Gagan Rastogi Vs. Rp Explorer Master Fund & Anr.

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SooperKanoon Citation : sooperkanoon.com/814

Court : Delhi

Decided On : Dec-08-2014

Judge : S. P. Garg

Appellant : Gagan Rastogi

Respondent : Rp Explorer Master Fund & Anr.

Judgement :

$~26 * IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON :

27. h November, 2014 DECIDED ON :

08. h December, 2014 + CS(OS) 2596/2014 GAGAN RASTOGI Through : ..... Plaintiff Mr.Kapil Sibal, Sr.Advocate and Mr.Rajeev Nayyar, Sr.Advocate with Mr.Ayush and Mr.Himanshu Gupta, Advocates. versus RP EXPLORER MASTER FUND & ANR. ..... Defendants Through : Mr.Darpan Wadhwa with Mr.Aman Varma and Ms.Anushula Grover, Advocates for D-1. Mr.Manuj Aggarwal and Ms.Manvi Aggarwal, Advocate, for D-2. CORAM: HON'BLE MR. JUSTICE S.P.GARG S.P.GARG, J.

I.A.No.16399/2014 (u/O39R1&

2) in CS(OS) No.2596/2014 1. Gagan Rastogi (hereinafter referred to plaintiff) has instituted the instant suit for injunction to restrain defendant No.1 from prosecuting and/or continuing/proceeding with Claim No.2013 Folio 1656 filed in the High

Court of Justice, Queens Bench Division, Commercial Court, England qua him.

2. The plaintiffs case is that he is an Indian citizen and is engaged in the business of export and import of various construction minerals. At present, he is residing in Singapore. R.P.Explorer Master Fund (to be referred as defendant No.1) is registered with the Cayman Island Monitoring Authority. Defendant No.2-Cals Refineries Ltd. is a company registered under the Companies Act, 1956; is listed on the Bombay Stock Exchange as well as National Stock Exchange and has its registered office at New Delhi. The defendant No.1 had initially impleaded Cals-defendant No.2 as a party (Thirteenth defendant) in the proceedings before the English Court. However, in order to avoid legitimate jurisdictional objections to its actions, later on, the defendant No.1 deleted defendant No.2 from the array of parties.

3. Further case of the plaintiff is that the dispute sought to be raised by defendant No.1 in English Court relates to alleged fraud and conspiracy by around 9 persons/entities including the plaintiff. It is alleged that said nine defendants induced defendant No.1 to invest approximately US$ 77 million by way of allegedly worthless Global Depository Receipts (GDRs) issued by Cals for the purpose of raising capital to establish an oil Refinery in Haldia, West Bengal, India. It is alleged that no refinery was actually established and the entire money invested by defendant No.1 was siphoned away/ misappropriated by the defendants and /or entities owned and controlled by them.

4. Plaintiffs further case is that he has been wrongly arrayed as defendant in the said English proceedings and has no role to play, whatsoever, in the alleged conspiracy complained of by defendant No.1. The plaintiff had made investments in Cals only after the alleged conspiracy had taken place and he himself is a victim of the conspiracy alleged by defendant No.1. He was not a party to any of the alleged contracts that were allegedly used in furtherance of the said conspiracy.

5. The plaintiff has further averred that defendant No.1 had initiated multifarious proceedings in India including courts in Delhi making similar allegations. A complaint dated 15.02.2010 was filed before the Economic Offences Wing (in short EOW) of Delhi Police in this regard. It was specifically mentioned therein that

the alleged conspiracy was hatched in New Delhi. Delhi Courts, thus, have closest and substantial nexus/connection to the alleged transaction complained of by defendant No.1 6. In para (10) of the plaint, the plaintiff has given details of various other proceedings initiated by defendant No.1 before Indian courts in relation to the same or similar subject matter which is pending consideration before the English court. As per its own admission in the said proceedings, the defendant No.1 came to know about the alleged conspiracy from SEBI order dated 23.10.2013 in India. Intervention application has already been filed by defendant No.1 before SEBI. The plaintiffs grievance is that the proceedings before the English Court have been initiated deliberately with a view to circumvent the Indian law of limitation which is at variance with English Law. The motive to initiate proceedings in England is to harass the plaintiff who has no connection whatsoever with the alleged conspiracy. The English court is a forum non-conveniens in respect of the claims raised by defendant No.1. It is neither a natural forum nor does it has any real or substantial connection or nexus with the matter in dispute or with the parties involved. Indian courts are the only appropriate fora for adjudication of the disputes sought to be raised by defendant No.1.

7. The defendants entered appearance before this Court on 13.10.2014 pursuant to the issuance of process by an order dated 02.09.2014. On request, the defendants were given four weeks time to file written statement/reply. The matter was adjourned to be listed on 27.11.2014. The defendants, however, failed to file written statement/reply. Counsel for the defendants opted to address arguments on the captioned IA without filing written statement/reply.

8. I have heard Mr.Kapil Sibal, learned Sr.Counsel for the plaintiff and the learned counsel for the defendants and have examined the file. I have also gone through the written submissions placed on record on behalf of the parties.

9. Learned Sr.Counsel urged that the defendant No.1 had no reasons to institute proceedings qua the plaintiff in English Court for the dispute raised therein. The purported dispute raised by defendant No.1 relates to a GDR issue of defendant No.2 (Cals). The entire cause of action in relation to the alleged dispute occurred

in India. The defendant No.1 way back on 15.02.2010 in a complaint to EOW of Delhi Police had categorically admitted that the alleged conspiracy was hatched in Delhi. On 06.02.2010, defendant No.1 had issued a legal notice against Cals, Cals Refineries Limited, Directors etc. inter alia, alleging that it was misled in the purchase of GDRs as well as implementation of the refinery project and related party contracts etc. and accordingly required them to fulfill obligations under the Put Option Agreement etc. In February/March 2010, the defendant No.1 through its Indian entity Rajan Cosmetics filed two proceedings against SRM Infrastructure under Section 9 of the Arbitration and Conciliation Act before this Court and a Company petition before Company Law Board to enforce security interest given to secure its investments in GDRs. On 13.09.2013, thorough its entity Rajan Cosmetics also entered into a settlement wtih SRM Infrastructures whereby SRM Infrastructures agreed to transfer 113.5 acres of its land located at Mewat, Haryana. This settlement was to settle all disputes in relation to agreements entered to secure defendant No.1s purchase of GDRs. Learned Senior counsel further urged that various representations dated 07.11.2011, 24.01.2012 and 14.02.2014 were made to SEBI of the alleged fraud and malpractices committed by Cals and others. On 09.06.2014, the defendant No.1 filed an Intervention Application in appeal filed by Cals against SEBI Order dated 23.10.2013 before SAT. No cause of action, whatsoever, arose within the jurisdiction of English Court. Earlier Cals, an Indian entity, central to the alleged conspiracy was impleaded as one of the defendants in the said proceedings before the English Court. However, subsequently, Cals and some other defendants were dropped from the array of parties.

10. Learned Senior counsel contended that English proceedings have been initiated to circumvent the Indian law of limitation whereby the defendant No.1 could initiate proceedings for the alleged conspiracy within one year from the date of knowledge. The law of limitation in England is six years for such actions. The English court has no connection or nexus with the dispute raised. It is further submitted that the plaintiff has never submitted to the jurisdiction of England courts.

11. Reliance has been placed upon Modi Entertainment Network and Anr. vs.W.S.G.Cricekt Pte.Ltd (2003)4 SCC341 (India TV) Independent News Services Pvt.Limited vs.India Boradcast Live LLC and Ors (2007) ILR2Delhi 1231; and Essel Sports Pvt.Ltd. vs. Board of Control for Cricket in INdia and Ors ILR (2011 V Delhi 585.

12. Learned counsel for defendant No.1 vehemently urged that defendant No.1-investment company was induced by certain individuals and entities including the plaintiff on 20.12.2007 to purchase GDRs listed on the Luxembourg Stock Exchange. The GDRs were issued on 12.12.2007 by defendant No.2- Cals listed on Bombay Stock Exchange Ltd. ostensibly for the purpose of raising capital to allow it to establish an oil refinery in Haldia, West Bengal, India. The oil refinery was not a genuine commercial enterprise. Defendant No.1 purchased 1,034,969 GDRs in all for the total amount of US$77,501,325 from the secondary market from Honor Financea company incorporated in the British Virgin Islands. The dispute raised before the English court is that the issue of GDRs on 12.12.2007 was fraudulent because no genuine capital was raised for the proposed enterprise. The GDRs purchase, thus, proved to be largely worthless and it sold those GDRs for net amount of US $ 6,063, 188 in between 2010 and 2011. Defendant No.1 seeks to recover the substantial loss suffered by it in the proceedings filed before the English court.

13. Learned counsel further urged that the plaintiff had played a pivotal role in the controversy and was involved in illegal diversion of the funds through Asiatexx, a company incorporated in Hong Kong under the pretext of supplying plant and machinery for the refinery project. SEBI in its Show Cause Notice dated 19.09.2013 and order dated 23.10.2014 has detailed out the role of the plaintiff. The investigation conducted by SEBI confirmed the existence of a large scale conspiracy and fraud perpetrated by Cals including the plaintiff. It is further urged that the plaintiff has already submitted to the jurisdiction of the English court and is actively pursuing his defence of forum non conveniens. The matter is listed for hearing objection to the jurisdiction on 10/11.12.2014 before the English court. The plaintiff is indulging in forum shopping by pursing two parallel remedies before two sovereign courts. The plaintiff must await the outcome of the proceedings kept for

hearing on 10/11.12.2014. Principles of comity of courts and propriety would require this court to refrain from proceeding with the present application to pass any order in favour of the plaintiff.

14. It is further contended that this Court has no territorial jurisdiction to entertain the present suit as the plaintiff is a resident of Singapore. The cause of action arose when he received summons in Singapore on 03.06.2014 in the said proceedings. No cause of action arose within the jurisdiction of this Court. Defendant No.1 is not amenable to the jurisdiction of this Court as it is a company incorporated in Cayman Island and does not have any branch office in New Delhi. It is further urged that jurisdiction of the English courts is not under challenge and the plaintiff has merely taken the plea of forum non-conveniens. The English court has jurisdiction over the dispute as alleged misrepresentations were received by the employees of defendant No.1 in London. The term sheet dated 13.11.2007 by which defendant No.1 indicated its willingness to purchase the GDRs was executed by RP Capital UK Ltd., the advisory company of defendant No.1, at London. The conspiracy itself was pursued and implemented in several countries. Majority of defendants in English proceedings are resident in the U.K. and have irrevocably submitted to the jurisdiction of the English courts. The courts in India are not a convenient Forum. English court is a natural Forum which has the closest nexus to the conspiracy. Proceedings are not oppressive and vexatious. They were initiated prior in time and pertain to a monetary claim.

15. Reliance has been placed on Ponty Singh vs.Anu Singh Bhatia (2014) 208 DLT580 Shiju Jacob Varghese vs.Tower Vision Ltd. (2013) 196 DLT385 Modi Entertainment Network & Anr.vs.W.S.G.Cricket Pte.Ltd. (2003) 4 SCC; Hansraj Nayyar Medical India vs.Smith Medical International Limited passed in Notice of Motion No.597 of 2014 in Suit No.367 of 2014, Honble High Court of Bombay; Berner Shipping Inc.&Anr.Vs.Mrs.Kala Ramchandran & Ors. (2000) 4 Bom CR565 and Gujrat Nre Coke Limited & Anr.vs.Gregarious Estates Incorporated & Ors. passed by Honble High Court of Calcutta in G.A. No.3568 of 2011 in Extra Ordinary Suit No.6 of 2011.

16. I have considered the submissions advanced by the parties. At the outset, it may be mentioned that despite specific direction by an order dated 13.10.2014, the defendants did not opt to file written statement/reply. No plausible explanation has been offered by them for not filing written statement within the prescribed period of 30 days from the date of service. The averments in the plaint supported by an affidavit have not been controverted by the defendants by filing written statement/reply and counter affidavit. There are no valid reasons to disbelieve the averments in the plaint. Defendant No.1 has filed detailed written submissions but omitted to file written statement/reply to controvert the assertions of the plaintiffs in the plaint. At this juncture to consider urgent stay application the facts in the plaint are prima facie taken as correct.

17. In the plaint, there is specific mention that the plaintiff is an Indian citizen. Even in the written submissions, defendant No.1 has not specifically denied it though the plaintiff is stated to be resident at Singapore. Summons of the English proceedings were served to him there.

18. The defendant No.1 had purchased GDRs on 20.12.2007 from secondary market from Honor Financea company who had subscribed to the entire GDR issue using US$ 200 million loaned to it by Banco Efisa, Portugal. It is alleged on 20.12.2007 defendant No.1 was induced by certain individuals and entities including the plaintiff to purchase GDRs issued on 12.12.2007 by defendant No.2 which is a company listed on Bombay Stock Exchange Ltd. ostensibly for the purpose of raising capital to allow it to establish an oil refinery in Haldia, West Bengal, India. The Oil Refinery was not a genuine commercial enterprise. Subsequently, as per defendant No.1s allegations it came to his knowledge that the issue of GDRs on 12.12.2007 was fraudulent because no genuine capital was raised for the proposed enterprise. GDRs purchased proved to be a largely worthless and in or about 2010 and 2011 the defendant No.1 sold it for the approximate net amount of US$ 6,063,188. It is relevant to note that at no stage soon after the purchase of GDRs in December, 2007, defendant No.1 raised any grievance about the alleged fraud, conspiracy and inducement by any specific individual. Apparently, no proceedings, whatsoever, were initiated by defendant No.1 against any individual or entity including the plaintiff. Admitted position is that

for the first time defendant No.1 had lodged a complaint on 15.02.2010 with the EOW of Delhi police alleging conspiracy by Cals and others. The said criminal complaint was filed to initiate proceedings under Sections 420/468/471/406/506 and 120-B IPC. In the said complaint, the defendant No.1 in certain terms admitted that the entire allurement, inducements, false promises as well as false agreements were signed in New Delhi and the entire criminal conspiracy was hatched in New Delhi. It appears that defendant No.1 did not pursue the said complaint to take it to logical end. It is uncertain as to what action was initiated on the said complaint dated 15.02.2010 or what investigation was carried out. However, no final charge-sheet against any individual is stated to have been filed in the court on the basis of the investigation conducted on the complaint dated 15.02.2010. In the said complaint serious allegations were levelled by the complainant/defendant No.1 against defendant No.2 Cals. Proceedings initiated in the English Court reveals that initially defendant No.1 had impleaded Cals - defendant No.2 as a party, however, for the reasons best known to it, subsequently, Cals was dropped from the array of parties. In the written submissions, the reason to exnorate defendant No.2 is that it was the prerogative or discretion of the plaintiff to implead him as a party and there was deficient evidence to prove charges against him. submissions/reasons inspire no confidence. These 19. Admitted position that the alleged fraud regarding the issue of GDRs by Cals is subject matter of dispute before SEBI who has proceeded against defendant No.2 and 94 others including ones who are parties in the English proceedings. The said proceedings have been commenced by way of issuance of notice dated 19.09.2013. The plaintiff is the one of the individuals involved in the said show cause notices. It is also not in dispute that on 09.06.2014, defendant No.1 has filed an Intervention application in appeal filed by Cals against SEBI order dated 23.10.2013 before SAT. In the written submissions, defendant No.1 has admitted that the said application is still pending. Apparently, SEBI, a Statutory body in India, has already taken cognizance of the dispute which is the subject matter in the proceedings before the English courts.

20. No satisfactory reasons have been offered by defendant No.1 not to approach English courts for more than four years after lodging complaint on 15.02.2010 to EOW of Delhi police. No specific overt act has been attributed to the plaintiff to

show if any inducement/misrepresentation was made by him to defendant No.1 within the jurisdiction of the said court to constitute criminal conspiracy. It is uncertain as to how and why after the purchase of GDRs in 2007, the defendant No.1opted to institute civil proceedings in English Forum against the plaintiff even though he was not amenable to the jurisdiction of the English courts being resident of Singapore and citizen of India. Learned counsels plea that the plaintiff has already submitted to the jurisdiction of the English court and the suit is not maintainable on that score is devoid of merits. The plaintiff has placed on record acknowledgment of service whereby in column No.4 the defendant categorically expressed his desire to contest jurisdiction of English court. The defendant has already moved the English court challenging its jurisdiction to entertain the proceedings exparte against him there. Mere appearance of the plaintiff in the said pleadings as abundant precaution to avoid default judgment is not suffice to urge that the plaintiff has accepted the jurisdiction of the English courts. In the plaint, the plaintiff in clear terms has denied English courts to have any jurisdiction to entertain the suit qua him.

21. Defendant No.1 had itself initiated number of proceedings including the complaint to EOW, Delhi police, Intervention Application to SEBI and other various proceedings detailed in the plaint in India. The defendant No.2 which is alleged kingpin of the alleged conspiracy is a company registered under the Companies Act in India. Thus at this stage, it cannot be inferred that defendant No.1 is not amenable to the jurisdiction of courts in India.

22. Initially the defendant No.1 had impleaded 16 defendants in the proceedings before the English court. However, later on, names of defendant Nos.4,7 and 11 to 14 were deleted/dropped. No sound reasons have been cited as to how the case of the plaintiff is different from them. Initiation of belated civil proceedings against the plaintiff appears to be oppressive with a motive to harass him.

23. Considering the facts and circumstances of the case and the law enunciated in the judgments cited above, I am of the considered view that the plaintiff has a prima facie case. Balance of convenience lies in his favour and if the stay is not granted, he will suffer irreparable loss to face proceedings at two different

jurisdictions for the almost similar/identical acts.

24. Accordingly, the captioned IA is allowed and defendant No.1 is restrained from prosecuting and continuing Claim No.2013 Folio 1656 filed in High Court of Justice, Queens Bench Division, Commercial Court, England qua the plaintiff till the disposal of the suit.

25. It is clarified that observations in the order would have no impact on the merits of this case.

26. The captioned IA stands disposed of. CS(OS) 2596/2014 27. Learned counsel for defendant No.1 states that he has filed written statement/reply.

28. Learned counsel for the plaintiff states that he has got the copy of the written statement/reply 29. Replication (if any) be filed within four weeks.

30. Learned counsel for defendant No.2 seeks some time to file written statement. Let it be filed within four weeks.

31. Replication (if any) be filed before the next date of hearing.

32. Put up before the Joint Registrar on 22nd April, 2015 for completion of pleadings and admission/denial of documents.

33. Copy of the order be given dasti to the learned counsel for the parties under the signature of the Court Master. (S.P.GARG) JUDGE DECEMBER08 2014 sa