



C.M.A.No.1772 of 2022

IN THE HIGH COURT OF JUDICATURE OF MADRAS

RESERVED ON : 23.09.2022

PRONOUNCED ON : 21.12.2022

CORAM:

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A.No.1772 of 2022

&

C.M.P.Nos.12842 & 12844 of 2022

1.Dr.Pranay Kumar Singh

2.Dr.S.Sonu Verma

... Appellants

Vs.

1.Dr.Agarwals Healthcare Ltd.
Rep. by its Authorized Signatory,
A Thanikainathan having its registered
Office at Budhari Towers, No.4,
Moores Road, Off Greams Road,
Egmore, Chennai – 600008.

2.M/s.Vinayak Netralaya, A partnership firm represented
By its partners Dr.Pranay Kumar Singh and Dr.S.Sonu Varma
203, Lakshya Badgara Crest Tower, above
Zari Saree Showroom, New Curewell Hospital,
Janjirwala Square, Indore,
Madhya Pradesh – 452001.



C.M.A.No.1772 of 2022

3.M/s.Vinayak Optix, A partnership firm represented
By its partners Dr.Pranay Kumar Singh and Dr.S.Sonu Varma
203, Lakshya Badgara Crest Tower, above
Zari Saree Showroom, New Curewell Hospital,
Janjirwala Square, Indore,
Madhya Pradesh – 452001.

...Respondents

Prayer: Civil Miscellaneous Appeal is filed to set aside the impugned order dated 11.07.2022 passed by the Hon'ble Arbitral Tribunal in I.A.No.1 of 2022.

For Appellants : Mr.E.Om Prakash
Senior Counsel
for Ms.Deepika Murali

For Respondent 1 : Mr.Sathish Parasaran
Senior Counsel
for Mr.R.Parthasarathy

For Respondents 2 & 3 : Not ready in notice.

JUDGMENT

The respondents in the arbitral proceedings and in the Section 17 petition are the appellants before this Court. The challenge is to



C.M.A.No.1772 of 2022

the impugned order dated 11.07.2022 passed in I.A.Nos.1 and 2 of 2022 in the arbitration proceedings between the respondent / claimant and the appellants and the proforma respondents herein. The learned Arbitrator has relegated the contentions raised by the appellants in their application in I.A.No.3 of 2022 to await the result of the main claim petition. The facts in brief preceeding the filing of the appeal are as follows.

Facts of the case as pleaded by both parties:

2. The agreements which gives rise to these proceedings are four Business Transfer Agreements dated 31.01.2020 and two Contract of Service Agreements of the same date. The appellants herein are reputed Ophthalmologists practicing at Indore. The appellants had started health care services with reference to Eye Care in the name of Vinayak Netralaya and Vinayak Optix, proforma respondents 2 and 3 herein.



3. It appears that the 1st respondent and the appellants herein had negotiated for the sale of respondents 2 and 3. Ultimately, the negotiation had culminated in the execution of the four Business Transfer Agreements (hereinafter referred to as BTA) with identical contents dated 31.01.2020. The BTAs were entered between:

- (i) The 1st respondent and the 1st appellant;*
- (ii) The 1st respondent and the 2nd appellant;*
- (iii) The 1st respondent and the 2nd respondent;*
- (iv) The 1st respondent and 3rd respondent.*

4. Under these agreements, the 1st respondent had acquired the title and the business operations of the respondents 2 and 3, including the movable, immovable and other incorporeal rights. The slump sale consideration for the four agreements was a sum of Rs.16.43 Crores.

5. One of the terms of the BTAs (Clause 7.3) was that the appellants herein would execute the contract of service on mutually



acceptable terms and conditions on the closing date. The closing date was the date on which the BTAs were executed by the parties. The BTAs had spelt out the obligations of both the parties. The broad spectrum of the agreement between the parties was that the 1st respondent would purchase the business of the 2nd and 3rd respondents for the fixed sale consideration.

6. The 2nd and 3rd respondents represented by the appellants were required to effect the transfer of the business in the name of the 1st respondent. The 1st respondent had agreed that the business would be carried on in the name and style of Dr. Agarwal's Health Care with Vinayak Netralaya / Dr. Agarwal's Eye Hospital with Vinayak Optix.

7. The employees of the 2nd and 3rd respondents were to be taken over by the 1st respondent on the same terms as they were engaged by respondents 2 and 3. The 1st respondent on acquiring these employees were required to execute employment agreements with the said



employees. The 2nd and 3rd respondents were required to make necessary applications to the tax authority for transferring the various registrations like Goods and Service Tax license, Excise license, Sales Tax Registration, VAT registration, etc., standing in the names of respondents 2 and 3 in favour of the 1st respondent.

8. The 2nd and 3rd respondents were also required to provide assistance for transferring the business and also for effecting the change in name. The movable properties were also required to be handed over to the 1st respondent. Simultaneously, the appellants were required to execute the contract of service which also contains different Clauses.

9. It is the case of the appellants herein that the terms of BTAs had been complied with and nothing remains to be executed further. Under Clause 7.5 of BTA, the undertaking was taken from the appellants and respondents 2 and 3 that they would not engage in any



C.M.A.No.1772 of 2022

other service or assignment on their own apart from the services rendered to the 1st respondent or engage with any other Hospital or concern for providing Medical Facilities in the same line as that of the 1st respondent. The Brand / Trade name, Good will etc., of respondents 2 and 3 were to exclusively belong to the 1st respondent with effect from the date of the execution of the BTAs.

10. As per the terms of the two contract of services which is entered into between the 1st respondent and the appellants herein (where again the terms were common for both agreements), the appellants were to be designated as Regional Head - Clinical services in the newly merged Hospital in Madhya Pradesh. The appellants were to be paid a consultancy fees of Rs.3,50,000/- per month. In addition, they were to be provided additional consideration for milestone based additional payments. The agreement provided that the initial lock in period of the contract would be five years, terminable by both only in the manner set out in Clause 10 therein.



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11. It is the case of the appellants that pursuant to the signing of the various agreements, the appellants and the 2nd and 3rd respondents were paid a total consideration of a sum of Rs.16,43,00,000/-. In addition to the above consideration, the 1st respondent was required to pay a sum of Rs.4,27,93,496/-, which was to be used for settling and closing the various liabilities of the 2nd and 3rd respondents.

12. The appellants herein would contend that within a year and half of their entering into the agreement, dispute arose between the appellants and the 1st respondent in the form of,

a. Failing to retain the brand name Vinayak Netralaya / Vinayak Optix. The appellants would contend that not only was the name used but the 1st respondent had failed to procure the latest equipments as promised, refused to pay agreed increment of 10 %.



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b. Not only was the increment was not granted but the 1st respondent was also deducted the appellants' salaries for the period from April 2020 to November 2020 and the variable pay was cut from May 2021.

c. The appellants were never consulted when important management decision were taken and one Ganesh Subramaniam who was given charge of the internal operations and external marketing had started making these decisions and had also changed the reporting authority to new recruits who were not part of the merger.

13. In view of the above, the appellants had sent several letters to the 1st respondent to resolve these issues. However, the same was not redressed properly by the 1st respondent. The appellants would submit that the combined sale had been effected without recourse to



C.M.A.No.1772 of 2022

the appellants and without any forewarning. The refusal of the 1st respondent to cure the breach despite notice being issued by the appellants led to the issuance of the notice of termination on 21.08.2021. The appellants had granted 30 days time. As per this notice, the cure period was till September 2021.

14. A reply was received from the 1st respondent setting forth the allegations that the BTAs had not been performed and further that the appellants have set up a competitive Eye care centre in total violation of the Non-competition and Non-solicitation Clause. The 1st respondent had stated that amounts were due and payable from the appellants.

15. The 1st respondent had filed Section 9 application before this Court and the appellants had also lodged a criminal complaint with the Police Commissioner on 18.01.2022 and the Director General of Police on 07.03.2022 against the 2nd respondent in the main claim



C.M.A.No.1772 of 2022

petition and other members of the 1st respondent. Therefore, this Court by order dated 30.03.2022 had appointed Ms.R.Banumathi, Former Judge of the Supreme Court of India as the Arbitrator and had relegated the parties to the Arbitral Tribunal.

16. Before the Arbitral Tribunal, the 1st respondent had sought for recovery of amounts. Before the filing of the claim petition, the 1st respondent had moved a Section 17 application for a direction to the appellant to furnish security to the tune of Rs.16,43,00,000/- and for an injunction restraining the appellants from practicing as Doctors.

17. The appellants had filed a counter as well as a counter claim seeking security to the tune of Rs.3,41,42,050/- being damages payable by the 1st respondent to the appellants for the breach committed by them by not paying the agreed monthly income and incentives to the appellants.



18. The 1st respondent without filing the claim statement had taken out an application under Section 17 of the Arbitration and Conciliation Act, herein after called the A & C Act, for the reliefs claimed supra. The grounds on which Section 17 application was moved is summarised as follows:

a. The appellants herein are under obligations to continue to provide their service for a period of 9 years including lock in period of 5 years.

b. Under the terms of the BTA and the Contract of Services Agreements, the appellants and respondents 2 and 3 were prohibited from undertaking any service or assignment on their own, apart from the services rendered to the 1st respondent or from engaging with any other Hospital or concern for providing medical service in the same field during the term of service and three years thereafter.



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c. After the term of service, the appellants herein could take up assignments as employee / consultant in the 1st respondent's Hospital but cannot set up their own practice. Due to COVID - 19 pandemic and the lock down the business had suffered and therefore the revenue of the business were affected and consequently it was resolved to reduce the fees and salary of the Doctors associated with them.

d. The appellants had started acting against the interest of the 1st respondent in the course of discharging their duties by committing breach of the BTAs and Contract of Service Agreement. That the appellants were engaging certain employees to cause discord in the association by giving false complaint against the 1st respondent and its staffs.



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e. The appellants behind the back of the 1st respondent had tried to promote their erstwhile firm, which is against the terms of the BTA.

f. Notice of termination dated 17.11.2021 issued is contrary to the terms of the contract.

This formed the sum and substance of the Section 17 application that had been filed.

19. The averments for seeking furnishing of security is set out as follows:

a. The appellants are working against the interest of the 1st respondent.

b. Substantial sums of money have been received by the appellants and respondents 2 and 3 from the BTAs and the Contract of Service Agreement.

c. The 1st respondent had received authentic information that the appellants were attempting to setting



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up practice in the new Hospital under the name and style of Anandam Netralaya.

d. The appellants, respondents 2 and 3 would not have means to pay damages once the 1st respondent succeeds in their claim.

20. The appellants herein have countered this Section 17 application by filing a counter claim under Section 17 seeking the following reliefs:

(a) An order of injunction restraining the claimant from creating any encumbrance or third party interest over the property at Lakshya Badgara Crest Tower, Above Zari Saree Showroom, Near Curewell Hospital, Janjirwala Square, Indore, Madhya Pradesh — 452001 being the premises of the claimant:

(b) The Claimant be directed to furnish a security of Rs. 3,41,42,050/-.



C.M.A.No.1772 of 2022

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© *The claimant be directed to share their annual*

revenue report for the period of January 2020 to September 2021.

(d) Ad-interim orders in terms of prayers (a) and (c) above.

21. In the said application, it is the case of the appellants that prior to the execution of the BTA and Contract of Service, the parties had been exchanging e-mails setting out the terms of negotiation. It is their case that after the final terms of agreement had been firmed up in the appellants' e-mail dated 09.04.2019, however there was no response from the 1st respondent. Further, the 1st respondent had attempted to poach the employees of the respondents 2 and 3 which constrained the appellants herein to issue an e-mail dated 10.06.2019 calling upon the 1st respondent to refrain from such activities.



22. It appears that the 1st respondent was attempting to establish a foot hold in Indore without the assistance of the appellants herein.

When that attempts had failed, they requested the appellants herein to re-consider the proposal sent vide their e-mail dated 08.04.2019. Thereafter, the four agreements and two contract of service came to be executed between the parties. The appellants' contention is that under the two Service Agreements they are entitled to:

*“1.As per Clause 4.2 of the two service agreements
an additional goodwill amount of :*

*(i) Rs 3 crores to be paid over a period of 3 years
on achieving 10% revenue growth Year on Year OR*

*(ii) Rs 6 crores to be paid over a period of 3 years
on achieving 20% revenue growth (Revenue growth to be
considered on Indore center revenue alone)*

*2. As per Clause 4.1 of two service agreements
Fixed payout of Rs.3,50,000/- has to be tendered.*



C.M.A.No.1772 of 2022

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3. *3% of Indore turnover per doctor per month -*

Variable incentive to kick in if Indore monthly turnover is more than Rs. 45,00,000/-.

4. The satellite centers to be taken over and rebranded - Revenue to pass through their books and expenses to be borne by the 1st respondent. Profits from the center will be their own with a small operating fee for the company - Rs 10,000/- per center

23. The appellants have stated that contrary to the assurance made by the 1st respondent after the transfer of the business were completed the 1st respondent had reneged on the assurance and terms put forth by them. The following were the breach committed by the appellants:

a. refusing to pay 10% increment.

b. refusing to pay good will amount of Rs.1,50,00,000/-, of each to the appellants.



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c. deducting the salary during the period of April 2020 to November 2020 and the variable pay from May 2021. This despite the fact that, throughout, the 1st respondent's medical institution had made huge profits during the Covid period.

d. Restricting the appellants from making any management decisions and appointing one Ganesh Subramaniam as Vice President, though under the contract of service, the appellants were to be designated as a Regional Head - Clinical services.

e. Changing the line of reporting authority.

f. Failing to retain the brand name “Vinayak Netralaya” - A Unit of Dr. Agarwal's Eye Hospital for the existing as well as new centres.

g. Failing and neglecting to procure latest technology advanced equipments including the FEMTO LASIK apparatus



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h. Causing harassment to the employees of respondents 2 and 3, who had been taken over by the 1st respondent as per the terms of the BTA.

i. Causing irreparable and irreversible damage to appellant's reputation.

j. Not shifting to a better infrastructure tertiary centre as originally agreed upon, in order to increase the revenue generation. The promise of having the appellants herein to be sole authority and a point person for undertaking all the business decision, hiring employees etc., had been given a go by, thereby breaching the terms of the contract.

k. Failing to pay the remuneration and the additional good will amount which is violative of terms of the agreement.



C.M.A.No.1772 of 2022

24. Therefore, it was the case of the appellants that the breach of obligations are on the side of the 1st respondent and since there is a breach of payment, the appellants had exercised their right under the agreement and terminated the contract after giving 30 days notice period.

25. The appellants have in their application claimed a sum of Rs.9,91,025/- towards salary deduction, per appellant, which works out to a total of sum of Rs.19,82,050/-. The financial loss of about Rs.3,21,60,000/- in the form of the additional yearly salary, loss of salary for eight months and the refusal to pay the pending good will amount.

26. The appellants had also stated that they had come to learn that the 1st respondent was in discussion with the other entities to sell off the business of the respondents 2 and 3. Therefore, the appellants



C.M.A.No.1772 of 2022

had come forward with the application under Section 17 of the A & C Act.

27. A reply has been filed to this petition by the 1st respondent. A reading of this reply would indicate that the payment of the goodwill amount was only with the tacit understanding that the appellants herein would continue to be associated with the respondents 2 and 3. It is their contention that since there was no income on account of Covid pandemic situation, the additional payments based on the agreement could not be achieved and therefore the salary of the employees had been reduced. They would contend that the assurance given under the BTAs has not been kept up by the appellants.

28. The 1st respondent would contend that the appellants and respondents 2 and 3 were not entitled to separate additional goodwill amount other than the contractual consideration. The only reasons for



C.M.A.No.1772 of 2022

reduced salary was the pandemic and the consequent low flow of funds.

29. The 1st respondent had clearly stated that the appellants were not entrusted with the managerial position but only rendering professional services. They had denied the statement that the brand name had to be preserved. Therefore, they had sought for the dismissal of the application filed by the appellants and prayed their application to be considered.

30. The learned Arbitrator had passed a common order in I.A.Nos.1 and 2 of 2022 alone and no orders have been passed in I.A.No.3 of 2022. However, the allegations contained in I.A.No.3 of 2022 has been taken note of by the Arbitrator. The learned Arbitrator on examining the pleadings and the arguments proceeded that there has been a breach by the appellants in starting competitive business. The learned Arbitrator had opined that there is a violation of Clause



C.M.A.No.1772 of 2022

7.5 of the BTA and 12.2 of Service Contract Agreement which clearly stipulates Non-competition and Non-solicitation.

31. The 1st respondent had made out a case that the appellants were engaged in the competitive business in the name and style of “*Anandam Netralaya*”. The unilateral decision of the 1st respondent to reduce the salary has been upheld by the learned Arbitrator by contending that the decision for reducing the salary have been taken on account of an unprecedented cause - COVID - 19 pandemic and the appellants have also given their consent for the reduction under their e-mail dated 24.04.2020. Therefore, the learned Arbitrator had held that the termination of the contract by invoking Clause 10.3 is not correct. The non payment of the additional consideration which had been put forth by the appellants has been brushed aside by the learned Arbitrator by once again quoting the COVID - 19 pandemic.



32. The appellants had contended that the 1st respondent was continuing to make profits, but had however, failed to rectify the breaches. The learned Arbitrator held that whether the company had earned income during the pandemic situation and post the Hospital acquisition is the matter that has to be considered later after both parties let in their evidence.

33. The contention of the appellants that they have been hindered in the day to day functioning has also been relegated to the main claim by the learned Arbitrator. The learned Arbitrator has directed the deposit of a sum of Rs.16,43,00,000/- only on the following reasons:

“No doubt, the power to direct the Respondents to deposit the amount or secure the amount by way of Bank Guarantee is more in the nature of the Order under XXXVIII Rule 5 CPC. The power under Order XXXVIII Rule 5 CPC should be exercised sparingly and with



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utmost caution. Mere averment that the Claimant would not be in a position to realize the amount in case the Award is passed may not be sufficient to issue Order or direction to deposit the amount or to give security. But in this case, it is be pointed out that the Claimant has invested huge amount of Rs.16,43,00,000/- based upon the BTAs and the Contract of Service Agreements dated 31.01.2020. Admittedly, the said amount of Rs.16.43,00,000/- has been paid to the all four Respondents. The Respondents have invoked Clause 10.3 of the Service Contract Agreements to terminate the BTAs and Service Contract Agreements. BTAs are actually a Business Transfer Agreements, which are in the nature Sale Transactions. In fact, in BTAs, the Claimant is referred to as 'Purchaser' and the Respondents are referred to as 'Sellers'. It is pertinent to note, that while terminating the BTAs, the Respondents have not stated



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anything about the consideration of Rs.16.43,00,000/- and as to what will happen to the money/amount invested by the Claimant. As point out earlier, the BTAs and Service Contract Agreements are a composite business Transaction. In such facts and circumstances, it is necessary that pending Arbitral Proceedings interest of the Claimant has to be protected by directing the Respondents to deposit the amount of Rs.16,43,00,000/- or furnish security to the said amount by way of Bank Guarantee. Within a short time thereafter, the Respondents have terminated the BTAs and Service Contract Agreements by issuing termination notices on 17.11.2021. Within that short period, the Claimant would have neither earned profit nor made any amount from out of the investment made by them. In these facts and circumstances and in order to protect the interest of the Claimant, it is necessary to grant interim order directing



C.M.A.No.1772 of 2022

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the respondents to deposit the amount of Rs.16,43,00,000/- or to furnish security to the said amount of Rs.16,43,00,000/- by way of Bank Guarantee.”

Submissions:

34. The learned senior counsel appearing for the appellants would prima face question the order on the ground that the learned Arbitrator has in effect passed an award in the main claim petition without the appellants stating what their claim was. The learned senior counsel would submit that a sum of Rs.16,43,00,000/- has been paid under the 4 BTAs. The obligations of the appellants have been performed and nothing remains to be done in the same. He would further submit that the only ground which has been raised by the 1st respondent is that the appellants herein have terminated their contract, though the BTAs had been entered into only on the specific



understanding that the appellants would continue to offer their service exclusively for the 1st respondent. However, contrary to this undertaking the appellants have terminated the contract without any reason whatsoever.

35. The learned senior counsel would submit that the learned Arbitrator has totally brushed aside the contentions of the appellants as to the reason for terminating the contract which is on account of the breach of the undertaking given by the 1st respondent herein. He would submit that under the agreement, the appellants were to be given powers to take certain management decision and they were to be consulted in all managerial decision. However, contrary to the agreement that the appellants would be a Regional Head - Clinical Services, the 1st respondent had side lined the appellants and appointed third parties who are neither members nor Doctors and reduced the appellants to the state of mere employees.



36. The learned senior counsel would further submit that in keeping with the termed Clause 10.3 of the Contract of Service Agreement, the appellants who terminated the contract for non payment of their dues have given 30 days notice. He would submit that the 1st respondent had also breached the terms of the agreement that they would retain the name of the respondents 2 and 3 for the existing centres as well as new centres. He would further submit that once the terms of BTA had been fully complied with and performed by the appellants and respondents 2 and 3 herein, there is no question of furnishing security for the entire consideration that had been paid by the 1st respondent to respondents 2 and 3 and the appellants herein. The ingredients for the furnishing has not been made out in this regard.

37. The learned senior counsel would further submit that without even the filing of statement of claim and in the absence of pleadings by the 1st respondent, the learned Arbitrator has granted the



C.M.A.No.1772 of 2022

main relief itself. He would rely upon the unreported Judgement of the Bombay High Court in ***Arb.P.No.1599 of 2012 – Moser Baer Entertainment Limited Vs. Goldmines Telefilms Private Limited***, dated 30.01.2013, wherein the learned Judge has held as follows:

“22. The learned Arbitrator failed to appreciate that respondent had not even filed statement of claim and in the absence of such pleadings, no interim relief of such nature could be granted by the learned Arbitrator. The learned Arbitrator did not have entire pleadings and documentary evidence before him while considering the application under [section 17](#) and thus no such order was warranted.”

38. In the Judgement of the Delhi High Court reported in ***2022 SCC Online Del 1138 – Splendor Buildwell Pvt. and another Vs. Rajesh Kumar Pasricha***, where the Arbitral Tribunal had directed the appellant to furnish security on the basis that there were 25 cases



against the appellant, the learned Judge while setting aside the order had observed as follows:

“12. It was imperative for the Tribunal to examine if the Respondent had made the pleadings and proved that it had a prima facie case in its favour, and also that the Appellant was in the process of dissipating or removing its assets/funds so as to render the Award nugatory. The law on the above aspect, as cited by both the parties in judgments noted above, is now well established. This Court in [BMW India Private Ltd v. Libra Automotives \(P\) Ltd.](#), (supra), has held that an Order securing the amount claimed in arbitration, prior to the passing of the final award, has to be passed keeping the well-known principles provided under Order XXXVIII Rule 5 of CPC in mind. In [Dinesh Gupta](#) (supra), the Court held that while exercising jurisdiction under [Section 17\(1\)\(ii\)\(b\)](#) of the Act, though the Arbitrator is not strictly bound by the



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confines of Order XXXVIII Rule 5 of CPC, but he is proscribed from acting in a manner completely opposite thereto.

13. This aspect, in the Impugned Order, is entirely absent. No emergent apprehension was made out from the mere pendency of numerous cases against the Appellant, and it does not constitute a sufficient basis to apprehend that the award, if made against it, would be rendered infructuous. No other material has been placed on record to demonstrate that the Appellant would go into liquidation. No material was placed to suggest that the Appellant is disposing of any part of the Property, much less removing itself or its assets out of India so as to create a possibility of frustrating the monetary award that may be passed in favour of Respondents in the future upon the conclusion of arbitral proceedings.”



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39. Therefore, the learned senior counsel would submit that the 1st respondent not having put forth their claim and respondents 2 and 3 and the appellants having performed their obligations under the BTA, the order directing the appellants to furnish the security to the tune of Rs.16,43,00,000/- is totally misconceived and is liable to be set aside.

40. As regards the plea of injunction, the learned senior counsel would submit that by virtue of injunction, the 1st respondent is putting a fetter on the appellants practicing as Doctors, which is violative of Section 27 of the Indian Contract Act. He would submit that the termination of contract of service is only on the ground of non-payment of dues, which statement has not been denied by the 1st respondent herein. On the contrary, it is the contention of the 1st respondent that since there was lack of revenue owing to the COVID - 19 situation the revenues were not been generated. Further, it is the



C.M.A.No.1772 of 2022

contention of the learned senior counsel for the appellants that no proof has been filed by the 1st respondent to state that during the relevant period there was no revenue generated in the Hospital or that it was earning a very low income.

41. The learned senior counsel would submit that the terms of contract of service i.e., Clause: 10.3 gives power to the appellants to terminate the contract if there is a non-payment of the amounts as agreed. As stated earlier, admittedly there has been reduction in the payment of the salaries. Therefore, the order of injunction has to necessarily be suspended.

42. Per contra, Mr.Sathish Parasaran, learned senior counsel arguing on behalf of the 1st respondent would at the outset submit that the order has to be upheld and the appeal may be dismissed. The learned senior counsel would submit that the parties had entered into an agreement on the specific understanding that the appellants herein



C.M.A.No.1772 of 2022

would continue to serve the Hospital after the take over. However, contrary to the assurance, the appellants had issued a termination notice. He would submit that the appellants have committed the breach of agreement by not continuing to work for the 1st respondent. That apart, the setting up of a Hospital in the name and style of Anandam Netralaya to compete with the 1st respondent was contrary to the agreement which had clearly contained Non-competition and Non-solicitation Clause. He would submit that the respondents 2 and 3 and the appellants were under an obligation to work for the 1st respondent for a period of 9 years and after the period, for further period of 3 years they could carry on their independent work but could not be associated with any Hospital. He would further submit that the pamphlet which had been marked would show that the appellants have committed the breach of terms of Non-competition and Non-solicitation. The learned senior counsel would submit that a sum of Rs.16,43,00,000/- have been invested by the 1st respondent only on the express understanding that the appellants herein would continue to



C.M.A.No.1772 of 2022

work in the said clinic. However, the appellants have failed to keep up this assurance, as a result of which the Hospital had suffered loss.

Since there was a breach, the appellants were entitled to the refund of the amount paid by the 1st respondent.

43. The learned senior counsel would also submit that in the light of the non-competitive and non-solicitation agreement, the appellants were bound by the BTA and contract of service and should necessarily be enjoined from extending their service to any third party Hospital, which are the competitors of the 1st respondent. The learned senior counsel would rely upon the following Judgements in support of his arguments:

(i) **2021 SCC Online Del 5221** – Spml Infra Limited

Vs. Hitachi India (P) Ltd.,

(ii) **2021 SCC Online Del 5571** – L & T Finance

Limited Vs. DM South India Hospitality Private Limited
and others.



C.M.A.No.1772 of 2022

(iii) **2021 SCC Online Mad 410** – Vishal Krishna

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(iv) **2021 SCC Online Del 4619** – Sanjay Arora and

another Vs. Rajan Chadha and others.

Discussion:

44. Heard the learned senior counsels and perused the records.

45. A perusal of the records and the arguments of the learned senior counsels would clearly show that the entire dispute in the Section 17 application revolves around the narrow campus as to whether the appellants have committed a breach of the terms of the agreement and consequently failed to fulfill their obligations under the agreement and whether the termination of the agreement by the appellants was justifiable. It has to be noted that the claim petition is yet to be filed.



C.M.A.No.1772 of 2022

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46. The parties had entered into the BTAs with obligations being cast on both sides to do certain acts and the consideration had been fixed for the above. The records would reveal that the 1st respondent had paid a sum of Rs.16,43,00,000/- under the four BTAs. The 1st respondent would also clarify that the Section 17 application is restricted only in respect of the BTA and not the Contract of Service Agreement.

47. The appellants have in their counter to the Section 17 application and counter claim clearly stated that all their obligations under the BTAs have been fulfilled by them. Even according to the 1st respondent, the main ground for invoking the arbitration Clause and claiming security was on the ground that the Doctors, namely, appellants herein have terminated the contract and are engaged by the rival Hospital. The appellants on the other hand would submit that they have been constrained to terminate the contract by exercising the



power granted to them under Clause: 10.3 of the Contract of Service Agreement which gives a right to the appellants to terminate the contract in the case of there being the breach of payment obligation and if despite the 10 days notice, the breach has not been rectified by the 1st respondent.

48. The non-payment of the dues has been admitted by the 1st respondent who would contend that the non-payment is only on account of the fact that the revenue generated was very low and not as projected. However, neither has the 1st respondent filed a claim statement to show the relief that they are claiming nor have they filed their account books to show that the income earned during the relevant period, with a comparative statement for later and previous years to substantiate their contention that they were earning a low income. Merely on the pleading of the 1st respondent, that too in a Section 17 application, the learned Arbitrator has presumed that the termination of the contract of service has resulted in a loss for the 1st



respondent. It is pertinent here to mention that nowhere has the 1st respondent quantified the loss, that the obligation under the BTA has been fulfilled has not been denied by the 1st respondent. The failure of the appellants to work would at best be a breach of the contract of service agreements. Without providing the accounts to show how they are still entitled to the entire sum of Rs.16,43,00,000/-, which they had paid under the 4 BTAs the 1st respondent cannot insist upon the appellants to furnish security to the tune of the money that they had paid as sale consideration. Therefore, even without filing a claim statement the 1st respondent seeks to have appellants furnish security to the tune of the money paid that too when the obligations under the BTAs have been performed and the 2nd and 3rd respondents taken over by the 1st respondent. The only allegation is the breach of the terms of the contract of service. Another interesting aspect of the contract of service is that under clause 13, which is titled Governing Law, Dispute Resolution and Jurisdiction, 13.2 which is dispute resolution contains the following clause in both the contract of services:



C.M.A.No.1772 of 2022

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“Dispute Resolution: In the case of any dispute arising out of, involving or relating to, or in connection with, this Contract or the interpretation of any provisions of this Contract, or the breach, termination or invalidity hereof (“Dispute”), the Parties shall attempt to first resolve such Dispute or claim through discussions. The Parties agree that if the Dispute cannot be resolved by mutual consent the following resolution procedure shall be used to settle the matter”

However, the resolution procedure has not been stated thereafter and the next clause, namely, Clause 13.3 provides Jurisdiction, which reads as follows:

“Jurisdiction: Subject to arbitration provisions referred to above, the Parties irrevocably submit to the exclusive jurisdiction of the courts of Chennai, India over any dispute arising out of, involving, or relating to, or in connection with, this Contract.”

Therefore, under the contract of service, there is no clause that the parties will refer their disputes to arbitration. This observation is made only for the completion of the facts.



C.M.A.No.1772 of 2022

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49. In the absence of the proof of the above, the learned Arbitrator has allowed the application for furnishing security. The termination of the agreement has taken place nearly 2 years after the agreement. For 2 years, the 1st respondent has enjoyed all the assets, infrastructure, employees etc., of the 2nd and 3rd respondents and continue to do so. The sale consideration has been fixed only for the take over of the business of the 2nd and 3rd respondents and the sale consideration factors the assets (movable/immovable), employees etc., all of which have been admittedly transferred in favour of the 1st respondent. Therefore, once the terms of the BTA has been satisfied, the 1st respondent cannot seek the refund of the sale consideration. Even assuming that there has been a breach by the appellants for terminating the agreement or not consulting at the 1st respondent's Hospital, the remedy is only to claim damages.



50. In order to claim damages, the 1st respondent has to first quantify the same and provide statement of accounts as to how the said sum is arrived at. A mere perusal of the Section 17 application filed by the 1st respondent would clearly indicate that the same is not accompanied by a statement of accounts. Since the Claim Petition is not before the Court, this Court is unable to comprehend as to whether the 1st respondent has initiated arbitration proceedings for reimbursement of the consideration paid by them or for damages for the breach of contract. If it is damages for the breach of contract, which appears to be the case on a reading of the affidavit filed in support of the Section 17 application, then the right available to the 1st respondent is only to recover damages. In this regard, useful reference can be made to an earlier Judgement of His Lordship M.C.Chagla, in the case of *Iron & Hardware (India) Co. Vs. Firm Shamlal & Brothers* reported in *AIR 1954 Bom 423*, where the learned Judge has distinguished a debt and claim. The learned Judge has held as follows:



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“It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and therefore it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach, of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned.”

51. The learned Judge further observed as follows:

“Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damage or compensation by reason of any existing obligation on the part



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of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

The expression "to be ascertained" may well apply to a case which I have indicated earlier where the pecuniary liability cannot be ascertained without accounts being taken or some other process being gone through. But the whole basis of a suit for damages is that at the date of the suit there is no pecuniary liability upon the defendant and the plaintiff has come to Court in order to establish a pecuniary liability.



C.M.A.No.1772 of 2022

Therefore, a perusal of the instant case would show that the applicant have not quantified the pecuniary liability of the appellants and respondents 2 and 3.

52. It is needless to state that while passing an order for furnishing security, the Courts have to go beyond the prima facie case and find out if the plaintiff / appellant has proved their need for furnishing security.

53. The Hon'ble Supreme Court in its Judgement reported in **2008 (2) SCC 302 – Raman Tech. & Process Engg. Co. and another Vs. Solanki Traders**, had discussed the object of supplemental proceedings and the power of the Court under Order XXXVIII Rule 5 of the Code of Civil Procedure and the care that has to be taken while passing orders thereunder as follows:

*“4.The object of supplemental proceedings
(applications for arrest or attachment before judgment,*



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grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated.

The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court



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will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the



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Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.”

54. The Delhi High Court in the Judgement reported in **2022 SCC Online Del 1285 – Manish Aggarwal and another Vs. RCI Industries and Technologies Ltd.**, was considering the power to be exercised by the Arbitrator while exercising the Jurisdiction under Section 17 of the Arbitration and Conciliation Act. The learned Judge was considering the order passed by the sole Arbitrator under Section 17 of the Arbitration and Conciliation Act, refusing to grant interim



measure of protection which was an application filed for attachment before Judgement. The learned Judge referred to the Judgement of the Hon'ble Supreme Court stated supra and upheld the order of the sole Arbitrator as follows:

“ In the present case, quite clearly, the learned Sole Arbitrator has declined to grant the interlocutory order sought by the appellants in exercise of his discretionary power under section 17 of the A&C Act. Has this discretionary power been exercised in a manner that is palpably arbitrary, capricious, irrational or perverse? In the opinion of this court, the answer to that question is an emphatic 'No'. The interlocutory relief sought was to secure the counter-claims made by the appellants, which counter-claims are evidently disputed and the determination of which is yet to be made. In fact the learned Sole Arbitrator was in the process of hearing the appellants on their counter-claims. Interlocutory orders



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were sought on the ground that the respondent's financial position was weak and would render any award granted on the counter-claims, a mere 'paper-award'. This ground was premised solely on the fact that the respondent's net-worth was in the 'negative'. However, the learned Sole Arbitrator proceeded objectively on the basis that the 'negative' net-worth had reduced over the period March 2017 to March 2021, partly for the reason that the respondent had discharged the dues owed by DMT, i.e. the unit purchased from the appellants, to third party creditors. In any case, grant of the interlocutory relief sought, would have amounted to converting the indeterminate and unsecured counter-claims preferred by the appellants, into secure claims, which is ordinarily frowned upon in law.



55. Therefore, while exercising the jurisdiction under Section 17 of the Arbitration and Conciliation Act, the power has to be sparingly used and the Arbitrator has to sift through the pleadings and evidence to confirm as to whether the applicant has justified the request for the interim measure and has proved the entitlement for the said measure.

56. In the instant case, the obligations under the BTA agreement have been completed by the respondents 2 and 3 with the 1st respondent taking over the management and the assets of the respondents 2 and 3. As regards the contract of service, the appellants have extended their co-operation for over two years and they have given reasons for terminating the contract which has to be tested through evidence. Therefore, the exercise of the jurisdiction by the learned Arbitrator in directing security to the tune of the entire amount paid by the 1st respondent to the appellants and respondents 2 and 3 is unwarranted and since there is no prima evidence to prove claim as of now therefore this Court is interfering with the order passed by the



C.M.A.No.1772 of 2022

learned Arbitrator, moreso when the appellants are yet to submit their claim before the Arbitrator.

57. In the light of the above, the order of the learned Arbitrator in directing the appellants to furnish security to the tune of Rs.16,43,00,000/- is totally misconceived and liable to be set aside.

58. As regards the issue of injunction, the parties have entered into non competition and non solicitation agreement, which clearly stipulates that the appellants will not set up and be attached to rival Hospital, practicing in the same line of medicine. The 1st respondent have provided pamphlets which indicate that the 1st appellant is associated with another Hospital, namely, Anandam Netralaya, in which he is shown as their Doctor. Clause 12.1 of the Contract of Service Agreement would read as follows:

“12.1. Inconsideration for the mutual covenants, obligations and liabilities set out in this agreement, the



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Doctor shall not, for a period of (i) 3 (three) years from the date of termination of the Contract of Service; or (ii) 5 (five) years from the date of closing under the Business Transfer Agreement; whichever is later:

(i) either directly or indirectly (whether as a consultant to, or as a partner, agent, shareholder or member of, any other Person), (a) be engaged or concerned in owning and, or, operating an eye Hospital; (b) offer any medical services in connection solutions for ophthalmology including cataract, diabetic retinopathy, dry eyes and/ or, eye swelling, throughout the territory of India. For the avoidance of doubt, it is clarified that the Doctor shall be free to undertake necessary actions to ensure that his patents which could include certain ophthalmological patents and his services related to such patents, as a consultant or such other similar capacity, to research organizations and other institutions shall not be



C.M.A.No.1772 of 2022

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prohibited by the provisions of this Clause and all such actions / services shall be carried on by the Doctor such that it doesn't affect his ability to render the services contemplated herein; and

(ii) either directly or indirectly:

(a) solicit or entice, or endeavor to solicit or entice away from the Company, any of the employees or any of the consultants / doctors currently engaged in connection with the Company (and with whom a consultancy / service contract has been executed) or any other employee of the Company; or (b) employ, hire, engage or obtain services of, in any capacity whatsoever, whether under a contract of employment, consultancy arrangement or any other engagement or arrangement, whether on a full-time basis or otherwise, any employee of the Company, without the prior written approval of the Company.



59. A perusal of the same would show that the appellants who are the Doctors have been prohibited from carrying on their work with a rival Hospital. In the Judgement of the Delhi High Court reported in **2015 SCC Online Del 8337 – Arvinder Singh and another Vs. Lal Pathlabs Pvt., Ltd., and others**, the learned Judges have held as follows:

“67. The words 'profession' 'trade' and 'business' used in [Section 27](#) are specific words and we see no scope to give meaning to the word profession applying the rule of noscitur a sociis.

68. The injunction granted by the learned Single Judge against the appellants is : 'are restrained from carrying on practice/business/profession as a Pathologist or as a Radiologist in the city of Udaipur in any manner whatsoever including by providing consultancy services or by associating with any other person or body providing such services'.



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C.M.A.No.1772 of 2022

69. *The reasoning of the learned Single Judge is obviously on the basis that the activity of a profession is akin to that of a business, for if this was not the reasoning, the exception to [Section 27](#) of the Contract Act would not even apply. Such agreements not to carry on business if goodwill of a business is sold, subject to the restriction being reasonable, are alone carved out from the general embargo embossed by [Section 27](#) of the Contract Act.*

60. The learned Arbitrator has granted the order of injunction restraining the respondents from continuing the operation under the name and style of “Anandam Netralaya” or any other name and style in the field of eye care competing with the interest of the 1st respondent. The allegations for granting this relief in this regard is contained in paragraph no.22 of the Section 17 application, which reads as follows:

“I further state that the Applicant has claimed substantial sums of money, which the Respondents have



C.M.A.No.1772 of 2022

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received from the Applicant in pursuance of the BTAs and Contract of Services Agreement. In fact, the Applicant had obtained crucial information that the Respondent has taken steps to setup the practice in the name and banner of the wife of one Dr. Sachin Arya, along with whom he had entered into the present transaction, in order to create a smoke-screen to ostensibly hide his involvement and efforts behind setting up the competing eyecare centre. I state that the said Respondents and Dr.Sachin Arya have now gone ahead with the opening of a new hospital under the name and style of “Anandam Netralaya”, for which the inauguration ceremony was held around the 3 week of February 2022, which is proof enough that the Respondent has used/utilised the monies invested by the Applicant under the BTAs to fund his own private interest in opening a competing business”



61. Further, Clause 12.1 (i) clearly allows the appellants to continue their services to their patients and what is prohibited is their being associated with a Hospital. Therefore, in the guise of the interim order the functioning of Anandam Netralaya which belongs to some other person is sought to be enjoined. The injunction now granted cannot be used against a third party who is in no way connected with the agreement entered into between the 1st respondent and the appellants and respondents 2 and 3. The interim injunction is therefore modified as follows:

“The appellants shall not be associated with “Anandam Netralaya” as provided in clause 12.1 of the Contract of Service Agreement. The appellants are however, free to carry on their profession individually without being described as consultants of any other rival Hospital in Indore, till the disposal of the claim.”



62. The discussion regarding the furnishing of security and injunction is herein below summarised:

a. The 1st respondent / claimant is yet to file a claim petition crystallising his claim and before that the appellants are directed to furnish security to the tune of the amount paid under the contract.

b. The obligations of the appellants and respondents 2 and 3 have been fulfilled and for 2 years the appellants have been working for the 1st respondent, further the assets and Doctors have all been transferred and continues to be in the custody and serve the 1st respondent to date.

c. The appellants have exercised their right under the Contract of Service agreement as they have not been paid the remuneration as undertaken by the 1st respondent



C.M.A.No.1772 of 2022

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and the 1st respondent who has pleaded a drop in income and loss as a reason for non-payment have not proved the same.

d. The order directing the appellants to furnish security has not taken into consideration that fact that the 1st respondent has not yet proved the loss and their claim for damages has not been crystallised. Infact it is unclear if the 1st respondent is going to seek a reimbursement or damages for breach of contract.

e. The learned Arbitrator has treated an application under Section 17 as the claim petition itself in the instant case.



C.M.A.No.1772 of 2022

63. In fine, the appeal is allowed in so far as it relates to the order directing the appellants to furnish security and modified with regard to the order of injunction as follows:

“The appellants shall not be associated with “Anandam Netralaya” as provided in clause 12.1 of the Contract of Service Agreement. The appellants are however, free to carry on their profession individually without being described as consultants of any other rival Hospital in Indore, till the disposal of the claim.”

Consequently, connected Civil Miscellaneous Petitions are closed. No costs.

21.12.2022

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
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C.M.A.No.1772 of 2022

P.T. ASHA, J,

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Pre-Delivery Judgement in
C.M.A.No.1772 of 2022

21.12.2022