

O.A.No.905 of 2019
in
C.S.No.588 of 2019

SENTHILKUMAR RAMAMOORTHY,J

This application is filed for an interim injunction to restrain the respondents from enforcing the motion to compel and call upon the Applicant herein to depose as a witness in proceedings before the Hon'ble Superior Court, Norfolk County of the Commonwealth of Massachusetts pending disposal of the suit.

2. I heard the learned senior counsel for the applicant, Mr.P.S.Raman, and the learned senior counsel for the respondent, Mr.S.V.Jayaraman.

3. Mr.P.S.Raman submitted that the dispute arises out of a Settlement Agreement dated 24 April 2013 (the Settlement Agreement) between the applicant and the first respondent herein and that the relevant facts are the following. The settlement related to a Master Services Agreement dated 2 January 2004 (MSA) between Atlantic Broadband Finance, LLC(ABB), a company registered in the United States of America and the second respondent, Ellaar Infotech Private Limited, which resulted in a dispute pertaining to alleged

diversion of business. The applicant is a former employee of ABB. The second respondent instituted a suit against ABB and Grande Communications Network LLC for breach of contract. In order to settle these disputes, the applicant and the first respondent entered into negotiations that culminated in the Settlement Agreement. As per clause 2.1.1 of the Settlement Agreement, the applicant agreed, in his personal capacity, to compensate the first respondent by paying him a sum of Rs. 4,45,00,000 and the manner of payment was set out in clauses 2.1.2 to 2.1.4. Clauses 2.2 and 2.6 are significant and both these clauses are set out below:

"2.2 Upon satisfactory implementation of the conditions set out under clauses 2.1.3 and 2.1.4, Prasad shall simultaneously ensure that the proposal for withdrawal is filed in the court to ensure that the Suit is withdrawn as settled/dismissed and provide proof of the same to Mohan. Prasad undertakes to ensure that neither Mohan nor any director, employees and partners of ABB, Grande, Shasta Solutions shall be, directly or indirectly, made a subject matter of any legal proceedings on account of any action taken or proposed to be taken by Prasad against any party which directly or indirectly pertains to the ABB MSA. Similarly, Mohan undertakes the neither Mohan nor any of the above said parties, directly

or indirectly, make Prasad, M Rajini or their Legal Heirs a subject matter of any legal proceedings."

"2.6 Prasad undertakes to ensure that neither Mohan nor any director, employees, partners of ABB, Grande and Shasta Solutions shall be, directly or indirectly, made a subject matter of any legal proceedings on account of any action taken or proposed to be taken by Prasad or the Company against any party which directly or indirectly pertains to the ABB MSA. Similarly, Mohan undertakes that neither Mohan nor any of the above said parties directly or indirectly, make Prasad or any of his Family Members or Legal Heirs a subject matter of any legal proceedings."

4. By advertng to clauses 2.2 and 2.6, the learned senior counsel for the applicant submitted that the first respondent categorically undertook that he would ensure that the applicant is not, directly or indirectly, made the subject matter of any legal proceedings on account of any action taken or proposed to be taken either by the first respondent or the second respondent with regard to the ABB MSA. He emphasised that the scope of the undertaking is wide and not limited to not joining the applicant as a party to legal proceedings. Therefore, the expression used was not to make the applicant, directly

or indirectly, the subject matter of legal proceedings. Consequently, the undertaking encompasses involving the applicant in any manner in such legal proceedings.

5. After pointing out that the applicant discharged his liability as per clause 2.1.1 by paying the aggregate sum of Rs. 4.45 crore to the first respondent, he submitted that the first respondent committed a breach of clauses 2.2 and 2.6 by calling upon the applicant to depose in legal proceedings instituted by the respondents in respect of the ABB MSA before the Superior Court, Norfolk County, State of Massachusetts, USA. The Settlement Agreement confers exclusive jurisdiction on courts in Chennai in respect of all matters arising out of or concerning the Settlement Agreement and, therefore, the present suit was filed before this Court, in the above circumstances, for a permanent injunction restraining the respondents from violating the negative covenant in clause 2.6 of the Settlement Agreement by enforcing the motion to compel and call upon the applicant/plaintiff to depose as a witness in proceedings before the aforesaid court in the United States of America.

6. In support of and in conclusion of his submissions, the learned senior counsel relied upon the judgements that are set out below along with context and principle:

(i) **Modi Entertainment Network and another v. W.S.G.Cricket Pte. Ltd. (Modi Entertainment Network) (2003) 4 SCC 341**, wherein the Hon'ble Supreme Court, at paragraph 24, set out the principles relating to the grant of an anti-suit injunction. In a nutshell, the court held that the court should bear in mind the following: whether the defendant is amenable to the personal jurisdiction of the court, whether the ends of justice would be defeated if injunction is declined, the principle of comity, the appropriateness of the forum if more than one forum is available, the contratual stipulation on jurisdiction, etc.

(ii) **Shashi Agarwal v. Chairperson (Shashi Agrawal), DRAT 2009 SCC Online All 662**, wherein, at paragraphs 8 to 10, the Court held that a compromise agreement that provides for the withdrawal of legal proceedings is not contrary to Sections 23, 57 or 59 of the Indian Contract Act, 1872 (the Contract Act), and that if it is so construed it would render the compromise agreement invalid as a whole and not only in respect of the agreement to withdraw legal

proceedings.

(iii) **Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5**

SCC 545, wherein, at paragraphs 42 and 43, the Hon'ble Supreme Court held that a negative covenant in a contract is enforceable and that such enforcement does not violate Section 27 of the Contract Act. In addition, the principles related to the grant of interim injunction were elucidated.

7. In response and to the contrary, Mr. S.V. Jayaraman made submissions. His first contention was that the suit and the interlocutory application are bad for non-joinder of a necessary party, namely, Venkatkrishnan, who played a central role in the events leading to the suit. Such non-joinder, according to the learned senior counsel, is fatal to the suit as per Order I, Rules 9 and 10 of the CPC. His next contention was that the suit is laid to prevent the enforcement of a subpoena issued by a foreign court and that such a suit is not maintainable. In this connection, he relied upon Section 41 of the Specific Relief Act, 1963 (the SRA) and, in particular clauses (a), (b) and (h) thereof. His last contention was that the applicant acquiesced in the proceedings before the court in the USA and thereby waived any contractual right to file the present action. In order to substantiate this

submission, he relied upon the documents relating to the issuance of the subpoena on 29 January 2019 and the correspondence relating thereto wherein the applicant requested for a postponement of the deposition and did not refuse to participate in such proceedings by relying upon the Settlement Agreement. For all these reasons, he submitted that the application is liable to be rejected.

8. The submissions of the learned senior counsel were considered and the records were examined. At the outset, it is necessary to consider whether the applicant fulfils the requirements for seeking something in the nature of an anti-suit injunction and also whether the relief requested herein cannot be granted in light of Section 41 of the SRA. As stated earlier, the Settlement Agreement confers exclusive jurisdiction on courts in Chennai in respect of disputes arising out of the said Agreement. The present dispute pertains to the enforcement of specific clauses in the Settlement Agreement and, therefore, is clearly a dispute arising out of the Settlement Agreement. As per principles set out in **Modi Entertainment Network**, this is the chosen forum. Upon perusal of the Settlement Agreement, I find that the undertakings of the first respondent are contingent on the discharge of payment obligations by

the applicant and the first respondent admittedly received full compensation as per the Settlement Agreement. In spite of receiving full compensation, if an interim injunction is not granted, the first respondent would be permitted to renege on the corresponding obligation not to make the applicant the subject matter of legal proceedings arising out of the ABB MSA. This would render the undertaking nugatory and the suit would also be rendered infructuous. Moreover, the applicant does not seek to prevent the prosecution of the suit. Instead, the relief requested is limited to restraining the respondents from compelling the applicant to be a witness in the said proceedings. Given that the applicant does not seek to prevent prosecution of the suit and the relief is of narrower amplitude, Section 41(a) and (b) of the SRA are not violated. I also find that an equally efficacious alternative remedy is not available. For all these reasons, I am satisfied that the principles pertaining to the grant of an anti-suit injunction are satisfied in this case and that Section 41 of the SRA is not attracted.

9. Consequently, the limited question that arises for prima facie consideration is whether clauses 2.2 and 2.6 of the Settlement Agreement restrain the first respondent from calling upon the applicant

to depose as a witness in legal proceedings arising out of the ABB MSA. It is not in dispute that the legal proceedings in question arise out of the ABB MSA. Therefore, it comes down to the interpretation of the expressions "directly or indirectly, the subject matter of legal proceedings". Upon examining the language in the two clauses, it appears prima facie that the parties to the Settlement Agreement consciously used the wide language "subject matter of legal proceedings" instead of stipulating that the applicant should not be joined as a party in legal proceedings. In addition, the words "directly or indirectly" were used and this has the effect of further expanding the scope of the obligation. Prima facie, this indicates that the intention was to ensure that the applicant or the first respondent, as the case may be, should not be involved in any legal proceedings arising out of or pertaining to the ABB MSA. Therefore, I am of the view that the applicant has made out a prima facie case that the undertaking is sufficiently wide to encompass a restraint on calling upon the applicant to depose as a witness.

10. The other objections with regard to non-joinder and acquiescence/waiver remain to be considered. As regards non-joinder, I am of the view that it does not preclude the consideration of the

interlocutory application. The said issue can be decided subsequently

in the suit. With regard to acquiescence and waiver, although the correspondence indicates that the applicant requested for rescheduling of the dates for recording the deposition, it cannot be concluded, on that basis, that the applicant voluntarily relinquished his right to enforce the undertaking under the Settlement Agreement. In the circumstances, at least for interlocutory purposes, it cannot be said that the applicant is precluded from seeking interim orders on account of acquiescence or waiver.

11. For reasons set out above, I am of the view that the applicant has made out a strong prima facie case and that the balance of convenience is in favour of the applicant. As stated earlier, the applicant is not seeking to prevent prosecution of the suit. If interim orders are not granted, in spite of fulfilling the applicant's obligation under the Settlement Agreement, the first respondent would be in a position to enjoy the benefit of receiving full compensation under the Settlement Agreement without fulfilling the corresponding obligation to the applicant. Therefore, the balance of convenience is in favour of the applicant. Moreover, if interim orders are not granted, the applicant

cannot be compensated subsequently and irreparable hardship would be caused. Accordingly, the order of interim injunction as prayed for and as granted earlier on 01.10.2019 is made absolute until disposal of the suit.

30.01.2020

Speaking/non speaking order
Index : Yes/No
Internet : Yes/No
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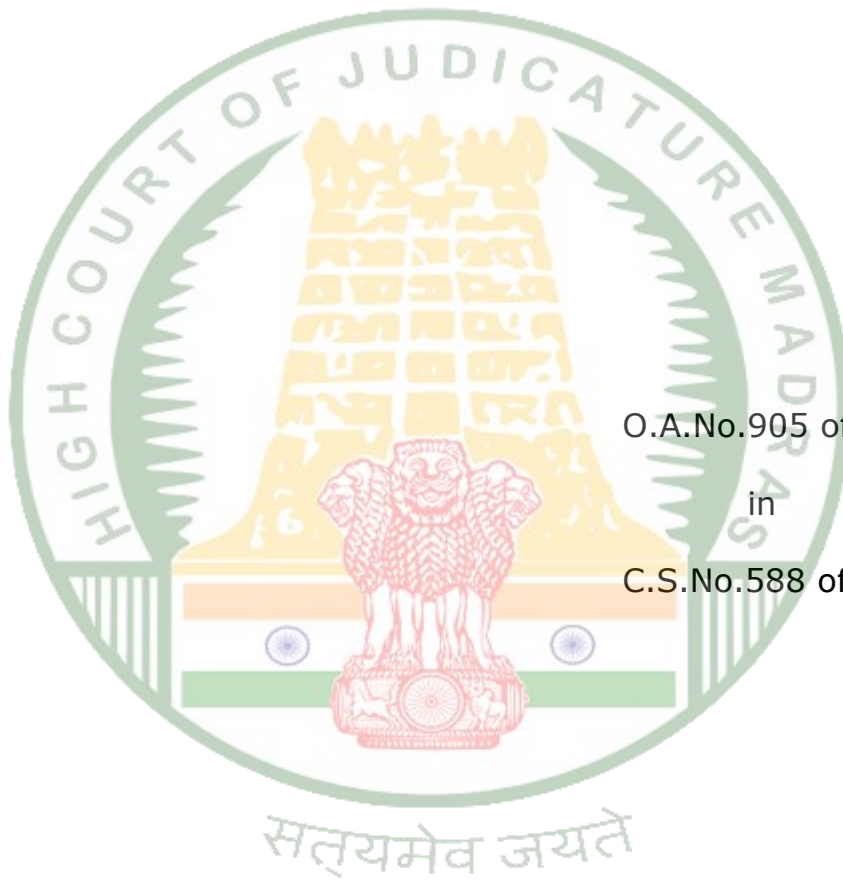


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