IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 3515 OF 2011
IN
SUIT NO. 2865 OF 2011

The Bank of New York Mellon, London Branch ...Plaintiff
vs.
Zenith Infotech Ltd. & Ors. ...Defendants

Mr.Janak Dwarkadas, Senior Advocate with Rohan Rajadhyaksha with Sukanya Bhaumik and Priyanka Hinday i/b. AZB Partners for Plaintiff.
Mr.J.P. Sen, Senior Advocate with Rakesh Reddy with Mahendhar Aithe, Company Prosecutor for Official Liquidator.
Mr.Zal Andhyarujina with P.A. Kabadi with Priyanka Ravindran I/b. Doijode Associates for Defendant Nos.5 and 6.

CORAM : S.C. GUPTE, J.

20 JUNE 2017

P.C. :

This notice of motion is taken out by Defendant Nos.5 and 6, who are promoters and directors of Defendant No.1 company, presently under liquidation, for stay of the present suit under Section 10 of the CPC. The application for stay is on the basis of a special civil suit filed by two shareholder entities for restraining Defendant No.1 company from utilising sale proceeds of proposed sale / lease of assets / business / divisions of Defendant No.1 company for any purpose other than redemption of bonds issued by it and from continuing / proceeding with the sale / lease of its assets / business / divisions. It is the case of the Plaintiff that the subject matter of the present suit, which seeks a money decree towards redemption of the bonds, covers the matter which is directly and substantially in issue in the said pending special civil suit.

2 The present suit has been filed by trustees on behalf of instructing bondholders, namely, QVT Fund LP and Quintessence Fund LP, who hold bonds issued by Defendant No.1 company, which are designated as 2011 bonds and 2012 bonds. The two instructing bondholders together hold approximately 75.6% and 57%, respectively, of 2011 and 2012 bonds issued by Defendant No.1. These two bondholders are partnerships formed under the laws of Cayman Islands. The suit seeks recovery of USD 36,046,369.55 under 2011 bonds and USD 53,752,833.33 under the 2012 bonds along with default interest. The hearing of the suit is sought to be stayed by the present notice of motion, as noted above, in view of the special civil suit pending before the City Civil Court, Dindoshi. This suit, as we have noted above, was filed by two entities, namely, QVT Mauritius West Fund and Quintessence Mauritius West Fund, who are shareholders of Defendant No.1. These shareholder entities, who between them hold about 0.2205% of equity (as on the date of filing of the special civil suit) of Defendant No.1 company, are private limited companies incorporated under the laws of Mauritius and registered as sub accounts under the SEBI (Foreign Institutional Investors) Regulations, 1995. The grievance of the shareholder entities in the special civil suit was that Defendant No.1 company, according to the explanatory statement at the Extra-Ordinary General Meeting held on 29 January 2011, had proposed to sell / lease its business / divisions, including subsidiaries of Defendant No.1, in domestic or international markets with a view to redeem or repay 2011 and 2012 bonds; but that contrary to the explanatory statement, Defendant No.1 company was likely to use the proceeds of the sale/lease for other purposes. In its affidavit in reply filed by Defendant No.1, it opposed grant of ad-interim reliefs in the special civil suit contending *inter alia* that the sale challenged in the special civil suit had been completed to the knowledge of the plaintiffs (namely, the

two shareholder entities) and that the sale proceeds received by Defendant No.1 towards such sale would be applied towards redemption of the two series of bonds. Despite this assurance to the court, the sale proceeds were not applied for redemption and Defendant No.1 continued to be liable on the bonds. The present suit is filed, in the premises, by the Plaintiff, as a trustee in respect of the two series of bonds on behalf of the bondholders and at the instructions of the two bondholders named above. The suit, as we have noted above, seeks an order and decree directing Defendant No.1 to pay to the Plaintiff amounts aggregating, respectively, over USD 36,046,369.55 and USD 53,752,833.33 under 2011 and 2012 bonds, along with default interest, etc. It also seeks an order from the court to declare the transfer of MSD division of Defendant No.1 in favour of a company owned by majority promoter/s of Defendant No.1, as illegal, null and void and a mandatory order and injunction against Defendant Nos.2 to 6 to take steps to restore the said business to Defendant No.1. It is the case of Defendant Nos.5 and 6, who are promoters and directors of Defendant No.1 and against whom relief is sought in the special civil suit filed before the City Civil Court as also in the present suit as noted above, that the matter in issue in the present suit, is directly and substantially in issue in the special civil suit and accordingly, this court ought not to proceed with the trial of the present suit pending the hearing and final disposal of the special civil suit.

3 There are too many difficulties in the way of the Applicants/Defendants in the matter of stay of suit sought in the present notice of motion. In the first place, the two suits are not between the same parties or between parties under whom they or any of them claim litigating under the same title. The special civil suit before the City Civil Court is filed by two shareholder entities, who are clearly different from not only the

Plaintiff herein but also the instructing bondholders at whose instance the present suit is filed, namely, QVT Fund LP and Quintessence Fund LP. These bondholders are, as noted above, limited partnerships established under the laws of Cayman Islands, whereas the two shareholder entities, QVT Mauritius West Fund and Quintessence Mauritius West Fund, are private limited companies incorporated under the laws of Mauritius. Neither of these parties claim under the other or others litigating under the same title. Learned Counsel for the Applicants / Defendants invites my attention to the shareholding patten, etc. of the respective two entities concerned with the special civil suit and the present suit. It is submitted that there are several indices, which show commonality of interest or control as between the two sets of entities and that they are for all practical purposes the same. An argument such as this would be clearly impermissible within the framework of the law of stay of suit under Section 10 of the Code. This court is not expected to lift the corporate veil and find out who the real entities are for the purposes of ascertaining whether the suit is between the same parties, or between the parties under whom they or any of them claim litigating under the same title. Lifting of corporate veil is permissible in a case where there is a fraud and the court endeavours to find out who the real perpetrators of the fraud are. It is impermissible in a case like this to undertake that exercise.

4 Be that as it may, there is a second unsurmountable difficulty in the way of the Applicants/Defendants for obtaining stay of this suit. The matter in issue in the present suit cannot be said to be directly or substantially in issue in the special civil suit filed before the City Civil Court. The matter in issue before the City Civil Court is, whether or not to permit Defendant No.1 from going ahead with its proposed sale of business so as to

allow the sale proceeds to be used for any purpose other than the one said in the explanatory statement issued for the Extra-ordinary General Meeting held on 29 January 2011, namely, redemption or repayment of 2011 and 2012 bonds. The present suit essentially seeks repayment / redemption of 2011 and 2012 bonds. That is not the subject matter of controversy in the special civil suit. Merely because incidentally the present suit seeks to restore to Defendant No.1 the business of MSD Division, the sale of which was sought to be restrained in the special civil suit filed earlier, the subject matter of the two suits cannot be said to be the same or even substantially the same. Mere identity of one of the issues in the two suits (which in the second suit is at any rate merely incidental to the main relief claimed), does not spell out identity of "matter in issue" in the two suits within the meaning of Section 10.

5 The third difficulty in the way of the Applicants / Defendants is that the City Civil Court, before whom the special civil suit is pending, does not have jurisdiction to grant the relief claimed in the present suit, namely, a money decree for about 100 million USD.

6 In the premises, there is no merit in the notice of motion. The two suits are not between the same parties or parties under whom they claim litigating under the same title. There is no identity of subject matter, even as a matter of substance, in the two suits. And the Civil Civil Court, before whom the prior suit is pending, has no jurisdiction to grant the relief claimed in the subsequent suit.

7 The notice of motion is, accordingly, dismissed. Costs to be costs in the cause.

(S.C. Gupte, J.)