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Chennai – 600 104

FIAT JUSTITIA NATIONAL MOOT COURT COMPETITION, 2015

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Moot Problem¹



1. The ebb and flow of the Indian economy over the past decade has made the fortunes of many and cast ruin upon others. One such company that had to navigate the tumultuous winds of the economic downturn while operating its commercial airline, 'Bel Air' was Belladonna Airways Private Ltd. ('BAPL'). BAPL, a private limited company incorporated under the Indian Companies Act, 1956, was widely known in the airline industry as a player which pushed the boundaries of competition through its flash sales and steep discounts.
2. Indeed, BAPL had been founded in the year 2001 with the vision of making air travel affordable to India's middle class. This vision of opening the sector to a

¹The Problem has been drafted by Mr. Arun Karthik Mohan, K. Prahalad Bhat &Subhang P Nair, Advocates, Madras High Court

vast, yet untapped, segment of the population was shared by two young entrepreneurs, Mr. Ali Azad and Mr. Dhiren Dalmia, who secured financing and set up BAPL to achieve the same. The whole of the shareholding in BAPL was divided equally between Mr. Azad and Mr. Dalmia, and they also managed the business themselves although Mr. Azad was the Managing Director of the company. Initially, BAPL's low fares secured it a sizeable market share as against more established airlines and made it a darling of the masses over the next decade.

3. However, BAPL eventually found itself in troubled waters when the Competition Commission of India, in January 2011, commenced an inquiry into its 'abnormally low fares' under Section 19 of the Competition Act, 2002. After six months, however, the CCI closed the said inquiry following a report by the Director-General with a categorical finding that there was no evidence of any contravention of the law.

4. Despite perfecting the legal niceties of its business practices, however, BAPL soon began to feel the heat from the economic repercussions of the same. Mr. Dalmia soon understood that, while BAPL remained the country's fastest growing airline, they would soon require investors with deeper pockets than theirs to fuel the growth of the airline and to keep it sustainable in the face of rising fuel prices. He also understood that his long-time friend, Azad, no longer had the appetite to run the business and that he would fold before the first commercially lucrative offer that was made to him.

5. Indeed, before Mr. Dalmia could secure a suitable buyer, Azad had entered into a Letter of Intent dated 09.09.2012 with one Mr. Chengalvaraya Wadiyar to sell his entire shareholding in BAPL for a sum of Rs. 300 crores through a contract to be executed within a period of six months. Although the buyer was not of Dalmia's choosing, he did not oppose the transaction as Wadiyar, a liquor baron with a billion dollar empire stretching across the world, was a client who regularly chartered private jets & helicopters from BAPL for use by him and his family members. Moreover, Wadiyar could also procure the economic backing required to realize Dalmia's vision of achieving lower fares than any other airline across India.




6. Azad, on the other hand, was satisfied with a smooth exit from BAPL. Azad, however, saw the need for a sustainable source of income. Towards this end, he also commenced planning a helicopter rental line of his own to make better use of his experience and contacts acquired during his stint at BAPL. He also understood that the ideal launch pad for his new business would be to procure the contract for helicopter rentals to Wadiyar, who had currently entered into a 5-year contract for the same with BAPL. Dalmia, who wanted to have the transaction executed smoothly and also to help his long-time friends, informally agreed to assign the same to Azad with Wadiyar's consent.

7. With the stipulated date of execution of the contract nearing, Dalmia and Azad began preparing the necessary documents and filings to be made in consonance

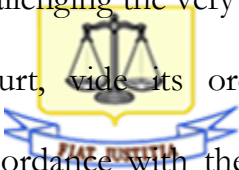
with the same. In these circumstances, on 01.03.2013, eight days before the execution of the proposed Shareholders' Agreement, an e-mail was received by Azad from Wadiyar stating that the entire sale consideration could not be arranged for upfront payment and, consequently, the transaction would have to be suitably modified. Azad, who had already taken steps in furtherance of the LOI, had little option but to follow the same. However, he insisted on a transfer of 18% of the total shareholding (36% of Azad's share) to his wife Nirupama Ali, who would then transfer the shareholding to Wadiyar. Consequently, Azad, Nirupama Ali and Wadiyar entered into a fresh LOI dated 04.03.2013 whereby Wadiyar would purchase 25% of the shares in BAPL for a first tranche consideration of Rs.150 crores. The remaining portion of Azad's shareholding and that of his wife would also be transferred in the second tranche to Wadiyar for a sum of Rs. 150 crores, which was to be paid after a period of 3 months and which was split proportionately between Nirupama Ali and Azad (18:7). The shares transferred in the first tranche were mortgaged by Wadiyar with Azad and his wife as security for the payment of Rs. 150 crores for the second tranche.

8. Pursuant to the amended LOI, Azad, Nirupama, Wadiyar and Dalmia (on behalf of BAPL) executed a Shareholders' Agreement dated 09.03.2013 ("SHA") whereby the transfer of Mrs. and Mr. Ali's shares in BAPL was effected as stipulated in the amended LOI. The LOI, which was duly registered and also stamped for an amount of Rs.100, also stipulated the assignment of the Helicopter Rental

Agreement by BAPL to Azad as a condition precedent to be completed within 30 days and as a corollary of which, Azad resigned as Managing Director, before closing the transaction. BAPL was to pay a sum of Rs. 10 crores to Azad in the event of a failure to assign the HRA to Azad within a period of 3 months. The SHA stipulated arbitration as the dispute resolution mechanism. Pursuant to a consequential side letter issued on 10.03.2013, Wadiyar mortgaged 25% of the total shareholding transferred to him under the Agreement with Azad and his wife as security for payment of Rs.150 crores. Pursuant to the SHA, Azad resigned as the Managing Director of BAPL. Subsequent thereto, a board meeting was also convened by Dalmia to appoint Dalmia as the Managing Director.

9.  Much to Dalmia's shock, he realized that Wadiyar was himself not in a position to procure funding for BAPL and, despite being aware of the same, Azad had continued with the transaction without informing him of the same. Angered by what he saw as a fraudulent conduct by his erstwhile business partner, Dalmia refused to assign the contract to Azad. When Azad sent a notice of winding up to BAPL for the payment of the contractual amount of Rs. 10 crore, (after the stipulated period of 3 months had passed) BAPL replied refusing to pay the said amount, despite admitting that, the same was due strictly as per the contract between the parties.
10. Wadiyar, also realizing that BAPL would not remain sustainable for much longer, refused to pay the amounts payable by him for the second tranche to Azad

alleging that the transaction itself was unenforceable. Azad and Nirupama Ali, who required the HRA as well as the remaining consideration or some form of security to obtain a loan and begin his proposed business, hastily issued notices seeking arbitration in accordance with the SHA and, thereafter, as there was no reply issued by BAPL or Wadiyar, approached the Madras High Court by way of an Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 on 06.08.2013, to appoint an arbitral tribunal as stipulated thereunder.

11. Wadiyar promptly entered appearance in this case of Azad Ali and anr. v. BAPL & anr., O.P. No. 9180 of 2013, and opposed the appointment of an arbitrator, challenging the very arbitrability of the transaction. However, the Honorable High Court,  vide its order dated 26.09.2013, constituted an arbitral tribunal in accordance with the terms of the SHA and referred the dispute, including the objections to jurisdiction raised by Wadiyar, to the said Tribunal.
12. The Tribunal, which convened its first sitting on 09.11.2013, worked at a pace which rivaled arbitrations before the best institutional tribunals in the world, and after a detailed hearing of all parties, including BAPL, which had entered appearance, passed an award on 02.03.2014 ('Award') in favour of Mr. and Mrs. Azad Ali, directing as follows:

"i. 25% of Mr. Wadiyar's shareholding shall be liable to be brought to sale by the Claimants (Mr. and Mrs. Ali) as stipulated in the SHA & the side letter dated 10.03.2013, to appropriate the proceeds of the same towards recovery of Rs. 150 crore and

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that Mr. Wadiyar shall be liable for any balance sum payable after the above sale and the Respondents shall take all necessary steps to effectuate such transfer of the shares to the third party purchaser. Mr. and Mrs. Ali are also given permission to purchase the shares themselves.

ii. As the 2nd Respondent had not assigned the HRA in favour of the Claimant as stipulated in the SHA, the 2nd Respondent shall be liable to pay the sum of Rs. 10 crore to Mr. Azad Ali.”


13. Aggrieved by the said Award, petitions were filed by Wadiyar (in Chengalvaraya Wadiyar v. Azad Ali & anr., O.P. No. 121 of 2014) and BAPL (BAPL v. Azad Ali and anr., O.P. No. 122 of 2014) before the Madras High Court, under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the validity of the same in the month of April, 2014. The Honourable Madras High Court, taking into consideration the different objections which were raised in each of these petitions, heard the matters separately.

14. On 29.04.2014, the Honourable High Court passed a final order in O.P. No. 122 of 2014 dismissing the objections raised by BAPL as regards the stamping of the SHA as well as the validity of the assignment, and upholding the Award. However, on 30.04.2014, the High Court disposed of O.P. No. 121 of 2014, allowing the objections raised by Wadiyar in relation to the arbitrability of the mortgage, observing that “The enforcement of the mortgage could not have been raised as an issue in the arbitration and, as the same is severable from the remaining portion

of the award, the relief granted by the Arbitral Tribunal directing the 1st Respondent therein to transfer 25% shareholding in BAPL to the Claimant is set aside. The Claimant (1st Respondent herein) is at liberty to pursue other remedies available to him under law.” Both the orders were confirmed by the Division Bench of the Court by orders dated 25.06.2014 and 26.06.2014 respectively.

15. In the meanwhile, Azad and Nirupama proceeded to enforce the award and on 20.03.2014, Azad bought the 25% of the shares in BAPL belonging to Wadiyar, that were mortgaged. The purchase price of the shares was Rs. 25 crores. In the meanwhile, differences arose between Dalmia and Wadiyar and hence, despite the protests of Wadiyar, BAPL, under the control of Dalmia, registered Azad in its Register of Members as a shareholder to the extent of 25% of its equity share capital. Azad immediately proceeded to file petitions to wind up BAPL on March 29, 2014 before the Madras High Court. However, on O.P. No. 121 of 2014 filed by Wadiyar being allowed, BAPL rectified its Register of Members to reflect Wadiyar as the owner of the 25% of share capital, which was earlier recorded as owned by Azad. On 01.06.2014, therefore, the Madras High Court, dismissed the winding up petition filed by Azad for lack of locus standi on his part, holding that he was no longer a member of the company as per its Register of Members and that the award, in his favour, would not constitute a debt for the purposes of winding up. The Court held that, even though the said amount might have constituted an admitted debt *dehors* the award, it had now become recoverable only

as an amount due under the award and hence, was not a debt for the purposes of winding up. The said order was confirmed by the Division Bench of the Madras High Court on 30.06.2014. To add to the woe of the Alis, Nirupama Ali moved a mortgage suit on 30.06.2014 before the Madras High Court in respect of the shares, stating that the award had been set aside for a lack of jurisdiction and hence, she was filing the suit in pursuance of the original contract. However, the Court dismissed the suit on the very same day, stating that the mortgage suit was not enforceable as the underlying transaction was illegal and hence, dismissed the suit. This order was confirmed by the Division Bench of the Madras High Court on 15.07.2014.

16.  BAPL & Azad promptly filed Special Leave Petitions against the orders dated 25.06.2014 & 26.06.2014 respectively. Azad also filed a Special Leave Petition against the order dated 30.06.2014 of the Division Bench, dismissing his appeal against the order of the Company Court (Madras High Court in exercise of its Company Jurisdiction). Similarly, Nirupama Ali filed a Special Leave Petition against the order of the Division Bench of the Madras High Court passed on 15.07.2014. The Honourable Supreme Court, while admitting all the above Petitions on 02.08.2014, observed that these Petitions provided the Court an opportunity for a reconsideration of several questions of arbitration and company law that had vexed courts in India and, as such, the same merit reference to a larger bench. Subsequently, the Chief Justice of India, in exercise of his powers,

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constituted a bench of five judges to hear all the SLPs together. Some of the issues that the Court has framed are as follows:

- A. Do the provisions of the Companies Act, 2013 apply in the present case or are the rights of parties to be determined under the 1956 Act?*
- B. Is the issue of mortgage of shares arbitrable?*
- C. Does a sum payable under an arbitral award constitute a debt for the purposes of winding up a company?*

NOTE: The Court has indicated that earlier decisions of smaller benches of the Court on the issues that arise on the present proceedings will be reconsidered by the Court.

