Application Nos.3127, 5901 and 5902 OF 2018
in
A.Nos.1126 and 1127 of 2018

M.GOVINDARAJ, J.

The Application is filed by the applicant to vacate the interim order granted in Application number 1126 of 2018 dated 08.02.2018. The short facts in this application are as follows:

2. The applicant Polaris Consulting and Services Limited, Chennai, entered into Memorandum of Terms for proposed purchase of share of Catalytic Software Limited, Hyderabad from respondents 2 and 3. The term sheet dated 26.06.2010 was drawn between the parties. After discussions it was agreed to enter into an agreement which, in this case is the Share Purchase Agreement. As per the transaction proposed, the applicant company was to acquire 8,47,11,675 (91.57%) shares held by the first respondent company for a consideration of US $4750000, according to which US $750000 was to be paid towards advance which is refundable upon the acquirer namely the applicant, if the first respondent has made misrepresentation impacting the value of the 50 acre campus owned by it.

3. On 10.09.2011, the third respondent acknowledged the receipt of the advance amount in June 2010 and sought for releasing of additional advance for making interest payment to EXIM Bank to avoid litigations. Following this, by letter dated 04.10.2011, the first respondent addressed a communication to the applicant seeking advance

amount of Rs.1,00,00,000/- (Rupees One Crore) for payment towards debt to Export Import Bank of India, Mumbai. The third respondent, on behalf of the Chief Executive Officer, once again acknowledged the receipt of US $750,000 for purchase of equity shares as per the term sheet dated 26.06.2010. Thereafter, on 04.11.13 Pre-Possession notice was issued by EXIM Bank followed by notice dated 19.11.2013. On 27.11.2013, the applicant caused legal notice setting out the developments of Pre-Possession and show cause notice mentioned above and demanded repayment of advance paid as per the Memorandum of Terms for US $750000 and Rs.1,00,00,000/- paid by the EXIM Bank of India to the first respondent along with interest at the rate of 18% failing which they would invoke the Arbitration clause under Section 14.9 of Share Purchase Agreement. Again on 25.02.2014, the applicant invoked Arbitration clause and nominated the Arbitrator themselves from their side calling upon the respondents to nominate their Arbitrator. On 27.03.2014, the respondents have nominated Arbitrator from their side without admitting the claim made by the applicants. It appears that both the Arbitrators have appointed presiding Arbitrator and Arbitration proceedings have been commenced.

4. From the records, it is seen that the Arbitration Tribunal has sent notice to all the respondents which could not be served and there is no response from the 2 and 3 respondents. In the meanwhile, by notice dated 05.04.2014, the respondents, in spite of their best efforts, to amicably resolve the dispute out of and in relation to the Share Purchase Agreement by mutual negotiations, an effective attempt was

made by the applicant which was prerequisite to invoke Arbitration proceedings. Hence, as informed by the principal share holder and principal sponsor namely the second and third respondent kept the whole process by invoking Arbitration proceedings. To this, the applicant sent reply, dated 02.06.2014, stating that they had sponsored two of their Senior Executives for negotiations and also agreed to request the two Arbitrators not to appoint the presiding Arbitrator for a further period of 90 days from 15.06.2014. Thereafter, it appears that the presiding Arbitrator was appointed by two Arbitrators and notice sent to them did not receive any response from 2 and 3 respondents.

5. On 18.01.2016, the applicant filed a Claim statement. Thereafter, on 09.11.2017, the applicant and the first respondent entered into Memorandum of Settlement thereby settling the dispute between them on payment of Rs.1,27,67,397/- (Rupees One Crore, twenty seven lakhs, sixty seven thousand three hundred and ninety seven only) to the applicant. The applicant has received the money without prejudice to continue the Arbitral proceedings against the other respondents. Clause 4 of the settlement rights reads as follows:

> *"The first respondent shall not disburse any amounts to its shareholders or their affiliates (including but not limited to the other respondents in the Arbitral Proceedings and their affiliates) for a period of three months from the date of this MoS or until completion of the Arbitral Proceedings against the other respondents, whichever is earlier."*

6. As per clause 4, the first respondent is entitled to disburse the amounts to share holder for the affiliates for a period of three months. The three months period came to a close on 08.02.2017. It appears that the Arbitration proceedings could not be completed for want of service of notice on the second and third respondent. The second respondent changed the name of the Company from Catalytic Software Limited, Inc. USA to Catalytic Services. In the E-mail dated 10.09.2011, the third respondent mentioned the name of one Prithvi who is not making regular payments. They searched on the internet about the status of the second respondent company and were let to believe that the company was taken over by Prithvi Catalytic, Inc. Later the said Prithvi Catalytic, Inc. was changed to Abilius, Inc. filed on 15.04.2014. Pursuant to the confirmation passed by the United States Bankruptcy Court for the Western District of Pennsylvania, it is evident by the Certificate of Amendment to the Certificate of Incorporation of Prithvi Catalytic, Inc. dated 15.04.2014. Therefore, the applicant filed an amendment application changing the name of the Catalytic Software, Inc. to Abilius Inc. Thereafter, the first respondent produced the certificate of change of name to Catalytic Software, Inc. USA, to Catalytic Services Limited. Therefore, the applicant filed a petition for impleading all these companies in the place of the second respondent. The Arbitration Tribunal allowed those applications in view of the peculiar circumstances of change of name of the companies and as to notice Arbitration proceedings could not make any progress. By this time,

the three months period mentioned in the Memorandum of Settlement between the applicant and first respondent came to a close. Since the second respondent is a principal share holder and the third respondent is a principal sponsor of this Share Purchase Agreement for selling the shares of the first respondent company, the applicant move this Court under Section 9 to preserve the assets of the principal share holder and the principal sponsor in the first respondent company.

7. This Court by its order dated 08.02.2018 in Application Nos.1126 of 2018 granted an order of injunction restraining the first respondent from disbursing or transferring any amounts to or under the direction of the second and third respondent or to any persons claiming under second and third respondent or either of them until enforcement of the Arbitral award and directing the first respondent to deposit into this Hon'ble Court such amounts not exceeding US $750,000 available with the first respondent for payment to the second and third respondents.

8. Aggrieved over the order passed by this Court in A.No.1126 of 2018 dated 08.02.2018, the first respondent has filed the above application to vacate the interim order granted. The contention of the first respondent is that the Memorandum of Terms dated 26.06.2010 does not have any Arbitration clause. Therefore, there cannot be an Arbitral dispute between the parties and hence the Arbitration itself is not maintainable so an interim order also granted pursuant to the term sheet.

9. Secondly, the Share Purchase Agreement entered between

the parties does not have any communication to the Memorandum of Terms. It is evident from the reading of the Share Purchase Agreement:

1.The Share Purchase Agreement, no way, mentions the Memorandum of Terms and payment of advance towards purchase of shares.

2.Even assuming that there was hire purchase agreement, pursuant to the Memorandum of Terms, the present Share Purchase Agreement has nothing to do with them as sale consideration was originally agreed was US $4,750,000; after deducting the advance US $750,000 the sales consideration should be US $4,000,000 whereas, the Share Purchase Agreement relied on by the respondents discloses the sale consideration of US $3,640,000. Therefore, there is no connectivity between the Memorandum of Terms through which the applicant claims to have advance of US $750,000 and Share Purchase Agreement relied on by them.

3.Even assuming that there was some connection between the memorandum terms of Share Purchase Agreement no notice was served on the 2 and 3 respondents and therefore the order passed by this Court is not sustainable.

4. After amendment of the act, the applicant should have approached the Tribunal under Section 17 and an order passed by this Court is contrary to statutory provision.

5.The garnishee order can be passed only against the judgment debtor. Even before the award can be passed, the applicant had presumed that they succeeded in the Arbitration and sought for orders which is not sustainable in the eyes of law in view of the Order 21 Rule 46 of Civil Procedure Code. Therefore, interim granted shall be vacated.

10. I have considered the rival contentions. It is not in dispute that there was a Memorandum of Terms between the applicant and the second respondent Catalytic Software, Inc., Corporation to purchase shares held by the first respondent. It is specifically agreed that the second respondent could be the principal share holder and the third respondent was principal sponsor. They agreed to sell 8,47,11,675 (91.57%) shares held by the first respondent company and also the principal Sponsor shall assist the acquisition of 7,791,205 (8.42%) shares held by Hyderabad Information Technology Ventures Limited (HITVL) and also the balance 2,115 (0.01%) shares including all assets of the company. Therefore, it is clear that the shares held by the first respondent company was sought to be acquired by the applicant. The second respondent, being the principal share holder and third respondent being the principal Sponsor, have entered into agreement. The second respondent was shown as seller / principal share holder and third respondent as principal Sponsor, Clause 1.18 defines relied documents, Clause 1.19 specifies the sale consideration as US $364,000, Clause 14.9 speaks about the Arbitration agreement governed by Arbitration and Conciliation Act, 1996.

11. Now that, as contended by the first respondent it has to be seen as there are any connection between the Memorandum of Terms and the Share Purchase Agreement dated 21.10.2010. It is useful to refer

the e-mail communication between the parties, particularly the e-mail dated 10.09.2011 and the letter dated 21.10.2013 addressed by the second respondent to its share accountants. In the e-mail dated 10.09.2011, the third respondent addressed the executive of the applicant company that they have received US $750,000 from the applicant company in 28.06.2010 and sought for additional advance for settlement of interest payment to EXIM Bank.

12. Secondly, the letter dated 21.10.2013 by the second respondent proves that share accounts is under S.R.Batliboi and Associates LLP. This letter normally mentions that the second respondent received US $750,000 as advance for the purchase of equity shares as per the term sheet dated 26.10.2010 and it is signed by the third respondent to the Chief Executive Officer of the second respondent. Therefore, it is clear that the Share Purchase Agreement dated 21.10.2010 was pursuant to the Memorandum of Terms dated 26.06.2010. The letter returned by the third respondent has no reference to another Share Purchase Agreement. In that event, it should be safely presumed that the Share Purchase Agreement dated 21.10.2010 was only in pursuance of the term sheet dated 26.10.2010. If at all, if there is Share Purchase Agreement, the respondents, while issuing reply notice dated 27.03.2014 would have mentioned the same. Curiously, the reply notice mentions only the Share Purchase Agreement dated 21.10.2010 and the Memorandum of Settlement dated 09.11.2017 between the applicant and the first respondent specifically mentions in clause 5 as follows:

"Upon the aforesaid payment by the first respondent, the claimant agrees to withdraw all claims against the first respondent in these Arbitral Proceedings. The Claimant and first respondent also agree not to raise or pursue before any forum any further claims against each other in regard to the subject matter of these Arbitral Proceedings or arising from or deriving out of the term sheet dated 26th June, 2010 and the share purchase agreement dated 21st October, 2010. However, this does not prevent the claimant from seeking interim relief under section 9 and 17 of the Arbitration and Conciliation Act, 1996 to secure its claims against the other respondents."

From the reading of clause 5 it would clearly show that the term sheet dated 26.02.2010 and Share Purchase Agreement dated 21.10.2010 are inter connected and the Share Purchase Agreement is derived out of term sheet dated 26.10.2010. Therefore, it cannot be denied that the advance US $750,000 has connection with the Share Purchase Agreement. Therefore, this Court is of the considered opinion that the Arbitration is maintainable in respect of the said dispute. Further more, substantiated by reply notice given by respondents dated 27.03.2014 appointing Sr.Raghuvir, advocate, as Arbitrator from their side. Therefore it is an after thought to say that there is no Arbitral dispute between the parties.

13. From the reading of the Share Purchase Agreement, it is very clear that the second respondent company is the principal Share Holder of the first respondent company and the third respondent is principal Sponsor. The 91.57% of share holding of the first respondent company belongs to second and third respondents. In that event, if the first respondent is permitted to liquidate its assets, the applicant will be left with nothing to enforce the award against the second and third respondent. The primary agreement and the advance of US $750,000 was for purchase shares of the second respondent held in first respondent company. Therefore, this Court, considering the prima facie case and balance of convenience, had decided to protect and preserve interest of the applicant, pending disposal of the Arbitration proceedings. Therefore, the grant of interim order is justified.

14. The learned counsel appearing for the respondent would vehemently contend that the respondents are not Judgment attached and there is no decree passed against them. In the absence of any decree, issuance of garnishee order under Order 21 Rule 46 of Civil Procedure Code is not maintainable. In support of the contention, the learned counsel relied on Judgments reported in MANU/SC/0714/2011, MANU/BH/0104/1968, MANU/SC/0142/1965 and MANU/UP/1385/2004. The order granted is considered as a garnishee order. The present application has been filed under Section 9 (i), (ii) (c) of Arbitration and Conciliation Act, 1996 empowers the Court to preserve any property which is a subject

matter of dispute and Arbitration and to grant an order of interim injunction and also such other interim measure of protection made by the Court to be just and convenience.

15. In the instant case, if the second and the third respondents are permitted to liquidate their assets which is the subject matter of dispute and Arbitration to which the advance amount of US $750,000 is paid, the applicant will be left with nothing to secure the contact of second and third respondent and by itself proved that they have appeared before the Arbitration Tribunal only after interim protection granted by this Court in the above application. But for this interim order, the second and third respondent has not chosen to appear in respect of service of notice by the Arbitration Tribunal. In such circumstances, it is just and reasonable to sustain the interim order granted by this Court. The contention of the respondent on this aspect is not sustainable and accordingly rejected.

16. a) In the result, the interim order granted on A.No.1126 of 2018 is made agreeable, Application No.3127 of 2018 is dismissed.

b) In A.Nos.5901 and 5902 of 2018, since the Arbitration Tribunal has itself amended, the petition amending the cause title and description of the second respondent, the consequent amendment in the above applications are also ordered.

30.08.2019

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