M/S. Mdr Cranes And Infrastructure (P) ... vs M/S. L & T Finance Ltd on 8 October, 2012

Author: K.B.K.Vasuki

Bench: K.B.K.Vasuki

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8-10-2012

CORAM

THE HON'BLE MS.JUSTICE K.B.K.VASUKI

A.No.3914 of 2012
in A.No.3510 of 2012

M/S. MDR CRANES AND INFRASTRUCTURE (P) LTD
NEAR PORT STADIUM
VISAKAPATTINAM

VS

M/S. L & T FINANCE LTD
L & T HOUSE MM MARG BALLARD ESTATE PO BOX NO.278 MUMBAI

M/S. M. SUDHA RANI
30O2 TRISUL MAJESTIC APT 80 FEET ROAD VISAKHAPATNAM

ORDER

The first respondent in A.No.3510 of 2012 is the applicant herein. The application A.No.3510 of 2012 is filed for an appointment of Advocate Commissioner to seize Hydraulic Drilling Pilling Rig more fully described in the schedule appended to the judges summon either in the premises of the respondents or wherever it is found and deliver the same to the custody of the applicant.

2.The applicant M/s. L & T Finance Ltd has come forward with the application A.No.3510 of 2012 for appointment of an Advocate Commissioner in exercise of their right available to the applicant as

contained in Article 13 of the loan cum hypothecation agreement dated 29.12.2009 entered into between the applicant and the first respondent in respect of the loan sanctioned for purchase of the schedule mentioned equipment. The second respondent stood as guarantor for due repayment of the amount and executed a separate guarantee deed dated 29.12.2009. As per the terms and conditions of the loan cum hypothecation agreement, the borrower agreed to repay the amount in monthly installments and the finance company is entitled to treat the entire amount as due and recall the entire debt, in the event of any default on the part of the borrower, in addition to the right available to the finance company to repossess the equipment, for the purchase of the same, loan is sanctioned.

3.In the case in hand, the borrower admittedly committed default in payment of amount, which compelled the lender to take steps to seize equipment. The lender apprehending law and order problem approached this court for appointment of Advocate commissioner to seize the equipment and the same was ordered exparte on 17.8.2012. In pursuance of the order, the Advocate Commissioner seized the vehicle at Gujarat on 2.9.2012 and the same was handed over to the applicant's representative on due acknowledgment. Thereafter, the first respondent in A.No.3510 of 2012/borrower has come forward with the present application directing the applicant to hand over the equipment, which was seized by the Advocate Commissioner pursuant to the order of this court dated 17.8.2012 and dismiss the application A.No.3510 of 2012 as not maintainable.

4.For the purpose of convenience, the parties i.e., finance company, borrower and guarantor are referred to, as per their rank in A.No.3510 of 2012.

5.The borrower has, in this application A.No.3914 of 2012, challenged the correctness of the order passed by this Court in A.No.3510 of 2012 by raising both legal and factual objections. The legal objection raised herein is that A.No.3510 of 2012 is not maintainable before this court as no part of cause of action arose within the jurisdiction of this court. The other objections raised herein are that (i) as the lawyer's notice dated 7.7.2012, which is purported to be the termination notice, is never served upon the borrower, there is no termination and in the absence of effective termination, the right of repossession does not accrue and (ii) there was no default committed on the part of the first respondent and the amount is recalled contrary to the agreement pending reconciliation of the accounts between the parties.

6.As far as legal objection raised regarding lack of jurisdiction of this court to entertain the application, is concerned, according to the borrower, the registered office of the finance company and the borrower company are at Visakhapattinam and the entire transaction was concluded with Vizag branch of the first respondent and the loan cum hypothecation agreement was signed and executed and the loan amount was disbursed all at Visakhapattinam and the payment was made directly to Mait India Foundation Equipment Private Limited at Navi Mumbai and the legal notice relating to the transaction was sent only to Visakhapattinam branch and Chennai where no part of cause of action arose, is falsely referred to as one of the places, wherein part of cause of action arose only to maintain the relief within the jurisdiction of this Court.

7.Whereas, according to the learned counsel for the finance company, the loan cum hypothecation agreement and guarantee deed were entered into and concluded at Chennai and the same were stamped at Chennai and the place of agreement mentioned in the loan cum hypothecation agreement is Chennai and the borrower agreed to pay the loan installments at Chennai, as such, major part of cause of action arose at Chennai and the objection raised regarding jurisdiction issue is devoid of any merits.

8.Heard the rival submissions made on both sides.

9.In order to appreciate the legal objection relating to jurisdiction issue, the relevant documents to be looked into are (i) invoice dated 9.11.2009; (ii) sanction letter dated 29.12.2009; (iii)loan-cum-hypothecation agreement dated 29.12.2009; and (iv) guarantee deed dated 29.12.2009.

10.It may be true that the particulars entered in invoice, sanction letter, loan cum hypothecation agreement and guarantee deed would go to show that both finance company, corporate office of the borrower, the guarantor and the persons cited as witnesses, who are parties to loan cum hypothecation agreement, deed of hypothecation and deed of guarantee do belong to and are from and at Visakhapattinam. 'Term loan facility' was sanctioned by L & T Finance Ltd at Hydrabad and the sanction letter was signed by the Assistant Manager-Equipment Finance, L & T Finance Branch at Somajiguda, Hyderabad and the borrower company M/s.MDR Cranes and Infrastructure Private Limited is at Visakhapattinam, Andhra Pradesh and the loan amount was disbursed at Mumbai to the supplier company of the equipment in question and the address of corporate office of the borrower company was also mentioned so in the sheet appended to the sanction letter, the loan agreement was also signed by the same Assistant Manager-Equipment Finance, L & T Finance, Somajiguda, Hyderabad and the Chairman & Managing Director of MDR Cranes & Infrastructure Pvt. Ltd at Visakhapattinam on behalf of the lender and borrower respectively and the witnesses for the loan documents were residents of Visakhapattinam and the deed of guarantee was also executed by the Chairman & Managing Director of the borrower company in favour of L & T Finance having its registered officer at L & T House, Ballard Estate, Mumbai and guarantee deed was executed in favour of the finance company by the guarantor belonging to Santhipuram, Visakhapattinam and its witnesses were from Visakhapattinam etc.

11.However, the learned counsel for the finance company has drawn the attention of this court to the stamping of loan cum hypothecation agreement and deed of hypothecation made at Chennai and also the entry made in one of the columns in the summary schedule appended to loan cum hypothecation agreement and also in the deed of guarantee, which as per declaration given by the guarantor in the deed of guarantee, forming part of loan cum hypothecation agreement, wherein, Chennai is agreed to be the place of agreement.

12.The learned counsel for the finance company has also sought to rely upon jurisdiction clause 19 of loan cum hypothecation agreement, similar clauses under 18 and 19 of the deed of hypothecation and clauses (b), (e) and (f) of last page forming an integral part of letter of guarantee in support of maintainability of the application before this Court.

13.In order to appreciate the issue relating to jurisdiction, the relevant provision of law to be looked into is Section 20 CPC. For better understanding, the same is extracted as follows:

> "Section 20. Other suits to be instituted where defendants reside or cause of action arises- Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of action, wholly or in part, arises.

Explanation- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office at such place.

In short, under section 20 of the Code of Civil Procedure, every suit shall be instituted in a Court within the local limits of whose jurisdiction, the cause of action, wholly or in part arises.

14.The particulars entered in the agreement and other particulars, as referred to in the foregoing paras 10 to 12 would go to negative the contention raised on the side of the borrower that no part of cause of action arose at Chennai. Though it is contended by the learned counsel for the applicant herein that Chennai is falsely stated to be one of the places, where part of cause of action arises only to maintain the relief sought for in the other application within the jurisdiction of this court, in my considered view, the borrower company having been one of the parties to loan documents, through Chairman & Managing Director, who affixed his signature in the same, in approval of the terms and conditions and other particulars contained therein, wherein Chennai is referred to as deeming place of agreement and the same loan documents having been stamped at Chennai, cannot now be permitted to say that the recitals to that effect are either falsely or casually introduced in the documents.

15.Our Hon'ble Apex Court in AIR 1989 SC 1239 (ABC Laminart Pvt Ltd. and another v. A.P.Agencies, Salem) held that the jurisdiction of the court, in the matter of contract, will depend on the situs of the contract and the cause of action arising through connecting factors. The cause of action means bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue and it is not limited to the actual infringement

of the right sued on, but includes all the material facts on which it is founded". The Supreme Court has, in para 13 of the judgment cited above extracted explanation III added under earlier section 7 of Act 7 of 1888 since omitted, as per which, one of the places, where the cause of action arises in any suit arising out of the contract is the place where the contract is made. The Supreme Court in para 14 of the same judgment, observed that though explanation III is omitted, "it may serve a guide" and in para 15 further observed that "making of the contract is part of cause of action and the suit on a contract therefore be filed at the place, where it was made". The Supreme court, in para 20 of the judgment cited above, referred to the prevailing practice in introducing specific stipulation in the agreement between the parties that the contract shall be deemed to have been made at a particular place. It is further observed by the Supreme Court that "the same would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract". The Supreme Court in para 18 of the same judgment cited another judgment reported in AIR 1971 SC 740 (Hakam Singh v. M/s.Gammon India Ltd) wherein, Clause 13 of the agreement between the parties provided that notwithstanding the place where the work under the contract was to be executed, the contract shall be deemed to have been entered into by the parties at Bombay and the court in Bombay alone shall have jurisdiction to adjudicate upon and the same was upheld by the High Court and was confirmed by the Hon'ble Supreme Court.

16.The Supreme Court, in para 20 of the judgment reported in AIR 1989 SC 1239 cited supra, is also pleased to refer to the practice of introducing stipulation in the contract regarding place of contract. It is observed that "often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract". In Salem Chemical Industries v. Bird & Co., AIR 1979 Mad 16 where the terms and conditions attached to the quotation contained an arbitration clause provided that: "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an Arbitrator", it was held in different context that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the Court at Calcutta. The Supreme court in para 19 of the same judgment, having regard to introduction of specific stipulation in the contract to treat particular place as deeming place of contract, observed that "ordinarily, the courts would respect the agreement between the parties, which was borne out of the meeting of their minds out of consideration of convenience."

17.The Supreme Court in the subsequent judgment reported in (2005) 7 SCC 791 (Harshad Chiman Lal Modi v. DLF Universal Ltd and another) referred to the decision of the Supreme court in Hakam Singh case and in para 25 listed various cases, wherein the principles laid down in Hakam Singh case was followed and reiterated. The other cases referred to therein are extracted as follows:

(i) (1983) 4 SCC 707 (Globe Transport Corpn. v. Triveni Engg. Works),

(ii)(1989) 2 SCC 163: (1989) 2 SCR 1 (A.B.C. Laminart (P) Ltd. v. A.P. Agencies,

(iii)(1991) 4 SCC 270 (Patel Roadways Ltd. v. Prasad Trading Co.),

(iv)(1993) 2 SCC 130 (R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd.),

(v)(1995) 4 SCC 153 (Angile Insulations v. Davy Ashmore India Ltd.),

(vi)(2002) 9 SCC 613 (Shriram City Union Finance Corpn. Ltd. v. Rama Mishra) and

(vii)(2004) 4 SCC 677 (New Moga Transport Co. v. United India Insurance Co. Ltd.)

18.In 2012 (5) CTC 172 (Garlapati Ramanaiah Naidu and another v. L & T Finance Ltd) also, the lender is the same finance company i.e., L & T Finance Ltd, Egmore, Chenani and the deeds are executed at Chennai and the loan agreement are stamped at Chennai. Similar objection regarding territorial jurisdiction of Chennai is raised. The Division Bench of this court, after detailed discussion on jurisdiction issue and after relying upon various judgments and after analysing covenants in the agreement in the light of legal principles laid down in the judgments, negatived the objection regarding jurisdiction. The Division Bench, while doing so, in para 51 observed that "the jurisdiction of the court in the matter of contract will depend on the situs of the contract and if there is any stipulation that the contract shall be deemed to have been made at a particular place, the same would provide the connecting factor for jurisdiction of the courts of that place in the matter of any dispute and/or arising out of that contract". The Division Bench, by relying upon the identical non exclusive jurisdiction of the court of Mumbai like that of the instant case, arrived at a conclusion that no exclusive jurisdiction has been conferred on the Courts of State of Mumbai and negatived the objection regarding lack of territorial jurisdiction.

19.Though it is sought to be argued on the side of the respondent/borrower by relying upon the authority reported in (2004) 4 SCC 671 (Hanil Era Textiles Ltd v. Puromatic Filters (P) Ltd that the parties cannot, by agreement, confer jurisdiction upon one court, which does not possess the same under the Code, such contention is legally and factually not maintainable in the present case.

20.Here is the case, wherein, the parties did not enter into any agreement to confer jurisdiction upon Chennai court contrary to the relevant provision of law under CPC. The parties by having referred to place of Chennai as situs of the contract, agreed to treat Chennai as the place at which, the contract is deemed to have been executed. The prevailing practice in arriving at such consensus is also in the judgments above cited quoted with approval by the Apex Court.

21.The additional factor involved in the present case is that Chennai is also the place at which both loan documents were stamped. The attention of this court is drawn to loan agreement, deed of hypothecation and deed of guarantee enclosed at pages 6 to 24, 25 to 32 and 32 to 43 respectively in the typed set of papers filed by the finance company in A.No.3510 of 2012. The cursory glance at first page of each documents reveal that the stamping of the documents is made at Chennai on 3.9.2009 in respect of loan agreement and deed of hypothecation and on 5.11.2009 in respect of guarantee deed. As rightly argued by the learned senior counsel for the finance company, stamping is also one of the facts which would support the contention raised on the side of the applicants that the part of cause of action arises at Chennai. These two factors would, as rightly argued by the

learned counsel for the lender, provide the connecting factors for Court at Chennai to have jurisdiction, as held in AIR 1989 SC 1239, as such, the place of Chennai can be along with other places i.e., Hydrabad, Visakhapattinam and Mumbai, deemed to have been one of the places where part of cause of action arisen.

22.At this juncture, it is but essential to refer to other terms and conditions contained in loan cum hypothecation agreement and deed of hypothecation and deed of guarantee regarding the place of jurisdiction. The place of jurisdiction contained in Clauses 18.3 and 19 of loan-cum-hypothecation agreement, clause 18 of the deed of hypothecation and clauses (b) (e) and (f) of the last page appended to the letter of guarantee. The parties, under the clauses referred to above, agreed to seek relief under the provisions of the Arbitration and Conciliation Act in any other court of competent jurisdiction subject to non exclusive jurisdiction of the courts of City of Mumbai and it is agreed to be at the sole discretion of the lender to determine the place of arbitration and the jurisdiction court. (clause (e) of the last page of deed of guarantee).

23.In the present case, the finance company, who is the lender, has by exercising the discretion available to the same, chosen to approach the court at Chennai, where part of cause of action arisen as the same is deemed to have been the situs of the contract by the parties. It is noteworthy to mention at this juncture that there is no ouster clause added in the loan agreement regarding jurisdiction of one court in exclusion of other courts. Though in the present case, part of cause of action has also arisen at Visakapattinam, Mumbai and Hyderabad, no certain jurisdiction is specified in the contract to infer any intention to exclude all others. Thus, in the absence of any clause in the agreement exclusively vesting the jurisdiction upon one court, thereby ousting the jurisdiction of other courts, the objection regarding the jurisdiction of this court to entertain the application under Section 9 of the Arbitration and Conciliation Act deserves no merits and consideration.

24.The next objection raised on the side of the borrower is that no notice of termination is served on the borrower and in the absence of effective termination notice, no cause of action arisen to exercise the right to repossess the equipment in question. In this regard, the relevant Clauses to be appreciated are Clauses 11 to 14 of loan cum hypothecation agreement. Under clause 11, the parties agreed that the lender can, at its discretion recall the loan by giving to the borrower three working days notice. Clause 12 explains the acts constituting the events of default on the part of the borrower. As per clause 13, in the event of occurrence of any of the events specified in clause 12, the lender is entitled to resort to any of the actions as enumerated under clauses 13.1.1 to 13.1.5 one of which is termination of the loan agreement. The right so determined under clause 13 can be exercised by the lender without notice to the borrower and without prejudice to any other right or action, the lender may be entitled to under law and under the agreement. The other unqualified right available to the lender under clause 13.1.4 is to repossess the asset. As Clause 13.4 is non obstante clause in and under which notwithstanding anything contained in the agreement, the lender shall be entitled to repossess the asset whether the entire loan amount has been recalled or not whenever, in the absolute discretion of the lender, there is likelihood of the dues of the lender not being paid by the borrower and/or the asset is likely to be transferred by the borrower to defeat the security and/or payment of the due amounts of the lender.

25.The combined appreciation of the clauses above referred to would undisputedly establish the right of the lender to repossess the vehicle in the event of any default committed by the borrower with or without the intervention of the court and with or without notice of termination or with or without any other legal notice for recovery of the amount and the same can be exercised in addition to any other right available to lender, as such, the absence of termination notice, if any, does in no manner render the discretion exercised by the finance company to repossess the vehicle, to be illegal or unlawful.

26. Even otherwise, the perusal of the records enclosed in the typed set of papers filed by the finance company shows that termination notice dated 7.7.2012 through speed post sent to the borrower and the guarantor at the last known address of the borrower and the guarantor, was returned unserved as no such addressee. The cursory glance at other documents would reveal that the address mentioned in loan documents and the copy of the notice dated 7.7.2012 addressed to the borrower and the guarantor is one and the same. Further, the learned counsel for the borrower has also duly received the notice dated 10.4.2012 sent to the same address as evident from the copy of the notice dated 10.4.2012 enclosed in the typed set of papers filed by the borrower.

27. It may be true that as per tracking sheet obtained from India Post enclosed at page 7 of the same typed set of papers filed by the borrower showing track events in respect of the notice sent to the borrower and the guarantor, both the items are duly bagged to Visaghapattinam and despatched at Visaghapattinam, but not delivered for want of sufficient address. When the address mentioned in the cover is the same as that of the address mentioned in the loan agreement, any failure to despatch the item to the addressee concerned by the postal department cannot be attributed to the finance company. At this juncture, the observation of the supreme court in the judgment AIR 1989 SC 630 (M/s.Madan & Co. v. Wazir Jaivir chand) would come to the rescue of the finance company. The case decided by Supreme court is arising under Section 11 of Jammu & Kashmir Houses and Shops Rent Control Act (34 of 1966), in and under which, the protection available to the tenant for eviction is that no amount shall be deemed to be in arrears unless the land lord on the rent becoming due serves a notice in writing through post office under a registered cover on the tenant to pay or deposit the arrears within period of 15 days from the date of receipt of such notice and the tenant failed to repay the same. Accordingly notice was sent to the tenant but the same was returned unserved and the controversy raised is whether notice sent by the respondent by registered post can be said to have been served and the petitioner can be said to have been in receipt of the said notice. When it is contended on the side of the tenant, in the absence of factual service of notice and actual receipt of the same by the tenant, the statutory requirements providing safeguard and benefit of protection are not strictly complied with and hence, no eviction could be passed, the Supreme Court did not accept the contention so raised on the side of the tenant.

28.The Supreme Court, having observed that the proviso to relevant provisions of law insists only service of notice through post, is pleased to hold as follows:

> "6. ....All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no

> control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a court under Order V of the CPC. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter..... In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word served as sent by post , correctly and properly addressed to the tenant, and the word receipt as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant."

29. Though in this case, no such statutory requirement is provided for the benefit of the borrower, either under the agreement or under the statute, applying the view of the supreme court, the finance company is in the present case, to be held as discharged the responsibility entrusted with it in the matter of sending notice to the borrower.

30. The last objection raised by the borrower is as if there was no default on his part. Whereas, the facts involved in the present case would reveal that the borrower committed default in payment of installments and even after the finance company having exercised its right to repossess the asset, the borrower has not come forward to discharge his liability much less admitted liability. Such conduct on the part of the borrower would disentitle him to deny his liability towards the lender.

31. For the reasons discussed above, this court is of the view that all the legal and factual objections raised on the side of the borrower are devoid of any substance and are hence liable to be negatived.

32. In the result, A.No.3914 of 2012 stands dismissed.

rk