



2023:DHC:7628-DE



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA(OS) 136/2012 & C.M.Nos.12305/2014, 39987/2017**

SHIJU JACOB VARGHESE & ANR.

..... Appellants

Through: Mr.Anil Airi, Sr.Advocate with Mr.Navin Kumar, Ms.Rashmeet Kaur, Ms.Aarti Mahto, Mr.Mudit Ruhella, Ms.Sadhana and Ms.Bhagya Ajith, Advocates.

versus

TOWER VISION LIMITED & ORS.

..... Respondents

Through: Mr.Dayan Krishan and Mr.Rajshekhar Rao, Sr.Advocates with Mr.Susmit Pushkar, Mr.Anchit Oswal, Mr.Sanjeev Seshadri, Mr.Shreedhar Kale, Mr.Sudi Mullick, Mr.Yigal Gabriel, Mr.Meherasp Mistry, Ms.Meherunissa Anand, Mr.Dushyant Kale and Ms.Roshni Srivastava, Advocates.

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Reserved on : 25th September, 2023
Date of Decision: 17th October, 2023

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MINI PUSHKARNA

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RFA(OS) 136/2012

Page 1 of 33



2023:DHC:7628-DE



TABLE OF CONTENTS

	Para Nos.
APPLICATION.....	1
ARGUMENTS ON BEHALF OF THE APPLICANTS-RESPONDENTS.....	2-5
ARGUMENTS ON BEHALF OF THE APPELLANTS.....	6-22
Court's Reasoning.....	23-51
<i>If on account of a subsequent event the suit or appeal becomes infructuous, the court can dispose it of</i>	23
<i>Due to a consensual global agreement in Tel Aviv, the cause of action no longer survives.....</i>	24-27
<i>Dismissal of the rescission application operates as a bar in prosecuting the appeal.....</i>	28-31
<i>To allow the continuance of the appeal would be violative of the principle of comity of courts.....</i>	32
<i>Additional reliefs and additional parties in present suit offer no assistance to the appellants.....</i>	33
<i>Share entitlement does not bind respondents no.3, 4 & 5.....</i>	34-37
<i>Question of enforcement of consent order does not arise.....</i>	38
<i>Argument that consent order gave enhanced rights to appellants has to be canvassed before courts in Israel.....</i>	39
<i>Appellants' reliance on judgment of Supreme Court of Israel is misconceived.....</i>	40
<i>Proceeding ahead with appeal despite consent order, amounts to relitigation which is an abuse of process.....</i>	41-49
Conclusion.....	50-51



J U D G M E N T

MANMOHAN, J:

CM APPL.39987/2017

1. Present application has been filed on behalf of the Respondents under Section 151 of the Code of Civil Procedure, 1908 ('CPC') for dismissal of the appeal on the ground that it has become infructuous.

ARGUMENTS ON BEHALF OF THE APPLICANTS - RESPONDENTS

2. Mr. Dayan Krishan and Mr. Rajshekhar Rao, learned senior counsel for the Applicants-Respondents contended that the present appeal was infructuous in view of the settlement of disputes between the parties as recorded in the consent order dated 11th May, 2017 passed by the Tel Aviv District Court. In support of their contention, they relied on the following facts and submissions:

2.1 A document entitled '**Share Entitlement**' was executed in favour of Appellant No.1 by Respondent No.2 i.e. Tower Vision Limited Partnership through Respondent No.1 i.e. Tower Vision Limited in its capacity as the general partner of Respondent No.2 on 17th October, 2006. The Share Entitlement dated 17th October, 2006 is reproduced hereinbelow:-

"To:

Mr.Shiju Varghese

Re: Share Entitlement

1. *We the undersigned Tower Vision Limited Partnership, an Israeli registered limited partnership (the "Partnership"), hereby confirm that you have today an absolute and unconditional interest in 7% of the rights of the Partnership. We further confirm that in case of any structure changes which will result in the partners holding their interests in the Tower Management business through any other entity. You shall be entitled to receive absolutely and unconditionally 7% of the rights of any such other entity, which will be established by the partners of the Partnership, and which will replace the Partnership in any holding structure related to the Tower Management business of the Partnership. For the avoidance*



2023:DHC:7628-DE



of doubt such Tower Management business of the Partnership is today carried out via Tower Vision Mauritius Limited.

2. *We will allocate the rights or shares referred to in Section 1 above to your name or to any other entity as Instructed in writing by you.*
3. *Our undertaking herein supersedes any previous undertaking provided to you by us and/or by any related entity in respect of your entitlement to receive any share and/or right in the Partnership's tower management business. Any previous undertaking and/or obligation regarding the subject matter of this letter shall become null, and void as of the date of this Letter.*

Sd/-

*Tower Vision Limited Partnership
by Tower Vision Ltd as General Manager"*

2.2 Though Respondent No.3, Tower Vision India Private Limited (an Indian Company), had been incorporated prior to the date of Share Entitlement i.e. on 27th January, 2006, yet there was no reference to the said company in this document. As on the date of execution of Share Entitlement i.e. 17th October, 2006, 99.99% shares of Respondent No.3 were held by Respondent No.4 and 0.01% (1 share) was held by Elgadcom Group Company.

2.3 On 13th November, 2008, a suit being '**Civil File No. 2192 of 2008**' was filed by the Appellants ('**Tel Aviv suit**') before the Tel Aviv District Court against Respondents No.1 and 2, who are Israeli companies as well as Respondent No.6 (Trustee) and Rani Benyamini (not a party in the present proceedings), relying solely on the Share Entitlement dated 17th October, 2006.

The amended reliefs claimed in the said suit are reproduced hereinbelow:-

"43. The Honorable Court is hereby requested to determine in declaratory judgment as follows:

43.1 The Share Entitlement Document is valid and is absolutely and unconditionally binding on the Partnership and Tower Israel in its capacity of general partner;

43.2 Alternatively – Benyamini signed the Share Entitlement Document, and he is personally obligated to fulfill the Share Entitlement Document.



2023:DHC:7628-DE



43.3 *The Partnership and/or Tower Israel and /or Benyamini breached their undertakings under the Share Entitlement Agreement with the Plaintiff 1.*

43.4 *The Trustee has breached his duties towards the Plaintiff 1 under Section 15 of the Limited Partnership Agreement.*

43.5 *The Plaintiffs are absolutely and unconditionally entitled to allocate the Rights in accordance with the Share Entitlement Agreement to Triassic and/or other entity instructed by the Plaintiff.*

43.6 *The Plaintiff is entitled to all the accumulated and/or distributed assets and rights including the made of fruits, in the Partnership and/or the Alternative Entity and/or Tower Mauritius, from the date of the establishment of the Partnership, in trust for the Plaintiff No.2.*

43.7 *The Trustee shall transfer the Rights to Triassic and/or other entity instructed by him.*

43.8 *The Plaintiffs are entitled to split off the remedies deriving from the cause of action, and to sue the Defendants, jointly or severally, the monetary compensation they are worthy of on account of and/or with respect to the Rights under the Share Entitlement Agreement and also on account of the loses and/or expenses and/or direct and/or indirect damages caused to the Plaintiffs on account of the Defendants' acts and/or omissions, jointly or severally, including not honoring the Share Entitlement Document and the breach of the Defendants undertakings towards them, after submission of report as requested in this claim."*

2.4 An application for interim relief was filed by the Appellants in the Tel Aviv Suit in January, 2011 i.e. more than two years after the institution of the suit. The application was based on the apprehension that the Respondents No.1 and 2 were selling their rights in the Indian entity i.e. Respondent No.3.

2.5 An affidavit dated 27th January, 2011 was filed on behalf of Respondents No.1 & 2 in the Tel Aviv Suit which clearly disclosed the structure of holding in the various group companies as also the status of Respondent No.2's holdings. However, no steps were taken by the Appellants to either implead the various group companies or to amend the Tel Aviv suit. The relevant portion of the said affidavit is reproduced hereinbelow:-



2023:DHC:7628-DE



“I, the undersigned, Moshe Shushan, I.D. 057921850, after having been duly warned that I must state the truth and that I may be subject to penalties prescribed by law if I fail to do so, hereby declare as follows:

1. *I am the chairman and CEO of Fore Group Management & Investment Ltd., a partner in Defendant 2 and a shareholder in Defendant 1. I am adept in all aspects of the mutual claims in Civil Case 2192/08, and I am furnishing this affidavit in support of the Defendants'/Respondents' response to the motion of Shiju J. Varghese (hereinafter: “**Plaintiff 1**”) and SJ Varghese & Co. LLP (hereinafter: “**Plaintiff 2**”) (hereinafter jointly: “**The Plaintiffs**”) to grant the issue of temporary injunctions (Motion No.31) (hereinafter: “**The Motion**”).*

2. *Structure of holdings;*

- (a) *Defendant 2 is a limited Israeli partnership and Defendant 1 is the General Partner in it (holding 1% thereof); the rest of the partners of Defendant 2 are limited partners with insignificant liability;*
- (b) *Defendant 3 and 4 are limited partners in Defendant 2, whereby Defendant 4 holds its partnership as a trustee;*
- (c) *The structure of the holdings of the chain of companies that are also held by Defendant 2 is as follows:*
- (d) *Only TVLP is based in Israel, and only TVLP is a party in the Plaintiffs claim. The rest of the companies are each based in their domiciles (TVM in Mauritius, TVJ in the Island of Jersey and TVI in India);*
- (e) *TVLP (Defendant 2) holds and manages the partners' assets in respect of their part in the activity of Tower Management Business in India, through its holdings in TVJ to TVM and to TV India thereof;*
- (f) *The financial and institutional investors have invested their participation in the activity of Tower Management, each according to its requirements (primarily based on tax considerations), in TVM and TVJ; in reality, all of the moneys that were raised and invested serve to finance the activity of Tower Management Business in India, which is at the bottom of the chain of holdings.*

3. *The structure of the Companies subject of the Clam and Motion is as follows:*

- a. *In India – **Tower Vision India (TVI)** establishes and builds sites for cellular antennas, and leases them to Indian telecommunication companies based in India.*



2023:DHC:7628-DE



- b. Tower Vision India is held – at 99.9% - by Tower Vision Mauritius TVM, and one share is held by Tower Vision Jersey (TVJ).
- c. Tower Vision Mauritius – is a public company incorporated and based in Mauritius, as more than 25 shareholders have shares in it (TVJ) and the institutional and private investors in it);
- d. Tower Vision Jersey- holds 50.27% of Tower Vision Mauritius and the remaining shares are held by institutional investors and public and private bodies. Contrary to the arguments set forth in the Plaintiff's Motion (Par.8.1)- RP Capital and Insurer Shamir do not hold any shares in the Group.
- e. Defendant No. 1, a company incorporated in Israel (TVL), is the General Partner in Defendant No. 2; the remaining parts in the partnership – TVLP are held by individuals, including Trustee Amon Gitseleter Adv. – Defendant No. 3, who holds 7% of the Limited Partnership - which are the holdings subject of the dispute in this case.
- f. Considering the abovementioned structure of the companies, the part of the partnership in the businesses of Tower Management, in the chain of companies up to India, is only 32%. The remaining businesses of TVI are held by more than 25 shareholders from different places around the world via their holdings in TVM and TVJ.
4. All of the companies and bodies that are part of the Tower Vision Group are active companies which, among others, recruit capital and investors for their continued activity, in respect of the activity in India, which does not stop or "freeze" as a result of the claim subject of this case. In the course of the development of business in India, the value of the rights of each of the partners is upgraded respectively, including the 7% that the Plaintiff in this case is claiming from TVLP, which is held in trust by the Trustee (Defendant 4), until it is settled by the court.
5. Like any other business entity, some investors in the companies and bodies leave and others enter, shares "exchange hands" and negotiations are held on a daily basis with investors, banks, various investment entities, and in all conventional commercial transactions.
6. The activities of the companies in the Tower Vision Group and the operations in India are subject to and based on the recruitment of capital to the alignment of companies and finance of the activity by external sources. Considerable capital is required in order to continue building telecommunication towers, which is facilitated by the recruitment of capital and loans from banks and financial institutions. The damage to the reputation of the groups in the Company, which are the holding companies of the activity in India, and the damages to our



2023:DHC:7628-DE



operations in India as a result of the Plaintiff's action and its applications to foreign third parties, as well as investors and shareholders and/or banks and/or financing bodies, cause us tremendous difficulties and damages- amounting to millions of dollars.

7. ***Even if a given activity in the framework of the said companies - the sale or purchase of shares in the company in India, recruitment of investors and capital, as a result of which the shareholders in the companies in India or Mauritius or Jersey, change – the Plaintiffs are in no way entitled to object, prevent, stop and freeze such business activity – even if they were (and are no longer!) shareholders (7%) in Defendant No. 2 the Limited Partnership (TVLP).***
8. ***The Partnership Agreement of the Limited Partnership TVLP entitles and authorizes the General Partner (TVL) to manage the businesses of the Partnership, to conduct negotiations, recruit investors, acquire and sell assets, rights the belong to the Limited Partnership [as aforesaid, the sole asset of the Partnership are the shares in Tower Vision Jersey (TVJ)] without any given consent or approval of any of the other partners in TVLP (whose liability is limited as aforesaid (insignificant – given their status as "limited partner", in its definition by law).***
9. *None of the Companies and particularly not the partnership TVLP have conducted negotiations for the sale of the assets or businesses, and the articles quoted from the Indian press are fallacious. Though we have been approached with an offer to sell the activity (and the Indian company), we did not respond to this offer;*
10. ***All of the management businesses of Indian Tower*** (Tower Management Business), which are the Partnership's sole asset are and have always been executed only via Tower Vision Mauritius, being the parent company, which fully owns the Indian Company. The same had happened when Plaintiff No.1 was involved in the businesses of the Group, and this fact has not changed since its involvement has concluded. The partners hold the rights of the Partnership – Defendant No. 2; no other body has been established that denies any of the rights of the partnership – Defendant No. 2, and the Partners did not retire and establish any alternative entity to the Partnership or to the holding of rights thereof.
11. *The establishment of TVJ – Tower Vision Jersey was required by the investors, the companies Jerbina and RP. The moneys of these bodies, which had been invested in the Indian enterprise, by way of their investment in Tower Vision Jersey, had in reality saved the business in India, following the retirement of "Ashmor" company – the investor that wanted, alongside Plaintiff No. 1, to take*



control of the Company in India, and after the Indian Company's businesses were on the verge of collapse due to the damages caused by Plaintiff No. 1.

- 12. The moneys invested by all of the shareholders in the Group (more than 25 shareholders) facilitated the establishment of the hundreds of thousands of sites in India and, in reality improved the asset held by the Israeli company. Let it be stressed that, in December, 2006, upon termination of the Service Agreement of Plaintiff 1, the Indian company held approx 330 sites! The current number of sites totals totals approx. 6000, where many more sites are established every month.*
- 13. Any injunction that causes delays in the development of the partnership's businesses in India causes it (and its partners) tremendous damages. Any delay in the processes of recruiting capital, finance, recruiting credits, as well as in selling the Partnership's assets- if the right moment comes – causes the partners, in the framework of the partnership, damages amounting to US\$ 40 million a year, as a result of the step-up conditions of the preferred stock. The delay that the Plaintiff caused, when creating the dispute with Ashmor and bringing about its retirement, in the years 2007-2008, also exceeds another £ 20 million.*
- 14. The Plaintiff frequently distributes fabricated stories in various distorted ways that are libelous to third parties, and are knowingly alien to the procedure and the case; each time such delivery of the Plaintiff's "report" letters, containing its fictitious stories, the goodwill of the activity in India is reduced and its financing incurs delays; granting an injunction will in itself place the activity in risk of massive losses, to the extent where it will lose its entire value.*
- 15. It is not clear why the Plaintiffs who claim they are entitled to 7% of the rights in the Partnership, are making such great efforts to "take it down" and paralyze its activity, as well as damaging its reputation throughout the financial and business world. It is as though they are themselves chopping down the branch on which they sit. The only conclusion I may have in this regard is that, since the Plaintiff lost their chances of success in their claim, and given their tangible fear from the counterclaim of the counter-defendants- they are trying to "convince" us to pay them 'hush money to remove their claims.*
- 16. Though we are convinced that the Plaintiffs are not eligible for anything – to the contrary, we know that they owe us a lot - we have in any case vowed the part of the controlling shareholders, by the 7% that the Plaintiff's are claiming from the Partnership TVLP, as a donation to the soldier of the IDF, and our defense from the Plaintiffs' claims is primarily aimed to secure the rights of our soldiers. As far as we are concerned, our part is the said 7% belongs from the onset to the IDF, and our defense from the Plaintiffs' claims is primarily aimed to secure the*



2023:DHC:7628-DE



rights of our soldiers. As far as we are concerned, our part in the said 7% belongs from the onset to the IDF soldiers.

I hereby declare that this is my name, my signature and the content of my affidavit is true.”

2.6 The Tel Aviv District Court vide order dated 20th June, 2011 partially allowed the application for interim relief filed by the Appellants and as an *ad interim* measure directed that seven per cent (7%) of the proportionate share of Respondent No.2 in any consideration to be received from the foreign companies be deposited in trust with the Attorneys for the parties.

2.7 Upon an appeal being filed by Respondents No.1 and 2, the Supreme Court of Israel vide order dated 24th October, 2011 set aside the *ad interim* order dated 20th June, 2011 of the Tel Aviv District Court and on a reading of the Share Entitlement dated 17th October, 2006, inter alia, held that ‘*it is clear that it is not binding on the foreign companies*’.

2.8 Thereafter, the Appellants, on the strength of the same document i.e. Share Entitlement dated 17th October, 2006, filed the underlying suit being **CS(OS) 150 of 2012** before this Court claiming the following reliefs:-

a. *pass a decree of perpetual injunction restraining the Defendants from further diluting in any manner the shareholding of the Tower Vision Limited Partnership, the Defendant No.2 herein, in the business and assets of the Defendant No.3 Company to the detriment of the Plaintiffs;*

b. *pass a decree of perpetual injunction in favour of the Plaintiffs and against the Defendants jointly and/or severally restraining them from selling, alienating, transferring or in any manner creating any third party rights in respect of their business, shares, assets and stakes in the Defendant No.3 Company- Tower Vision India Private Limited, in any manner prejudicial to 7% right/share of the Plaintiffs in respect of the entire business of the Defendant No.3 Company or its Tower Management business;*

c. *Pass a decree of mandatory injunction against the Defendant No.6 directing him to hand-over the 7% rights of the Plaintiffs in the Partnership business of the Defendant No.2, which he is holding in trust for the benefit of the*



2023:DHC:7628-DE



Plaintiffs in accordance with the Tower Vision Limited Partnership Agreement dated 26th March, 2006;

d. Pass a decree in favour of Plaintiffs declaring the Plaintiffs as the shareholder of 7% of the equity and the business of the Defendant No.3 in India and that the Plaintiffs are entitled to all benefits arising of such right/share in the business of the Defendant No.3;

e. Direct the Defendant No.3 to render complete accounts to the Plaintiffs in respect of its incorporation, its past and present assets and resources regarding the Tower Management business in India, its share-holding and management since inception, any dilution of shareholding or business in favour of third parties, and of any future transaction relating to sale, transfer, alienation, encumbrance, etc. of the business, shares, assets and/or stakes of the Defendant No.3 etc.;

f. Award pendente lite and future interest @ 12% per annum on the amount that may be found due and payable to the Plaintiffs from the Defendants;

g. Award cost of the suit in favour of the Plaintiffs and against the Defendants;

h. Pass such other of further orders in favour of the plaintiffs and against the Defendants that this Hon'ble court may deem fit and proper in the facts and circumstances of the case.

2.9 A learned Single Judge of this Court vide the impugned judgment dated 16th November, 2012 dismissed the said suit **CS(OS) 150/2012** on the grounds that the Appellants had suppressed material facts and documents and that the suit was violative of principle of comity of courts, constituted an abuse of process and amounted to forum shopping and re-litigation. The learned Single Judge in the impugned judgment has given the following findings:

- i. The reliefs claimed by the Appellant in the suit before the Tel Aviv District Court, and before this Court were almost identical. The documents on the basis of which those reliefs were claimed were also the same.



- ii. The affidavit of Moshe Shushan dated 27th January 2011 was filed before the District Court in Israel before the filing of the stay application and did not represent a new cause of action.
- iii. The Plaintiff/Appellant was guilty of suppression of facts for it had made a half-hearted disclosure about the proceedings before the Supreme Court of Israel and had not placed the order of the Supreme Court on record.
- iv. The explanation to Section 10 of the Code of Civil Procedure, 1908 would only protect a plaintiff in a case where the defendant had approached a foreign court and would not rescue a plaintiff who had themselves approached the foreign Court.
- v. The principle of comity of courts precluded this Court from granting any relief to the Appellant/Plaintiff, for it would otherwise amount to overreaching the orders of the Court of Israel. The learned Single Judge emphasised that it was concededly the position of the Appellant, that the suit had been filed by way of ‘*abundant precaution*’.

2.10 The relevant portion of the impugned judgment is reproduced hereinbelow:-

“60. To put in a nutshell, the plaintiffs have approached two courts for the same cause, one after the other, after being unlucky in the first round. The plaintiff chose to approach this court as it could not get a favourable order from the Israel court. The practise of choosing a particular forum by the plaintiffs for redressal of his grievances i.e choosing a place to sue which is convenient to him or a court which has an umbilical connection with the cause of action, etc is undeniably an unfettered right. However since a long time now the pernicious practice of choosing a particular court by the plaintiff with a motive to get a favourable order is becoming commonplace. This graphically described practice of forum hunting or forum shopping indubitably leads not only to the multiplicity of proceedings but also of the abuse of the process of the court. The courts have to discourage such practice with a heavy hand. Judicial propriety and discipline do not permit to give a free hand to the plaintiffs to manoeuvre the process of the court for its own self conceived designs. The present case thus clearly tantamounts to forum shopping; to



2023:DHC:7628-DE



take a chance before the Indian courts after having not succeeded before the Hon'ble Supreme Court of Israel which is the highest court of land of another sovereign state.

61. Section 151 of the Code of Civil Procedure recognises the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. It acknowledges the powers of the court to do what is right and undo what is wrong, that is, to do all things necessary to secure the ends of justice and prevent abuse of its process. As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances. The conduct of the plaintiffs approaching this court and institute parallel proceedings and indulging in forum shopping along with suppressing facts from the court is certainly an abuse of the process of the court. A party certainly cannot take recourse to a machination which amounts the abuse of the process of the court. The valuable judicial time spent in adjudicating the rights of the parties and making life altering decisions is being wasted in adjudicating vexatious suits which is most unfortunate, to say the least. It is an opportune time to sound a word of caution; desist and deflect; to the ones approaching this court with clandestine motives attempting to manipulate the process of law via exasperating litigation to recoil and refrain from the same.

62. In the light of the above discussion, this court is of the considered view that the present suit filed by the plaintiffs is not only a classic case of forum shopping but also a case clearly impinging upon the well-established principle of comity of courts. The plaintiffs are also guilty of suppressing material facts from this court as discussed above. In the ultimate analysis, this court is not inclined to threadbare discuss the various other issues raised and also the judgments cited in support thereof by both the parties and hereby dismiss the present suit in the exercise of inherent powers vested in the court under Section 151, CPC so as to prevent the abuse of the process of the court and to secure the ends of justice.”

2.11 Subsequently, Consent Terms were filed by the Appellants and the Respondents No.1 & 2 in the Tel Aviv Suit. The said suit was disposed of as settled vide order dated 11th May, 2017. It was recorded that the consent agreement was in order to ‘conclude the dispute’. There was no reservation in respect of the Indian proceedings.



2023:DHC:7628-DE



2.12 Shortly, thereafter an application to rescind / recall the order dated 11th May, 2017 of the Tel Aviv District Court was moved by the Appellant No.2 on 14th May, 2017. This application was supported by an affidavit of Roger Needham, a member of Appellant No. 2 i.e. SJ Varghese Co. LLP. The contention raised in the application to rescind was that the Appellant No. 2 had not given its consent to the wording of the judgment, as it was written and that the Appellant No.1 was not authorized to give consent on behalf of Appellant No. 2. On that basis, it was contended that the consent order be rescinded or annulled or set aside. It is pertinent to mention that the Appellant No. 2 in the said application to rescind admitted that “*the wording of the judgment in Israel has weight and importance in the court in India*” and it was conceded that the order of the Tel Aviv District Court settling the proceedings did in fact impact the Indian proceedings in ***CS(OS) 150/2012***.

2.13 The aforesaid application moved by the Appellant No. 2 was dismissed by the Tel Aviv District Court vide order dated 11th July, 2012 holding that the judgment dated 11th May, 2017 was given by consent. It was further held that the party wishing the judgment to be rescinded given by consent on account of a defect in its making or on account of its breach by the other party, must submit an independent action to the competent Court which gave the judgment. The Tel Aviv District Court further held that there was no cause to recall the order and the remedy, if any available, would be to ‘*submit a separate action*’.

3. Learned senior counsel for the Respondents submitted that the consent order had now attained finality in view of the fact that the period of limitation to file a



2023:DHC:7628-DE



challenge in Israel against the order dated 11th July, 2017 rejecting the application to rescind had expired on 29th October, 2017.

4. They further submitted that the present appeal needed to be dismissed as it amounted to re-litigation and thus, constituted an abuse of process of law. In support of their submission, they relied upon the judgment of the Supreme Court in **K.K. Modi vs. K.N. Modi & Ors., (1998) 3 SCC 573**.

5. Learned senior counsel for the Respondents lastly stated that the malafide intent of the Appellants in continuing with the present appeal would be evident from the email dated 31st January, 2023 addressed by Appellant no.1 to Mr. Amit Shetye, which showed that they were misusing the pendency of the present appeal to threaten potential investors of the Applicant-respondents. The email dated 31st January, 2023 is reproduced hereinbelow:-

“Dear Mr Shetye

I am writing to you as you are the General Counsel of Global Infrastructure Partners India and we have seen media reports that GIP is acquiring Tower Vision India. I presume that in your due diligence you have been made aware of our litigation in the Delhi High Court against Tower Vision for various violations against me and my firm going back to the founding of the company. In case you have not been made aware of the matter I am happy to put you in touch with our counsel in Delhi who can provide full details.

I must state at this point that we only wish to safeguard and secure our interests in Tower Vision India and would be very happy if ownership and control were to pass to a reputable fund such as GIP. Therefore, we would like a chance to discuss with you how we can facilitate the transaction to mutual benefit, as I am sure none of us would wish to continue the legal process until there is a resolution since that may take a long time still. In any event, we naturally reserve all our rights in the meantime.

*I look forward to hearing from you.
Yours sincerely*

*Shiju Varghese
Managing Director”*

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RFA(OS) 136/2012

Page 15 of 33



2023:DHC:7628-DE



ARGUMENTS ON BEHALF OF THE APPELLANTS

6. *Per contra*, Mr. Anil Airi, learned senior counsel for the Appellants stated that the impugned judgment had been passed by the learned Single Judge on the basis of facts contrary to record and on an erroneous interpretation of law leading to the unjustified conclusion that firstly, the underlying suit was filed on the same cause of action; secondly, that the Appellants were seeking the same relief as that in the suit before the Israeli District Court; thirdly, that since the Respondents affidavit dated 27th January, 2011 was considered by the Courts in Israel for passing the interim order, therefore, the Appellant's suit in India was a case of forum-shopping; fourthly, that the prima facie observations of the Supreme Court of Israel were binding on the Courts in India and therefore, the Appellants were guilty of suppression of material facts and lastly following the principles of comity of courts, this Court would not entertain the suit of the Appellants. He submitted that the impugned judgment dismissing the suit constituted a serious interruption of the rights of the Appellants to proceed with the trial in order to get legitimate reliefs according to the substantive merits of the case.

7. He stated that since the Respondents No. 1 and 2 did not transfer the seven per cent (7%) rights / shares of the Partnership firm (Respondent No.2) in accordance with the Share Entitlement dated 17th October, 2006, in favour of the entity nominated by the Appellant, the Appellants filed a Suit before the District Court of Tel Aviv on 13th November, 2008 for enforcement of their seven per cent (7%) right in the Partnership's businesses wherever it may be.

8. He emphasised that in 2008 at the time of filing the said Suit in Tel Aviv, there was no indication or apprehension that the Respondents had dissipated any of their businesses in India, Mauritius, Jersey or at any other place and therefore,



2023:DHC:7628-DE



no relief of injunction had been sought by the Appellants at that point of time before the Tel Aviv Court.

9. He stated that subsequently upon an application for interim relief being filed, the District Court of Israel passed a temporary injunction order against the Respondents on 9th January, 2011 by which the Appellants' alternative application was granted.

10. He also stated that the Respondents filed an Affidavit dated 27th January, 2011 stating inter alia that they had no intention to sell their assets in the Indian Company and it was disclosed for the first time that the Respondents had diluted their hundred per cent (100%) shareholding in Respondent No.3 (the Indian company) to a mere thirty-two per cent (32%) as on that date.

11. Subsequently, on 20th June, 2011, the District Court of Israel granted temporary relief directing the Respondents to deposit, in trust, seven per cent (7%) of the proportionate part of the partnership (Respondent No.2) in any consideration to be received by any of the foreign companies from any transaction to be executed by them.

12. Thereafter, the Respondents No. 1, 2 and 6 herein filed an Appeal before the Supreme Court of Israel on the ground inter alia that the transaction in question related to an Indian Company - Respondent No.3, which was not even a party to the Suit in Tel Aviv District Court.

13. Learned senior counsel for the Appellants contended that the Respondents in their Appeal had averred that the Tel Aviv District Court had issued injunction orders against foreign companies which were not parties to the Suit and were therefore not bound by the orders passed by Tel Aviv Court. It was also pleaded in the Appeal that the Respondents had no influence over any of the foreign



companies in Jersey, Mauritius or India and therefore, would not be able to enforce the decision of the Israeli Court on the said foreign companies.

14. He stated that accepting the above contentions and submissions of the Respondents, the Supreme Court of Israel vacated the interim injunction granted by the Tel Aviv District Court primarily holding that the Courts in Israel cannot pass far reaching injunction orders binding foreign companies in Mauritius or in India in order to protect the rights of the Appellants as the said companies were neither parties to the Appellant's Suit in Tel Aviv nor the Respondents herein claimed to have sufficient influence for implementing the injunction orders against such foreign companies in Mauritius and India.

15. Learned senior counsel for the Appellants stated that apprehending an eminent sale/transfer by the Respondents of the entire shareholding/assets in Respondent No.3 and in view of the decision of the Supreme Court of Israel that the Israeli Courts cannot protect the interest of the Appellants in India, the Appellants had no choice but to seek protection by filing the Suit bearing **CS (OS) No. 150 of 2012** before this Court.

16. He contended that in the present Suit, other than the Respondent No.1, Respondent No. 2 and the Trustee (Respondent No.6), the Appellants had also impleaded Respondent No.3, Respondent No.4 and Tower Vision Jersey Limited (Respondent No.5) as Defendants.

17. He submitted that the cause of action on which the Suit in New Delhi was filed was neither existing in 2008 when the Appellants filed their Suit in Tel Aviv nor was it identical or even similar to the relief sought in the amended Statement of Claim therein. The relief of declaration in respect of the Appellants' seven per cent (7%) right in the Indian Company (Respondent No.3) had been sought in the present Suit only by way of abundant caution as stated in the Plaint. Consequently,



he emphasised that the parties, cause of action and reliefs claimed in Israel were different from the parties, cause of action and reliefs sought in the present suit.

18. He submitted that explanation to Section 10 CPC permits the Appellants to file such a suit in India even if it is on the same cause of action. He stated that the extent to which the Appellants would be entitled to the reliefs in India can only be determined after trial.

19. In any event he stated that the said consent order had to be seen in context of the suit filed, contentions raised by the parties, the documents on record, etc. which even as per Respondents could only be tested in trial.

20. He also submitted that the effect of the consent order dated 11th May, 2017 was that the Appellants had been recognized as a partner of Respondent No.2 to the extent of seven per cent (7%), which had been denied by the Respondents and based on such denial, other reliefs as claimed by Appellants were objected to. According to him, the effect of the consent order was that the Appellants' claim in the Tel Aviv Suit to be declared as partner in Respondent No.2 had been allowed / agreed and therefore the Appellants became entitled to seven per cent (7%) of the Tower Management business of Respondent No.2, including all the downstream companies owned and managed by Respondent No.2. He contended that the said consent order supported and strengthened the case of the Appellants for grant of other reliefs claimed in the underlying Suit filed by the Appellants in India.

21. He submitted that the Respondents cannot treat the said consent order dated 11th May, 2017 as a foreign judgment and request this Court to take cognizance of the same to dismiss the present Appeal. He submitted that the said consent order dated 11th May, 2017 is not a foreign judgment under Section 2(6) of CPC and is not conclusive under Section 13 of CPC as it falls under the exception having not been decided on merits. According to him, the said order can at best be treated as



an agreement between the parties and contradictory interpretations of the same having been given by both the parties made it an issue that needed to be adjudicated in trial. He emphasized that the Court cannot be called upon to recognize and enforce the said consent order to dismiss the Appeal when it is neither a foreign judgment nor enforceable as it has been passed by a non-reciprocating territory.

22. He lastly submitted that the Appellants had not waived their rights under the Consent Terms to claim reliefs in the present suit and it is settled law that waiver has to be specific and had to be pleaded. [See: *Sonell Clocks and Gifts vs. New India Assurance Company Limited (2018) 9 SCC 784 (Para 13)*]

COURT'S REASONING

IF ON ACCOUNT OF A SUBSEQUENT EVENT THE SUIT OR APPEAL BECOMES INFRACTUOUS, THE COURT CAN DISPOSE IT OF

23. It is settled law that if any event during the pendency of the suit or the appeal renders it infructuous, it is open to any party to bring such an event to the notice of the Court by filing an application under Section 151 CPC, which in turn is obligated in law to dispose of such suit or appeal as having become infructuous. The Supreme Court in *Shipping Corporation of India Limited vs. Machado Brothers and Ors., (2004) 11 SCC 168* has held to this effect. The relevant portion of the said judgment is reproduced hereinbelow:-

“25. Thus it is clear that by the subsequent event if the original proceeding has become infructuous, ex debito justitiae, it will be the duty of the court to take such action as is necessary in the interest of justice, which includes disposing of infructuous litigation. For the said purpose it will be open to the parties concerned to make an application under Section 151 CPC to bring to the notice of the court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not.



2023:DHC:7628-DE



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31. For the reasons stated above, we are of the opinion that continuation of a suit which has become infructuous by disappearance of the cause of action would amount to an abuse of the process of the court, and interest of justice requires that such suit should be disposed of as having become infructuous. The application under Section 151 CPC in this regard is maintainable.”

DUE TO A CONSENSUAL GLOBAL AGREEMENT IN TEL AVIV, THE CAUSE OF ACTION NO LONGER SURVIVES

24. The admitted position is that the sole basis for all the claims of the Appellants in both the suits filed in Tel Aviv and New Delhi is the Share Entitlement dated 17th October, 2006 executed by Respondent No.1 and Respondent No.2 in favour of the Appellants. The Share Entitlement dated 17th October, 2006 inter alia records as under:-

- a) The Appellant is entitled to interest in seven per cent (7%) of the rights of the partnership i.e. Respondent No.2.
- b) As of that date, the tower management business of Respondent No.2 is carried out by Respondent No.4 i.e. Tower Vision Mauritius Limited.
- c) The aforesaid undertaking supersedes any previous undertaking given by Respondents No.1 and 2.

25. Relying on the Share Entitlement dated 17th October, 2006 as their ‘sheet anchor’ the Appellants had filed a suit in Tel Aviv Jaffa District Court claiming comprehensive reliefs against Respondent No.1 and Respondent No.2. A review of the amended Statement of Claim in particular Para 43.6 reveals that the Appellants sought to enforce rights, which they claimed flowed from Share Entitlement dated 17th October, 2006, including reliefs against all the downstream companies owned and managed by Respondent No.2.



2023:DHC:7628-DE



26. The Tel Aviv suit was finally disposed of with consent of parties in accordance with a Settlement Agreement vide order dated 11th May, 2017 which is reproduced as under:-

*“Tel Aviv-Jaffa District Court
Civil Action 2192-08 Jakob Shiuj et al v. Tower Vision Ltd. et al
May 11, 2017*

Before the Hon. Judge Ruth Ronen

*The Plaintiff: 1. Jakob Shiju
2. S J Varghese Co. LLP
The Defendants: 1. Tower Vision Ltd.
2. Tower Visioin Limited Partnership
3. Oron Gitzleter
4. Rani Binyamini*

Present:

*Counsel of the Plaintiff – Adv. Keren Pollak
Counsel of the Defendants – Advs. Sabri, Segel
Receivers – Advs. Matri and Hever*

Transcript

Counsel of the parties:

Without admission, and in order to conclude the dispute at the subject of the action, we agree to the granting of the following judgment:

The Plaintiffs are entitled to 7% in the TVLP partnership (Defendant 2), on the date of filing the claim, and this will realize their rights in 7% under the entitlement document (the share entitlement dated October 17, 2006).

We request that a short written document is submitted regarding the expenses.

Adv. Pollak:

The would like the deposit to be returned to the Plaintiffs, through me, after the judgment is given.

Judgment

***Given the force of a judgment at the request of the parties, as set forth above... ”
(emphasis supplied)***

27. This Court is of the view that the Appellants having accepted seven per cent (7%) shares in Respondent No.2 as realisation of their rights under the Share Entitlement dated 17th October, 2006 and having ended all their ‘*disputes at the subject of the action*’ arising from the Share Entitlement dated 17th October, 2006,



by way of a consensual global settlement, the cause of action to file the suit/appeal no longer survives.

DISMISSAL OF THE RESCISSION APPLICATION OPERATES AS A BAR IN PROSECUTING THE APPEAL

28. This Court is further of the opinion that the Appellants themselves realising that the consent judgment would operate as a bar in prosecuting the underlying suit, filed an application for rescission of the said judgment before the Tel Aviv Court. The rescission application filed by Appellant No.2 was duly supported by a detailed affidavit, which is reproduced hereunder:-

“Affidavit

I the undersigned, Roger Needham, bearer of British passport number 510738108, after having been warned that I must state the truth and that I will be subject to the penalties prescribed by law if I failed to do so, hereby declare in writing as follows:-

1. *I provide this affidavit in support of the Plaintiff’s motion to dismiss the judgment provided by the Hon. Judge Ronen in Civil Action 2192/08 in the Tel Aviv District Court (hereinafter: the “Case,” the “Claim”).*

2. *I am a member of the SJ Varghese & Co. LLP partnership (hereinafter: the “Partnership”) and am authorized to provide an affidavit on its behalf.*

3. *The Partnership is Plaintiff No.2 in the Case, and has not provide its consent to the wording of the judgment as written, and does not agree to it now.*

4. *Plaintiff No.1 in the case, Shiju Varghese, was not authorized to agree on behalf of the Partnership to providing the judgment allegedly with its consent, as written.*

5. *The Partnership received the consent of its members to the last version that the Plaintiff, Mr. Varghese, provided as follows:*

“Since both sides agree to receive the remedy according to the statement of claim the judgement will be as follows: The plaintiffs are entitled to 7% in the TVLP partnership on the date of submission of the claim and by that their rights are satisfied according to the share entitlement letter. Whatever the rights of both the plaintiffs and the defendants whether initiated anywhere in any court past or future will not be affected by this ruling and would not be considered as a waiver of those rights by either party.”

6. *The wording above is comprised of two sentences, and was provided to me by Mr. Varghese. The first sentence was agreed upon by all of the parties in the Case, and was proposed by the Honorable Court together with another sentence.*



The second sentence, which was proposed by the Hon. Court, was not agreed upon by the Defendants in the Case, as set forth in the notice filed by them. Mr. Varghese further informed me that in order to reach an agreed version, our counsel proposed the underlined wording to the counsel of the Defendants, as it appears in Section 5 above.

7. *I was informed by Mr. Varghese that as of the date of hearing on May 11, 2017, our counsel has not yet received any response regarding its proposal.*

8. *We would like to state that the wording of the judgment is different from the wording approved by the Partnership, primarily in that it is lacking the determination that the rights of the parties, if claimed in any other court, are reserved and the judgment in Israel will not impair them. The first sentence also is different from what had been agreed previously.*

9. *I was informed by Mr. Varghese that on the date of the hearing, he spoke with our counsel by phone, and was informed of the wording appearing in the judgment, and further that he was misled into believing that he provided his consent on behalf of the Partnership as well.*

10. *It is unfortunate that more time was not available to enable Mr. Varghese to inform the Partnership of the proposed new wording for the judgment as this situation would not have occurred if Mr. Varghese had not been misled into believing that he had to give an instantaneous response.*

11. *I would like to state that according to the legal counsel received by the Partnership from its counsel in India, the wording of the judgment in Israel has significance and weight in the courts in India in the claim filed there, and the counsel of the Defendants may claim alleged consent that the Partnership provided to the judgment in its current wording, which was not provided.*

12. *This is my name, my signature and the content of the affidavit is true.”*

29. From the aforesaid, it is apparent that the Appellants by filing an application for rescission of the order dated 11th May, 2017 wished for protection of their rights with respect to proceedings (in the past or future) in any other Court. However, the said application for rescission was dismissed by the District Court of Tel Aviv by way of a detailed order dated 11th July, 2017. The same is reproduced hereinbelow:-

“(Seal of the State of Israel)

Tel Aviv- Jaffa District Court

Civil Case 2192-08 JAKOB SHIJU and others v. Tower Vision Ltd. and others

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DECISION

Application for rescission of judgment.

In the application it is argued that the judgment of 11.5.2017 was given without the consent of the 2nd applicant (which is the 2nd plaintiff in the action). According to the applicants' counsel, she erroneously thought that the applicant's reply, once she contacted him during the hearing, in which he agreed to the judgment as it was received, was also on behalf of the 2nd applicant and with its consent (in the application the words "the 2nd defendant" were written by mistake, but the application concerns the 2nd plaintiff).

The plaintiffs argued that the wording of the judgment as it was received is entirely different from the wording which was presented to the 2nd applicant and to which it gave its consent.

The respondents (who are the defendants in the action) opposed the application. They argued, inter alia, that the argument that the plaintiff was not authorized to give consent to the wording of the judgment on behalf of the 2nd applicant was a baseless argument. It was also stated that there were no grounds for rescission of the judgment as the applicants' counsel had agreed to it on behalf of her clients and after she had received their approval.

The respondents added that one of the issues in dispute in the action was the issue of the 1st applicant's authority to bind the 2nd applicant and there could be no dispute that the applicants' counsel was well aware of who was authorized to bind the 2nd applicant. The respondents added that after the Court "rose from its seat" and gave judgment, it was not authorized to rescind the judgment. Beyond all this it was argued that the argument that the plaintiff was not authorized to bind the 2nd applicant was an argument contrary to the presentations and evidence which were presented on behalf of the applicants, and therefore they are estopped from raising it.

Discussion

At the hearing of 11.5.2017 the parties' counsels made declarations about the agreement between them, and this agreement received the validity of a judgment. There is no dispute that the counsel for the applicants-plaintiffs represented at that hearing both the applicants. The declaration by "the parties' counsels" about the agreement between them in the record of that meeting was therefore given by her, on the face of it, on behalf of the applicants whom she represented.

The judgment is therefore a judgment given by consent.

*With regard to such a judgment, not once has case law ruled that it can be attacked in two manners - **"If the attack relates to the agreement itself, therefore the party requesting rescission of judgment must act in the same manner for which cancellation of a contract is petitioned under the contract laws. If the attack relates to the judicial process of approval of the judgment,***



such as because a defect occurred in the trial proceedings, including the procedures, it is necessary to act by way of appeal". (See Goren, Issues in Civil Procedure, Eighth Edition, p.312).

*As appears from this application, the applicants' arguments are with concern to a defect in the agreement. Case law has ruled in this regard that an application for rescission of judgment on the grounds of a defect in the agreement, must show the alleged defect which occurred in it, and in addition that **"The party wishing to rescind a judgment given by consent on account of a defect in its making or on account of its breach by the other party, must submit an independent action to the competent Court which gave the judgment, and cannot make do with solely providing a notice of rescission. As long as the judgment has not been rescinded it is valid and its force is not less than the force of another judgment. Attacking the contractual part is done by way of submitting a separate action..."** (Goren, *ibid*, and the references to which the quotation refers).*

Therefore, in the present application, it is not possible to instruct that the judgment shall rescind. As far as the applicants may wish to rescind it, they will be required to submit a separate action to the Court for the rescission of the judgment, in which they shall explain the defects, which according to them, occurred in the agreement which was validated by the judgment, defects which according to them justify its rescission.

Therefore the present application is dismissed.

Given today, 17 Tammuz 5777, 11 July 2017, in the parties' absence.

(Signed)

Ruth Ronen, Judge"

30. Once the Appellants chose not to file a fresh/separate action for rescission of the consent order dated 11th May, 2017 as directed by the Court in the aforesaid order, it is implied that they accepted the consent order in its present form.

31. Consequently, as the consent order dated 11th May, 2017 results in resolution of the disputes between the parties stemming from the Share Entitlement dated 17th October, 2006, all the disputes between the parties (including those pending in other jurisdictions) as on the date of passing of the consent order, came to an end and the present appeal as well as the underlying suit became infructuous. Accordingly, with the cause of action no longer surviving, the Appellants cannot continue to prosecute the present appeal.



TO ALLOW THE CONTINUANCE OF THE APPEAL WOULD BE VIOLATIVE OF THE PRINCIPLE OF COMITY OF COURTS

32. This Court is of the opinion that while adjudicating the present appeal, it cannot go behind the orders passed by the Tel Aviv District Court. To allow the continuance of the present appeal by the Appellants would be violative of the principle of comity of courts as it could result in conflict of decisions between an Israeli and Indian Court. In **Max India Limited vs. General Binding Corporation, 2009 SCC OnLine Del 1967**, an earlier Division Bench has explained the principle of comity of Courts as under:-

“47. Comity is a tool for co-operation. But it can also be a tool for exclusion. Forum non conveniens (Latin for “inconvenient forum” or “inappropriate forum”) (FNC) is a discretionary power of mostly common law courts to refuse to hear a case that has been brought before it.....”

ADDITIONAL RELIEFS AND ADDITIONAL PARTIES IN PRESENT SUIT OFFER NO ASSISTANCE TO THE APPELLANTS

33. The argument that in the underlying suit in Delhi more parties had been impleaded and more prayers had been sought, offers no assistance to the Appellants as they should have taken all steps in the Tel Aviv District Court suit to seek comprehensive reliefs and to implead all the relevant and necessary parties for a complete adjudication of the dispute especially when, the Appellants had information as to the nature of holdings and entities involved in the Respondents’ group.

SHARE ENTITLEMENT DOES NOT BIND RESPONDENTS NO.3, 4 & 5

34. In any event, this Court is of the view that all the rights in favour of the Appellants flow from the Share Entitlement dated 17th October, 2006 alone and that too against Respondents No.1 and 2 only.



35. The said Share Entitlement dated 17th October, 2006 does not entitle the Appellants to file a suit and claim relief against an independent legal entity such as Respondent No.3, the Indian company which is governed and regulated by its own Articles of Association and the Indian Companies Act.

36. At the highest, the Share Entitlement dated 17th October, 2006 can be treated or regarded as an Agreement between the appellants and the promoters of Respondent No.3. The Supreme Court in **V.B. Rangaraj** (supra) has held that an agreement between a non-member and two members of the company does not bind the company, unless the said agreement is reduced into its Articles of Association. The relevant portion of the said judgment is reproduced hereinbelow:-

“7. These provisions of the Act make it clear that the Articles of Association are the regulations of the company binding on the company and its shareholders and that the shares are a movable property and their transfer is regulated by the Articles of Association of the company.

8. Whether under the Companies Act or Transfer of Property Act, the shares are, therefore, transferable like any other movable property. The only restriction on the transfer of the shares of a company is as laid down in its Articles, if any. A restriction which is not specified in the Articles is, therefore, not binding either on the company or on the shareholders.....

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10. In S.P. Jain v. Kalinga Tubes Ltd. [(1965) 2 SCR 720 : AIR 1965 SC 1535 : 35 Comp Cas 351], it was also a case of a battle between two groups of shareholders led by P and L as they were named in the decision..... It was an agreement between a non-member and two members of the company and although for some time the agreement was in the main carried out, some of its terms could not be put in the Articles of Association of the public company. As the company was not bound by the agreement it was not enforceable.”

37. Consequently, reliance on Share Entitlement dated 17th October, 2006 to seek relief against Respondent No.3, Respondent No.4 and Respondent No.5 is misconceived in law.



QUESTION OF ENFORCEMENT OF CONSENT ORDER DOES NOT ARISE

38. The question of enforcement of the order dated 11th May, 2017 in terms of the Code of Civil Procedure, 1908 does not arise before this Court, as the settlement is not being executed in these proceedings. Consequently, neither the question of it being a foreign judgment in terms of Section 13 of the CPC nor the question of Israel being a reciprocating territory or the effect of Explanation to Section 10 of CPC arise for consideration.

ARGUMENT THAT CONSENT ORDER GAVE ENHANCED RIGHTS TO APPELLANTS HAS TO BE CANVASSED BEFORE COURTS IN ISRAEL

39. This Court is of the view that grievances relating to the settlement and its purported impact on the entitlement of the Appellants can only be raised before the Courts in Israel. If the Appellants are under the impression that the consent order entitles them to rights over and above than what is spelled out in the order dated 11th May, 2017, it is for them to institute enforcement proceedings before the Courts in Israel.

APPELLANTS' RELIANCE ON JUDGMENT OF SUPREME COURT OF ISRAEL IS MISCONCEIVED

40. Further the reliance of learned counsel for the Appellants on the observations of the Supreme Court of Israel in the judgment dated 24th October, 2011 is misconceived as they were passed in a proceeding where the interim order passed by the District Court had been impugned. Subsequently, the suit has been disposed of finally by way of a consensual global settlement and it is this consent judgment that will bind and govern the parties.



**PROCEEDING AHEAD WITH APPEAL DESPITE CONSENT ORDER,
AMOUNTS TO RELITIGATION WHICH IS AN ABUSE OF PROCESS**

41. It is settled law that relitigation is an abuse of process. This concept is grounded on the principle that there is public interest in finality in litigation. In ***Hunter Vs. Chief Constable of the West Midlands Police [1982] A.C. 529*** the House of Lords defined as an example of abuse of process, “...the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which had been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had full opportunity of contesting the decision in the court in which it was made.”

42. Relitigation may or may not be barred as *res judicata*. The English Courts in ***Henderson Vs. Henderson, (1843) 3 Hare 100*** while dealing with relitigation amounting to abuse of process extended the *res judicata* principle in two respects, namely, the rule applies not to matters which were decided by a Court, but to matters which might have been decided but were not; the rule applies not just to subsequent litigation between the same parties but also to parties to the subsequent proceedings who were not joined as parties to the earlier proceedings. It has also been held by English Courts that there is no distinction in law between cases where the original action concludes by settlement and where it concludes by judgment.

43. Recently, the Jamaican Court of Appeal in ***West Indies Petroleum Limited Vs. Courtney Wilkinson and John Levy, [2023] JMCA Civ 2*** has held as under:-

“....the ground of abuse of the process of the Court based on duplicity includes, but is not limited to, situations such as bringing an action :

(1) between the same parties and based upon the same matters as have already been adjudicated upon, such as to give rise to an issue estoppel;



- (2) *which could and should have been raised in earlier concluded proceedings between the same parties as in **Yat Tung Investment Co v. Dao Heng Bank Ltd. and another** [1975] AC 581, in which a second claim for injuries was struck out following the successful first claim for damages to the car;*
- (3) *which amounts to a collateral attack upon an earlier decision of a court of competent jurisdiction as illustrated in **Hunter v. Chief Constable of the West Midlands Police and others** [1982] AC 529; and*
- (4) *which would involve the re-litigation of issues already settled by a compromise, which was the point of dispute in **Clarence Ricketts vs. Tropigas SA Ltd and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 109/1999, judgment delivered 31 July 2000, where this court considered whether a claimant would be allowed to file a claim for the recovery of damages for personal injury suffered in a motor vehicle crash, in circumstances where a judgment in respect of his property loss in that crash, had already been concluded in a previous claim, by way of consent....”*

(emphasis supplied)

44. Consequently, the concept of ‘abuse of the process’ in the form of duplicity is wider than the concept of *res judicata* or issue estoppel.

45. In **K.K. Modi Vs. K.N. Modi & Ors.** (supra), the Indian Supreme Court has also held that one of the examples of abuse of process of Court is relitigation. The relevant portion of the said judgment is reproduced hereinbelow:-

*“44. One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as *res judicata*. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted.....”*



2023:DHC:7628-DE



46. This Court is of the view that whether relitigation amounts to an abuse depends upon the facts and circumstances of the case. A broad, merit-based judgment has to be adopted, taking into account all the public and private interests involved and all the facts of the case (See: ***Johnson Vs. Gore Wood & Co (No.1)*** [2002] 2 A.C. 1, HL). This “*broad, merits based*” approach does not refer to the substantive merits but to the merits relevant to the question whether the claimant should be allowed to pursue its second action. This Court is further of the view that the parties’ conduct in bringing the first action to an end is relevant and a merits based approach is appropriate in determining whether pursuing the second action after settlement of the first action is fair.

47. Consequently, a suit/appeal may be struck out as an abuse even if that party is not bound by res judicata if it is shown that the new proceeding (i) is manifestly unfair to a party to the new proceeding; or (ii) would bring the administration of justice into disrepute. Needless to state, that this power must be exercised with care and caution.

48. Since the Appellants entered into a Settlement which resulted in the consent order dated 11th May, 2017 without reserving any liberty to continue the Indian proceedings despite being fully aware of the nature of the holding of Respondent No.2 in the downstream entities, the Appellants by continuing to agitate their rights under Share Entitlement dated 17th October, 2006 in the present appeal are now ‘*mounting a collateral attack*’ on the final consent decree / order passed by a competent Court of law.

49. Consequently, the Appellants by continuing to prosecute the present appeal are re-litigating which is an abuse of process. Any doubt with regard to the malafide intent of the Appellants in continuing with the present Appeal is



2023:DHC:7628-DE



dispelled from the email dated 31st January 2023, which shows that they are misusing even the pendency of the present Appeal to ‘scare away’ investors.

CONCLUSION

50. Keeping in view the aforesaid, this Court is of the view that the present appeal has become infructuous in view of the settlement of disputes as recorded in the consent order dated 11th May, 2017 passed by the Tel Aviv District Court.

51. Accordingly, CM No. 39987/2017 is allowed and the present appeal is dismissed as infructuous, along with other pending application.

MANMOHAN, J

MINI PUSHKARNA, J

OCTOBER 17, 2023

AS/js/TS