to the applicant. Since the said amount has not been paid to the applicant, the present suit is filed by the applicant against the respondents.

3.Since the respondents/defendants are at Canada, the present application has been filed by the applicant seeking leave of the Court.

4.When the present application came up on 16.10.2014, this Court ordered notice to the respondents returnable by three weeks.

5.On appearance, the respondents/defendants have filed a detailed counter opposing to grant leave to the applicant, contending that there is a jurisdiction clause in the Licence Agreement dated 14.12.2012 between the applicant and the respondents bestowing jurisdiction upon the Courts at Canada for adjudicating disputes arising under the said agreement; therefore, this Court will not have jurisdiction to try the present suit.

6.The learned counsel for the respondents submitted that the 1st respondent is the Licensor and the applicant is the Licensee. The subject matter of License is the sale of a product termed Customer Service Program Online for

development of skill in learners employed in retail industry. Sale of the product is from Canada. Agreement was signed on behalf of the 1st respondent by its Director-3rd defendant, a Canadian Citizen, while visiting Delhi during his trip to India and not at Chennai as claimed by the plaintiff. Total payment to be made under the agreement was 20,000 Canadian dollars (Rs.10 lakhs). The applicant remitted 10,000 Canadian dollars (Rs.5 lakhs) which was received in Canada by the 1st respondent under the agreement. The termination notice is dated 12.09.2013 issued by the applicant terminating the License agreement. The entire basis for the suit claim is for breach of the License Agreement only. Since the transaction under License is a sale, a claim if at all can only be for breach of warranty and a claim for damages when established.

7.The learned counsel for the respondents further submitted that as per Clause 9.4 of the License Agreement dated 14.12.2012 entered between the 1st respondent and the applicant, the terms of the agreement shall be governed by an interpretation in accordance with the laws of Canada and shall be subject to the jurisdiction of the courts in Ontario. The very existence of the jurisdiction clause in the agreement makes the intention of the agreement very clear that only the Courts at Canada will have the jurisdiction in this matter; therefore, the suit is not maintainable before this Court. Thus, the learned counsel for the respondents sought for dismissal of the application.

8.Per contra, the learned counsel appearing for the applicant submitted that the substantial part of the transaction took place in Chennai and the money under the contract was paid through Andhra Bank Vadapalani Branch, Chennai and License Agreement was executed at Chennai and the business was to be conducted in Chennai, which is more clear from the license agreement. Hence, this Court has natural jurisdiction to try the present suit. Clause 9.4 in the Licence Agreement will not exclude the jurisdiction of this Court. Moreover, the suit is filed only for recovery of a sum of Rs.26,60,200/-. If the suit is filed before the Court at Cananda for recovery of Rs.26,60,200/-, the applicant will have to spend more amount than that of the amount claimed under the suit. When substantial cause of action arose within the jurisdiction of this Court, Clause 9.4 found in the License Agreement can not exclude the jurisdiction of this Court. In this regard, the learned counsel for the applicant relied upon the judgment reported in ***1989(2) SCC 163 [A.B.C.Laminart Pvt. Ltd. Vs. anr Vs. A.P.Agencies, Salem]*** and ***CDJ 1998 MHC 216 [Premium Industries India Ltd Vs. Quality Fabrications].***

9.Keeping the submissions made on either side, have perused the materials available on record.

10.It is the main submission of the learned counsel for the applicant that by virtue of Clause 9.4 in the Licence Agreement, it was agreed between the parties to vest the jurisdiction exclusively with the Courts at Canada; hence, the suit filed before this Court is not maintainable. Further, it is the submission of the learned counsel for the respondents that substantial portion of the cause of action arose within the jurisdiction of the Court at Canada; where the respondents had received the amount from the Bank. The learned counsel for the respondents has also denied the case of the applicant that the agreement was signed at Chennai.

11.Per contra, it is the submission of the learned counsel for the applicant that Clause 9.4 in the Licence Agreement does not exclude the jurisdiction of this Court. Since this Court has natural jurisdiction, there will not be any bar for filing the suit before this Court.

12.In view of the submissions made on either side, it would be appropriate to extract Clause 9.4 in the Licence Agreement, which reads as follows_

> "9.4. Applicable Law and Competent Court : The Terms shall be governed by an interpreted in accordance with the laws of Canada

and shall be subject to the jurisdiction of the Courts in Ontario."

From a reading of the above said Clause in the Licence Agreement, I find that the said Clause has not exclusively excluded the jurisdiction of this Court. Admittedly, the amount was sent by the applicant through Andhra Bank at Chennai, which is situated within the jurisdiction of this Court. Further, according to the applicant, the Licence Agreement was entered at Chennai; but whereas according to the respondents, Licence Agreement was signed at Delhi by the 3rd respondent who is the Director of the 1st respondent-Company while he visited Delhi during his trip to India. But, the question as to whether the Licence Agreement was entered into between the parties at Delhi or at Chennai, is purely a matter of evidence and the same cannot be gone into at this stage. However, for the purpose of deciding the present application, I find *prima facie* that in the plaint, the applicant has made a specific averment to the effect that the Licence Agreement was entered into between the parties only at Chennai. Therefore, I am of the opinion that as per the averments in the plaint, this Court has got natural jurisdiction to try the present suit. Unless the jurisdiction of this Court is exclusively excluded, it cannot be said that the jurisdiction of this

Court is totally barred to entertain the suit. In this regard, a reference could be placed in the judgment reported in ***1989(2) SCC 163 [A.B.C.Laminart Pvt. Ltd. Vs. anr Vs. A.P.Agencies, Salem]***, wherein it has been held as follows_

> "Under the facts and circumstances of the case, we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdiction having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which Court otherwise had jurisdiction under law through connecting factor of delivery of goods there at was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court."

The dictum laid down in the above judgment squarely applicable to the facts of this case. Even in this case, the jurisdiction was not exclusively excluded under Clause

9.4 of the Agreement. In the case of ***Gujrat NRE Coke***

Ltd & anr Vs. Gregarious Estates Incorporated & ors reported in **CDJ 2012 Cal HC 536**, it has been held by the Calcutta High Court that the recitals in regard to submission to exclusive or non-exclusive jurisdiction of a court of choice in an agreement are not determinative and it should depend upon the facts of each case. In the instant case, the applicant/plaintiff is claiming a sum of Rs.26,60,200/-. If the applicant is directed to approach the Court at Canada, he has to spend more than the amount claimed in the plaint. Since this Court has got natural jurisdiction, I am of the opinion that the suit is well maintainable before this Court.

For the foregoing reasons, leave is granted and the application is allowed.

sd/.R.P.S.J

01.06.2015

//Certified to be a true copy//

Dated this the day of 2015

R.s/07.08.2015 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.