IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.01.2020

PRONOUNCED ON : .01.2020

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Application No.3382 of 2017 in
C.S.No.708 of 2016

M/s.Sical Logistics Limited,
South India House,
No.73, Armenian Street,
Chennai 600 001. ... Applicant

vs.

M/s.Kyko Global Inc
One Wilkinson Road, Brampton,
Ontario,
Canada – L6T – 4M6
Represented by its
Authorized Signatory Amit Pande ... Respondent

Prayer:- Judges summons under Order XIV Rule 8 of Original Side Rules r/w Order VII Rule 11 of C.P.C., to reject the plaint in C.S.No.708 of 2016.

WEB COPY

For Applicant : Mr.Srinath Sridevan
For Respondent : Mr.Thriyambak J.Kannan

ORDER

The point for consideration in this application is, 'whether the plaint has to be rejected for the reasons stated in the application'.

http://www.judis.nic.in

2.The present suit in C.S.No.708 of 2016 is filed to enforce the foreign judgment rendered by the Superior Court of Justice, Ontario, Canada dated 09.11.2012 directing the defendants to pay the money they owe to the plaintiff.

3.According to the plaint statement, in the year 2010, defendant No.4 approached the plaintiff through Mr.Yogesh Asher of Seenol Finance and Investments Pvt. Ltd., ("Seenol"), for availing trade facilitation facility. Defendant No.4 was in the business of providing logistic services and one of the customers were defendant numbers 2 and 3. Defendant No.4 approached the plaintiff to provide Trade Facilitation Service on the bills raised by defendant No.4 on defendant Nos.2 and 3 for services availed by defendant Nos.2 and 3. After thorough due diligence process plaintiff was made to understand that there was a holding – subsidiary relation between defendants 2 and 3 and defendant No.1. Since, defendant No.1 is a company having good credit standing and is a publically traded company in India, plaintiff agreed to proceed with the transaction. Plaintiff entered into an agreement with defendant No.4 to provide Trade Facilitation Services with respect to bills raised by defendant No.4 on defendant Nos.2 and 3 upto a maximum amount amount of US$ 1.8 million. As a term of this agreement, defendant No.4 had also to provide promissory notes from defendant Nos.2 and 3 in favour of the plaintiff for full value of Trade Facilitation Services availed by defendant No.4.

http://www.judis.nic.in

The defendant Nos.2 and 3 executed the following promissory notes at Mumbai in favour of the plaintiff for good and valuable consideration.

> "1.*Promissory note dated 5th April, 2010 in the amount of US$ 269,220.00 which was due and payable on 20th June, 2010.*
>
> *2.Promissory note dated 8th May, 2010 in the amount of US$ 259,980.00 which was due and payable on 24th July, 2010;*
>
> *3.Promissory note dated 1st July 2010 in the amount of US$ 254,240.00 which was due and payable on 18th September, 2010; and*
>
> *4.Promissory note dated 3rd August, 2010 in the amount of US$ 261,830.00 which was due and payable on 20th October, 2010.*
>
> *5.Promissory Note dated 31st August, 2010 in the amount of US$739,659.00 which was due and payable on 4th February 2011.*
>
> *6.Promissory note dated 27th October, 2010 in the amount of US$ 255,470.00 which was due and payable on 18th March 2011."*

WEB COPY

4.Export Development Canada (EDC), a Corporation of the Canadian Government provides credit insurance to companies in Canada for their foreign receivables. EDC had provided credit insurance to the plaintiff towards these receivables and as part of this insurance EDC required plaintiff to obtain an

http://www.judis.nic.in

unconditional guarantee from defendant No.1 towards the indebtedness of defendant numbers 2 and 3. Accordingly, the first defendant executed an unconditional guarantee in favour of the plaintiff on 02.08.2010. The guarantee was provided for good and valuable consideration and as per the terms of the guarantee, the first defendant had guaranteed to the plaintiff punctual and complete payment and satisfaction of all the obligations of defendant Nos.2 and 3. Legal opinion was also obtained as requested by the EDC. In conditional to the guarantee, defendant No.1 also issued two account payee cheques as security for the debts of defendant Nos.2 and 3. The due date for promissory notes dated 05.04.2010 and 08.05.2010 were 20.06.2010 and 24.07.2010 respectively. But no payments were received from defendants 2 and 3. The date of payment was later extended at the request of the defendants but inspite of several communications and acknowledgements, the defendants failed to pay the debt. Hence, the suit was filed before the Ontario Superior Court of Justice, Canada after due service of notice through email to the defendants 2 and 3 and through the office of Sheriff of Mumbai upon defendant Nos.1 and 4. The judgment dated 09.11.2012, was passed against the defendants by the Superior Court of Justice, Canada.

WEB COPY

5.Inspite of proceeding before the Superior Court of Justice, Canada, the first defendant filed suit on 25.07.2012 before the Hon'ble High Court, Madras in C.S.No.495 of 2012 seeking declaration that all the transaction documents are null and void and to restrain the plaintiff herein from taking any action on

http://www.judis.nic.in

the basis of those documents. Interim injunction restraining the plaintiff from using the documents was granted on 25.07.2012. The defendant No.2 wholly own the subsidiary of defendant 3 and the defendant No.3 wholly own the subsidiary of defendant No.1. The defendant No.4 to provide service defendants 2 and 3 raised invoices which are the subject matter of the suit and the plaintiff has made payment to the fourth defendant towards those invoices. With this pleadings, the suit is filed for recovery of the decreetal amount ordered by the Superior Court of Justice, Canada.

6.Gist of the Application to reject the plaint (A.No.3382 of 2017):-

The first defendant has filed the present application to reject the plaint on various grounds primarily, on the ground of limitation and lack of jurisdiction. According to the first defendant, the Superior Court of Justice, Canada decree which is sought to be enforced is dated 09.11.2012. The limitation for enforcement of a foreign decree is three years from the date of judgement. Whereas, the present suit is filed only in the year 2016. The decree for a US$ 24,45,863.33/- together with interest @ 16% interest per annum is usurious and contrary to the public policy.

7.The transaction as spelt out in the plaint is expressly prohibited by the Foreign Exchange Regulation Act (FERA) and the Foreign Exchange

http://www.judis.nic.in

Management Act (FEMA). The first defendant has filed suit in C.S.No.495 of 2012 and interim order was passed against the present plaintiff from using the pronotes and other documents, in any legal proceedings. Despite the interim order, the plaintiff herein has obtained an exparte order from the Superior Court of Justice, Canada and tried to enforce the same after lapse of 5 years. Pointing out the observation made by the Division Bench of this Court in O.S.A.Nos.179 to 186 of 2014, the applicant/1st defendant contends that the present suit is filed contrary and in violation of the Division Bench order dated 12.01.2016. Though the plaintiff herein has stated in the plaint that the suit is filed pursuant to the leave granted by the Hon'ble Division Bench of High Court on 12.01.2016, no such leave was granted and the present suit is filed in direct contravention of injunction passed by the Division Bench.

8.Counter to the Application (A.No.3382 of 2017):-

The plaintiff/first respondent has filed counter stating that the application is misconceived, devoid of merit, guilty of suppression and misrepresentation. The cause of action to file the present suit has been set out in the plaint filed before the Superior Court of Justice, Canada has directed the first defendant to pay the money claimed since the said judgement cannot be directly enforced in terms of Section 44A r/w Section 13 of C.P.C., the present suit is filed for the purpose of enforcing the the decree passed by the Canadian Court. Under Order VII Rule 11 C.P.C., the plaint can be rejected only if no cause of action is

http://www.judis.nic.in

disclosed. As far as this case is concerned, the plaintiff has disclosed cause of action and hence, on that score, the plaint cannot be rejected.

9.The applicant/first defendant has taken mutually destructive stand once the plaint has disclose cause of action, the question of its veracity, completeness, sustainability or validity is something that has to be gone into at the time of trial and cannot be dealt summarily.

10.As far as the question of limitation is concerned, it being a mixed question of fact and law, 'whether the suit is barred by limitation or not', also matter of evidence which has to be adduced in the course of trial. The first defendant filed C.S.No.495 of 2012 and obtained exparte interim injunction. This was not made known to parties or Court, by the time the Superior Court of Justice, Ontario, Canada passed the decree which is the subject matter of the present suit (C.S.No.708 of 2016) against the interim order passed restraining the plaintiff herein to proceed against the defendants using the documents, the plaintiff herein has preferred O.S.A.Nos.179 to 186 of 2014. In these appeals, by common order, the Division Bench has given liberty to the plaintiff herein to file fresh suit in accordance to law. Therefore, the present suit in C.S.No.708 of 2016 is filed.

11.This suit is filed pursuant to the judgment passed by the Superior Court of Justice, Ontoria, Canada in CV 12-2476 dated 09.11.2012. Application

http://www.judis.nic.in

to reject the plaint is filed on the ground that the suit is barred by limitation and filed in breach of law inforce. Order VII Rule 11 of C.P.C., deals with rejection of plaint. Section 13 of C.P.C., deals with enforcement of foreigh decree. Since Section 10 of C.P.C., also relevant in this case, those provisions are extracted below:-

Order VII Rule 11 C.P.C.,:-

"11. Rejection of plaint— The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law :

Section 10 C.P.C.,:-

"Stay of suit.

WEB COPY

http://www.judis.nic.in

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

Section 13 C.P.C:-

"13. When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a

WEB COPY

http://www.judis.nic.in

refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India."

12.The relief sought in the present suit is as under:-

"a.This Hon'ble Court be pleased to judgment and decree agaisnt the defendants jointly and severally to pay to the plaintiff a sum of Rupees equivalent to US$ 24,45,863.33/- (Rs.16,46,90,895.77) with interest thereon at such rate as was decided by Ontario Superior Court in file No.CV-12-2476-00 from the date of decree till payment or realization at prevailing exchange rate of US Dollar and costs of the suit;

b.Adjudicate and award the rate of interest payable on Invoice #WCMPL/CSD/02/2010-11 dated 08.05.2010 (as amended by acknowledgement dated 09.08.2010); and Invoice # WCMPL/NGOPAL/01/2010.

c.costs;"

13.The previous suit in C.S.No.495 of 2012 between the parties, is pending for the following relief:-

http://www.judis.nic.in

"(i)To declare the extracts of the minutes of the Board of Diectors Meeting dated July 15, 2010 of the plaintiff company and purported to have been signed by 10,11 and 14th defendants as null and void. Consequently,

(ii)To pass an order of permanent injunction restraining the 1st and 2nd defendant from using the guarantee documents dated 2nd August 2010 purported to have been signed by 10,11 and 14th defendants in any legal proceedings;

(iii)To pass an order of permanent injunction restraining the 5th defendnat from using the two undated cheques issued signed by the 7th defendant of the plaintiff company defendants in any legal proceedings

(iv)To pass an order of permanent injunction restraining the 1st and 2nd defendants from using the Bill of Exchange – Promissory note purported to have been executed by the 6th defendant and the 9th defendant through 7th, 8th, 12th and 13th defendants dated 31 August 2010 defendants in any legal proceedings.

v.To pass an order of permanent injunction restraining the 1st and 2nd defendants from using the Negotiable Instrument dated 27.10.2010 purported to have been executed 6th defendant and the 9th defendant through 7th, 8th, 12th and 13th defendant in any legal proceedings

vi.To pass an order of permanent injunction restraining the 1st and 2nd defendants from using the promissory note dated 08.03.2010 executed 6th defendant and 9th defendant through 7th, 8th, 12th and 13th defendants in any legal proceedings;

WEB COPY

http://www.judis.nic.in

vii.To pass an order of permanent injunction restraining the defendant Nos.1, 2 defendants from using all other documents defendants in any legal proceedings which is in their custody as the documents executed by the plaintiff and their representative without the permission of this Hon'ble Court

viii.To award costs of the suit"

14.The first respondent/plaintiff herein namely M/.Sical Logistics Limited filed C.S.No.495 of 2012, wherein, an order of injunction was granted by this Court on 30.07.2012 restraining the plaintiff herein and others from instituting or continuing any legal proceeding with the documents mentioned in the plaint. The said interim order was extended time to time. The interim order granted in O.A.No.594 of 2012 on 30.07.2012 was vacated and application was dismissed on 18.01.2013. The said order was set aside by the Division Bench on 29.04.2013 and directed the single Judge to take up O.A.Nos.593 and 594 of 2012 and decide them on merits and in accordance with law. Meanwhile, the first defendant – M/s.Sical Logistics Limited filed another application in A.No.767 of 2013 to restrain the plaintiff and others from in any manner proceeding to enforce or otherwise executing the judgement of the Superior Court of Justice, Ontario, Canada dated 09.11.2012. The interim order passed was extended time to time by this Court and on 28.03.2014, a detailed order was passed holding that on 09.11.2012, the day on which a final judgement has been passed by the Canadian Court there was an interim injunction

WEB COPY

http://www.judis.nic.in

granted by this Court and was in force. But parties were not aware of the interim order in force. Hence, after detailed discussion, dismissed the applications in A.Nos.593 and 594 of 2012 which were remanded back by the Division Bench along with O.A.No.764 of 2013 which was filed subsequently for restraining the enforcement of judgement of the Superior Court of Justice, Ontario, Canada.

15.Aggrieved of this order, the first defendant filed an Intra Court Appeal in O.S.A.Nos.179 to 186 of 2014 before the Division Bench of this Court. The Division Bench in the said appeals, on 22.07.2015 has observed as below:-

> *"4.We had closed the interim application (M.P.No.1 of 2014) as at that stage, we did not consider it necessary to issue any interim directions. The parties endeavour to settle fell short of the final settlement as stated aforesaid. A perusal of the impugned order shows that the proceedings in the Ontario Courts in Canada were carried on under the understanding as if the interim orders granted by the learned single judge were applicable upto a particular date. However, in the impugned order, a finding has been reached that in fact, the impugned order was in force though it was understood otherwise by respondent No.1 who was the claimant before the Canadian Courts and that is the reason the proceedings were held in the absence of the original plaintiff is the present proceedings, who did not participate. The very continuity of proceedings before the Canadian*

WEB COPY

http://www.judis.nic.in

Courts being contrary to the injunction order would have to be examined and thus, for the present, no further proceedings can be held in pursuance to the decree obtained from the Canadian Courts. The interim orders would thus operate in these terms.

5.We may note that the parties will be in the same situation as before the learned Single Judge when the interim orders were passed, contrary to which the proceedings have gone on in the Canadian Courts."

16.Later, the plaintiff herein filed an application seeking permission to file a suit within the jurisdiction of this Court without prejudice to the rights and contention in the Intra Court Appeals. The learned counsel appearing for the first defendant/applicant has stated that he cannot have any objection to institution of any fresh civil proceeding as well as they are in accordance with law and so long as the order passed earlier in respect of interim relief is not interfered with. Recording these submissions, the application of the plaintiff was dismissed permitting to file a suit within the jurisdiction of this Court in accordance with law. Paragraph No.5 of the said judgement, the Division Bench has further stated that it is needless to say that the request for modification having been withdrawn the order already passed as interim measure on 22.07.2015 could not be affected.

17.In this background, the first defendant has filed the present application to reject the plaint on two grounds. The order to restrain to proceed

WEB COPY

http://www.judis.nic.in

with the Canadian judgement granted by the Division bench on 22.07.2015 is unaltered while so, the present suit based on the Canadian decree is barred under law. Further, the suit is based on an exparte foreign decree on 09.11.2012. The period of limitation for filing a declaration suit regarding the validity of foreign judgment is three years as per section 101 of the limitation Act. Whereas, the plaint presented in the year of 2016 to enforce a foreign decree passed on 09.11.2012. Hence, to be rejected on limitation.

18.Further, there was judicial order restraining the plaintiff from filing the present suit only for limited period. After exclusion of the period where there was restrained order in A.Nos.593, 594 of 2012 and 767 of 2013, the suit is beyond the period of limitation. Whether the suit is barred by limitation, or not', in the present case can be decided only in the course of time, being a mixed question of fact and law is a plea unsustainable since on the face of the record suit is filed beyond the period prescribed under the limitation Act.

19.The judgement and decree rendered by the Canadian Court is not a decree passed by a reciprocatory country. Further, it is a non contesting decree. Therefore, the said judgement is not conclusive as per Section 13 of C.P.C. Under law, though, there is a presumption as to validity of a foreign judgement, the decree holder of a foreign judgement has to file suit before the competent Court in the Indian territory for enforcement and execution of the said foreign judgement.

http://www.judis.nic.in

20.Even before the plaintiff could get a decree from a Canadian Court, the first defendant has approached this Court in C.S.No.495 of 2012 and has obtained an interim order restraining the plaintiff from using the disputed documents in any manner. Thus, the suit in C.S.No.495 of 2012 is prior in point of time. The Canadian Court has passed a decree on 09.11.2012 when the interim order was in force, therefore, the first defendant has later filed an application to restrain the plaintiff from in any manner executing the foreign decree.

21.A learned single judge has dismissed all the applications on 28.03.2014. The deck for the plaintiff to proceed against the first defendant and others was cleared on that day. However, the first defendant has filed O.S.A.Nos.179 to 186 of 2014 aggrieved by the order of dismissal. In these Intra Court Appeals, the Division Bench has stated that the very continuing of proceeding before the Canadian Court being contrary to the injunction order, this would have to be examined. So, for the present, no further proceeding can be held in pursuance to the decree obtained from the Canadian courts. The interim orders would thus operate in these terms. The Division Bench has again reiterated the above legal position vide order dated 12.01.2016 while disposing the miscellaneous application filed by the plaintiff for modification.

http://www.judis.nic.in

22.No doubt, liberty was given to the plaintiff herein to file suit in accordance with law as long as the interim relief granted in favour of the defendants is not affected. In other words, the later suit C.S.No.708 of 2016 is based on the judgement and decree passed by the Canadaian Court. Whereas, whether the said judgement and decree is valid under the teeth of an interim order of this Court is yet to be decided and subject matter of C.S.No.495 of 2012. The order of the Division Bench dated 22.07.2015 read in conjunction with clarification order dated 12.01.2016, without any ambiguity or doubt clearly restrains the plaintiff herein from proceeding in any manner based on the Superior Court of Justice, Ontario, Canada.

23.Till the legality about the non contested judgement passed by the Canadian Court is upheld, the liberty given to the plaintiff herein to proceed against the defendants in accordance with law can be only based on the alleged original cause of action and not on subsequent foreign decree. The present suit is not based on original cause of action namely the alleged money transaction between the plaintiff and the defendants.

WEB COPY

24.The plaint in the suit in C.S.No.708 of 2014 been presented before the Registry on 18.03.2016. Though there is a court seal bearing date 10.03.2016, the Assistant Registrar, Original side of this Court has made note on the docket of the plaint that it was presented on 18.03.2016. However, on verifying the plaint, this Court finds that the plaint and verification has been

http://www.judis.nic.in

signed by the plaintiff only on 21.07.2016. Further, it is to be noted that in the plaint, the statement regarding limitation is very bald and it does not explain how the suit is saved by limitation. In paragraph No.36 of the plaint, it is only stated that the present suit is within the period of limitation as provided under the Limitation Act. How it is within the limitation after 3 years from the date of foreign decree not explained.

25.The learned counsel appearing for the applicant/first defendant, would submit that even if the period where there was specific injunction restraining the plaintiff from proceeding with the foreign decree is excluded, the suit is presented beyond the period of limitation. This Court is more convinced that the subsequent suit namely C.S.No.708 of 2016 has to be stayed till the disposal of the previous suit namely C.S.No.495 of 2012 by invoking Section 10 of C.P.C., and the question of limitation can be take up after the validity of the foreign decree is decided in C.S.No.495 of 2012.

26.Since, the matter in issue in the subsequent suit (C.S.No.708 of 2016) is directly and substantially the issue in the previous instituted suit between the same parties.

27.The Hon'ble Division Bench of this Court vide order dated 22.07.2015 has clearly observed that the proceedings based on the Canadian Court have to be examined and till then, no further proceeding can be held. The validity of

WEB COPY

http://www.judis.nic.in

the Canadian Court decree dated 09.11.2012 is based on the outcome of earlier suit in C.S.No.495 of 2012 which questions the validity of documents which are the basis for the Canadian Court decree. Therefore, invoking the power under Section 10 C.P.C., this Court stay all further proceedings in C.S.No.708 of 2016 till the disposal of C.S.No.495 of 2012. This application is ordered accordingly. No costs.

.01.2020

jbm

Index : Yes/No
Speaking order/non speaking order

WEB COPY

G.JAYACHANDRAN.J.,

jbm

Pre Delivery Order made in

A.No.3382 of 2017 in C.S.No.708 of 2016

WEB COPY

.01.2020