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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved On : February 06, 2017

Judgment Delivered On : February 16, 2017

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EFA (OS) No.2/2011

LOTUS NIKKO HOTELS TRAVEL PVT. LTD.

.... Appellant

Represented by: Mr.L.K.Singh, Mr.Sonal Sinha,
Ms.Saira Parveen & Ms.Tanvi Khurana,
Advocates.

versus

ASHOK CHOPRA & CO & ORS

.... Respondents

Represented by: Mr.Rohit K Agarwal, Advocate for
respondent No.1.
Mr.Sanjeev Sindhvani, Senior Advocate
instructed by Mr.R.S. Mathur and
Mr.Amitabh Marwah, Advocates for
respondent No.2/ ITDC.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. Indian Tourism Development Corporation Ltd. (hereinafter referred to as the ITDC) owned various buildings in different cities in India wherein Hotels were established. One such building is in Gaya. A hotel by the name 'Hotel Bodhgaya Ashok' was being run from the building. The respondent No.1 : M/s Ashok Chopra & Company was the successful bidder to execute civil,

plumbing and electrical works in respect of which a dispute arose. The agreement between the parties having an arbitration clause, the dispute was referred to arbitration, parties wherein were ITDC and respondent No.1.

2. The learned Arbitrator published an award on June 02, 1994 which was filed in this Court in CS (OS) No.964A/1996, in which prayer made was that the award be summoned and be made a Rule of the Court. As per the award, respondent No.1 was awarded ₹15,14,187.60 with simple interest @ 13% per annum with effect from July 30, 1990.

3. On May 25, 1996 ITDC filed objections to the award and matter concerning the award remained pending in this Court till when on November 09, 2001 the Government of India took a decision, under its policy of disinvestment to hive-off the hotel business at Gaya. As per the policy, Bodhgaya Hotel Pvt. Ltd., shares whereof were wholly owned by the Government of India was constituted under a Scheme of Arrangement as per Section 391 read with Section 394 of the Companies Act, 1956, between the ITDC and Bodhgaya Hotel Private Limited whereunder the business at Gaya was proposed to be assigned to Bodhgaya Hotel Pvt. Ltd.

4. The Scheme of Arrangement defined and described as under:-

“(a) All the assets including leasehold assets, moveable assets and financial assets, together with all present liabilities and debts pertaining to such undertaking as mentioned in Schedule 1 as per the records of the transferor.

(b) xxxxx

(c) xxxxx

(d) *All immovable assets of the transferred undertaking including any leasehold or freehold rights in the land upon which the transferred undertaking is situated.*

(e) xxxxx.”

5. Being relevant we note Clause No.3.3 (c) of the Scheme of Arrangement dated November 09, 2001 between ITDC and Bodhgaya Hotels Private Limited. It reads: -

“(c) the debts, liabilities including debts and liabilities lying in the books of accounts of the projects division and corporate office of the Transferor and obligations of the Transferor relating to the Transferred Undertaking, shall, without any further act or deed stand transferred to the Transferee and shall become the debts, liabilities and obligations of the Transferee which it undertakes to meet, discharge and satisfy. All liabilities and obligations arising out of guarantees executed by the Transferor relating to the Transferred Undertaking or any third party/ies shall become the liabilities and obligations of the Transferee which it undertakes to meet, discharge and satisfy on and from the Appointed Date.”

6. Further, clause No.3.4 is as under:-

“3.4 All legal or other proceedings by or against the Transferor pending on the Effective Date and relating to the Transferred Undertaking (including property rights, power, liabilities, obligations and duties of Transferor) shall be continued and enforced by or against the Transferee.”

7. The Scheme of Arrangement providing for demerger between the ITDC and Bodhgaya Hotels Private Limited was confirmed and sanctioned by the Department of Company Affairs, Government of India vide order dated November 09, 2001 and it became binding with effect from March 31, 2001.

8. The Government of India thereafter invited offers to purchase the shares of Bodhgaya Hotels Pvt. Ltd. M/s Lazard India Ltd., an entity tasked to complete the disinvestment made available documents for due diligence to persons whose expression of interest had been accepted to bid for the shares. One such person was the appellant.

9. On November 29, 2001 whilst the objections filed by the ITDC were pending in CS(OS) No.964A/1996, the entire share holdings that was held by the Government of India and Indian Hotels Limited in M/s Bodhgaya Hotels Private Limited was sold to and purchased by M/s Lotus Nikko Hotels, a division of M/s Lotus Trans Travel Private Limited. The Share Purchase Agreement dated November 29, 2001 was executed and is filed. The relevant clauses of the Share Purchase Agreement are quoted as under.

Clause J of the recitals in ‘Share Purchase Agreement – A’ dated November 29, 2001 notes –

“J. The Purchaser has conducted a financial, technical and legal due diligence as to the affairs and financial position of the Unit transferred to the Company and in this context has done a complete and thorough review of the Date Room Documents (as defined hereafter).”

‘Business’ in clause 1.1 include the business of Hotel Bodhgaya Ashok comprising amongst others, litigation; all liabilities and debts.

Sub clause e of clause 8.6 of Article 8 notes :-

“(e) With effect from the Closing Date, all trade and other creditors and liabilities whether secured or unsecured, of the Business as detailed in the attached Balance Sheet shall, without any further act or deed stand transferred to the Purchaser. The Purchaser undertakes and represents to assume, pay and discharge the aforementioned creditors and liabilities on the same terms and conditions including in relation to the credit period and terms of interest on which these were assumed by the Purchaser, as it such creditors, liabilities and obligations were originally incurred by the Purchaser.”

10. On October 22, 2003 the objections of the ITDC were dismissed in default but were restored on November 5, 2003. The matter was finally heard on February 14, 2006 and the award was made the rule of the Court.

11. By its impugned order in EA(P) No.230/2006, this Court had discharged the ITDC from the liability under the decree dated February 14, 2006 on the ground that merely because the counsel for ITDC had continued appearing in the objections without information being provided to M/s Ashok Chopra & Co. of the approval of demerger would not be a reason to fasten the liability upon ITDC Ltd.

12. This order is challenged by the appellant in the appeal before us.

13. It is the case of the appellant that at the time of submission of the bid for purchase of Hotel Bodhgaya Ashok, M/s Lazard India Limited, had only provided a copy of the balance sheet of M/s Bodhgaya Hotels Private Limited as on March 31, 2001, which merely disclose a liability of ₹3,20,000/- payable by the ITDC to M/s Ashok Chopra and Company in the form of a security deposit and that the information qua the proceedings in relation to the award dated June 02, 1994 was never furnished and that it was only when the ITDC had sent a letter dated July 08, 2002 with a two page annexure, the details of litigation pertaining to Hotel Bodhgaya Ashok was provided to it for the first time but even the said list did not make a mention of the proceedings in relation to the award.

14. It was argued by the learned counsel for appellant that even at the time of execution of the Share Purchase Agreement dated November 29, 2001, the ITDC had surreptitiously and without its knowledge had entered a list of litigation into the agreement and that the appellant had signed the agreement dated November 29, 2001 in the normal course of human conduct and initials were made on the document in the routine manner without reading its contents and under the belief that the legal information included in the agreement is same as provided to the appellant at the time of submission of the bid. It was argued that the ITDC had failed to disclose the devolution of interest upon the appellant either to the appellant or to M/s Ashok Chopra & Company while the proceedings in relation to the award were pending and thus have put the appellant to a disadvantage.

15. The ITDC had refuted the allegation of the appellant by saying that the detail of the litigations in which M/s Hotel Bodhgaya Ashok was a party was duly provided to the appellant at the time of the bid and it was so included in annexure E to the Share Purchase Agreement dated November 29, 2001 and such annexure was duly signed by the appellant after going through and understanding its contents. The ITDC had denied of sending any list of cases attached to the letter dated July 08, 2002.

16. The argument of the appellant that it came to the knowledge of the litigation only when the ITDC had sent the list of cases to it along with its letter dated July 08, 2002, and even the said list did not refer to proceedings of award, appears to be clumsy, firstly because the letter dated July 08, 2002 of GM- Legal, ITDC Limited written to the Managing Director of Lotus Nikko only refers to SLP (C) No.20035-54/2000 filed by the Bihar State Electricity Board for grant of special leave to appeal against the common judgment and order dated June 26, 2000 passed by the Division Bench of Patna High Court in CWJC No.5542/1999 and secondly reading of such letter does not reveal of any annexure containing any list of litigation as alleged and hence the argument that a list of litigation was attached to this letter is frivolous.

17. Now, the balance sheet of M/s Bodhgaya Hotels Private Limited as on March 31, 2001 so provided to the appellant, do refer to a liability of ₹3.20 Lacs payable to M/s Ashok Chopra & Company. Moreso, clause 6.12 of the Share Purchase Agreement dated November 29, 2001 notes that except as

disclosed in Annexure E–Outstanding Litigation, there are no other outstanding litigation against the company as on the date of execution hereof. The said annexure E refers to an arbitration case of M/s Ashok Chopra & Company in a dispute pertaining to expansion of Travellers Lodge in the Hotel and that an award of ₹28 Lac so given is being challenged in the High Court. Hence the appellant cannot allege the agreement dated November 29, 2001 did not contain information pertaining to an award, pending in the High Court.

18. Though, the appellant had alleged that such information was included surreptitiously and it had signed the agreement in the normal course believing that it contain the same list of litigation as was provided to it at the time of submission of the bid, but a perusal of the agreement dated November 29, 2001 do show that a document D-5 relating to a ‘Statement showing the changes occurred in the list of employees since 28.08.2001’ was cancelled and it bear the initials of the parties to the agreement. This act rather shows due application of mind by both the parties to the agreement in preparing and executing such agreement.

19. Even otherwise, allegations of misrepresentation qua the terms of contract would only make such contract voidable at the option of the appellant. Admittedly, the appellant even on coming to know of this alleged misrepresentation or alleged surreptitious inclusion of the list of litigation in the agreement dated November 29, 2001 did not rescind the contract but had preferred to continue with it and thus now cannot allege that the contents of the

agreement suitable to him were within his knowledge and the rest were not. Since, annexure E is signed on behalf of the appellant, it cannot disown it by merely denying that such list was never a part of the agreement dated November 29, 2001. If the appellant had ignored such information or was not diligent enough to elicit further information, the ITDC cannot be held responsible. Under the Share Purchase Agreement dated November 29, 2001 it was certainly the responsibility of the appellant to further pursue the objections in the proceedings of CS(OS) No.964A/1996 and to assume the liability in the event of objections preferred by the ITDC being dismissed.

20. The appellant further argued that the executing court ought not to have upset the decree by discharging ITDC in exercise of power under Section 47 of Civil Procedure Code as it tantamount to fastening of liability upon appellant. It was argued that an executing court was bound to execute the decree as it is and it could not have discharged the respondent No.2 particularly when the nature of the objections taken in the execution proceedings were never taken in the suit which culminated into a decree and as the ITDC had failed to inform about the demerger to the Court or to M/s Ashok Chopra & Co., the decree could not be executed against the appellant.

21. Admittedly the Scheme of Arrangement providing for demerger stood confirmed and was made binding w.e.f. March 31, 2001 and once the Scheme stands approved it binds the creditor whether or not they may have specifically consented to the Scheme. Hence, even if the ITDC had not disclosed about the

demerger to M/s Ashok Chopra and Co. it would still be not liable under the decree. Moreso, under the Share Purchase Agreement the liabilities stood transferred to the appellant and thereafter it was the responsibility of the appellant to assume such liability in the event of objections preferred by ITDC being dismissed. The appellant cannot allege that the failure of the ITDC to disclose subsequent events would make the ITDC liable under the decree.

22. Learned counsel for appellant though had relied upon the decision reported as 2004 (9) Scale 384 Government of Orissa Vs. M/s Ashok Transport Agency & Ors but the said decision is not applicable to the facts of this case, firstly because per clause 7 of the M/s OMC Alloys Limited and the Orissa Mining Corporation Limited (Amalgamation) Order, 1991 it was obligatory for the plaintiff to implead the Government in his suit and secondly in the case before us the appellant had a notice of arbitration proceedings as noted by us.

23. The decision reported as 2001(3) SCR 1129 Dhurandhar Prasad Singh Vs. Jai Prakash University and reported as 2016 (1) SCC 730 Sharadamma Vs. Mohammed Pyrejan (D) through LRs and Anr would rather be relevant in this context, wherein it was held that the legislature has not envisaged the penalty of the dismissal of the suit or appeal on account of failure of the assignee to move an application for impleadment and to continue the proceedings. He can continue the proceedings for the benefit of assignee.

24. Thus the law as it emerges is a mere continuation with the proceedings for the benefit of the assignee would not make the decree executable against the assignor, in this case the ITDC.

25. Consequently, the appeal being devoid of merit is dismissed.

26. No order as to cost.

(YOGESH KHANNA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

FEBRUARY 16, 2017

M/VLD