

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

O.S.A.Nos.79 to 81 of 2021

O.S.A.No.79 of 2021:

Ken Vander Weele,
Partner, Creation Investments Equitas Holdings LLC,
445, East North Water Street,
#2101, Chicago IL,
United States of America. Appellant

Vs.

1. Small Industries Development Bank of India,
756L, Overseas Towers,
Anna Salai, Chennai, Tamil Nadu.
2. Creation Investments Equitas Holdings LLC,
a wholly owned subsidiary of
Creation Investments Social Ventures Fund II LP,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.
3. Creation Investments Social Ventures Fund II LP,
2711 Centerville Road, Suite 400,
Wilmington, County of New Castle,
Delaware 19808,
United States of America.
4. Patric Fisher,
Former Manager, Creation Investments Equitas Holdings LLC,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.
5. Orbis Financial Corporation Private Limited,
4A, Technopolis, Sector-54, Golf Course Road,
Gurgaon-122 002.

... Respondents

O.S.A.No.80 of 2021:

Creation Investments Social Ventures Fund II LP,
2711 Centerville Road, Suite 400,
Wilmington, County of New Castle,
Delaware 19808,
United States of America.

... Appellant

Vs.

1. Small Industries Development Bank of India,
756L, Overseas Towers,
Anna Salai, Chennai, Tamil Nadu.
2. Creation Investments Equitas Holdings LLC,
a wholly owned subsidiary of
Creation Investments Social Ventures Fund II LP,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.
3. Patric Fisher,
Former Manager, Creation Investments Equitas Holdings LLC,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.
4. Ken Vander Weele,
Partner, Creation Investments Equitas Holdings LLC,
445, East North Water Street,
#2101, Chicago IL,
United States of America
5. Orbis Financial Corporation Private Limited,
4A, Technopolis, Sector-54, Golf Course Road,
Gurgaon-122 002.

... Respondents

O.S.A.No.81 of 2021:

Patric Fisher,
Former Manager, Creation Investments Equitas Holdings LLC,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.

... Appellant

Vs.

1. Small Industries Development Bank of India,
756L, Overseas Towers,
Anna Salai,
Chennai, Tamil Nadu.
2. Creation Investments Equitas Holdings LLC,
a wholly owned subsidiary of
Creation Investments Social Ventures Fund II LP,
2711, Centerville Road, Suite 400, Wilmington,
County of New Castle, Delaware 19808,
United States of America.
3. Creation Investments Social Ventures Fund II LP,
2711 Centerville Road, Suite 400,
Wilmington, County of New Castle,
Delaware 19808,
United States of America.
4. Ken Vander Weele,
Partner, Creation Investments Equitas Holdings LLC,
445, East North Water Street,
#2101, Chicago IL,
United States of America.
5. Orbis Financial Corporation Private Limited,
4A, Technopolis, Sector-54, Golf Course Road,
Gurgaon-122 002.

... Respondents

Prayer:

Appeals filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the order dated 6.10.2020, which was corrected vide order dated 18.11.2020, passed in O.A.No.1137 of 2019.

O.A.No.1137 of 2019:-

Original Application praying that the Hon'ble Court be pleased to pass an ex-parte and interim order of injunction restraining the Respondents from dealing with and/or selling and/or transferring and/or disposing of and/or alienating and/or encumbering and/or creating third party interest in any manner whatsoever in respect of the shares held by the Respondents No.2 in sonata finance Private Limited as detailed in the Schedule to the Judges Summons.

For Appellants

: Mr.P.S.Raman
Senior Counsel
for Mr.P.Vinod Kumar
in all three appeals

For Respondents

: Mr.P.H.Arvinth Pandian
Senior Counsel
for Mr.Edward James
for respondent No.1
in all three appeals

COMMON JUDGMENT

(Delivered by the Hon'ble Chief Justice)

O.S.A.No.80 of 2021 is taken up as the lead matter and the parties are referred to herein as they are arrayed in such appeal. All three appeals arise out of a common judgment and order of October 6, 2020, as corrected on November 18, 2020.

2. The appellant, a limited liability partnership firm, is indignant at being hounded by a party that once did business with an erstwhile company in which the appellant originally owned the full complement of its shares. The appellant steadfastly urges a point of principle: that if a party has not entered into an arbitration agreement with another, such first party cannot be proceeded against in an arbitral reference and, consequently, no application may be moved against it under Section 9 of the Arbitration and Conciliation Act, 1966.

3. Across the court from the American appellant is an Indian public sector undertaking. Such Indian entity, having mostly been led up the garden path by the second respondent, invokes the group of companies doctrine, wants the corporate veil to be pierced and even takes recourse to the string theory - not as a discipline in science, but as applicable to a puppet - to chase the former holding entity of a vanishing party with which the first respondent had business transactions. The essence of the first respondent's case in the Section 9 proceedings is that the party with which the first respondent herein entered into an agreement was merely a puppet whose strings were in the control of the appellant herein and the same was writ large in how the second respondent herein always described itself as a wholly-owned subsidiary of the appellant herein in the several documents and Court proceedings that it filed. The first respondent also claims that as a consequence of an undertaking furnished by the second respondent herein in this Court, by which the appellant herein bound itself, the first respondent has every right to proceed against the appellant herein and

treat the appellant as a party to the arbitration agreement in the document where the only eo nomine parties were the first and second respondents herein.

4. The matter pertains to a share purchase agreement of December 11, 2013. The second respondent herein entered into an agreement with the first respondent for the purchase of shares in a company by the name of Equitas Holdings Private Limited. Disputes arose between the two parties which culminated in the second respondent invoking the arbitration clause contained in agreement and making a reference for a claim in the nature of specific performance of the share purchase agreement and seeking an award commanding the first respondent to sell the relevant shares to the second respondent.

5. The arbitration clause contained in the relevant agreement of December 11, 2013 provided as follows:

"11. DISPUTE RESOLUTION

11.1 If any dispute or claim between the Parties hereto arises out of or in connection with this Agreement, including its breach, termination or invalidity thereof ("Dispute"), the Parties hereto shall use all reasonable endeavours to negotiate with a view to resolving the Dispute amicably. If a Party gives the other Party notice that a Dispute has arisen ("Dispute Notice") and the Parties hereto are unable to resolve the Dispute amicably within 30 days of service of the Dispute Notice (or such longer period as the Parties may mutually agree), then the Dispute shall be referred to arbitration in accordance with the terms of Clause 11.2 below.

11.2 Subject to Clause 11.1 above, any Dispute shall be referred to and finally resolved by arbitration, in accordance with the Arbitration and Conciliation Act, 1996. Unless the Parties are able to agree on a sole arbitrator within a period of 30 days of such reference to arbitration being made, the Dispute shall be referred to a panel of 3 arbitrators, of whom the Seller shall appoint 1 arbitrator and the Purchaser shall appoint 1 arbitrator and the 2 arbitrators so appointed shall appoint the third arbitrator. Any arbitral award shall be final and binding on the Parties hereto. The venue of the arbitration shall be Chennai, India. The language of the arbitration shall be English."

6. The arbitral reference was disposed of by a split award with two of the three arbitrators rejecting the claim. The arbitral award of September 19, 2016 was challenged before this Court in proceedings under Section 34 of the Act.

7. During the pendency of the arbitral reference and prior to the commencement of the reference, the second respondent obtained an injunction restraining the first respondent herein from selling the subject shares in company Equitas Holdings Private Limited, pending the outcome of the arbitration proceedings. Upon the claim being rejected, the prayer was carried to the Court in the proceedings under Section 34 of the Act. The Court renewed the order of injunction, but put the second respondent herein on terms by requiring an affidavit of undertaking to be furnished by it to the effect that if the injunction was ultimately vacated and a loss was occasioned to the first respondent herein as a consequence of the injunction, the second respondent would make good the loss. It was the usual underlying undertaking which is given by a suitor seeking an injunction, except that in this case it was an express undertaking. The original order was modified by a further order of January 31, 2017 requiring a clearer undertaking to be furnished, duly stamped.

8. The document that was filed pursuant to the order of January 31, 2017 was executed by one Ken Vander Weele (the appellant in O.S.A.No.79 of 2021), claiming to be a partner and authorised signatory of the second respondent herein. In addition to such affidavit indicating the assets that the second respondent held in India, it also detailed the assets of the holding entity of the second respondent in India and overseas. The appellant herein was the relevant holding entity, having at one point of time held the entirety of the paid-up capital in the second respondent herein.

9. Among the assets of the appellant indicated in the relevant affidavit was the appellant's holding of shares of value then in excess of Rs.91.99 crore in a company by the name of Sonata Finance Private Limited.

10. On or about July 11, 2019, the second respondent's challenge to the arbitral award stood dismissed. As a consequence, the injunction restraining the first respondent from dealing with the shares in company Equitas Holdings Private Limited was dissolved. On or about October 1, 2019, the first respondent herein wrote to the second respondent, lodging a claim in excess of Rs.76.77 crore on account of the damages suffered by it as a consequence of its shares in company Equitas Holdings Private Limited being injuncted from being sold and the interest thereon. The first respondent asserted in the relevant

notice that it had suffered an actual loss of Rs.36,73,55,489/-. It also claimed interest to the extent of Rs.40,04,14,088/-.

11. It does not appear that either the appellant or the second respondent issued any immediate reply to the notice of October 1, 2019. It was only by a communication dated December 3, 2019 that Patrick Fisher, who had earlier signed documents on behalf of the second respondent as its manager, informed the first respondent herein that the second respondent had gone into voluntary liquidation within about 20 days of its challenge to the arbitral award failing. Incidentally, Patrick Fisher is admittedly the founder and managing partner of the appellant herein and the appellant has asserted at several places that the second respondent was floated by the appellant as an investment arm.

12. Thus, the first respondent was faced with a piquant situation where the first respondent had suffered damages on account of the needless injunction that it suffered and perceived that it had no recourse to the second respondent since it had gone into liquidation. Within a fortnight or so of the first respondent receiving the news of the second respondent's virtual legal demise from Patrick Fisher, the first respondent instituted a petition under Section 9 of the Act against the appellant, seeking security to cover its claim. The relevant petition asserted that by its conduct or association, the appellant herein was an equal party to the share purchase agreement of December 11, 2013 and the arbitration clause contained therein as the second respondent. An initial injunction was issued in favour of the second respondent which has now been confirmed by the judgment and order impugned dated October 6, 2020, as corrected on November 18, 2020. The order passed is in the nature of attachment before judgment and the appellant has been restrained from selling its shares in company Sonata Finance Private Limited till the disposal of the arbitral reference.

13. In the interregnum, in January, 2020, the first respondent herein commenced arbitral proceedings against the appellant herein within the meaning of Section 21 of the said Act. An initial request was made before the Chief Justice of this Court for the constitution of an arbitral tribunal; but, on an objection by the appellant herein, the request has been carried to the Chief Justice of India on the appreciation that the resultant arbitration may be an international reference.

14. The appellant asserts that merely because the appellant was at one point of time the holding entity of the second respondent would not imply that the appellant was a party to the share purchase agreement entered into by the second respondent

with the first respondent herein or that the appellant would be covered by the arbitration clause contained in the matrix contract involving the first and second respondents herein. According to the appellant, it had nothing to do with the share purchase agreement between the first and second respondents and the association of Patrick Fisher in connection with such agreement was only in Patrick Fisher's capacity as a manager of the second respondent company.

15. The first respondent, on the other hand, says that not only did the second respondent represent in its very description in the share purchase agreement and elsewhere that it was inextricably connected with and an integral part of the appellant herein, implicit in the furnishing of the details of the appellant's assets in the affidavit pursuant to the order January 31, 2017 was that the appellant herein remained bound for the obligations of the second respondent herein. The first respondent contends that once the second respondent, with direct knowledge of the key officers of the appellant, indicated the assets of the appellant to impress this Court that the second respondent had the requisite funds to discharge its monetary obligations if the injunction were to be ultimately vacated, the appellant herein stood roped in, if not as a party to the original share purchase agreement, but in the nature of a guarantor taking responsibility to fulfill the obligation of the second respondent herein, should the second respondent independently fail in such regard.

16. The first respondent submits that Patrick Fisher may be seen to have been the controlling mind of both the appellant herein and the second respondent. The first respondent adds that since the transactions between the first respondent and the second respondent were conducted on the second respondent's behalf by Patrick Fisher and the majority of the documents signed or executed by the second respondent bear the signature of Patrick Fisher, it may be seen that it was always the appellant which was a party to the transaction, though operating in the name and style of the second respondent.

17. In support of first respondent's assertion that the appellant and the second respondent were inexorably connected, such that the second respondent had only to be recognised as an extension of the appellant herein, several cases have been brought to bear, including the judgments reported at (2013) 1 SCC 641 (Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.), AIR 2019 SC 4449 (Mahanagar Telephone Nigam Ltd v. Canara Bank) and (2015) 15 SCC 622 (Purple Medical Solutions Private Limited v. MIV Therapeutics Inc.).

18. In the first of the cases, the Supreme Court referred to the principle pertaining to commonality of interest and another pertaining to the interlinking of assets being the guiding factors to perceive when a non-party to an arbitration agreement could be regarded to have been so intricately connected to the transaction covered by the matrix contract so as to be treated as a eo nomine party thereto and governed by the arbitration agreement. In the second of the cases, the group of companies doctrine was pressed into service to find that a related company could be roped in as a party to an arbitration agreement. In the third of the cases, the old principle of lifting the corporate veil was resorted to, to discern whether the apparent non-party was lurking behind the veil and such non-party may be treated as an alter ego of the relevant eo nomine party and be regarded as a party to the arbitration agreement.

19. The appellant, however, seeks to detract from the line pursued by the first respondent by referring to the same Mahanagar Telephone Nigam Ltd case and relying on paragraph 10.2 therefrom. The passages that the appellant rely on speak of a holding company and a subsidiary being distinct corporate entities, as would also be a company and an associate company, and unless the transactions linked the holding and the subsidiary or one associate with another, the non-party to the arbitration agreement may not be brought within the fold of arbitration.

20. After the sea-change in the philosophy of corporate jurisprudence in this country over the last decade, the purist may wonder if the old adage still holds good: that the affairs of a company include the affairs of its subsidiary. But whether or not the affairs of a company may include the affairs of its subsidiary, in the present case, there was an element of the appellant not only lurking behind but also hovering over the second respondent through the person of Patrick Fisher, who executed the primary documents on behalf of the second respondent and appears to have been in control of such company. Since Patrick Fisher is also the founder and the managing partner of the appellant herein and the appellant admits that the second respondent was incorporated as an investment arm, the overwhelming connection between the appellant and the second respondent cannot be missed, particularly in the context of the apparently dishonest conduct on the part of the second respondent to sneak into oblivion by applying for voluntary liquidation shortly after the dismissal of the challenge to the arbitral award. There is every likelihood that Patrick Fisher may be found to have executed the liquidation papers on behalf of the second respondent.

21. Indeed, the communication of December 3, 2019 addressed

by Patrick Fisher to the first respondent and the circumstances pertaining to the second respondent as mentioned therein, would demonstrate that it may have been Patrick Fisher who was the controlling mind of both the appellant and its investment arm, the second respondent herein. At any rate, the issue need not be answered conclusively. Prima facie, it appears that such a perception would be plausible in how the parties conducted themselves and how Patrick Fisher projected himself and the entities under his control.

22. At its inception and even at the time of the execution of the share purchase agreement on December 11, 2013, the second respondent was wholly-owned by the appellant herein. This made the second respondent a veritable proprietorship concern of the appellant. Just as a proprietorship concern of a human proprietor does not have any identity independent of the human agency in control of it, the business and transactions of the second respondent must be seen to have been merely a part of the business and transactions of the appellant herein at the relevant point of time. If the second respondent can be seen to have functioned as a mere instrumentality of the appellant herein or the appellant seen to have operated through the agency of the second respondent herein, there is sufficient identity between the appellant and the second respondent for the appellant to be perceived as the other contracting party with the first respondent herein in the share purchase agreement of December 11, 2013.

23. The second respondent appears to have been a company. Curiously, Ken Vander Weele described himself as "a Partner and Authorized Signatory of the Applicant" in the affidavit of undertaking executed by him on April 12, 2017. It may have been the proverbial Freudian slip in the deponent indicating his position in the parent entity rather than the relevant "Applicant" that found its way in the affidavit. It is only one of the pointers indicative of how the second respondent may only have functioned as a unit of the appellant herein, particularly since the human agencies involved in the transactions on behalf of the second respondent were in de facto control of the appellant herein.

24. One of the grounds urged in passing by the appellant here is that an order for furnishing security or in the nature of attachment before judgment would not lie in a claim for damages. Ordinarily, the principle is beyond question, except that it comes with certain caveats as when liquidated damages for an ascertained sum have been indicated or the methodology for assessing damages has been agreed upon and the breach resulting in damages is apparent. In the present case, the undertaking furnished was in the nature of an indemnity to cover

any loss that could be caused to the first respondent herein as a result of the embargo on the sale of its shares by an order of injunction that could ultimately be found to be without basis. Generally, the principle that no security may be furnished in a claim for damages is founded on the twin grounds that the factum of damages having been suffered has first to be established and, thereupon, the quantum of damages would require to be ascertained. However, where the factum of damages is evident and the quantum payable on account thereof is also ascertainable, the principle may not hold good, particularly in the context of a foreign entity holding ephemeral assets as shares of a company in the country where the lis originates. If an injunction in the nature of a Mareva order may be seen to be permissible if the claim were to be fashioned as a suit, an order in the nature of security may also be made in the circumstances.

25. Given that the second respondent was born as an investment arm of the appellant and that the second respondent operated through the human agencies that controlled the appellant itself, the righteous indignation displayed by the appellant does not behove it. There is no doubt that a de jure argument is still possible, but the facts as they present themselves and the surreptitious manner in which the second respondent went into voluntary liquidation smack of a foul odour brought about by the orchestration of the appellant and the persons in control thereof. The first respondent's action must be seen, as of now, to hold the persons responsible for its loss accountable. Viewed from such perspective, the injunction issued appears to be justified in principle.

26. At the end of the day, it is the arbitral tribunal which may have to decide whether the arbitration clause contained in the share purchase agreement of December 11, 2013 would govern the appellant and the claim of the first respondent made against the appellant in the present case. Since a prima facie view has now been taken, upon noticing that a substantial loss had been caused to the first respondent herein by the injunction obtained by the second respondent, in principle, the order impugned does not call for any great interference.

27. However, the quantum of the security may require some adjustment. If the claim of the first respondent made on October 1, 2019 is anything to go by, the principal component thereof can be seen to be to the tune of Rs.36.73 crore. There is no doubt that such quantum is dated and is the figure as at November 8, 2019. There is also no doubt that the first respondent herein may have a claim on account of interest, depending on what date is finally fixed for ascertaining the damages suffered by the first respondent. For the present purpose, if a composite amount of about Rs.60-65 crore were to

be deposited in any nationalised bank, that should be sufficient cover for the first respondent's claim against the appellant.

28. Accordingly, the order impugned dated October 6, 2020, as corrected on November 18, 2020, is modified by requiring the appellant to deposit a sum of Rs.65 crore in any nationalised bank having a branch in this city within a period of eight weeks. Till such time that the deposit is made, the injunction in terms of the order impugned will continue. In the event the deposit is made within the time permitted, the injunction pertaining to the shares in company Sonata Finance Private Limited will stand vacated.

29. It is made clear that the observations here are tentative and will not bind the arbitral tribunal in course of the reference, if any.

30. In the light of the above order, no further disclosure of assets need be made by the appellant.

31. Accordingly, OSA Nos.79 to 81 of 2021 stand disposed of with the impugned order being modified as aforesaid. There will be no order as to costs. Consequently, C.M.P.Nos.3071, 3084 and 3104 of 2021 are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

sasi/suk

To

The Sub Assistant Registrar,
Original Side, High Court,
Madras-104.

+1cc to Mr.P.Vinod Kumar, Advocate, S.R.No.14984

+1cc to Mr.Edward James, Advocate, S.R.No.15283

O.S.A.Nos.79 to 81 of 2021

VBM(CO)
CS/23/04/2021