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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 14.07.2015
Pronounced on: 17.08.2015

+ **FAO(OS) 513/2014**
APOLLO GROUP INC. & ORS. Appellants

Versus

KK MODI INVESTMENT AND FINANCIAL SERVICES PVT.
LTD. & ORS. Respondents

+ **FAO(OS) 4/2015**
APOLLO GROUP INC. & ORS. Appellants

Versus

K.K MODI INVESTMENT AND FINANCIAL SERVICES PVT.
LTD. & ORS. Respondents

Through : Sh. Dhruv Mehta, Sr. Advocate with Sh.
Dhruv Wahi, Sh. K.V. Singh, Sh. Manish Dembla
and Sh. Ashish Sindhu, Advocates, for the
appellants in Item Nos. 8 and 9.

Sh. Arvind Nigam, Sr. Advocate with Ms.
Manmeet Arora, Advocate.

Sh. Mohit Bhardwaj, Advocate, for proforma
respondent nos. 4 and 5.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1 The present appeals question the orders of the Learned Single Judge
dismissing an application (preferred by the appellant/defendants) seeking

rejection of the plaint, under Order VII Rule 11 of the Civil Procedure Code 1908, and the dismissal of an application for deletion of parties under Order 1 Rule 10 CPC. . The appellants are hereafter referred to as the defendants and the respondent shall be referred to as the plaintiff. Defendants No. 2-8, shall however, where specifically required, be referred to as the applicants.

2. The plaintiff is an incorporated company and part of the K.K. Modi Group of Companies. The said Group of Companies- it is stated, has a strong presence in the field of education. The suit impleads nine defendants. The plaint alludes to the fact that the fifth and sixth defendants control the first, fourth and eighth defendants. The plaint further alleges that together, the fifth and sixth defendants control the John Sperling Voting Stock Trust and Peter Sperling Voting Stock Trust. The said two defendants and the two trusts collectively own 100% of second defendant's class B common stock. The second defendant is a body corporate under the laws of the State of Arizona, USA. Defendants No.1, 3, 4 and 8 are the subsidiaries of the second defendant and further on their own account or through trust, the fifth and sixth defendants exercise complete control on the business operations of defendants No.1 to 4 and 8. Together they form part of the group of companies known as Apollo Companies. The third and fourth defendants are body corporates, constituted under the laws of the State of Arizona, USA offering degree and non-degree programmes in various fields of education. Defendant No.7 is the Vice President of the second defendant. Defendant No.8 is alleged to be incorporated by the second defendant to pursue investments in international education services and to capitalize on the global demand for educational services. Defendants No. 1 and 8 are said to

have identical objects. The ninth defendant was incorporated on 14th December, 2001 as a joint venture company of plaintiff and defendant No.1.

3. The first two defendants entered into a 20 year long Master Agreement dated 15.10.1999. In furtherance of the Master Agreement and with object of offering education programmes in India, the first defendant entered into a Shareholders Agreement dated 30.08.2001 with the plaintiff for creation of a joint venture company for exclusively providing educational offerings of defendant No.2 and its subsidiaries in India. The Shareholders Agreement is valid for 40 years. Further to it, the ninth defendant was incorporated on 14.12.2001. The plaintiff holds 54.1% of total equity shares in the said ninth defendant. Clause 1.3 of the Shareholder's Agreement reads as follows:

"1.3 Purpose: ...With respect to this Section 1.3, Apollo and Modi agree that neither party will, unless acting in accordance with the other party's prior written consent (which may be withheld in the other party's sole discretion), directly or indirectly pursue, operate, manage, fund, join, operate or control, or participate in the ownership, management, funding, operation or control of, or be connected as a partner, consultant or otherwise with, or permit its name to be used by or in connection with, any profit or non-profit business or organization within India which involves a HES, or any component thereof, and/or other similar purposes as set forth in this Section; or be engaged in any activity in India, which may directly or indirectly compete with the activities of the Company,

provided, however, that nothing contained in this clause shall affect the ability and competence of Apollo and Modi and their affiliates to continue, implement and pursue the projects and agreements described in Exhibit C hereto. The rights of the Company in India shall be exclusive."

4. The first defendant also entered into a license agreement and implementation agreement both dated 06.09.2002 with the third defendant under which the latter was to provide educational programmes in India through the first defendant or its subsidiaries as well as provide faculty, personnel and curriculum etc. for such programmes. In return, the third defendant receives 5% of gross tuition revenue earned as a fee. The first and ninth defendants entered into a royalty agreement dated 31.01.2003 whereby the ninth defendant was given rights to offer the educational programmes of the third defendant in India and the right to use the name, trade mark and/or logos associated with the said for a royalty payment of 5%.

5. The Plaintiffs filed O.S. 2205/2010 against all nine defendants seeking perpetual injunction to restrain them from directly or indirectly pursuing, (or in any manner engaging, or participating) in the ownership, management, funding, operation or control of, or be connected as a partner, consultant or otherwise with, or permit its name to be used by or in connection with any profit or non-profit business or organization within India which involves a Higher Education Service or any component thereof, or be engaged in any activity in India, which may directly or indirectly compete with the activities of the Plaintiff and thus be in violation of Article 1.3 of the Shareholders Agreement and from taking any step in setting up a wholly owned subsidiary in India connected to the Higher Education Service. The cause for filing the suit, allege the plaintiffs, is that in April, 2009, the ninth defendant's CEO received the copy of a letter dated 22.04.2009 from the law firm representing the third defendant addressed to the first defendant terminating the implementation and license agreement. It

was alleged that defendants seek to abandon and frustrate the Shareholders Agreement and enter into Indian education market directly. The plaintiffs allege that the said defendants have created the eighth defendant with said same object and purpose as first defendant to make a direct entry into the Indian market. According to the plaintiffs, Clause 1.3 of the Shareholder Agreement, obligates the defendants not enter into the Indian market directly through the first defendant and they were bound to run business activities in India exclusively in collaboration with plaintiff as envisaged in the Shareholders Agreement.

6. The plaintiffs argue that the corporate veil should be lifted and the first four defendants and the eighth defendant who are directly or indirectly controlled by Defendant No.5 to 7 are liable to be forbidden from frustrating or otherwise breaching exclusivity of the non-compete clause in the Shareholders Agreement. It is also averred that the third defendant filed a suit before this Court being CS (OS) 1123/2009 where it sought to restrain ninth defendant from enrolling students after 22.05.2009 and from using the trademark or other intellectual property of third defendant No.3. This Court passed an interim order on 20.07.2009 and 10.08.2009 restraining the ninth defendant from enrolling students. It is urged that as the reputation and goodwill of the said ninth defendant is at stake and students were enrolled with the said defendant, the plaintiff entered into a partnership with American Transport Institution to carry to offer education services, with Stratford University. It is further pointed out that the third defendant filed another suit being CS (OS) 2313/2009 against the plaintiff and defendants No. 1 and 9 for relief of permanent and mandatory injunction. It is averred

that the said suit seeking implementation of the order passed in the first suit is not maintainable. No interim order has been passed in the said suit.

7. It is alleged that the Shareholders Agreement is valid and subsists in terms of Article 10.1. It is further stated that the said agreement is binding on the parties for a period of 40 years so long as each party continues to hold 40% of the shareholding. It is further urged that the defendants are bound by the negative covenant explicitly set out in Article 1.3 of the Shareholders Agreement.

8. After notice was issued and the proceedings in the suit commenced, the appellant defendants moved two applications (one under Order 1, Rule 10(2) being IA 16903/2010) for their deletion from the array of parties and the other, IA 16906/2010- under Order VII Rule 11, CPC for rejection of plaint on the ground that there is no cause of action as against Defendant Nos. 2-8 (hereafter “the applicants”). Both applications were supported by similar pleadings and arguments. The applicants firstly submitted that there was no privity of contract between the plaintiffs and them. It was highlighted that the Shareholders Agreement was entered into between the plaintiffs and the first defendant which led to the creation of the ninth defendant. The applicants state that the entire suit claim is based on an alleged violation of Article 1.3 of the Shareholders Agreement dated 30.08.2001. The applicants are not parties to the Shareholders Agreement which is between the plaintiff and first defendant. It is further stated that the plaint discloses no cause of action against defendants No.2 to 8, i.e. the applicants and is barred by law. It was also averred that the plaint can be rejected in part, or alternatively, defendants No.2 to 8 being neither

necessary nor proper parties to the suit, be deleted from the array of parties.

9. Apart from Clause 1.3 the applicants also relied on other conditions in the implementation agreement of 06.09.2002 to say that exclusive rights were not granted to the ninth defendant to conduct courses and there was no bar against the applicants from carrying on business in India. Furthermore, the applicants relied on Clauses 11.7 and 11.11 and 11.13 to say that (i) the Shareholders Agreement had to be read as a whole; (ii) that third parties rights were precluded and (iii) that the agreement could be changed only through a formal amendment. It was submitted that in view of these express conditions, non-parties such as the applicants could not be held down to an arrangement that was to bind the first and ninth defendants. Consequently, the plaint had to be rejected, or alternatively the applicants, deleted from the array of parties.

10. The Learned Single Judge, after discussing the merits of the pleadings, materials before the court submissions made on behalf of the parties, dismissed both applications. The impugned order held, *inter alia*, that:

“38. A perusal of the plaint shows that what the plaintiff actually pleads is that the agreement is only between the plaintiff and defendant No.1, but defendants No.1 to 8 have privity of interest and common business goal and are attempting to use the device of their complex business arrangement to frustrate the shareholders agreement. It is averred that defendant No.8 has been created only to evade the non compete clause, namely, clause 1.3 of the shareholder's agreement. Hence, it is urged that if the corporate veil be lifted and then it would be discovered that defendants no.1 to 4, and defendant no.8 are directly/indirectly under control of defendant No.5 to 7 and as such are likely to be forbidden from frustrating or otherwise

breaching the aforesaid exclusivity and non compete clause in the shareholder's agreement.

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48. Hence, the issue comes as to whether in the light of the legal position stated above defendants 2 to 8 are necessary or proper parties to the present suit filed by the plaintiff. Shorn of details the plaintiff seeks a decree of permanent injunction restraining the defendants from pursuing, parting, managing etc any private or non private business or organization within India which involves higher education services which directly or indirectly competes with the activity of the plaintiff and from taking any step in setting up the wholly or a subsidiary in India dealing with the higher education services. The higher education service is obviously relatable to the education services provided by defendants No.3 and 4 by and its trade marks and other such rights. Defendant No.8 is also involved in the said higher education services. Defendants No.5 to 7 are the officers concerned. If an injunction was to be passed only against defendant No.1 relating to higher education services this may impinge upon the rights of defendants no.3 and 4. After all the whole issue revolves around the higher education services of defendants 3 and 4. Such a injunction could affect the interest of defendants No.2 to 8. Whether such an injunction should be granted or not is not the subject matter of the present application. To my mind the presence of defendants 2 to 8 is necessary to effectively and completely adjudicate upon the disputes and issues raised by the plaintiff in the accompanying plaint. There is in my opinion no merit in the contention of the defendants No.2 to 8. Clearly defendants no. 2 to 8 are necessary and proper parties to the present proceedings.

49. Coming to the last submission of the plaintiff regarding Section 41(h) of the Specific Relief Act. What the plaintiff seeks is enforcement of a negative covenant. Hence, in view of section 42 of the Specific Relief Act the said contention of the applicants is without merits.

50. There is no merit also in the present application IA No. 16903/2010 and the same is dismissed.

51. It is clarified that any conclusions or observations made herein are only for the purpose of disposal of the present applications. No observations made herein will prejudice the parties in any manner whatsoever in any subsequent proceedings.”

Contentions of the appellants

11. Mr. Dhruv Mehta, Learned senior counsel appearing for the applicants/appellants argued that the Shareholders Agreement was executed between the plaintiff and the first defendant only. Clause 1.3 which is the non-compete condition binds only parties to the agreement. The implementation agreement dated 06.09.2002 entered into between the first defendant and third defendant for providing educational courses in India through the ninth defendant grants no exclusive right to the said first defendant. Therefore, urges counsel, nothing prevents the applicants from transacting business in India independently as they are not bound by the non-compete Clause. The plaintiffs’ contention regarding representations made by the applicants that they were bound by shareholders agreement is not borne out of any of the documents filed with the suit.

12. Learned senior counsel submitted that under Clause 11.7 of the Shareholders Agreement, there is a clear statement that the agreement sets forth the entire understanding of the shareholders and supersedes all the prior agreements arrangements etc. whether written or oral. Consequently, if any representation was made prior to the execution of the Shareholders Agreement, then such representations stand superseded by the specific provisions of the shareholders agreement. The alleged representations made do not lead to amendment of the Shareholders Agreement. It is alleged that even otherwise the present suit for injunction would not lie as the plaintiff

has an alternative remedy and can seek damages for alleged breach of the agreement as provided for under Section 41(h) of the Specific Relief Act.

13. Mr. Mehta argued that by reason of the proviso to clause 11.3 (the non-compete clause) certain agreements and arrangements were excluded: they found reference in Exhibit C to the Shareholder's Agreement. Consequently, any activity of the Apollo Group companies or entities was excepted from the non-compete clause.

14. Learned counsel has relied upon *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal & Ors.* (1998) 2 SCC 70 to urge that a clear right to sue has to be shown in the plaint: in the present case, no such clear averment can be discerned. Reliance is also placed on *Indowind Energy Ltd v. Wescare (India) Ltd. & Anr.* (2010) 5 SCC 306 to say that each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or a common Board of Directors, would not result in the two being considered as a single entity. He urged that the economic unity concept which appears to have persuaded the Learned Single Judge to accept the plaintiffs' submissions, is inapplicable. *Sunil Kumar & Anr. v. Ram Prakash & Ors.* (1988) 2 SCC 77, is relied upon for the proposition that Section 41(h) of the Specific Relief Act bars grant of injunction where the party has an equally efficacious alternative remedy. In this context, learned counsel referred to the legal notice issued on behalf of the plaintiff and urged that in fact damages were demanded. Lastly, it was argued that the Plaintiffs are precluded from urging that the applicants are parties to any agreement with them because in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, it was held that there was no

arbitration agreement between the said parties.

15. The Letter of Intent, the Shareholders Agreement and the addendum to it each contain references to the second, third and fourth defendants, which shows that the Plaintiff was aware of the other defendants, but only the first defendant was party to the agreement- which is apparent from the language of the SHA, including Clause 1.3. Mr. Mehta relies on the finding of this Court in order dated 25.05.2009 passed in OMP 292/2009 that the SHA which is an agreement between the Plaintiffs and Defendant No.1 cannot be considered to be an agreement between the Plaintiff and the applicants. This was affirmed by the Division Bench of this Court in order dated 11.08.2009 passed in FAO (OS) 245/2009. Though the plaintiff was given liberty in the said orders to seek remedies against the defendants therein under appropriate law, it cannot be construed to mean that the question of whether Defendant Nos.2 to 4 are bound by the SHA has been left open in the proceedings as sought to be contended by the plaintiff.

Contentions of the Plaintiff/ respondents

16. Mr. Arvind Nigam, learned Senior counsel for the plaintiffs argued that the impugned order is well reasoned, sound in law and does not call for interference. It was submitted that the purpose of the non-compete clause which parties agreed to in Clause 1.3 of the SHA would be defeated if the applicants are deleted from the array of parties. Counsel submitted that in any proceeding where a plaint is sought to be rejected, the scope of scrutiny of the court is narrow and limited. Inviting attention of the Court to the pleadings in the suit, counsel highlighted that there are clear allegations that

the applicants had arrangements with the plaintiffs, which they now seek to renege on. Highlighting that the Shareholders Agreement and the arrangement between the plaintiff and the first and ninth defendants was to continue for 40 years, counsel submitted that the common intention of the parties was to create a joint venture, i.e the ninth defendant, which would be the vehicle for dissemination of educational programmes designed and owned by the third and fourth defendants. These entities were owned by trusts controlled by or on behalf of the fifth and sixth defendants. The applicants were bound by the arrangement, as was clearly urged by the plaintiff.

17. In support of the argument, learned counsel relied on the terms of the Letter of Intent (dated 16.11.2000) between the Modi Group and Apollo Inc, particularly the following condition:

"Subject to Indian regulatory requirements, AI shall receive reimbursement from the HES and/or JV on a dollar-for-dollar basis for relevant costs associated with the provision of any products or services rendered to the HES and/or JV by AI or any of AI's affiliated companies, which' for the purposes of this LOT include AI's various subsidiaries or JV's throughout the world and the AG companies, including the University of Phoenix. Likewise, MG shall receive reimbursement from the HES and/or JV on a rupee-for-rupee basis for relevant costs associated with the provision of any products or services rendered to the HES and/or JV by MG or any of MG's affiliated companies."

It was submitted that the conditions in the Master Agreement dated 15.10.1999 (relied on by the applicants to say that the activities of the Apollo group were excluded) have to be seen. Here, reliance was placed on

the following stipulation in the Master Agreement- which is part of Exhibit C to the Shareholders Agreement:

"4. Competition. AI shall not compete, directly or indirectly or through any controlled entity, with Apollo or UUP or any or their respective subsidiaries or affiliates in the United States, Canada, or Puerto Rico. In other parts of the world, AI shall first offer-to Apollo and its subsidiaries the opportunity to provide the products and services contemplated herein for each location at which AI or its subsidiary proposes to offer educational programs. In the event Apollo declines to provide such products and services pursuant to the terms of this Agreement, AI may nevertheless pursue development of such products and services at such location and may contract with any person or entity to obtain such products and services as it may require to provide such educational programs at the specified location. Apollo is free to independently (that is outside of this Agreement) commercialize educational service opportunities outside the United States, Canada, or Puerto Rico, provided, however, that if such opportunities are first presented by AI, then Apollo may pursue such opportunities only with AI under this Master Agreement."

18. Counsel for the plaintiff particularly highlighted the condition that the first two defendants, could not have competed directly or indirectly with any or respective subsidiaries or affiliates in specified countries. Though India was not one of them, Apollo, i.e the second defendant was free to use opportunities outside US and specified territories, then *"if such opportunities are first presented by AI, then Apollo may pursue such opportunities only with AI under this Master Agreement."* Counsel stressed that far from liberating the applicants of any obligations, Apollo's subsidiary (defendant No. 8) could not have been set up in India without offering first opportunity to Apollo Inc. which would then have been unable to exploit it, because of Clause 1.3 and its proviso - of the Shareholders Agreement.

19. It was submitted that the suit discloses a triable cause of action and indeed issues have been framed. Emphasizing that the Court cannot reject a plaint in part, learned counsel submitted that barring a clear case where a plain reading of the suit discloses that it is barred or that no cause of action is disclosed, the court should desist from taking recourse to Order VII Rule 11, CPC. It was argued in this context that the documents filed with the suit included returns filed by the applicants with the United States Securities Exchange Commission (SEC) which disclosed the relationship of the parties and the obligations owed by them to the plaintiff. Particularly, the following extract was *inter alia*, relied upon:

"Apollo International, Inc.

As of August 3, 2008 we directly own approximately 3.8% of the preferred stock of Apollo International Inc, which provides educational products and services in India. Dr. John G. Sperling was a director of Apollo International until November 2005. In addition, we beneficially own shares of Apollo International stock. We received shareholder distributions of \$0.6 million in 2007, and no distributions in 2008 and 2006.

Effective September 2002, Western International University entered into an agreement with Apollo International that allows Western International University's educational offerings to be made available in India through a joint venture between Apollo International and K.K. Modi Investment and Financial Services Private Limited. The joint venture company is named Modi Apollo International Group Private Limited. Apollo International is responsible for the relationship with the entities in India that are offering the Western International is responsible for the relationship with the entities in India that are offering the Western International University programme while Western International University maintains the educational content and other academic aspects of the programme pursuant to an agreement with Apollo International. Western International University received approximately £0.2 million during

the fiscal years 2008, 2007 and 2006 in connection with its agreement with Apollo International."

20. Counsel urged that beyond seeing whether the cause of action was pleaded and appropriate averments existed in the suit, the Court cannot make an inquiry into the merits of the dispute; that has to be left to the trial process. It was argued that similarly, there were sufficient averments in the pleadings in the suit, as against the applicants, against whom relief was sought and in whose absence a proper and full trial cannot be undertaken.

Analysis and conclusions

21. The foundation of the appellant/applicant's plea is that due to lack of privity of contract between them and the plaintiff, the non-compete clause (Cl. 1.3 of the Shareholders Agreement) does not constrain them from operating any business in India and that the plaintiff cannot seek an injunction against them. It is also urged, entirely on the basis of an interpretation of the documents annexed to the plaint, that there can be no cause of action as against the appellant defendants. They further submit that the Learned Single Judge erred in accepting the plaintiff's plea that all applicants and defendants 1 and 9 had economic unity of function and that the Court may lift the corporate veil.

22. It is a well settled position of law as enunciated in ***Raptakos Brett & Co. Ltd. vs. Ganesh Property*** (1998) 7 SCC 184 and ***Saleem Bhai & Ors. vs. State of Maharashtra and Ors*** (2003) 1 SCC 557 that a plaint cannot be rejected on the basis of allegations made by defendant in its written statement. Furthermore, a plaint must be read as a whole to find out whether it discloses a cause of action. Crucially the Court cannot exercise this power

and reject the plaint where the averments in the plaint do disclose a cause of action. Reference may be had to *Mayar (H.K.) Ltd. and Ors v. Owners and Parties, Vessel M.V. Fortune Express and Ors* (2006) 3 SCC 100. As to what is a cause of action is a question of fact which has to be gathered on the basis of averments made in plaint in its entirety taking them as correct. Generally, in *A.B.C. Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, Salem* (1989) 2 SCC 163 and *Bloom Dekor Ltd. vs. Subhash Himatlal Desai & Ors.* (1994) 6 SCC 322), a "cause of action" has been described as *"every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court."*

23. The standard indicated by the Supreme Court for rejection of plaints is that it must plainly show that the litigant has no cause of action and that a perceived dexterity in the pleadings should not mask the lack of a genuine cause to move the court. The Court should be able to recognize that *"clever drafting has created the illusion of a cause of action nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage."* (Ref. *T. Arivandandam vs. T.V. Satyapal & Anr* (1977) 4 SCC 467).

24. It was held in *Liverpool and London S.P. & I Association Limited v. M.V. Sea Success I & Anr* (2004) 9 SCC 512 that the plaint together with the documents are the only material that the Court can examine when considering a plea under Order VII Rule 11. The requirement of what is sufficient for a pleading to pass muster has been explained in *William v.*

Wilcox (1838) 8 Ad. & EL 331 *"It is an elementary rule in pleading that when a state of facts is relied, it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegations."* This was endorsed by the Supreme Court in **Mohan Rawale v. Damodar Tatyaba & Ors.** (1994) 2 SCC 392 in the following terms:

"It may be true that Order 7 Rule 11(a) although authorizes the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct."

25. The applicant's contention that Clause 1.3 does not apply to them because they are not parties to the Shareholders Agreement is facially appealing. A deeper analysis of the materials however reveals a different story. The ninth defendant is the mechanism set up as a consequence of the Shareholders Agreement. The first defendant has assured the plaintiffs to ensure that educational services and support - which is the subject matter of the arrangement with the plaintiff, would be made available. These educational "offerings" are developed by the third and fourth defendants. The fifth and sixth defendants have overwhelming control, according to the plaintiffs, over the other defendants. The plaintiff relies on the theory that in reality all the applicants are one economic entity. Here, paras 42 to 44 of the plaint are relevant. The Learned Single Judge relied on them; they are extracted below:-

"42. In the aforementioned circumstances, acting upon the representations and pursuant to the detailed discussion held with defendant No.5, Defendant No.6, Defendant No.7, Defendant No.2, Defendant No.3, Defendant No.4 and its directors, employees and authorized agents who prevailed upon and invited the plaintiff to sign a Letter of Intent (LOI) dated 16.11.2000 incorporating the proposed terms of a joint venture or the partnership proposed between Apollo Companies, all acting through their affiliate defendant No.1 and plaintiff. The LOI was signed at New Delhi by defendant No.7. Under the terms of the LOI the parties agreed to establish on an exclusive basis, a higher education presence throughout India through the joint development of a Higher Education System (HES).

43. That acting in furtherance of the aforesaid LOI, on 22.03.2001, the defendant No.2, Defendant No.5, Defendant No.6 and Defendant No.7 caused its wholly owned subsidiary Defendant No.3's Board of Directors to unanimously approve a resolution to enable Defendant No.3 to enter into a relationship with Defendant No.1 and plaintiff with the intent of offering Defendant No.3's programmes in India through the joint venture of Defendant No.1 and the plaintiff.

44. That as per the applicable laws of Arizona, to enable defendant No.3 to offer its programs in India it was mandatory for defendant No.3 to obtain accreditation of the educational programs, to be made available in India, from Higher Learning Commission, Northern Central Association of schools and colleges, State of Arizona, USA (NCA-HLC). Accordingly, the plaintiff, Defendant No.3 and Defendant No.2 along with its affiliates worked together in making a proposal to be submitted to NCA-HLC for obtaining accreditation of educational programs of Defendant No.3 to be made available in India. For this purpose, around June 2001, Defendant No.3 under the instructions of Defendant No.2, Defendant No.5, Defendant No.6 and Defendant No.7 made a 'Request for Change' to the NCA-HLC."

Thus, there are averments about the involvement of the applicants/appellants. This is also backed up by documents filed along with the suit, which are to be treated as part of the plaint (**London & Liverpool**

S.P & I Association Ltd (supra)). Those documents *prima facie* disclose not only an *inter se* nexus between the defendants but also that conscious statements were made about their obligations vis-à-vis the plaintiffs, before US regulatory authorities. Consequently, this Court is of the opinion that the Single Judge's conclusions with regard to adequacy of pleadings to warrant dismissal of the application for rejection of plaint are sound and do not call for interference.

26. The next question is with respect to the plea that the applicants are not parties to the Shareholders Agreement and its terms preclude consideration of any condition or previous correspondence, conversation etc. This plea is with the objective of underlining that the non-compete Clause 1.3 does not bind them and cannot be relied upon. The defendants rely on *Indowind (supra)* for this purpose. That judgment was in the context of a claim to apply an arbitration clause to a non-party. The Supreme Court held that the inter se relationship of a holding and a subsidiary company would not lead to the conclusion that the agreement by one with a third party containing an arbitration clause would bind the other. Here, the court went by Section 7 of the Arbitration and Conciliation Act. In the present case, however, the plaintiff's attempt to invoke the arbitration clause was rebuffed when the Section 9 application was rejected and the rejection affirmed in appeal. At the same time, the court expressly kept open the door to agitate any cause in accordance with law.

27. The plaintiff's reliance on the doctrine of "lifting the corporate veil" and seeing the reality in the facts of this case, appears to be *prima facie* sound. The Supreme Court has, in diverse situations lifted the corporate veil

to discern the true nature of a company or a group of companies, or even transactions. In ***State of UP v. Renusagar Power Corporation*** AIR 1988 SC 1737 it was held that "*In the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation.*" ***Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*** AIR 1965 SC 40 is an authority that the corporate veil could be lifted where the companies shared the relationship of a holding company and a subsidiary company. Likewise, in ***Juggi Lal Kamalpat v.C.I.T.*** AIR 1969 SC 932 the Supreme Court held that the veil of corporate entity could be lifted to pay regard to the economic realities behind the legal facade, for example, where the corporate entity was used for tax evasion or to circumvent tax obligation. As to whether the plaintiffs can in fact prove their allegations, based on the materials adduced and the evidence led, cannot be speculated by this Court at this stage; its task is confined to see whether a cause of action has been pleaded, not its strength. This Court is satisfied that the pleadings on the record justified the Single Judge's order on this point.

28. The next point is a related one; it is whether Clause 1.3 - through its excepting portion enables the applicants to say that they can carry on business which competes with that of the ninth defendants, unhindered in any manner. The attempt was to say that the allusion to the Master Agreement between the Apollo Group and Apollo Inc. was expressly made in Ex. C to the said agreement; therefore, the applicant/appellants are not bound by the non-compete clause. The plaintiff, however points out that if the Apollo Group seeks to carry on business in any part of the world, other

than those specified, the first right or offer should be made to Apollo Inc. Intl. This is based on Clause 4 of the Master Agreement itself. This interpretation *prima facie* commends itself to this Court, because the object of Clause 1.3 of the SHA was to prevent either party to start or set up a rival business activity. That condition however is subject to a proviso, i.e the projects which are undertaken by either party in terms of the existing arrangements detailed in Annex C, the activity is permissible. However, Clause 4 of the Master Agreement itself places certain restrictions and constraints upon the Apollo Group from starting any rival business without first offering the right to do so to Apollo Inc. Apollo Inc. itself has set up the ninth defendant, as its affiliate (being a joint venture entity). In these circumstances, neither of the first two defendants can *prima facie* claim to be free of the non-compete condition, i.e Clause 1.3 SHA. So far as the question of the suit being barred by Section 41 (h) is concerned, the learned single judge held that the pleadings indicate existence of negative covenants and *prima facie* the argument is unsound; in any case the matter requires fuller consideration after the trial. That view is not unsound; this court affirms it.

29. This Court is of the opinion that there are sufficient pleadings and materials on the record, as part of the suit and accompanying documents, alleging the role of Defendant Nos. 2-8. The relative strength of these averments cannot be gone into at this stage. The Court is also satisfied that the said defendants are necessary parties, without whose participation the plaintiffs cannot expect appropriate relief, if they prove the averments in the plaint. Consequently, the appeal in respect of rejection of the Order 1 Rule 10 CPC application is without merit.

30. For the above reasons, this Court is of opinion that the impugned judgment and order of the learned single judge does not call for any interference. The two appeals, FAO 513/2014 and FAO 4/2015 are consequently dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

AUGUST 17, 2015

