IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2877 of 2018
and
C.M.P.No.21868 of 2018

1. QDSeatoman Designs Pvt. Ltd.
   5th Floor, Status Quo,
   38, Sterling Road, Nungambakkam,
   Chennai - 600 034.

2. Quintessential Designs India Pvt. Ltd.
   5th Floor, Status Quo,
   38, Sterling Road, Nungambakkam,
   Chennai - 600 034.

3. Quintessential Designs India Pvt. Ltd - Apparel Ventures
   5th Floor, Status Quo,
   38, Sterling Road,
   Nungambakkam,
   Chennai - 600 034. ... Appellants/Respondents/Applicants

Vs.

Lifestyle Equities CV
Prins Bernhardplein
1097 JB, Amsterdam,
The Netherlands. ... Respondent/Claimant/Respondent

Civil Miscellaneous Appeal is filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, to set aside the order dated 09.10.2018 passed by the Learned Arbitral Tribunal in I.A.No.2 of 2018 in Arbitration Case No.3 of 2018 and to allow the same.

For Appellants : Mr.R.Parthasarathy
For Arun Karthik Mohan

For Respondent : Mr.Sathish Parasaran
Senior Counsel for
Mr.Thriyambak Kannan

Judgment

The present Civil Miscellaneous Appeal has been filed against the order dated 09.10.2018 passed by the Learned Arbitral Tribunal in I.A.No.2 of 2018 in Arbitration Case No.3 of 2018.

2. The appellants before this Court in the present Civil Miscellaneous Appeal is the respondents/counter claimants/applicants who had filed an Interlocutory Application in I.A.No.2 of 2018 in Arbitration Case No.3 of 2018 which in fact is an application taken out under Section 17 of the Arbitration and Conciliation Act, seeking furnishing of security towards the appellants/counter claimants.

3. The first appellant, namely, M/s.QDSeatoman Designed Pvt. Ltd., is a full service vendor providing end-to-end services in the Apparel business from design to finished product, offering services of design, Product Development, Technical Design, Process Management and Quality Control to clients overseas and in India.

4. The second appellant M/s.Quintessential Designs India Pvt. Ltd., is an apparel manufacturer/vendor, offering services of production for woven apparel.

5. The third appellant M/s.Quintessential Designs India Pvt. Ltd. - Apparel Ventures, is only a bank account of the second appellant and has no separate existence in law.

6. The respondent, namely, M/s.Lifestyle Equities CV, is a Limited Liability Partnership incorporated in the Netherlands, having its office at Amsterdam, owners of the trademark "Beverly Hills Polo Club" for specific territories and in the business of licensing the trademark to third parties as an Apparel and Lifestyle brand.

7. The brief facts before adverting to the issue in hand are that the respondent/claimant and the appellants/applicants/counter claimants entered into an agreement dated 26.02.2016, so as to take effect from 30.06.2014, by which, the appellants herein agreed to provide the respondent/claimant two separate services for neat and woven apparels for the brand "Beverly Hills Polo Club" (hereinafter referred to as BHPC for brevity). As per the agreement, the appellants shall organise higher and support the brand BHPC of Lifestyle, for which, the respondent shall pay a monthly retailer of Rs.15,000 U.S Dollars to the appellants for its service in accordance to the agreement. The services agreed to be provided was 1) Brand Services and 2) Nominated Agency Services. As per the contract, the scope of work was production, planning, quality process, management and controls other

sourcing requirements of the brand and buyers. During the course of execution of the contract between the appellants and the respondent, dispute arose.

8. The appellants have submitted that the respondent, in breach of its contractual commitment to route all apparel buying of its retail partners through the provider had already moved a portion of the nominated agency services to new agents. The respondent and its buyers sought to impose new terms of engagement, contrary to the existing terms of the agreement, which were commercially unacceptable to the appellants herein. They forced the appellants out of the agency services in blatant disregard to the terms of the agreement. The respondent, in spite of sending the appellants out of business as the nominated agent in breach of the agreement, had started making demands for Tech packs, Samples developed and prototyped by the appellants herein for Apparel designs created by them for the season Fall 17. The said design services were not covered in the scope of the services provided in the agreement, therefore, the appellants did not share the Tech packs and proto samples of the Fall 17 season, which copyright right was vested only with the appellants. Due to the said dispute, the respondent filed a statement of claim before the sole arbitrator as early as 14.05.2018. The appellants herein/the respondents before the learned arbitrator had filed Section 16 Application questioning the Arbitrability of the respondent claimant in I.A.No.1 of 2018 which is pending before the Arbitrator. Later, the appellants herein have also filed a counter claim along with an Interlocutory Application filed under Section 17 of the Arbitration and Conciliation Act, seeking an order directing the respondent herein to furnish security towards the appellants/counter claimants. The appellants, in the said application under Section 17, sought for a direction to the respondent to furnish the security to the extent of U.S. Dollars (USD) 6,211,369.29 equivalent to approximately in Indian Rupees (INR) 42,54,78,796.37, and failing which, directly attachment of the respondent's trademark i.e. "Beverly Hills Polo Club" pending Arbitral proceedings.

9. The respondent herein has stated in the counter that the respondent had substantial business interest in India and the appellants in the absence of placing evidence that the respondent was likely to abscond or that the respondent was taking steps to dispose of its property had failed to make out a case for furnishing security in terms of the principles contained in Order 38 Rule 5 of the Code of Civil Procedure and hence, prayed that the application has to be rejected.

10. The learned Arbitrator, after hearing both the claimant and the counter claimants i.e. the appellants and the respondent herein, have dismissed the Interlocutory Application No.2 of 2018 on 09.10.2018. Against which, the present Civil

Miscellaneous Appeal has been filed by the appellants/counter claimants.

11. Mr.R.Parthasarathy, learned counsel appearing for the appellants vehemently argued that the learned Arbitrator erroneously proceeded to reject the appellants' application under Section 17 of the Arbitration and Conciliation Act based on a mere averments of the respondent that it allegedly continues to maintain its business activity without any scope for withdrawal from India, and in contrary, the appellants had brought to the knowledge of the learned Arbitrator about the financial situation of the respondent, that too relying upon the annual accounts of the respondent for the year ending 31.12.2017 which reflects an Asset Base of only 4.56 million euros, equivalent to approximately in Indian Rupees (INR) 36,56,61,184.45 whereas the appellants have made a counter claim for an amount of USD 6,211,369.29 equivalent to approximately INR 42,54,78,796.37 which is much more higher than the financial status and Asset Base as reflected in the annual accounts of the claimant for the year ending 31.12.2017. Hence, he would further state on the basis of balance sheet as on 31.12.2011 till 14.06.2018, the appellants have filed an application seeking an Interlocutory Order to direct the claimant i.e. the respondent herein, to furnish security to the extent of U.S Dollar 6,211,369.29 equivalent to approximately INR 42,54,78,796.37., failing which, to direct the attachment of claimant/respondent trademark "Beverly Hills Polo Club".

12. The learned counsel for the appellants also pointed out the balance sheet accounts in the typed set of papers and contended that when the appellants/counter claimants have made prima facie case, especially on the financial status of the respondent, the Tribunal ought to have directed the respondent to furnish security equivalent to the amount of the counter claim or else in the event of succeeding the counter claim, the award will be only a paper award which cannot be realised in favour of the appellants herein.

13. The learned counsel for the appellants also argued that within the scope of Arbitration, in fact sourced to specific provision of the agreement between the parties and the learned Arbitrator who ought to have appreciated and adjudicated Section 17 Application on merits based on the counter claim made by the appellants herein. In fact, he also argued that I.A.No.1 of 2018 was filed questioning the arbitrability of the Arbitrator which ought to have been decided prior to taking any decision in Section 17 Application filed in I.A.No.2 of 2018. Further, he would argue that the respondent had no establishments in India, no business operation in India, when he has no establishment or no physical or tangible assets in India, the questioning of fulfilling the criteria of Order 38 Rule 5 of the Code of Civil Procedure viz. that the respondent may seeks to abscond or wind

up its business operation in India, does not arise. Moreover, he would argue that mere trademark owning a licencing entity incorporated as a Limited Liability Partnership Firm in Netherlands and considering low Asset Base of the respondent and the value attributed by the respondent based on the agreement of the respondent. In the absence of effective measures or recourse available to the appellants in the event of award in favour of the appellants, the Tribunal ought to have directed the respondent to furnish the security to the extent of the counter claim.

14. In support of his claim, the learned counsel for the appellants would rely upon the Judgements reported in 2013 SCC Online Bom 1005 [Deccan Chronicle Holdings Limited V. L&T Finance Limited], 2011 SCC Online Del 3689 [Steel Authority of India Ltd. V. AMCI PTY Ltd. & Anr] and 2004 SCC Online Bom 25 [National Shipping Company of Saudi Arabia].

15. Mr.Sathish Parasaran, learned Senior Counsel appearing for the respondent would submit that the respondent is a reputed concern having undisputed financial stability and substantial business interest in India and it operates a Global business under a well-known brand called "Beverly Hills Polo Club" (BHPC), which was established in the year 1982 and in India, it started its business in the year 2007. The said products is available in all over 60 countries from Europe, Asia, North America, South America, Middle East Asia and Gulf Cooperation Council and other countries. The said brand has been valued as U.S. Dollars 1.7 billion and ranked 34 in the Elite Club of well known brands in the world and all its trademarks in India owned by the respondent. The respondent has entered into the licence contract with reputed entities such as Major Brands (in India) and Apparel Groups (in the GCC), and Major Brands operate more than 10 stores in India under this licence model for the respondent, where the respondent or its sister concern is paid royalty on sales achieved by each of these stores. In the GCC itself, Apparel Group operates more than 60 stores under the same business model.

16. The learned Senior Counsel would further submit that the appellants had contracted with the respondent to provide services in the nature of "Brand Services and Nominated Agency Services", and the appellants had unilaterally abandoned the Contract in February 2017. At the time of entering into the Contract, the appellants were well aware that the respondent was following the same business model and were working with the respondent from 2008 and never had any reservations about the respondent not having any place of business or assets in India. Further, he would submit that there is no outstanding liability under the contract which is evidenced from the appellants' counter claim in the Arbitration, where the appellants have not claimed any outstanding amounts from the respondent but only

made claims on the basis of purported breaches of the contract, and when the expiry of the contract in the year 2017, the respondent had already launched 2018 and 2019 collections with some other service providers and continued to prepare for the launch apparel collections and for future seasons also, and this respondent cannot be termed as a shell company and he would also pointed the Judgment rendered in Techmo car SPA Versus The Madras Aluminium Company Ltd. 2004 (3) CTC 754, wherein, the Court has observed that a party cannot take a defence of the claimant not having a place of business in India when they were aware of the same at the time of entering into the agreement.

17. The learned Senior Counsel would further submit that the order passed by the Arbitrator is well within the purview of the statute and having not established a prima facie case for issuance of an order under Section to provide security for the counter claim amount the learned Arbitrator has fairly considered the statement and documents furnished before the Arbitrator. Section 17 Application filed was totally misconceived and the appellants are failed to prove a prima facie case that the respondent had breached in terms of the contract for maintaining a counter claim. The counter claim was only speculated and such claims cannot be secured by way of directions under Section 17 of the Arbitration and Conciliation Act, and there was no likelihood or attempt to defeat the Arbitral award and there was no material placed before the Arbitrator to secure an order for attachment that there was any likelihood or an attempt to defeat the Arbitral award. A relief of security which is an exceptional remedy and it will be granted only when a case has been made out that the parties likely to abscond or to show that the parties taking steps to dispose of the property with an intention to deceive or defeat the decree or award to be passed by the Tribunal that there was no proof to show or there was no evidence to show that the respondent herein is trying to wind up its operations, and the Arbitral Tribunal have greatly passed an order when the appellants are failed to plead or satisfy that the respondent is acting in a manner so as to defeat the realisation of any alleged monetary award.

18. The learned Senior Counsel would also submit that regarding Order 38 Rule 5 of the Code of Civil Procedure, it has been read with the Section 17, the Arbitrator has come to the conclusion that any security is not required in the absence of averments touching upon the ingredients of Order 38 Rule 5, and he would submit that the Section 17 Application has been dismissed by the Tribunal with a detailed and well-reasoned order and has applied the law rightly to the facts of the case. Moreover, he would submit that the Arbitral Tribunal has not shown that the case projected by them will fall under Order 38

Rule 5 of the Code of Civil Procedure and the appellants are failed to establish any case for directing the respondent to furnish security or to attach their assets. In the pleadings there was no averment, credible or otherwise that there is an attempt to defeat the award except making a bald statement in the Application.

19. The learned Senior Counsel would also submit that the appellants have failed to show that the respondent business had come to a grinding halt or that there was any reliable information that the respondent is likely to wind up its business in India or that the respondent has become bankrupt or that the respondent was indulging in any activity which throws considerable, reasonable or reliable doubt about its business prospects in India or that the respondent is indulging in any activity that undermine its honest business operation in India or that the financial ranking of the respondent by any authentic recognised body creates serious doubts about its business or monetary prospects and whether they had any loss, and which will cause a irreparable damage to the appellants in regard to the counter claim. Moreover, he would submit that the appellants had failed to make out a case for the Arbitrator to pass an order under Section 17 and the Arbitrator has rightly dismissed the I.A. and prayed for dismissal of this appeal.

20. In support of his argument, the learned Senior Counsel has relied upon the cases reported in 1) 2018 SCC Online SC 3254 [State Bank of India V. Ericsson India Private Limited and Others] 2) 1990 (Supp) SCC 727 [Wander Ltd. And Another V. Antox India P. Ltd] 3) 2003(1) Mh.L.J. [Nimbus Communications Ltd. V. Board of Control for Cricket in India] 4) 2011 SCC Online Madras 924 [M/s.A-1 Biz Solutions Chennai V. M/s.Cascade Billing Center Incorporated] 5) 2012 (1) CTC 225 [C.S.S. Corp Private Limited V. Space Matrix Design Consultants Private Limited] 6) 2004 (3) CTC 754 [Techmo Car SPA V. The Madras Aluminium Company Ltd].

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

22. The present Civil Miscellaneous Appeal is arising out of an impugned order passed in an application filed under Section 17 of the Arbitration and Conciliation Act which is as hereunder :

"17. Interim measures ordered by arbitral tribunal :

> 1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

23. No doubt, the statute has given right powers under Section 17 to the Arbitral Tribunal to make an interim measures of protection as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute. While doing so, the Arbitral Tribunal may require a party to provide appropriate security in connection with the measure ordered under Sub-Section (1) of Section 17. To impress upon the Tribunal to pass such an order, the applicant should establish a prima facie case, the balance of convenience and irreparable loss and injury, if no such order is passed for furnishing security.

24. As far as the case in hand, an agreement has been entered between the appellants and the respondent on 30.06.2014, since there was an alleged breach of contract, the respondent had filed a detailed claim before the learned Arbitrator on 11 headings, claiming an amount of U.S. Dollars 43,522,628.

25. The appellants, on receiving the claim petition filed by the respondent, had taken out an application under Section 16 of the Arbitration and Conciliation Act, questioning the arbitrability on the ground that the statement of claims filed by the claimant is beyond the scope of Jurisdiction of the Arbitral Tribunal in terms of the Arbitration agreement contained in the contract dated 30.06.2014. Thereafter, on 14.07.2018, the appellants herein have filed a statement of defence along with the counter claim, claiming an amount of U.S. Dollars 62,11,369.29 equivalent to approximately INR 42,54,78,796.37 together with 18% interest per annum. The appellants have made a counter claim as against the respondent herein and have computed the above claim based on various headings from A to H on various captions. Along with the counter claim, the appellants have also filed Section 17 Application, seeking for a direction from the Tribunal, directing the respondent to furnish security equivalent to the amount claimed in the counter claim.

26. This Court is not inclined to go into the merits of the claim on the counter claim as the matter is pending before the Arbitral Tribunal. However, with regard to the application filed by the appellants under Section 17 seeking for furnishing security, it is pertinent to look into the application and the documents filed before the learned Arbitrator as to whether the pleadings made in the application and the documents filed in support of the application is sufficient for the learned Arbitrator to pass such an order under Section 17.

27. On perusal of the documents and upon the arguments put forth by the counsels, it is apparently clear from the pleadings

set out in the Application filed by the appellants under Section 17 of the Arbitration and Conciliation Act 1996 averred in Paragraph No.3 which is reproduced hereunder :

> "The Respondents state that their claims are for an amount of USD 6,211,369.29/- equivalent to approximately INR 42,54,78,796.37. The Respondents further state that the Claimant is incorporated as a Limited Partnership Firm in Amsterdam and in the event the Respondents succeed in getting any award against the Claimant in the arbitral proceedings, there is no way for the Respondents to execute or realize the said award in as much as the Claimant has no assets in any form in India, barring its registered trademark 'Beverly Hills Polo Club'. That apart, the Claimant does not have a business enterprise in India for the Respondents to have any recourse. Furthermore, a reading of the Annual Accounts of the Claimant for the year ending 31.12.2017 reflects an asset base of only 4.56 million Euros, equivalent to approximately INR 36,55,61,184.45. Hence, it has become imperative for the Respondents to file the present application seeking for an interim direction to the Claimant to furnish security for an amount of USD 6,211,369.29/- equivalent to approximately INR 42,54,78,796.37, to protect the rights and interests of the Respondents in the likelihood of their obtaining an award against the Claimant in the present arbitral proceedings."

28. No other pleading set out by the appellants for making a prima facie case for the Arbitral Tribunal to pass an order under Section 17. By merely stating that the respondent annual accounts (as per the balance sheet) is lesser than the amount claimed in the counter claim by the appellants is not sufficient enough for the learned Arbitrator to pass an order directing the claimant to furnish security.

29. It would be pertinent to point out at this Juncture to refer the Judgments referred by the counsel for the appellants.

30. All the three Judgments referred by the learned counsel for the appellants pertains to exercise of power by the Court under Section 9 of the Arbitration and Conciliation Act. There is a big difference between Section 9 and Section 17 of the Arbitration and Conciliation Act, wherein, Section 9 empowers the Court to pass orders on interim measures either before or during the Arbitral proceedings or at any time after making an Arbitral award but before it is enforced in accordance with Section 36, wherein, the order passed by the Court invoking Section 9 should fall within the expression and meaning of expression and interim measure of protection as distinguished

from permanent protection, whereas, Section 17 of the Arbitration and Conciliation Act empowers the Tribunal to pass interim orders as it deems fit in the circumstances of the case during the Arbitral proceedings. However, for securing an order under Section 9 or under Section 17, a party invoking such provision should prima faciely established a prima facie case, balance of convenience and irreparable loss and injury in the event of securing an award in their favour. The party seeking such interim relief have to prove that it may not be in a position to obtain the fruits of the Arbitration while executing the award.

31. In the present case, the appellants had knowledge that the respondent company is a foreign company who have no assets in India other than the trademark "Beverly Hills Polo Club (BHPC)", which existed even at the time of entering into the contract as early as 30.06.2014. There is no change of status as far as the respondent is concerned, when that being so, the appellants invoking Section 17 neither had pleaded nor had produced strong materials to substantiate the claim. The Tribunal merely based on the accounts statement produced by the appellants cannot pass an order to furnish security merely based on insufficient averments. Though the appellants have pleaded balance of convenience in their favour, on perusing the application and the documents filed in support of this application, this Court do not find that the appellants have established and substantiated their claim for the relief under Section 17 of the Act.

32. It is apparently clear that the party invoking Section 17 before the Arbitral Tribunal, such party must show that it will not secure the award amount and that award result as a paper decree or a decree which cannot be enforced, these aspects neither have been pleaded nor have been substantiated by the appellants before the Arbitral Tribunal and in consequent to the same, the learned Arbitrator had rightly rejected the claim made by the appellants under Section 17, seeking furnishing security equivalent to the amount claimed in their counter claim.

33. As per Section 37 of the Act, the Appellate Court while exercising its jurisdiction, will interfere with the order only when it is shown that the Tribunal had exercised its discretion arbitrarily, capriciously, perversely or where the Court had ignored settled principles of law.

34. The Arbitrator has rightly passed an order based on the facts by applying the settled principles of law. When the Arbitrator has rightly rejected the claim of the appellants and when there is no perversity or arbitrariness, this Court need not interfere with such an order being passed by the Arbitrator.

35. Under the above stated circumstances, this Court is of the view that the impugned order passed by the Learned Arbitrator has to be sustained and no interference is called for from this Court. Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-III)

// True Copy//

Sub Assistant Registrar

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To

1.The Presiding Officer,
Arbitral Tribunal, Chennai.

2.The Section Officer,
VR Section,
Madras High Court,
Chennai.

+1cc to Mr.Arun Karthick, Advocate, SR.No.83142.
+1cc to Mr.Thriyambak Kannan, Advocate, SR.No.82710.

C.M.A.No.2877 of 2018
and
C.M.P.No.21868 of 2018

KS(CO)
CSR:22/01/2020