IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS (CD) NO.132 OF 2019
IN

COMMERCIAL SUIT NO.49 OF 2017
WITH
INTERIM APPLICATION (L) NO.9462 OF 2020
(NOT ON BOARD)

SBI (Mauritius) Limited ... Applicant/Plaintiff
Versus
GTL Limited
And Another ... Defendants

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Mr. Zal Andhyarujina, Senior Advocate with Hursh Meghani, Mona Bhide and Ishani Mushi and Swati Chandan i/b Dave & Girish & Co. for the Applicant/Plaintiff.

Dr. Abhinav Chandrachud with Vinod Agarwala, Shardool Kulkarni, Prasad Lotlikar, Jyotsana Kondhalkar, Rahul Jain i/b VBA Legal for the Defendants.

Mr. Nishit Dhruva, Ashok Kumar Mishra, Prakash Shinde, Niyati Merchant, Sagar Vichare i/b MDP & Partners for Intervener-IDBI Bank Limited, Applicant to Interim Application (L) No.9462 of 2020.

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CORAM : S.C. GUPTE, J.

RESERVED ON : 17 DECEMBER 2020

PRONOUNCED ON : 24 MARCH 2021

(Judgement)

. This Chamber Summons, taken out by the original plaintiff in the Commercial Suit, seeks amendment of the plaint and the affidavit in support of the Notice of Motion taken out in the suit, pursuant to leave granted in that behalf by this court by its order dated 11 January 2019.

2 The Commercial Suit seeks a perpetual injunction restraining the defendants from alienating their assets until the final disposal of the proceedings between the parties pending before the courts in Mauritius. The basis of the plaintiff's cause of action in the suit is Letters of Guarantee cum undertaking issued by defendant No.1 for the line of credit made available by the plaintiff to defendant No.2.

3 The plaintiff's case is that defendant No.1 had executed two documents, being letters dated 31 August 2010 and 1 December 2010, which were in the nature of Letters of Guarantee cum undertaking, to enable the plaintiff to extend a line of credit to defendant No.2, which is a wholly owned subsidiary of defendant No.1. These Letters of Guarantee *inter alia* provide for defendant No.1 continuing to maintain at least 51 % ownership in defendant No.2 and causing it to be operated and maintained in such manner as to be in a financial position to meet its obligations in favour of the plaintiff towards the credit extended by the latter. According to the plaintiff, the Letters of

Guarantee also include a commitment on the part of defendant No.1, in the event of the plaintiff being unable to recover from defendant No.2 the funds made available to it under the line of credit, and on demand, to make sufficient funds available to ensure that defendant No.2 meets its obligations to the plaintiff.

4 The schedule of amendments annexed to the Chamber Summons seeks to add some averments and delete some others in the plaint as well as in the plaintiff's affidavit in support of the Notice of Motion. The amendments appear to be in the nature of clarifications concerning the nature of relief claimed by the plaintiff in the present Commercial Suit. The plaintiff's main prayers in the suit are for (i) perpetual injunction against defendant No.1 restraining the latter from alienating or transferring its assets until the final disposal of the pending proceedings between the parties in the courts of Mauritius, and (ii) directions against defendant No.1 for taking necessary steps so as to ensure that defendant No.2 is in a financial position to meet its obligations towards the plaintiff. By the proposed amendment, the plaintiff seeks to clarify :

(a) that defendant No.2 has been added merely as a formal party, with no particular relief being claimed against it;

(b) that the plaintiff is entitled to restrict the terms of perpetual injunction upto any particular date; such restriction does not imply that the injunction sought is anything but a perpetual injunction; the relief claimed, in other words, is final and not interim; and

(c) that the cause of action of the two proceedings, i.e. proceedings before the courts in Mauritius and the present suit, represent separate and distinct causes of action, the proceedings in Mauritius being based upon the default of defendant No.2 in repaying the line of credit to the plaintiff, whereas the present suit is premised upon the obligation of defendant No.1 to honour its commitments under the Letters of Guarantee.

Apart from the aforesaid averments, which are also sought to be added in the affidavit in support of the plaintiff's notice of motion, the amendment seeks to substitute the original prayer-clause (a), which claims a perpetual injunction restraining defendant no.1 from disposing of its assets until the final disposal of the proceedings between the parties before the courts at Mauritius, by a new prayer-clause seeking perpetual injunction instead till final repayment of the plaintiff's dues either by defendant No.1 or defendant No.2. An alternative prayer for damages is also sought to be added against defendant No.1 for breach of the Letters of Guarantee cum

Undertaking, as an alternative to the original reliefs sought in the suit which are in the nature of specific performance of the Letters of Guarantee cum Undertaking.

5 The amendments are opposed by defendant No.2 mainly on two grounds. Firstly, it is submitted that the proposed amendments have the effect of changing the very nature of the suit; a suit essentially for interim relief pending proceedings before the Mauritius courts is sought to be converted into a suit for specific relief and, in the alternative, for damages. Learned Counsel for defendant No.1 submits that the plaintiff's suit in Mauritius is for recovery of money from defendant No.2 herein and the injunction sought in the present suit, which is the main relief in the suit, is to operate during the pendency of the Mauritius suit. Learned Counsel submits that the present suit, seeking interim injunction during the pendency of another suit, is, in the first place, not maintainable. Learned Counsel for defendant no.2 relies on the Supreme Court judgment in the case of **Bharat Aluminium Ltd. Vs. Kaiser Aluminium Technical Services Inc.**[1] in support of this proposition. Secondly, and at any rate, it is submitted that it would be impermissible to change the nature of the suit by amendment by converting it into a suit for specific performance of the contract of guarantee and damages, in the alternative. Secondly, it is submitted that the new claim sought to be added by way of amendment is barred by the law of limitation and cannot be allowed to be brought in.

1 (2021) 9 Supreme Court Cases 552

6 Let us first consider if the present suit is a suit for interim relief pending proceedings between the parties before the Mauritius courts, for if it is so, only then would the plaintiff's submission that the amendment seeks to change the nature of the suit really fall for consideration. Before we do so, it also needs to be made clear that this aspect is being examined not from the point of view of considering whether the present suit is not maintainable on the ground urged by the defendant. That is framed as one of the issues in the suit and would have to be considered when the particular issue is heard.

7 Merely because the suit restricts the prayer for perpetual injunction upto a particular date or till the happening of a particular event, it cannot be said that the injunction sought is anything but a perpetual injunction. A perpetual injunction, after all, is a permanent injunction, claimed as a final relief in a suit, seeking to restrain the defendant from doing any particular act. It is a specie of specific relief granted under Section 38 of the Specific Relief Act to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. Alternatively, the relief sought can also be viewed as a relief seeking enforcement of an obligation, in the nature of specific performance. It may well be the plaintiff's case that the defendant has an obligation not to do something till a particular date or till the happening of a particular event and if the former seeks to

enforce such obligation or prevent its breach, the case is nothing but a case for specific performance of the particular obligation or for specific relief of perpetual injunction preventing breach of such obligation. It is the plaintiff's case here that the defendant (defendant No.1 herein) has an obligation to maintain a particular share of equity in defendant No.2 company and discharge the liability of defendant No.2 and keep defendant No.2 in a position of financial capability to repay the plaintiff's dues and this obligation exists till the happening of a particular event, namely, full repayment of the plaintiff's dues. The relevant prayer-clause in that behalf was originally worded in a manner so as to prevent the breach of this obligation till the time the *inter se* proceedings between the plaintiff and defendant No.2 herein were pending before the courts in Mauritius. The amendment seeks to extend this period, namely, the period during which the plaintiff has such obligation in its favour, upto the date of repayment of the plaintiff's dues either by defendant No.1 or defendant No.2. Both injunctions, namely, injunction upto the disposal of proceedings and injunction upto repayment of the plaintiff's dues, are nothing but perpetual injunctions. By seeking to substitute one injunction (injunction upto repayment) for another (injunction till the disposal of the proceedings), the plaintiff cannot be said to be changing the nature of the suit, i.e. from a temporary injunction suit to a specific performance suit. Specific performance of a duty to perform an obligation and perpetual injunction to prevent breach of such obligation, are both species of specific relief and formulating the relief one way or the other does not change the nature of the suit. As for damages, they can always be claimed at any stage of the proceedings as an alternative relief to specific performance.

8 The judgment of **Bharat Aluminium Co.** (supra) cited by learned Counsel for defendant no.1 considers whether an *inter partes* suit simply seeking interim relief pending proceedings before another forum (including an arbitrator) is maintainable. Though we are not really considering the maintainability aspect for the present, it is important to note that the judgment considers situations where there is no separate cause of action for filing of the suit for injunction save and except to protect the assets during the pendency of other proceedings. The Supreme Court held in **Bharat Aluminium Co.** that such a suit would not be maintainable. The court held that an interlocutory injunction can only be granted during the pendency of a civil suit claiming relief which is likely to result in a final decision upon the *subject in dispute* ; the suit would be maintainable only on the existence of a *cause of action*, which would entitle the plaintiff to the substantive relief claimed in the suit. The right to obtain an interlocutory injunction pending some other suit or proceeding (involving a particular cause of action) is not in itself a cause of action; it cannot stand on its own. Such right is merely ancillary and incidental to a pre-existing cause of action. This law would have applied to our case had it been simply a case for interlocutory injunction pending another proceeding without there being any cause

of action to otherwise maintain it. In our case, however, as we have noted above, the suit has a cause of action of its own. Even if the relief originally sought was restricted during the pendency of another proceeding (namely, the proceeding before the Mauritius court), the relief was based on an obligation on the part of defendant no.1 and in favour of the plaintiff herein, namely, to discharge the liability of defendant no.2 or to keep defendant no.2 in a financial position to meet its liability to the plaintiff. This is in an independent cause of action, that is to say, independent of the cause of action in the Mauritius proceeding, which is 'dues owed by defendant no.2 to the plaintiff herein'. In that sense, the relief claimed in the present suit is a substantive relief and not a relief ancillary to the relief claimed before the Mauritius court.

9 The objection of defendant No.1 based on the plea of bar of limitation also has no merit for the purposes of the present amendment application. As long as the amendment is not to relate back to the date of the suit, the defendant has no cause to be aggrieved. In a matter such as this, it would indeed be in the interest of justice to allow the amendment and leave the question of relation back to the date of the suit or prospective nature of the amendment to be decided at the trial of the amended suit. That gives an opportunity to the defendant to state his case vis-a-vis the amended suit in his written statement or additional written statement dealing with the amendment and debating the application of the law

of limitation vis-a-vis such amendment after thus stating his case. In other words, the question of limitation concerning the amended claim may appropriately be kept open and not decided finally at the stage of allowing the amendment.

10 Accordingly, the Chamber Summons is allowed. The plaintiff shall carry out the amendment within a period of two weeks from today. It is made clear that the amendment is without prejudice to the objection of defendant No.1 based on the plea of limitation; and the question of bar of limitation concerning the amended claim is kept open, to be debated at the trial of the suit.

11 In case the Defendants or either of them propose or proposes to file additional written statement/s, the same must be filed within a period of four weeks after the amended plaint is served on the Defendants. The suit to appear for a case management hearing after six weeks from today.

(S.C. GUPTE, J.)