

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 04.01.2019
Dated of Pronouncement: 24.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

O.S.A.Nos.275 to 277 of 2018

OSA No. 275 and 277 of 2018

1. Prashant Hasmukh Manek
Residing at:
94, Harrowdene Road,
North Wembley, Middlesex, HA02JF,
United Kingdom
2. Sanjay Chandi
Residing at:
Kizingo Complex, Plot No. 453 MSA/XXVI/481,
Mombasa Island, PO Box 80638-80100, Mombasa, Kenya
3. EAGM Ventures (India) Private Limited,
Rep. By its Director, Mr. S. Chandi,
Having its registered office at:
Concordia Wintersun, Plot 56/57, D.No.1
Naidu Street, Kotturpuram,
Chennai 600 085

.. Appellants

VS

1. Ramu Annamalai Ramasamy
Residing at:
No.25, 70 Feet Road,
Saidapet, Chennai 600 015
2. R.M.Palaniyappan
Residing at:
No.25, 70 Feet Road,
Saidapet, Chennai 600 015
3. GI Retail Private Limited
Rep. By its Director, Mr. R.M. Palaniyappan
Having its registered office at:
C-9, Thiru Vi.Ka. Industrial Estate,
Guindy, Chennai - 32

.. Respondents

Prayer:

Appeal under Order 36 Rule 9 of the O.S. Rule read with Clause 15 of the Letters Patent against the common judgment and decree dated 26.06.2018 made in O.A.No.276 of 2018 in C.S. No. 192 of 2018 and A.No.3470 of 2018 in O.A.No.276 of 2018 C.S.No.192 of 2018 respectively.

Prayer in OA.No.276 of 2018:-

Original Application praying that this Hon'ble Court be pleased to grant on order of ad-interim injunction restraining the Respondents/Defendants and their men, agents, representatives and assigns, from in any manner, instituting or proceeding with any legal proceedings initiated by them before the High Court of England and Wales, Queen's Bench Division (Commercial Court), including but not limited to claim No.CL-2017-00625.

Prayer in CS.No.192 of 2018:-

(a) A permanent injunction restraining defendants and their men, agents, representatives and assigns from in any manner, instituting or proceeding with any legal proceedings initiated by them before the High Court of England and Wales, Queen's Bench Division (Commercial Court) including but not limited to claim no. CL-2017-00625 and costs of suit.

Prayer in A.3469 of 2018:-

(a) To treat this Application as urgent

(b) revoke the leave granted to sue the applicants/respondents/defendants vide order dated 22.03.2018 in A.No.2554 of 2018.

(c) Pass any other order deemed fit in the interest of Justice, equity and good conscience.

Prayer in A.3470 of 2018:-

(a) Treat this Application as urgent

(b) Vacate the ex-parte Ante-Suit Injunction dated 23.03.2018 and dismiss O.A.No.276 of 2018 with exemplary costs and

(c) pass any other order deemed fit in the interest of justice equity and good conscience.

OSA No. 276 of 2018

1. Prashant Hasmukh Manek
Residing at:
94, Harrowdene Road,
North Wembley,
Middlesex, HA02JF,
United Kingdom

2. Sanjay Chandi
Residing at:
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Concordia Wintersun, Plot 56/57, D.No.1
Naidu Street, Kotturpuram,
Chennai 600 085

.. Respondents

Prayer: Appeal under Order 36 Rule 9 of the O.S. Rule read with Clause 15 of the Letters Patent against the judgment and decree dated 26.06.2018 made in A. 3469 of 2018 in C.S. no. 192 of 2018.

For Appellants : Mr. Arvind P. Datar, Sr. Counsel
for V.P.Raman and M.S.Seshadri
for 1st Appellant in all O.S.As
Mr. P.R. Raman, Sr. Counsel
for V.P.Raman and M.S.Seshadri
for 2nd Appellant in all O.S.As

Mr. Aurup Das Gupta
for Mr. V.P. Raman & M.S. Seshadri
for 3rd Appellant in OSA No. 275 &
277 of 2018 &
for 4th Respondent in OSA No.276
of 2018

For Respondents : Mr. P. S. Raman, Sr. Counsel
for Mr.R.Parthasarathy
1st Respondent in all O.S.As
Mr. Satish Parasaran, Sr. Counsel
for Mr.R.Parthasarathy
2nd Respondent in all O.S.As
Mr. A.R.L. Sundaresan, Sr. Counsel
3rd respondent in all O.S.As
for Mr. R. Parthasarathy

COMMON JUDGMENT

M.M.SUNDRESH, J.

Heard Mr. Arvind P. Datar, Mr. P.R. Raman, Mr. Aurup Das Gupta, Mr. P.S. Raman, Mr. Satish Parasaran, Mr. A.R.L. Sundaresan, Senior Counsel appearing on either side. Perused the documents and written submission.

FACTUAL MATRIX:

2. Facts form the core of an adjudicatory process. Thus, it is imperative to place them on record.

3.1. The appellants owned 6 per cent shares in M/s.Hermes i-Tickets Private Limited (hereinafter referred as 'Hermes'). The first and the second appellants owned 5.2 per cent and the third appellant owned 0.8 per cent shares respectively. G.I.Retail Private Limited, the third respondent company was held by the first and the second respondents and their family members. To be precise, they hold 63.4 per cent and the remaining 36.6 per cent was with the members of their family.

3.2. There was series of communications between the appellants, through their representatives, and the first and the second respondents for the sale of shares. Incidentally, the first and the second respondents were at the helm of the third respondent company. It was accordingly agreed to transfer the

shares held by the appellants and the respondents in Hermes in favour of M/s. Emerging Markets Investment Fund IA (hereinafter referred to as "EMIF") incorporated in 2015. 5 per cent share held by the first and the second respondents was transferred to the third respondent on 05.09.2015 and on 9.9.2015, 6 per cent held by appellants 1 and 2 was transferred to the third respondent. Thus, the third respondent acquired 100 per cent shares in Hermes. Then, 99.9 per cent shares of Hermes was sold by the third respondent to EMIF on 18.09.2015.

3.3. M/s. G.I. Technology, a holding company of the third respondent, approved issue of 4% shares in G.I. Technology to EMIF on 25.09.2015 through capital increase and approved issue of 56 per cent of share in favour of Wirecard AG on 25.09.2015 through capital increase. An agreement was made by Wirecard AG on 27.10.2015 to acquire 100 per cent of shares from G.I. Retail Group leading to a completion on 01.03.2016. M/s. Wirecard AG acquired 99.9 per cent in M/s. Hermes and 60 per cent in G.I. Technology Private Limited accordingly. The remaining one share was also acquired on 01.03.2016 from the third respondent.

3.4. There were communications between the appellants and the second respondent prior to the transfer of shares held in M/s. Hermes. Meetings were held at London. Mr. Amit Shah and his concern M/s. IIFL acted as go-between. According to him, he was having mutual acquaintance of the appellant's representatives and EMIF. Mr. Amit Shah contacted the appellants pursuant to the mail dated 21.08.2015 sent by the first respondent stating that he had passed on the contact details of the appellants to EMIF.

3.5. The communication by the first and the second respondents were made through domain names "hermes-it.in" or "gitech.it.in". The first domain name belongs to M/s. Hermes and the second belongs to M/s. G.I. Technology Private Limited. The appellants sold their shares vide agreement dated 09.09.2015. The share transfer agreements do contain the following arbitration clause:-

"3.2 Governing Law:

3.2.1 This Agreement shall be construed in accordance with, and governed by the laws of Republic of India.

3.2.2 Any dispute arising out of or in connection with this Agreement including without limitation any question regarding its existence, interpretation, performance, validity, effectiveness or termination of the rights or obligations of any party, shall first be settled amicably by the Parties wherever practicable

without recourse to litigation.

3.2.3 If such dispute cannot be resolved amicably by the Parties after a period of thirty (30) days after the receipt by one Party of a notice from the other Parties of the existence of the dispute, then it shall be referred to and resolved by a single member arbitration mutually appointed by both the Parties in accordance with the provisions of the Indian Arbitration & Conciliation Act, 1996 as amended from time to time. The Arbitrator shall conduct the Arbitration proceeding in fast track manner and conclude and render a binding final award within 60 days from the date of reference. The venue of such arbitration shall be in Mumbai.

3.2.4 Notwithstanding the above, the parties irrevocably submit to the non-exclusive jurisdiction of the courts of Mumbai, India to support and assist the process set out in this clause, including if necessary the grant of equitable, injunctive and/or interlocutory relief pending the outcome of that process."

3.6. The agreements bound not only the third respondent but also its Directors. Incidentally, the first and the second respondents were the Directors. While the venue was specified at Mumbai, which can be taken as a seat of arbitration, the parties were given liberty to approach any Court to support and assist the process set out in the above mentioned clause, including obtaining appropriate orders pending the process. Therefore, the agreements only provide a non-exclusive clause with reference to approach to the Court with a caveat that it should be in relation to the process underlined.

3.7. There was series of communications between the representatives of the appellants and the first and the second respondents either prior and after the execution of Share Purchase Agreements. The transfers as aforesaid, for the purpose of taking over of the entire shares held in M/s. Hermes, were made initially in favour of EMIF which was incorporated only in the month of February 2015 and thereafter to M/s.Wirecard AG. There seems to be some other transactions between M/s.Wirecard AG and the respondents. According to the appellants, by taking note of the swiftness in the process coupled with the agreement of shares from G.I.Technology Private Limited to Wirecard AG and the subsequent dealings between the parties, while the first and the second respondents continued to be the Directors of M/s. Hermes, the appellants smelt a rat. According to them, the

particulars of the shares sold by the first and the second respondents were not provided. They believed that what has been given to them was a pittance and everything was stagemanaged by intimidation, deceit, misrepresentation between the first and the second respondents, Mr.Amit Shah and IIFL. It is their specific case that by deceit and stagemanagement the appellants were pushed to a situation by supressing the material facts. The deal with M/s.Wirecard AG was already stuck wayback in the month of December 2014 as it was the unknown intending purchaser. This is also for the reason that EMIF came into existence only in the month of February 2015 and therefore the offer received in the month of December 2014 would not have emanated from it and thus, the inference can only lead to Wirecard AG. This can be seen from the statement made by M/s. Wirecard AG during the investor call on 07.04.2016 that they agreed for earn-out consideration of EUR 110 million, based on the achievement targets for 2015 - 2017.

3.8. A series of exchange of communications made between the parties. Mails emanating from the domain names used by the first and the second respondents, as aforesaid, do not indicate that they were sent on behalf of the third respondent. A legal notice was issued by the appellants to the respondents on 04.04.2017. According to them, the notice was issued pursuant to the investigation made which is a continuing process involving roles of M/.s IIFL and Mr. Amit Shah. A reply was given by the third respondent by which the allegations made were denied.

3.9. Thereafter, notice dated 06.10.2017 was issued by the appellants to the first and the second respondents alone along with M/s. IIFL and Mr. Amit Shah. In this notice, specific allegations on the conduct of the first and the second respondents were made in collusion with Mr. Amit Shah and M/s. IIFL was raised annexing particulars of collusion. It was duly replied by the respondents by the reply notice dated 14.12.2017.

3.10. A claim was made on 26.01.2018 by the appellants by arraying the first and the second respondents, Mr. Amit Shah and M/s. IIFL. In the claim, specific allegations have been made on deceit, intimidation, conspiracy and this is a joint liability. This is a tortious claim, pure and simple. We do not wish to delve much into the averments made in the claim petition except by stating that they are very specific in nature. Therefore, according to the appellants, the process of deceit sought earlier in point of time lead to the execution of Share Purchase Agreement through the conspiracy hatched by the respondents therein. To buttress this stand, the communications between the

parties, the refusal to give particulars and certain external materials including the publications made were relied upon. Therefore, according to the appellants they do not seek any claim against the third respondent but only the first and the second respondents along with Mr. Amit Shah and M/s. IIFL.

3.11. We may note that the English Courts do provide for a process of discovery. As the first and second respondents are the citizens of this country and Mr. Amit Shah was working from Singapore, the appellants sought for permission before the English Court incorporating CPR 6.36 - 6.39. These provisions require a Court in England to satisfy the jurisdiction over a foreign defendant. They, accordingly mandate that a claimant must satisfy the Court that in all the circumstances it is the appropriate forum for resolving the dispute. Therefore, it is mandatory to state the same in the application and the Court shall grant permission only on satisfying about its jurisdiction qua the issue involved against the foreign defendant. The aforesaid decision along with the relevant rules is dealt with in Newland Shipping & Forwarding Limited v. Toba Trading Fzc and others reported in (2017) EWHC 1416 (Comm) by the Queen's Bench:-

'The Challenge to jurisdiction:

The Rules

22. The relevant rules and principles are not in issue. CPR 6.37 requires an application for permission to serve out of the jurisdiction to state:

c. which ground in paragraph 3.1 of Practice Direction 6B is relied on ((1)(a));

d. that the claimant believes that the claim has a reasonable prospect of success ((1)(b)); and

e. where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B (necessary and proper party), the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the Court to try (2).

It also provides that the Court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim. It is therefore implicit that an application for permission to serve out should deal with this aspect

23. Those provisions of CPR reflect the common law rules as to what a claimant must show in order to

found jurisdiction over a foreign (non-European) defendant as re-stated by Lord Collins in AK Investment CJSC v. Kyrgyz Mobil Tel Ltd (2012) 1 W.L.R. 1804 at [71]:

'On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law or, both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances (England) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

24. In this case the relevant jurisdictional gateway relied on by the Claimant was that set out in paragraph 3.1(3) of Practice Direction 6B. It provides:

"The Claimant may serve a claim from out of the jurisdiction with the permission of the court under rule 6.36 where:

(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and:

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim."

25. In AK Investments, Lord Collins cited with approval at [73] what Lloyd LJ has said in The Goldean Mariner [1990] 2 Lloyd's Rep.215 at p.222 in relation to the precursor to this gateway contained in the old RSC:

"I agree...that caution must always be exercised in bringing foreign defendants within our jurisdiction [on that basis]. It must never become the practice to bring foreign defendants here as a matter of course, on the grounds that the only alternative requires more than one suit in more than one different jurisdiction.""

3.12. Thus on being satisfied, the Queen's Bench permitted the appellants to issue notices. Thereafter, a further order was passed on 14.03.2018 granting freezing injunction against the first and the second respondents. In pursuant to the order dated 02.02.2018, the first and the second respondents neither acknowledged the service nor entered appearance before the English Court. However, pursuant to the second order, an affidavit was filed by them through the solicitors on 21.03.2018 stating that they were in Rural India and accordingly sought time to comply with the order passed. Though an affidavit was filed on 21.03.2018, a suit was instituted in C.S. No. 192 of 2018 on the very same date. The respondents also obtained an order of injunction restraining the appellants from proceeding further in the English Court.

4. The learned Single Judge confirmed the order of injunction and dismissed the application filed to revoke the leave by the appellants. These orders are under challenge before us.

LEGAL ISSUES:

5. Having dealt with the bare facts, let us deal with the issues of law involved.

Anti-injunction suit:

6.1. A suit to restrain a party from proceeding with another proceeding instituted in a foreign Court has to be instituted at the earliest point of time. There is a difference between an injunction restraining a party from initiating the proceeding and the one after such initiation. In the latter case, the delay

has its own ramification, though to be seen on the facts of each case. Judicial restraint is required when the Court of first instance undertook the process of verifying its own jurisdiction resulting in an order passed. In such cases, the Court of second instance will have to be more cautious in upsetting the aforesaid position as its jurisdiction cannot be extended to sit in judgment over the first. The principle governing judicial restraint and discipline also warrant the same.

6.2. Law presumes that a Court of law has applied its mind when it takes a case on file and thereafter passes appropriate directions. The procedure as discussed above before the English Court also pre-supposes such a process. When there is a due compliance through a judicial order, the remedy open to the party is to approach the said Court and put forth its contentions qua jurisdiction, forum non-conveniens among others including the existence of arbitration agreement, though on different facts. The following passage reported in *Suryavadanan v. State of Tamil Nadu and others*, reported in (2015) 5 SCC 450 is appositely referred as under:-

"50. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In *McKee*¹³ which has been referred to in several decisions of this Court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court—the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.²¹ In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this Court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

51. If an interim or an interlocutory order passed by

a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by the courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by the foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child. This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

52. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, *prima facie*, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic)."

6.3. Thus when interim orders are passed and the subsequent suit has the effect of keeping them in abeyance, more caution is certainly required. The Second Court is not expected to go into the factual adjudication as against the averments made in the claim petition before the First Court and decide the issue, instead it shall ask the parties to approach the first Court especially when an adequate remedy is available.

6.4. The Second Court is not expected to delve much into the respective contentions of the parties on merit. A requisite satisfaction is required to be recorded by the second court while injuncting a party. This shall apply with more rigour when we involve in a case in which there is application of mind by the First Court followed by appropriate interim orders. The requirement is more when parties and their status are different, and so the facts. Of course, the question is not the maintainability of the suit before the foreign Court as such, but the conduct of the party in approaching it, which is however subject to the above limitation.

6.5. On the admitted factual premise with respect to the relief and status between the same parties, one has to ask the question as to whether the claimant in the foreign Court can seek the same relief within the jurisdiction of this country. When some of the defendants cannot be brought within the purview of a contract, the Court of second instance shall not lay its hands, especially when reliefs sought against them are based upon a tortious claim.

Comity of court, forum non-conveniens, oppressive and vexatious litigation:-

7. These principles overlap with each other.

Comity of courts:-

7.1. The principle of comity of Court will have to be applied with more rigour when the Court of first instance has applied its mind and passed certain orders. The Second Court will have to keep in mind the availability of the scope of enquiry qua the issue of any fact to be decided by the first Court. We may note, that when once a foreign Court decides on its jurisdiction, even thereafter it is open to the party to ask it to go into it once again, with the earlier one being ex-parte, then there cannot be any need for the second suit. Such interference shall not be done when an order was passed by the foreign Court on analysing the materials before it, including the witness statements given and especially when some of the similarly placed defendants placed their respective stands.

7.2. The presumption with respect to the jurisdiction is a matter to be raised before the Court which proceeded further on

being satisfied after hearing the first party. Such a presumption is a presumption in law which can be rebutted by the other side. The domestic court shall not give the impression that a suit is filed by a party with a view to circumvent and prevent the implementation of the interim orders passed by the first Court. One has to see as to whether there is any rationale in the cause of action in the first suit, with that of the second. Secondly a question has to be asked if the first suit along with the cause of action can be field before the Second court.

Forum non-conveniens, oppressive and vexatious litigation:-

7.3. Forum non-conveniens would normally involve when two Courts have jurisdiction. The concept of forum non- conveniens is also to be seen in the context of cause of action. There may be a case where an element of oppressive and vexatious action exist, not involving forum non-conveniens. For example, a suit can be filed in Court which does not even have a jurisdiction. This suit is certainly a vexatious one. Secondly, a suit can also be filed contrary to the agreed terms in the arbitration agreement. In such cases, there is no difficulty in holding that a Court of Second instance can come to the aid of the party which is facing such oppressive and vexatious litigation. This is for the reason that there is absolutely no jurisdiction in the first instance and there is a breach of contract involved in the latter. It is for the party which alleges litigation to be vexatious and oppressive to satisfy the Court. The jurisdiction of the court is limited to the extent of finding the existence of element of such oppressiveness and vexatiousness.

7.4. Though the plea of forum non-conveniens can be raised in any one of the two courts, when the proceedings are already pending between the parties before the first Court, then it would be appropriate to proceed further instead of going to other Court, especially when a process of verification of jurisdiction is done. Remedy, in such a case, in any form, will have to be proceeded only before the first court.

7.5. We cannot make a comprehensive definition of what is vexatious or oppressive. It is a matter to be seen on the facts of each case. Suffice it to state that by way of summing up, anti- injunction suit requires more caution and application of mind from the part of the Court, considering the fact that its scope is rather limited and thus the enquiry is no longer required to go beyond the core admitted facts in most cases

except, where facts are apparently seen without going through the process of complex adjudication. We may usefully refer to the following decisions to support the aforesaid conclusion arrived at.

7.6. Modi Entertainment Network and another v. W.S.G. Cricket Pte Ltd reported in (2003) 4 SCC 341 :

" It will be useful to refer to the following observations of Lord Goff:

"In the opinion of Their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."

18. In regard to the test laid down in this case, in the Oxford Journal of Legal Studies, Vol. 17 it is rightly commented:

"The focus is on the interests of the parties not just the appropriateness of the forum. Injunctions will henceforth be available only on a more limited basis; but that basis expressly balances both the fairness to the parties and the naturalness of the forum. It is open, sufficiently narrow in scope, even-handed and fair. In short, an entirely suitable contemporary test."

19. In Spiliada Maritime case the House of Lords laid down the following principle:

"The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice."

(emphasis supplied)

The criteria to determine which was a more appropriate forum, for the purpose of ordering stay of the suit, the court would look for that forum with which the action had the most real and substantial connection in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court, it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate, the court would normally grant a stay unless there were circumstances militating against a stay. It was noted that as the dispute concerning the contract in which the proper law was English law, it meant that England was the appropriate forum in which the case could be more suitably tried.

24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity – respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained – must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court

has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

7.7. Through Transport Mutual Insurance Association (Eurasia) Limited v. New India Assurance Association Company

Limited reported in (2004) EWCA Civ 1598 :-

"In considering the propositions advanced by Millett LJ in those paragraphs, it is important to note that, as we have seen from the decision of the ECJ in Gasser, so far as proceedings within the Regulation are concerned, the approach to contracts containing exclusive jurisdiction clauses is not now the same as that advocated by the English Courts. That is because the court first seised must decide whether any relevant court, including the court second seised, has jurisdiction under an exclusive jurisdiction clause within Article 23, so that there is no room for an anti-injunction. However, we see no reason why the principles in The Angelic Grace should not continue to apply to the circumstances in which claimants may be restrained from bringing proceedings in court of non-contracting states in breach of agreements to arbitrate.

As to proceedings brought in the courts of a contracting state, in the first of the paragraphs quoted above Millett LJ in our view drew an important distinction between proceedings brought in breach of an arbitration clause and proceedings said to be vexatious or oppressive was primarily for the court before which it was pending, whereas in the case of proceedings brought in breach of contract there was no good reason for diffidence in granting an injunction on the clear and simple ground that the claimant had promised not to bring them.

It appears to us that distinction is consistent with the reasoning in Turner v. Grovit which was of course a case in which the ground on which the injunction had been granted was that the proceedings in Spain were vexatious and oppressive. There is nothing in Turner v. Grovit which in our opinion contradicts the reasoning in the second or third of the paragraphs quoted from the judgment of Millett LJ, in so far as it relates to arbitration clauses. As to the second paragraph, there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute would be referred to arbitration in England. The English Court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state. As to the third paragraph, it remains the position that damages would be an inadequate remedy."

7.8. Turner v. Grovit and others reported in (2002) 1 WLR 107, House of Lords :-

"22. The power exercised by the Court of Appeal in the present case is one which had historical origins in the English legal system and the relationships which once existed between various different courts and the limited remedies which they were variously able to grant. It had however been recognisably established by 1834 (Portarlington v Soulby 3 My & K 104) and described as being grounded not upon "any pretension to the exercise of judicial rights abroad" but upon the fact that the party being restrained is subject to the in personam jurisdiction of the English court. The modern law is now based upon a statutory authority which is expressed in simple and broad terms in s.37 (1) of the Supreme Court Act 1981:

"The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so."

The Court of Appeal has the like powers on an appeal from the High Court. Judicial decisions, however, limit when it may be considered just to grant an injunction. Certain preconceptions and misunderstandings still tend to persist as to the nature of the type of restraining order made in the present case and the grounds upon which it can be applied for. It is important not to be misled by these misconceptions.

23. The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court: Lord Goff, SNI Aerospatiale v Lee [1987] AC 871 at 892. The order binds only that party, in personam, and is effective only insofar as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him. "An injunction will only be issued

restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy"

7.9. Donohue v. Armco Inc and others reported in (2001) UKHL 64 :-

"30. There is, as always, another side to the coin. All five Armco appellants have a clear prima facie right to pursue against Messrs Rossi, and Stinson and their respective companies any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings. It would not be appropriate for the English courts to form any judgment, however tentative, on the merits of the Armco companies' claims, beyond noting that lack of merit was not one of the grounds on which the PCCs invited Judge Schwartz to dismiss the proceedings in New York. It must be assumed that the claims made by the Armco companies against their former employees Messrs Rossi and Stinson, including the RICO claims, are serious and substantial claims. There is nothing whatever to suggest that these claims will not proceed in New York whether or not an injunction is granted to Mr Donohue."

7.10. From the above, the legal position is very clear that while facts are not supposed to be gone in the detail, it would be only proper to find out first as to whether the issue raised will be allowed to be dealt with by the court of first instance. Secondly, the Court of second, i.e., the Domestic Court, is not required to go into the facts through an adjudicatory process.

Arbitration agreement:

8.1. Mere existence of an arbitration agreement per se cannot be a ground, when a party contends through prima facie evidence that its remedy is against the third parties and the arbitration agreement itself is shrouded by a process of deceit, intimidation and misrepresentation. This also will have to be seen from the context of the cause of action, relief sought and the parties involved.

8.2. A stranger to an arbitration proceeding cannot be made

as a party, more so when a fraud has been alleged against him on a tortious claim along with others who are also not parties. While the general principle is that an arbitration agreement between the parties would govern, the same cannot be extended to other third parties against whom serious fraud and deceit are alleged. Therefore, when the allegations are very serious supported by prima facie materials, a Domestic Court shall not interdict the proceeding before a foreign Court on a different factual premise that the arbitration clause would govern, notwithstanding the fact that parties and their status was different. At the cost of repetition, we may say that this is not desirable when the first Court was satisfied with the jurisdiction on the averments made before it coupled with the documents perused and the statements of witnesses. We say this, only for the purpose of reiterating our view that remedy for a party in such cases is to approach the Foreign Court and substantiate that the arbitration agreement would govern and the facts as narrated by the claimant are nothing but an attempt to wriggle out of the contract. A useful reference can be made to the judgment in *A. Ayyasamy v. A. Paramasivam* reported in (2016) 10 SCC 386:-

"45. The position that emerges both before and after the decision in *N. Radhakrishnan* is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject-matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in *N. Radhakrishnan*¹ has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud:

45.1. First and foremost, it is necessary to emphasise that the judgment in *N. Radhakrishnan* does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. More often than not, a bogey of fraud is set forth if only to plead that the dispute cannot be arbitrated upon. To allow such a plea would be a plain misreading of the judgment in *N. Radhakrishnan*. As I have noted earlier, that was a case where the appellant who had filed an application under Section 8 faced with a suit on a dispute in partnership had

raised serious issues of criminal wrongdoing, misappropriation of funds and malpractice on the part of the respondent. It was in this background that this Court accepted the submission of the respondent that the arbitrator would not be competent to deal with matters "which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation". Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan¹ may come into existence.

45.2. Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed."

Tortious and contractual liability:-

8.3. There is a marked difference between claims based upon

tort and contractual liability. The tortious claim stands outside the contract. In a tort, a breach of duty comes out of a liability independently other than the contract, whereas in a breach of contract the remedy is sought for when a duty is not performed. When it becomes a tort simpliciter then the contract has got no relevancy. The test is as to whether the claim of tortious liability can be made notwithstanding the contract entered into. However, when a tortious claim is acted or founded on a contract then the remedy will be only under the contract and not independent of it. In such cases, a suit will be based upon the contract and not upon tort. This position would gain prominence when parties are different. For example, when the party's claim is made against the third party, which has got no connection with the contract, then such a claim would not come within its purview. To buttress the aforesaid legal position we may quote the following decisions.

8.4. National Bank of Lahore Ltd v. Sohan Lal Saigal and others (1965) 3 SCR 293:-

"6. The scope of Article 36 of the First Schedule to the Limitation Act is fairly well settled. The said article says that the period of limitation "for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specifically provided for" is two years from the time when the malfeasance, misfeasance or nonfeasance takes place. If this article applied, the suits having been filed more than 2 years after the loss of the articles deposited with the Bank, they would be clearly out of time. Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. Article 36 applies to actions "ex delicto" whereas Article 115 applies to actions "ex contractu". "These torts are often considered as of three kinds viz. nonfeasance or the omission of some act which a man is by law bound to do, misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful". But to attract Article 36 these wrongs shall be independent of contract. The meaning of the words "independent of contract" has been felicitously brought out by Greer, L.J., in *Jarvis v. Moy Davies Smith, Vanderveil and Co.*¹ thus:

"The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by

contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

If the suit claims are for compensation for breach of the terms of the contracts, this article has no application and the appropriate article is Article 115, which provides a period of 3 years for compensation for the breach of any contract, express or implied, from the date when the contract is broken. If the suit claims are based on a wrong committed by the Bank or its agent dehors the contract, Article 36 will be attracted."

8.5. Tarapore and company and Cochin Shipyard Ltd, Cochin and another reported in (1984) 2 SCC 680:-

"42. In *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanaft GmbH* a question arose whether a claim in tort would be covered by the arbitration clause? It was admitted that the claim for wrongful arrest is a claim in tort. And it was contended that a claim in tort cannot come within the arbitration clause. The Court of Appeal speaking through Lord Denning held that the claim in tort would be covered by the arbitration clause, if the claim or the issue has a sufficiently close connection with the claim under the contract.

43. In *Gunter Henck v. Andre & CIE S.A.* the Court [Queen's Bench Division (Commercial Court)] held that the words "arising out of" clearly extend the meaning than would otherwise be applied to the clause were it limited to "all disputes arising under the contract".

44. In the facts before us, the respondent in para 4 of its counter-statement filed before the arbitrator specifically referred to clause 16 of the General Conditions of Contract and to the Additional Terms and Conditions/Modifications forming part of the contract document. In para 11, it was stated that the claim of the appellant was completely outside the purview of the contract and the same does not fall within the purview of the first para of clause 40. It was further stated in para 13 that the contract provides for escalation in certain respects and that is the only escalation which is admissible in terms of the contract, and the claim made by the appellant does not come within the escalation clause nor in the agreed

formula relating to such escalation. The contractor relied upon Clause 13 of the Additional Terms and Conditions/Modifications which form part of the contract document to sustain its claim. From the pleadings, it clearly transpires that both the parties had recourse to the contract which is admittedly entered into in support of the rival contentions and therefore, the claim made by the appellant would be covered by the arbitration clause, which is of the widest amplitude. It is thus satisfactorily established that the claim made by the contractor would be covered by the arbitration clause."

8.6. Sri Raja Sobhanadrai Appa Rao Bahadur v. Sri Raja Parthasarathi Appa Rao Savai Aswa Rao Bahadur and others, The Law Weekly, 1932:-

"8. What then is the test of this distinction between an action of tort and an action for a wrong arising out of contract? The general rule is, that where a contract exists, the suit must be in contract and not in tort. But the fact that there is a contract will not prevent the plaintiff from suing in tort if he can do so without relying on the contract; for example, a physician who harms his patient by negligently administering a deleterious drug is guilty of a wrong which is both a breach of contract and a tort. It is a breach of contract because the physician has impliedly promised to use due care and skill in the treatment of his patient, and it is also a tort because, apart from contract altogether, no one has a right to do another physical harm by giving him poison. But, if, in order to Establish the liability of the defendant, it is necessary for him to prove the contract, then he must sue in contract and not in tort; for it is the contract that defines the defendants liability. The same principle is also thus stated:--If the complaint is in respect of an act which without proof of any contract does not give rise to a cause of action, then the suit is based upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that relationship, irrespective of contract, then the suit is one of tort.

(Odgers, Vol. I, page 646; also pages 440 and 441.)

(Halsburys Laws of England, Vol. XXVII, para. 907.)

(Halsburys Laws of England, Vol. I, para. 79.)

(For the illustration given above, see Salmond on Torts, 6th Ed., p. 3.)

9. It is somewhat difficult to ascertain as stated in Odgers, whether the facts of a particular case give rise to a cause of action founded on tort or on contract. (Vol. I, page 440.) But, in the present case, there seems to be no such difficulty. Were the defendants, apart from the contract of sale, bound to tell the truth and state their rentals correctly? Did they owe any such duty to the plaintiff? Supposing there was wilful misrepresentation but that it was not followed by a contract, what possible ground of action could the plaintiff have? In this case, the plaintiff does not complain of a breach of duty arising out of some relationship between the parties at Common Law; on the other hand, he is obliged to rely upon the contract made and his action is, therefore, founded on contract.

10. For the respondent, it is argued, that this is an action for deceit, as if that statement necessarily implies that it is not founded on contract. This argument is based upon a misapprehension. By reason of a fraudulent representation, the representee may alter his position in various ways. The alteration of position may take the form of some unilateral transaction; for instance, B may represent that C desired A to deliver a horse and acting on the faith of that representation A may deliver the horse to B. Again, the representee's alteration of position may assume the form of a contract with the representor. In both these cases, an action for deceit will lie. In the former, the representee has not to rely upon any contract; in the latter, without relying upon the contract, he gets no cause of action at all."

Submissions of the parties:-

9. Learned Senior Counsel appearing for the appellants have made the following submissions:

- (i) that the third respondent does not have any locus to seek anti-suit injunction since it is not a defendant in the foreign proceeding;
- (ii) that the requirements laid down in Modi Entertainment v. WSG Cricket reported in (2003) 4 SCC 1 have not been followed;

- (iii) that the first and the second appellants are not amenable to the personal jurisdiction of this Court;
- (iv) that comity of courts has to be respected;
- (v) that the impugned order does not render any finding that the foreign proceeding is vexatious or oppressive;
- (vi) that the cause of action for claim bearing CL-2017-600025 filed before the English Court does not arise within the jurisdiction of this Court;
- (vii) that the claim made by the appellants in the United Kingdom is not based on contract and therefore cannot be decided in arbitration;
- (viii) that the reason given in the impugned order have no relation to cause of action before the English Court;
- (ix) that the first and second respondents are not parties to the Share Purchase Agreements dated 09.09.2015;
- (x) that the impugned order has given findings on merits of the English Court by sitting on appeal over the order dated 02.02.2018;
- (xi) that without prejudice, the respondents ought to have approached the Courts at Mumbai and not this Court;
- (xii) that inconsistent stand on the invocation of arbitration;
- (xiii) that the first and second respondents have acted in their individual capacity and not as Directors of the third respondent;
- (xiv) that the first and the second respondents had knowledge about Wirecard from the beginning;
- (xv) that delay and conduct disentitle the respondents to equitable relief of injunction; and
- (xvi) that fraud can be inferred from circumstances.

10. Learned Senior Counsel appearing for the respondents made the following submissions:

- (i) The test made for grant of anti-injunction suit has been satisfied.
- (ii) The claim made is nothing but an attempt to wriggle out of the contract entered into between the third respondent and the appellants.

- (iii) The foreign proceeding in breach of an arbitration clause is saved for a grant of anti-injunction on the ground of forum non-conveniens.
- (iv) The appellants are bound by the Share Purchase Agreements along with the arbitration clause.
- (v) The claims come under the Share Purchase Agreements.
- (vi) There is no corresponding obligation on the first and the second respondents to fetch a better price than the one agreed in the Share Purchase Agreements.
- (vii) The respondents and M/s. Hermes are having their residences and office in India. The transaction took place here, including the flow of money. The non-exclusive clause also enables filing of the present suit.
- (viii) The principle of comity of court has to be seen.
- (ix) To buttress their submissions, learned Senior Counsel made reliance upon the following decisions of the Apex Court in Modi Entertainment Network (supra), Chloro Controls India Pvt. Ltd v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, Anantesh Bhakta and Ors v. Narayana S. Bhaktha (2017) 5 SCC 185, Tarapore & Company v. Cochin Shipyard Ltd, Cochin (1984) 2 SCC 680, Roop Kumar v. Mohan Thadani (2003) 6 SCC 595.

Discussion:

11. Before the English Court a claim was made by the appellants against the first and the second respondents before us for tort, deceit, intimidation and conspiracy. According to the appellants, by well-orchestrated play the appellants were hoodwinked into signing the Share Purchase Agreements quoting the poor performance of M/s. Hermes to the price offered as "Super Premium". The transaction between the appellants and the first and the second respondent is more in the private and personal nature and it is not in their capacity as Directors of the third respondent. The first and the second respondents continued to remain as Directors of M/s. Hermes. They did not disclose the transactions between them and IIFL, even though it was asked for. All the correspondences were made by them through the domain names belonging to either M/s. Hermes and G.I. Technology Private Limited.

12. Discussions did take place at London. Similarly proceedings were going on with M/s. Wirecard AG. The materials produced would show the swiftness with which the transactions

were happening one over the other. When the conspiracy was hatched, M/s. Wirecard AG was already into it. The scope of the enquiry before the English Court is different and so is the relief and the parties.

13. We find that these issues can only be gone into before the English Court. As discussed above, the disputed questions cannot be gone into by this Court when the English Court, on being satisfied by the application of judicial mind, passed an order and proceeded further. Therefore, the remedy open to the respondents is to approach the English Court and not knocking at the doors of our jurisdiction.

14. We are dealing with an anti-suit injunction. Restraint is certainly required. It is not a normal suit. Until and unless the requirements are met, such a suit shall not be entertained. It is not as if the respondents did not have a remedy before the English Court. The third respondent is not even a party before the English Court. The present suit has been filed on the same date when an affidavit was filed before the English Court. The arbitration proceedings have been initiated subsequently. The question for consideration is as to whether the suit as filed before the English Court could have been filed here. The answer, in our considered view, is in the negative.

15. There are sufficient averments to substantiate the allegations levelled against the first and the second respondents, including deceit, intimidation and misrepresentation, etc. There were materials produced coupled with two witness statements. Therefore, it would be appropriate for the respondents to approach the English Court instead of rushing to this Court. It appears as if the first and the second respondents have remedy to file the suit in view of the interim orders passed. Such a cause of action cannot be countenanced in the eye of law.

16. Averments and materials in the claim made would show that transactions were available much prior to the cause of action of Share Purchase Agreements. It appears that the first and the second respondents have taken a stand earlier that they are not amenable for any action.

17. The contentions are not only based on law, but also on facts. Therefore, we are of the view that these matters will have to be thrashed out before the English Court which passed an

order after applying its mind. We cannot conduct a roving enquiry and usurp the jurisdiction at this stage. The fact that the first and the second respondents are not inclined to go before the English Court can be seen from the evidence produced before us stating that they were in Rural India.

18. In the light of the discussion made on the comity of courts, forum non-conveniens, oppressive and vexatious litigation, we are of the view that the present suit is not maintainable. According to the appellants the cause of action has taken place within the jurisdiction of the English Court. Merely because the respondents and M/s.Hermes are having their residences within the territorial jurisdiction of this Court, suit cannot be stated to be maintainable in law. Similarly, the signing of the Share Purchase Agreements and the flow of money would not give the cause of action for anti-injunction suit. We are dealing with a different relief against different parties on a different factual scenario. The English Court has followed the procedure contemplated under the CPC Rules, 1998 with reference to 6.36 - 6.37. Such a judicial order cannot be set aside in an indirect way.

19. That apart, it is not the case of the respondents that they did not have the remedy before the English Court. In fact, the third respondent was not even a party before the English Court. If it is of the view that it is the concerned party, it is well open to it to get itself impleaded before the English Court. To be noted, the interim order granted by the English Court is operative only against the first and the second respondents and not against the third respondent. Initiation of arbitral proceedings was also done after obtaining the interim orders.

20. Much has been stated in the legal notices issued for the first time on behalf of the appellants. We are of the view that the said notices per se cannot be interpreted to mean that the claim is not maintainable. The notices issued were at a stage when the process of discovery of facts was on. After all, one has to see both the notices together. In this connection, it is to be stated that the initiation of the arbitral proceeding leading to filing of the petition under Section 11 of the Arbitration and Conciliation Act, 1996 is done only by the third respondent alone. Therefore, we are not inclined to accept the submission of the learned Senior Counsel who appeared for the respondents that the first legal notice issued on behalf of the appellants would dis-entitle them in maintaining the claim made

before the English Court.

21. We are dealing with a case of tortious claim. The question as to whether the claim is made tortious or contractual is a matter to be decided by the English Court, as discussed above. More so, sufficient averments available would show that the first and the second respondents have acted in the individual capacities forming a conspiracy with Mr. Amit Shah and IIFL. While the appellants want to proceed only against the first and the second respondents, the third respondent would insist that they should be left out but may get proceeded only in tune with the arbitral clause available.

22. As discussed earlier, the process involving the roving inquiry should be eschewed especially when a foreign Court after satisfying with its jurisdiction is in seisin. We cannot give a factual finding by going into the averments made in the plaint before us as against those made in the claim petition. The question regarding the existence of tortious liability, the parties involved and the relief sought for pending before the other Court cannot be a subject matter of this Court. We are also constrained to note that Mr. Amit Shah and IIFL are also not before us though they have filed their response before the English Court. We are not inclined to put all the respondents in the same basket in the teeth of the averments made in the claim petition coupled with the documentary evidence available. It is also the specific case of the appellants that the first and the second respondents continue to be the Directors of M/s. Hermes. Thus, we find that when English Court finds existence of jurisdictional facts, this Court is not expected to go into the same on a different factual plea made by the parties who are already before it.

23. Learned Senior Counsel appearing for the respondents raised one more contention. It is contended that even the actions of Mr. Amit Shah has been attributed to a corporate body. Any action done by the Director on behalf of and for the betterment of the company should be attributed with the company and it cannot be independently used against first and second respondents. The aforesaid contention has got no relevancy to the case on hand. As discussed above, we cannot interdict a proceeding before the English Court by giving a factual finding that the first and the second respondents acted on behalf of the third respondent by ignoring not only the averments made but also the documents filed coupled with the existence of the third parties.

24. We furthermore make it clear that the onus is heavily on the respondents to substantiate it and even that cannot be done before this Court but the English Court alone.

25. The learned single Judge, in our considered view, was not correct in holding that the cause of action arose within the jurisdiction of this Court on the premise, the Share Purchase Agreements were signed in Chennai, flow of funds was at Chennai and M/s. Hermes shares were sold within the territorial jurisdiction of this Court. These facts are not sufficient to institute a suit, to injunct the defendant from proceeding in the foreign Court on a different factual premise also involving third parties. A claim made in England is also not for breach of contract, but a tortious liability. The venue of the arbitration is only in Mumbai. The real intentions is to prevent the appellants to go on with their claim and thus not to facilitate arbitration proceeding. Perhaps that is the reason why all the three respondents jointly filed the suit.

26. In our considered view, the learned Single Judge ought not to have gone into the merits of the case. The moot question sought to be raised in the present proceeding by the respondents itself involves a disputed question of facts. We find that there is no specific finding given on the English forum being vexatious or oppressive. As discussed above, the reliance upon the legal notice issued also cannot be countenanced. In such view of the matter, we are inclined to set aside the orders passed by the learned Single Judge.

Conclusion:

27. Accordingly the order of the learned Single Judge is set aside and consequently the applications filed by the appellants seeking to revoke the leave is ordered. Original side appeals stand allowed. No costs.

Epilogue:

28. Though we have passed the above order, in view of the principle of law stated, any observation made by the learned Single Judge or by way of these appeals cannot have any bearing on the respective stands of the parties before the English Court. This, we do so for the reason that once it is held that it is the English Court which has dealt with the contentious issues, the findings and observations rendered by us will have to be confined only for the purpose of deciding the applications filed and therefore not on merits. Hence, the parties are given

liberty to raise all the other contentions in the pending claim petition before the English Court.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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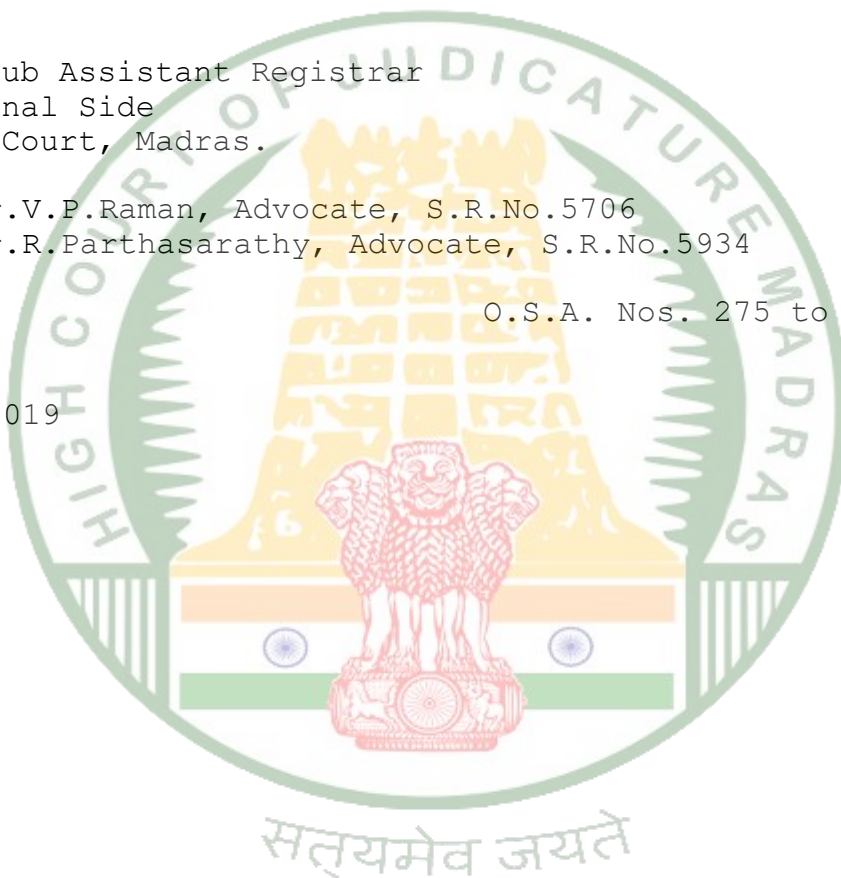
1. The Sub Assistant Registrar
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+1cc to Mr.R.Parthasarathy, Advocate, S.R.No.5934

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