

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.09.2016

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, THE CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE R.MAHADEVAN

O.S.A.No.266 of 2015

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

-vs-

1.J.S.Shekar,
Sole Proprietor,
LEAD HOSPITALITY,
No.1, Ground Floor,
34th Street, 4th Avenue,
Ashok Nagar,
Chennai-600 083.

2.C.Vijay Shankar,
Director,
BRISC-CARR GROUP.INC.,
1, Yonge Street,
Suite, 1801,
Toronto, Ontario,
M5E 1W7.

3.Meena Singh,
Director,
BRISC-CARR GROUP.INC.,
P.O.Box 235, Mallory Town,
ON, Canada KOE 1 RO.

(R-2 and R-3 deleted vide order of Court
dated 04.02.2016 made in O.S.A.No.
266 of 2015).

... Respondents

Appeal filed under Order 36 Rule 11 of O.S.Rules r/w Clause
15 of the Letters Patent, against the order passed by this Court
on 01.06.2015 in A.No.6373 of 2014 in C.S.(D)No.34580 of 2014.

For Appellant :: Mr.B.Mohan for Mr.A.S.Baalaji

For Respondents :: Mrs.Ambili Menon for R1

JUDGMENT

(Judgment of the Court was delivered by

R.MAHADEVAN, J.)

This appeal is filed against the order passed by this Court on 01.06.2015 in A.No.6373 of 2014 in C.S.(D)No.34580 of 2014, granting leave to the first respondent / plaintiff to sue the defendants who are living and carrying on business outside the jurisdiction of this Court.

2.The facts leading to the filing of this appeal are as under:

(i)The first respondent herein 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 to provide consultancy and training services in India. The appellant-company is a federally incorporated company in Canada to provide premium online training to build employable skills and increase productivity and the respondents 2 and 3 are its Directors. During the year 2011, the second respondent approached the first respondent herein 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. After various email correspondences between the first respondent and the respondents 2 and 3, the latter assured that a 'Preferred Placement Partner' agreement with a placement firm in Mumbai with All India reach would be entered during August 2011 and that the agreement would give the first respondent the similar option which would provide resume building tips and work to place the learners and on successful placement, the placement firm with an intimation to the licensee, would remit 25% of the placement fee directly. However, the said agreement was not entered into between the parties. After great deliberations and discussions, a Memorandum of Understanding (MOU) was entered into between the first respondent's company and the appellant-company on 14.12.2012 at Chennai and the third respondent signed on behalf of the appellant. On the same day, a Licence Agreement was also entered between them at Chennai. The objective and plan of the first respondent was to purely 'sell the ready-made online training programme to the market and earn the due profit or commission'.

(ii)After entering into memorandum of understanding and license agreement, the first respondent took various efforts to promote the product at all levels, ie., from NGOs in India to retail outlet companies and also school drop-outs, graduates and other individuals and in spite of the same, none of them had

shown any interest or satisfaction about the product and the same was informed to the respondents 2 and 3. Thereafter, the first respondent came to know about RAI (Retail Association of India), which is a core retail members club. The RAI was organising a two day event at Mumbai showcasing retail services and offered a platform to make a presentation and have stall there, where hundreds of their members would be present.

(iii) Hence, after obtaining license, they also participated in the exhibition conducted in Mumbai. Since the retailers were keen that the product be approved by RAI, in order to sell the product in the retail market, the approval of RAI was inevitable. Further, the first respondent took special efforts to speed up the decision process and convinced the RAI management to approve the on-line program well in time. Finally, RAI gave the payment option in three instalments ie., Rs.5 + 2.5 + 2.5 lakhs. As the appellant and the respondents 2 and 3 were delaying their decision, the first respondent herein, having no other alternative, paid a sum of Rs.5 lakhs to RAI in good faith on behalf of the appellant-company so that they could use the approved logo in their materials. The above payment to RAI was made with consent and knowledge of the appellant and the respondents 2 and 3 and on a specific understanding that the same would be reimbursed or adjusted towards purchase of licenses.

(iv) The first respondent, even though had not heard anything on meeting potential clients and pushing RAI to make the first respondent as part of their lecture to the industry, had done all works as part of branding and promoting the appellant's product. In the meantime, the first respondent was shocked to know that the second respondent was having series of meetings with RAI people and making full use of the member status and the same were done without the knowledge of the first respondent. Concluding that the above act of the second respondent certainly is in violation of the terms of MOU and license agreement, the first respondent decided to terminate the license agreement. Accordingly, on 12.09.2013 the first respondent had sent a letter of termination through email to the respondents 2 and 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 first respondent, 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. Further, a sum of Rs.7,50,000/- was also said to be paid to RAI as per the Tripartite agreement entered into between the appellant, RAI and the first respondent, dated 01.02.2013, more so as the appellant and the respondents 2 and 3 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 first respondent. The appellant and the respondents 2 and 3 were found to continue to correspond and communicate with RAI members even after the termination. According to the first respondent, the appellant and the respondents 2 and 3 are liable to pay a total sum of Rs.26,60,200/- to him. Since the said amount has not been paid to the first respondent, the present suit has been filed by the first respondent. Since the appellant herein and the respondents 2 and 3 are at Canada, the application in A.No.6373 of 2014 has been filed, seeking the leave of this Court, as stated supra.

3.(i)On notice, the appellant herein and respondents 2 and 3, who are the respondents in the said application, filed a detailed counter opposing to grant leave, contending that there is a jurisdiction clause in the licence agreement dated 14.12.2012 bestowing jurisdiction upon the Courts at Canada for adjudicating disputes arising under the said agreement and therefore, this Court will not have jurisdiction to try the present suit.

(ii)The learned counsel for the appellant herein as well as the respondents 2 and 3, who are the respondents therein, submitted before this Court that the appellant herein is the licensor and the first respondent herein is the licensee. The subject matter of license is towards sale of a product termed Customer Service Program Online for development of skills in learners employed in retail industry. Sale of the product is from Canada. Agreement was signed on behalf of the appellant by its Director-third respondent, 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 first respondent remitted 10,000 Canadian dollars (Rs.5 lakhs) which was received in Canada, under the agreement. The termination notice is dated 12.09.2013 issued by the first respondent 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 made for breach of warranty and a claim for damages, when established.

(iii)It was further submitted before the learned single Judge that as per Clause 9.4 of the license agreement dated 14.12.2012 entered into between the appellant herein and the first respondent, the terms of 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 sought for dismissal of the application.

(iv) Per contra, the learned counsel appearing for the first respondent herein submitted before the learned single Judge 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 Canada for recovery of Rs.26,60,200/-, the first respondent 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 cannot exclude the jurisdiction of this Court. In this regard, the learned counsel for the first respondent herein, relied upon the judgments reported in 1989(2) SCC 163 [A.B.C. Laminart Pvt. Ltd. and anr v. A.P.Agencies, Salem] and CDJ 1998 MHC 216 [Premium Industries India Ltd v. Quality Fabrications], in support of his contention.

(v) After hearing the arguments advanced on both the sides, and perusing the materials available on record, the learned single Judge held that Clause 9.4 in the licence agreement does not exclude the jurisdiction of this Court and that since this Court has natural jurisdiction, there will not be any bar for filing the suit before this Court. The learned single Judge further held that admittedly, the amount was sent by the first respondent herein through Andhra Bank at Chennai, which is situated within the jurisdiction of this Court. Further, according to the first respondent, the licence agreement was entered at Chennai; but whereas according to the appellant herein and the respondents 2 and 3, licence agreement was signed at Delhi by the third respondent who is the Director of the first respondent-Company while he visited Delhi during his trip to India. Therefore, holding that the question as to whether the licence agreement was entered into between the parties at Delhi or Chennai, is purely a matter of evidence and the same cannot be gone into at this stage, the learned single Judge, by referring to the judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the first respondent in 1989(2) SCC 163 [A.B.C.Laminart Pvt. Ltd. Vs. anr Vs. A.P.Agencies, Salem], held that this Court has jurisdiction. The learned single Judge also held that if the first respondent is directed to approach the Court at Canada, he has to spend more than the

amount claimed in the suit. Accordingly, the learned single Judge allowed the application filed by the first respondent and granted leave, which made the appellant herein to file the present appeal.

4. On 04.02.2016, when this appeal came up for hearing, it was informed before this Court that the second and third respondents are Directors of the appellant and they were sought to be given up in the present appeal, and this Court passed an order deleting the second and third respondents from the array of parties.

5. The learned counsel for the appellant submitted that when the first respondent / plaintiff having agreed under the license contract to submit to the jurisdiction of the Courts at Ontario, Canada, the learned single Judge has erred in granting leave to file the suit at Chennai. The learned single Judge has erred in applying the ratio of the Hon'ble Supreme Court in the Laminart's case (cited supra) to grant leave to sue the appellant herein. He further submitted that the learned single Judge ought to have held that where two Courts have jurisdiction, parties to an agreement can agree to exclude the jurisdiction of one Court in preference to another and accordingly should have given the finding that only the Court at Ontario had jurisdiction. He further submitted that the learned single Judge has erred in holding that this Court is a Court of Natural Jurisdiction on the basis that payment was made by the plaintiff through its banker located at Chennai, overlooking the fact that under the license agreement, in Clause 3.6, the beneficiary was detailed in Schedule-A at Canada and even though deposit by RTGS mode was made in Chennai, the place for the receipt of proceeds mentioned in Schedule-A, is only at Canada. Stating so, the learned counsel for the appellant submits that the cause of action arose only at Canada and hence this appeal has to be allowed and the order granting leave to sue the appellant, has to be quashed.

6. Per contra, the learned counsel for the first respondent, reiterating the submissions made on behalf of the first respondent before the learned single Judge of this Court, submitted that as the defendants are residing outside the jurisdiction of this Court, they filed an application for leave to file the suit; this Court has dealt with the matter elaborately and the learned single Judge has passed an elaborate order on merits analysing all the points in detail to sue the defendants and hence the same does not require any interference. He further stated that when the objective of the business itself is to cater to the Indian industry, it would only be appropriate

that the Indian Courts be allowed to try the suit. Stating so, the learned counsel for the first respondent submitted that this appeal has to be dismissed and the order of the learned single Judge has to be confirmed.

7. Heard the learned counsel on either side and perused the materials available on record carefully.

8. The appellant-company is a federally incorporated company in Canada to provide premium online training to build employable skills and increase productivity. The first respondent firm is in the business of providing technical solutions to the service industry and also to provide consultancy and training services in India. The appellant claims that they have no registered office here. The suit has been filed for recovery and realisation of a sum of Rs.26,60,200/- as damages towards the loss incurred by the first respondent / plaintiff in the course of its business with the appellant, in India. The said claim has been made on the basis that the execution of the Memorandum of Understanding dated 14.12.2012 and the license agreement was made at Chennai. According to the appellant, the first respondent's application seeking leave to sue, was allowed despite the fact that clause 8.2 more specifically mentioned in the memorandum of understanding defines the jurisdiction of the parties at Canadian Courts. Further, according to the appellant, the Tripartite agreement dated 01.02.2013 entered into between the appellant, the first respondent and RAI also stipulates that the jurisdiction of the Court will be at Mumbai. When such being the case, the application for leave ought not to have been allowed and it should have been rejected summarily, on that ground.

9. As rightly pointed out by the learned counsel for the appellant, when clause 8.2 of the Memorandum of Understanding dated 14.12.2012 entered into between the appellant and the first respondent more specifically defines that the jurisdiction of the parties will only be Ontario, Canada, and clause 9.4 of the license agreement entered into between them also defines that the terms shall be governed by and interpreted in accordance with the laws of Canada and shall be subject to the jurisdiction of the Courts in Ontario, the learned single Judge ought not to have allowed the application seeking leave to sue the defendants within the jurisdiction of this Court. Further, the Tripartite Agreement / Memorandum of Understanding entered into between the appellant-BRISC, RAI and the Lead Hospitality, also states that according to the Indian laws, each party shall submit to the jurisdiction of the Courts at Mumbai, India. In such view of the matter, the order passed by this Court granting

permission to the first respondent herein / plaintiff to sue the appellant and the respondents 2 and 3 within the jurisdiction of this Court, is liable to be set aside, and this appeal is liable to be allowed.

10.In view of all the reasons stated supra, this appeal is allowed and the order passed by the learned single Judge in A.No.6373 of 2014 in C.S.(D)No.34580 of 2014 dated 01.06.2015 is set aside. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

The Sub Assistant Registrar,
Original Side,
High Court Madras.

+1cc to M/S.A.S.Baalaji, Advocate Sr.55848
+1cc to M/S.K.s.Natarajan, Advocate sr.56393

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srg 24/10/2016

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