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

NOTICE OF MOTION NO.145 OF 2017
IN
COMMERCIAL SUIT NO.49 OF 2017

SBI (Mauritius) Ltd. .. Applicant/Plaintiff
v/s.
GTL Ltd. & Anr. .. Defendants

Mr. Zal Andhyarujina a/w Jalpa Shah, Azmin Colah i/b. Dave & Girish & Co. for the applicant in NMS/145/2017 and for the plaintiff in Suit no.49/2017.

Mr. Abhinav Chandrachud a/w Jyotsna Kondhalkar & Dhanashree Deshpande i/b. VBA Legal for defendant no.1.

CORAM : A. K. MENON, J.
DATED : 9TH JUNE, 2022.

P.C. :

1. By this Notice of Motion, the plaintiff seeks to restrain the 1st respondent from alienating, disposing, transferring or in any manner its assets including shares held by the 1st respondent in the 2nd respondent or implementing any scheme of arrangement or demerger which would lead to a change of shareholding of the

1st respondent in the 2nd respondent. The suit as filed seeks a permanent injunction restraining the defendant from alienating, disposing or transferring its assets till final repayment of dues by either 1st defendant or 2nd defendant. 2nd defendant is the borrower. The 2nd defendant is not represented today. 2nd defendant has not entered appearance and it is only 1st defendant which has filed its written statement. Indeed the relief sought in the IA are only against the 1st defendant.

2. By a letter dated 12th October, 2017 the court recorded a statement on behalf of 1st defendant that it would not in any manner alienate, dispose or transfer assets held by it in the 2nd defendant till the Notice of Motion is heard by the Court. The Notice of Motion has been taken up for hearing today. Mr. Andhyarujina seeks continuation of that order. Meanwhile, liberty had been granted to the defendant to apply for variation. No such application appears to have been made for variation and the statement continues to operate.

3. The plaintiff has based the suit on two letters one dated 31st August, 2010 and 1st December, 2010. These letters are identical in content, save and except that the first of these letters is seen to

have been issued on the basis of a borrowing of USD 20 million by the 2nd defendant. The second letter of 1st December, 2010 is based on the 2nd defendant's borrowing of USD 7 million. The fact that these funds have been borrowed is not in dispute. The letters apparently issued prior to the amounts being disbursed as evident from the opening sentence.

4. For ease of reference the letter in question is reproduced below;

"We confirm that, we are aware that you have offered to grant/continue banking facilities to International Global Tele-System Limited, Mauritius ("the Borrower") for USD Twenty Million.

We also confirm that, so long as any amount is outstanding to you under such banking facilities:-

1. We will continue to maintain 51% ownership of the Borrower and hereby undertake to advise you forthwith in the event of any decision being taken to dispose off our shareholding in the Borrower.

2. We will cause the Borrower to be operated and maintained in such a way as to be in a financial position to meet all its obligations from time to time to you. If the bank is unable to recover the funds under this arrangement we will, on demand, immediately either.

a. make funds available to the Borrower sufficient to meet its obligation; or

b. have funds made available to the Borrower by others in amounts sufficient to enable the Borrower to meet its obligation.

3. We will not take any action, which will result in the Borrower being unable to carry on its business or otherwise being unable to meet all its obligation from time to time to you and hereby undertake to advise you forthwith of any circumstances, which may affect the continuing *operation of the Borrower.*

4. We will furnish you with our consolidated annual audited financial statements and accounts will procure that the Borrower will furnish you with annual audited financial statements and accounts together with such additional financial information as may be reasonably required."

5. It is the case of the plaintiff that on the strength of the aforesaid letter, the plaintiff has lent an advance the aforesaid sum of USD 27 million. The defendant had sanctioned the line of credit to the 2nd defendant in a sum of USD 20 million and a further sanction in a sum of USD 7 million. Pursuant to these Sanction Orders, two Facility Agreements have been executed on 6th September, 2010 and 28th December, 2010. The Facility Agreement contemplated repayment of these amounts by the 2nd defendant borrower. The 2nd defendant was also said to be obliged to obtain a policy of insurance which has accordingly been done.

6. It is submitted by Mr. Andhyarujina, the learned Senior Counsel, appearing in support that clause 15.3 of the Facility Agreement, inter alia, provides that the 2nd defendant would not make any change in its ownership pattern without the prior consent of the plaintiff. The letter of 31st August, 2010 Exhibit 'A" unconditionally states that the 1st defendant would continue to

maintain 51% ownership of the 2nd defendant and that in the event any decision is taken to dispose the shareholding, the 1st defendant would advise the plaintiff. Accordingly, till date no such decision has been conveyed to the plaintiff and indeed by virtue of the statement made to the Court on 1st defendant's ownership in the 2nd defendant has not been diluted.

7. Mr. Andhyarujina invites my attention to the provisions of the letter which according to him constitutes an unconditional letter of guarantee or undertaking to the effect that till the defendant no.2 does not repay its dues to the plaintiff. The undertaking contained in clause 15.3 would oblige the 1st defendant to maintain the ownership of 51% shares of the 2nd defendant and also ensure that the 2nd defendant carries on its business in a manner such as to enable it to meet its obligations to the Bank. Mr. Andhyarujina has also invited my attention to the obligation of 1st defendant to provide funds to the 2nd defendant or arranged to have funds provided to the 2nd defendant in terms of clause 2 of the letter. The letter also records that the 1st defendant will refrain from taking any action which will result in the 2nd defendant being unable to meet its obligations to the Bank. Lastly, the letter contemplates copies of Annual Audited Financial

Statement of the 2nd defendant to be provided by the 1st defendant to the bank.

8. According to Mr. Andhyarujina, the letters forming the basis of the suit is the underlying obligation on the basis of which the 2nd defendant has been advanced funds. Quite apart from the relief sought in the present suit, it is stated across the bar that proceedings are pending against the 2nd defendant in the Court of Mauritius. We are, however, not concerned with those proceedings today, save and except to note that the plaintiff has in paragraph 38A of the amended plaint stated that the bank has initiated proceedings in Mauritius against the 2nd defendant for recovering monies under the agreement and that the 1st defendant has not made any payments. As a result the plaintiff has proceeded to file the proceedings, inter alia, on the basis that the 1st defendant is unable to meet its obligations under the letters of Guarantee.

9. The learned counsel for the plaintiff therefore submits that till such time the 2nd defendant does not repay the amounts due to the plaintiff bank, it is entitled to seek enforcement of the 1st defendant's obligations under the two letters of undertaking. He

therefore submits that the relief sought in the IA is liable to be granted.

10. At the hearing of this Notice of Motion, Dr. Chandrachud opposes grant of relief on the basis that the order cannot continue although no attempt was made to have the orders varied. Dr. Chandrachud submitted that in the present suit, the relief of the nature sought in the Notice of Motion cannot be granted. Dr. Chandrachud who submits firstly that the two letters in question are not letters of guarantee. They do not conform to the concept of a guarantee under Section 126 of the Contract Act, 1872. These are merely letters of comfort. These are not actionable and cannot be enforced in law for the reason that they do not constitute a contract between the parties viz. plaintiff and 1^{st} defendant, for want of acceptance. Dr. Chandrachud has invited my attention to the provisions of Section 2 of the Contract Act and submits that while the letters in question have been issued to the plaintiff, the plaintiff has not signified his assent to the said proposal. The letters constitute a proposal which had not been accepted expressly by the plaintiff bank and hence they do not constitute a contract which is an essential pre-condition of a contract of guarantee.

11. My attention has been invited to Section 126 of the Contract Act, 1872, Dr. Chandrachud seeks to persuade me to hold that the 1st defendant is not a surety for the principal debtor who is admittedly the 2nd defendant and in respect of whom whose default, the letter of guarantee has been issued. He submits that not having acquired the quality of a guarantee, the letter cannot be sought to be enforced against the 1st defendant.

12. The learned counsel for the defendant has in support of his contentions relied upon a decision of the Court of Appeals in the case of ***Kleinwort Benson Ltd. v/s. Malasia Mining Corp Bhd.*** [1] Inviting my attention to the ratio of the said judgment, it is contended that the two letters in question are in fact not letters of guarantee or undertaking but merely letters of comfort and being such letters of comfort, it is only a moral assurance in terms of the contents of the letters which cannot amount to liability in law. The letters of comfort are merely an assurance to the plaintiff in order to enable the plaintiff to consider the grant of line of credit to the 2nd defendant. Nothing in law would convert that assurance to an obligation to make any payments or to continue to honour such an assurance for all time to come such that the plaintiff can

1 [1989] 1 ALL ER 785

claim relief in terms as sought in the present application.

13. Considering the fact that the letter of comfort in the instant case contains no unconditional obligation to guarantee, payment of the dues, such as to impose upon the 1st defendant, the obligation of a surety in a contract of guarantee, no relief can be granted.

14. Dr. Chandrachud has submitted that the sanction of line of credit for USD 20 million and a separate sanction in respect of the USD 7 million i.e. Exhibit "C" and Exhibit "D" are addressed to the 2nd defendant. They contains no reference to any obligation of the 1st defendant. In fact, it is addressed only to the 2nd defendant. No copy is marked to the 1st defendant and the acceptance of the terms of the sanction is only by the 2nd defendant. The conditions precedent in the matter of security created does not refer to any obligation of the 1st defendant to the plaintiff bank.

15. According to Dr. Chandrachud absent any such condition or security in terms of the two letters, there cannot be any legal obligation to pay or fund the repayment of the loan. If there is no such legal obligation in the sanction or for that matter in the

Facility letter, there is no occasion for the plaintiff to seek relief against the 1st defendant. My attention was also invited to the decision of a Single Judge of this Court in Company Petition no.528 of 2012 in the order dated 5th December, 2013 in which the Court had occasion to consider a defence by the respondent company in relation to a "Patronage Letter" issued by the respondent in an attempt to interpret the suit letters as letters of comfort.

16. Dr. Chandrachud has submitted that such a patronage letter was held not to be a Guarantee Deed but a comfort letter. The Court had occasion to consider this and found that the loan agreement in that case was conditional upon execution of the Patronage letter-cum-guarantee. In paragraph 55, the Court held that the loan agreement was based on the guarantee given by the respondent and that if there was no guarantee by the respondent, the loan agreement would not have been executed. In the instant case, it is submitted that the sanction letter for the line of credit and the Facility Agreement do not make the execution of the letter at Exhibit "C" & "D" a condition precedent for the disbursal of the shareholding and that the line of credit was really utilized by the 2nd defendant without reference to any obligation of the 1st

defendant. This is one more reason why no obligation can be cast upon the 1st defendant much less any order of injunction passed as sought against the 1st defendant pending the disposal of the suit.

17. As far as the statement made to court is concerned, it is merely a voluntary statement at the ad-interim stage and to that effect I am of the view that it is for the 1st defendant to consider whether or not to continue the statement. Dr. Chandrachud has made it clear that he has instructions not to continue the statement and indeed the defendant no.1 is not obliged to. At the hearing I found that the two letters dated 31st August, 2010 and 1st December, 2010 being identical, contains a voluntary statement on behalf of the 1st defendant that they have been made aware that the plaintiff had offered to continue to grant facility to 2nd defendant in specified sums of 20 million and 7 million USD. The 1st defendant had unconditionally confirmed that they would continue to maintain their ownership pattern in the 2nd defendant borrower and advise the bank in the event of any change in that position. It also confirmed that it will cause the 2nd defendant to operate and maintain itself in a position so as to meet obligations to the plaintiff. The 1st defendant undertook it

will not take any action which will result in the 2nd defendant being unable to carry on business or meet its obligation from time to time. They incorporate an undertaking to advise the bank in the event any circumstances arising that would affect the continuity of business operations of 2nd defendant borrower. A fair reading of this letter establishes that it is entirely voluntary. It is not issued at the request of 2nd defendant or at the request of the plaintiff. The plaintiff has issued a sanction for the line of credit. No other condition of the sanction require the 1st defendant to provide such a letter of confirmation. No doubt the plaintiffs have sought to construe this guarantee/letter of undertaking. In the instant case the 1st defendant has undoubtedly agreed to continue to maintain its ownership at the levels specified in clause (1). It has agreed and confirmed that it would ensure that the business of the 2nd defendant would be conducted in the manner such as the operations would not be affected and that it would be able to meet all its obligations to the bank. The 2nd defendant is admittedly in default as a result of which proceedings have been initiated in the Courts in Mauritius.

18. The question is whether today the 1st defendant can be permitted to resile from obligations it has undertaken and in my

view the answer is in the negative. The 1st defendant has voluntarily offered to ensure that the 2nd defendant's business operations are not affected in a manner that would prejudice the plaintiff. Apart from maintaining the ownership levels, there is an undertaking to advise the plaintiff forthwith of any decisions being taken to divest shareholding since 31st August, 2010. The 1st defendant has admittedly not contemplated any such decision being taken. Thus, as on date the undertakings contained in these two letters continue to operate, the confirmations therein continue to operate and bind the defendant no.1. It is clear that the 1st defendant has not sought to withdraw from this letter at any stage which would possibly have precipitated further action.

19. In this set of circumstances, whether or not the letters in question amount to a letter of guarantee as contemplated under Section 126 of the Contract Act and whether it required express written acceptance by the bank as contemplated by the arguments made by the learned counsel for the 1st defendant are matters to be decided at the trial after evidence is led and which will bring out the real intention between the parties, especially that of the 1st defendant which has voluntarily executed these letters.

20. At the hearing of this application, nothing has been shown to the court to suggest as that the plaintiff has insisted on the defendant no.1 issuing the suit letters. The letters are issued by the 1st defendant to ensure the upkeep of the business operations of the 2nd defendant borrower. The letters expressly recognize the obligation of the 2nd defendant to avail of the line of credit and to repay the same. The decisions in *Kleinwort Benson Ltd. and Intesa* (supra), are of no avail. The fact situation in both these are different in a matter of evidence that has to be attracted and in the case of *Intesa* (supra), the fact situation reveals that the loan agreement was conditional upon the letter of comfort which the court found was a condition precedent. In my view, these decisions will not come to the assistance of the 1st defendant. The letters in question are unconditional and I find no reason why at this interim stage they cannot be enforced. The issues have been raised at the hearing today, are all matters that will have to be gone into at the stage of the trial after evidence is led by the parties or such of them who lead evidence. In the meantime, I am of the view that the plaintiff's rights are entitled to be protected. A strong prima facie case is made out. The balance of convenience also favours the plaintiff. In the result, the Motion must succeed.

21. I therefore pass the following order;

(i) Notice of Motion is made absolute in terms of prayer clause (a).

(ii) Notice of Motion is disposed in the above terms.

(A. K. MENON, J.)