Foresight Shipping Co. v. Union of India, 2004 FC 1501 (CanLII)

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Docket: T-455-02

Citation: 2004 FC 1501

Ottawa, Ontario, October 26, 2004

Present: **The Honourable Madam Justice Danièle Tremblay-Lamer**

BETWEEN:

FORESIGHT SHIPPING CO. LTD.

Applicant

and

UNION OF INDIA

- and -

FOOD CORPORATION OF INDIA

Respondents

AND

THE SHIPPING CORPORATION OF INDIA LTD.

Intervenor

REASONS FOR ORDER AND ORDER

[1] This is an appeal of a decision by Prothonotary Tabib granting the respondent permission to intervene in these proceedings in order to oppose the seizure of its ship. The Order also sets aside said seizure of the ship and returns the bank guarantee filed as security.

FACTS

[2] In 1993, subsequent to a charter party dispute, the appellant Foresight Shipping Co. Ltd. ("Foresight") obtained an arbitral award against the Union of India ("India") and the Food Corporation of India ("FCI"). Neither India nor FCI paid the award, even though it was registered as a judgment of the High Court of Delhi in 2000. The appellant also registered the judgment in England in 2001 and at this Court in 2002. Neither India nor FCI disputes the validity of the award or of the various registration orders, nor the fact that they owe the appellant more than $1,000,000.00 CND. Indeed, neither India nor FCI has made submissions, or appeared before the Court in this matter.

[3] The appellant is seeking to execute its judgment against India's assets outside the country, where it does not enjoy immunity from execution. This is why the appellant sought and obtained a writ of seizure and sale against the ship "Lok Rajeshwari" (the "ship"), which was stationed in Sorel, Québec.

[4] The Ship is not owned by either India or FCI. It is the property of the Shipping Company of India Ltd. ("SCI"), the respondent/intervenor in the present appeal. The respondent's motion before this Court to object to the seizure of its ship was granted. Prothonotary Tabib found that under Indian law SCI has a distinct juridical personality from the Union of India such that their assets and liabilities are distinct and separate. With respect to piercing the corporate veil, she found that Foresight is well founded in decrying India's conduct. However, no matter what opprobrium India's conduct may justifiably attract, the law does not provide that such conduct can be sanctioned by the dissolution of the boundaries between corporate entities and their owners. Piercing the corporate veil is not a punishment for a person's wrongful actions. It is only ever justified by the use to which a person or entity has put a company under its control. The conduct of the Union of India in failing to pay its debt to Foresight does not involve such a use of SCI.

[5] The appellant is appealing this decision.

THE APPELLANT'S SUBMISSIONS

[6] The appellant submits that Prothonotary Tabib erred by inaccurately analysing Indian jurisprudence (or the *lex loci,* as explained below), as it applies to the instant matter. Specifically, the appellant submits that two conclusions follow from Indian law: first, that SCI is the *alter ego* or instrumentality of India; and second, that the circumstances warrant piercing SCI's corporate veil. And, as result of either finding, SCI's assets, namely the ship, should be made available for the purposes of execution on the debt owed by India to Foresight.

[7] With regard to this latter issue, the issue of execution, the appellant further submits that Prothonotary Tabib erred by failing to properly apply the Canadian jurisprudence (or the *lex fori,* as explained below). Foresight contends simply that there exists Canadian authority for using SCI's assets to satisfy the debt owed.

THE RESPONDENT'S SUBMISSIONS

[8] The respondent on the other hand submits that Prothonotary Tabib's decision was correct. The respondent appears to draw a distinction between "lifting" and "piercing" the corporate veil, but nevertheless submits that piercing the corporate veil is not appropriate in this case. This manoeuvre would punish not only the corporation for the actions of the majority shareholder, but also its minority shareholders. Moreover, the respondent submits that it is not India's *alter ego* or instrumentality and that there is no proof of fraudulent conduct in this instance. The respondent further specifies that there is no evidence that India interfered with the operations of the company for the purposes of frustrating or thwarting the appellant's attempts to collect on its debt.

ANALYSIS

Standard of Review

[9] The standard of review applicable to appeals from a decision of a prothonotary was established in *Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (C.A.). At page 463 of the decision, MacGuigan J.A. wrote:

[95] [...] discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

(b) they raise questions vital to the final issue of the case. [note omitted]

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[10] Following the Federal Court of Appeal's reformulation of this test in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (F.C.A.), the first inquiry now concerns whether questions vital to the final issue of the case are raised. And it is on that basis that I will exercise my discretion *de novo* in this matter: the appellant is unlikely to have any further recourse in a Canadian Court against the respondents India and FCI if the seizure of the ship is set aside.

Conflict of Laws

[11] Since *Tolofson v. Jensen*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, it is well-established that in cases involving conflict of laws, comity requires that courts apply the *lex loci*, the law of the place where the incident occurred, to the substantive questions of the case. The *lex fori*, the law of the place where the case is heard, is applicable to questions of procedure. This means that in the case at bar, procedural matters will be resolved according to the procedural rules guiding this Court, and Indian law will be applicable to questions of substantive law.

[12] The present appeal stems from an attempt by the appellant to execute on a debt owed by the respondents India and FCI through the seizure of a ship. Execution is, as the appellant points out, a matter of procedure. Significantly, however, the ship is owned by another person, SCI. The appellant's ability to execute on the debt therefore rests on its ability to demonstrate that SCI's asset

is to be treated as an asset of India, either because SCI is the *alter ego* of India, or because the circumstances require the corporate veil of SCI to be pierced.

[13] These two issues are logically prior to the question of execution. And, in terms of conflict of laws principles, they are issues of substance that must be determined in accordance with the *lex loci* (see *Tolofson, ibid.*). Therefore, unless according to Indian jurisprudence, SCI is shown to be the *alter ego* or instrumentality of India, or that SCI's corporate veil should be lifted, the appellant's reliance on the *lex fori*, in particular on the decision reached in *Med Coast Shipping Ltd. et al. v. Cuba*, [1993] Q.J. No. 750 (QL) (S.C.), is misplaced.

THE EVIDENCE

Mr. Venkiteswaran's first affidavit

[14] Indian law recognizes the general principles of corporate law as expressed in the English decision of *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). In *Western Coalfields Ltd. v. Special Area Development Authority, Korba and others*, A.I.R. 1982 S.C. 697, a case in which the appellant companies were seeking exemptions from paying property taxes on the basis that their sole shareholder was the Central Government, Chief Justice Chandrachud of the Supreme Court of India stated at paragraph 20 of the decision:

Relying on these provisions, it is contended by the Attorney General that since the appellant companies are wholly owned by the Government of India, the lands and buildings owned by the companies cannot be subjected to property tax. The short answer to this contention is that even though the entire share capital of the appellant companies has been subscribed by the Government of India, it cannot be predicated that the companies themselves are owned by the Government of India. The companies, which are incorporated under the *Companies Act*, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies, the Government of India only owns the share capital.

[15] The Supreme Court then cites its decision in *Rustom Cavasjee Cooper v. Union of India*, A.I.R. 1970 S.C. 564, in which it reiterated the general principle that a corporation is a legal person, distinct from its individual members and that the property of the company is not the property of the shareholders (see also *Bacha F. Guzdar v. Commr. of I.T. Bombay*, A.I.R. 1955 S.C. 74 in which the Supreme Court of India also stated that a shareholder does not have an interest in the assets of the company).

[16] Moreover, in his experience, it is possible to execute, within India, the seizure of assets of statutory companies, companies such as FCI that are created by an Act of Parliament and over which the Central Government holds more power and interest than a company incorporated under the *Companies Act, 1956* (the respondent is incorporated under the *Companies Act, 1956*). Only India's own assets are exempt from seizure.

Mr. Venkiteswaran's second affidavit

[17] In his second affidavit, Mr. Venkiteswaran states that the fact that a company is considered a "Government company" according to section 617 of the *Companies Act, 1956* essentially means that the Comptroller and Auditor General of India has the power to name the auditor of the company (section 619 of the *Companies Act, 1956*). He notes that since the auditor is

ordinarily named at the Annual General Meeting, and that the government is the majority shareholder, this is what would result anyway.

[18] He adds that he does not know of even one Indian decision wherein a Court held that a shareholder had any right, title or interest in the assets of the company and he cites an additional decision by the Supreme Court of India which confirms the position that, even though a company may be fully owned by India, once it is incorporated it takes on its own entity, it cannot be considered a department of India, and its employees do not work for India (*Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.*, A.I.R. 1998 S.C. 418). Indeed, in *Food Corporation of India v. Municipal Committee, Jalalabad*, A.I.R. 1999 S.C. 2573, the Supreme Court of India held that even a wholly owned Government Company enjoys an independent existence from its shareholder and its assets do not belong to its shareholder. This decision was based on the fact that the act under which FCI is constituted specifically makes it a body corporate having all the attributes of a company.

[19] Mr. Venkiteswaran states that the Constitution of India does not provide that the assets of companies owned and controlled by India are those of the government. He also states that all the charter parties entered into by the Respondent are expressed in its name, and not in India's name nor in the name of the President of India.

[20] Mr. Venkiteswaran argues that those cases cited by Mr. Pratap in which certain companies are deemed to be instrumentalities of the State for the purpose of judicial review and of enforcing the protection of fundamental rights do not apply for the purposes of any other provision of the Constitution of India (see *Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 487). Thus, they do not apply in cases involving Part XII of the Constitution of India which deals with "Finance, Property, Contracts and Suits".

[21] Finally, Mr. Venkiteswaran states that Courts in India only allow the lifting, or piercing, of the corporate veil in exceptional cases, such as those when there are intention to commit fraud or tax evasion is apparent.

Mr. Pratap

[22] Mr. Pratap's evidence is to the effect that the respondent is considered a "Government company" according to the *Companies Act, 1956* and that it carries on business for India and holds assets for it as well.

[23] Mr. Pratap also advances the notion that Indian Courts have found certain companies whose major shareholder is India and who were subject to India's policies, directions, instructions and guidelines, to be organs of the state, or instrumentalities of the state for the purposes of judicial review of administrative action and the enforcement of fundamental rights (see *State of U.P. v. Renusagar Power Company*, A.I.R. 1988 S.C. 59; *Hackbridge-Hewittic & Easun Ltd. v. G.E.C. Distribution Transformers Ltd.*, A.I.R. 1992 C.C. 543). He proposes that the same logic could apply in the present instance. However, Mr.Pratap does not cite any cases in which an Indian Court applied such a logic in order to lift the corporate veil and allow an execution against the property of a Government company in respect of a debt owed by India.

[24] Mr. Pratap also adds that in South Africa, there were two instances where the respondent provided security for claims against other Government companies. This was also explained in the counter-affidavit of Jennifer McIntosh, a South African lawyer, provided by the respondent, but I do not find that Mr. Pratap's evidence on this point, or Ms. McIntosh's affidavit evidence in response, to be of any relevance to the issues in the case at bar.

Mr. Moisey

[25] Mr. Moisey's evidence is that the respondent is presented as "A Government of India Enterprise", even on its own website. The evidence submitted in support of his affidavit is mostly hearsay, especially the newspaper and magazine articles. Also, much of the documentation submitted in support of his affidavit relates to the so-called "privatization" of the respondent. Apparently, India is considering selling up to 51% of its stock in the respondent.

ARGUMENTS IN FAVOUR OF EXECUTION

[26] In order to execute on the debt it is owed by India, Foresight must demonstrate, under Indian law, that SCI is the *alter ego* of India, or that the circumstances are such that piercing SCI's corporate veil is warranted. Not surprisingly, these arguments are often conflated in the jurisprudence because they are intended to achieve the same result. Nevertheless, I will address each argument in turn.

i) The *alter-ego* argument

[27] The appellant is suggesting an analogy between the present case and other cases in which certain state-owned companies or government-controlled companies have been considered to be "organs" or "instrumentalities" of the Indian government for purposes of judicial review of administrative action and for purposes of enforcing the protection of constitutionally enshrined fundamental rights. By doing so, the appellant is attempting to convince this Court that the respondent is but an organ or *alter ego* of the government and that its property is exigible for seizure.

[28] I cannot accept this argument. To start, Indian law recognizes that corporations have distinct legal personalities from their shareholders. As was demonstrated by Mr. Venkiteswaran's affidavit evidence, even in cases where India exercises a supervening control over the affairs of a company, Indian courts have held that said company continues to exist as an entity distinct from India (see *Steel Authority of India Ltd., supra,* and *Food Corporation of India, supra*). There is no evidence before this Court that these decisions have ever been overruled and therefore, I find that they are indicative of corporate law in India today.

[29] I do recognize that finding a corporation to be an instrumentality or *alter ego* of the state is possible as a matter of Indian law. Those cases are however distinguishable: whereas those cases concerned the protection of fundamental rights, the present case pertains to property and contract law. More importantly though, the evidence before me does not demonstrate that SCI is a government instrumentality. The documents submitted by Mr. Moisey, for example, are mostly hearsay and relate primarily to the so-called "privatization" of SCI.

[30] India is the majority shareholder in SCI. However, that in itself is not sufficient to deny SCI's existence as an independent legal personality. The evidence before the Court does not support

the conclusion that the respondent's business, income, undertaking and assets are controlled or "owned" by India. The evidence also does not show that SCI, and/or its assets, were in any way implicated in India's refusal to pay its debt to the appellant.

[31] In short, the respondent possesses all of the powers of a company incorporated under the *Companies Act, 1956;* absent evidence of India exercising control over SCI and its assets for the purpose of escaping its liabilities, I cannot find that SCI is the agent, instrumentality or the *alter ego* of India. As indicated by the Prothonotary, and I fully agree, this Court when applying foreign laws in resolving a conflict of law issue, must apply the foreign law as it exists and not as reformers think it ought to be.

[32] Thus the first argument in support of allowing Foresight to execute on the debt owed by India must fail.

ii) Piercing the corporate veil

[33] In her decision, the Prothonotary applied Canadian law to determine whether piercing the corporate veil was appropriate. However, as a substantive question of law, Indian jurisprudence governs this determination (see *Tolofson, supra*).

[34] The appellant did provide support (see *State of U.P., supra* and *Hackbridge-Hewittic & Easun Ltd., supra*) for the proposition that the veil on corporate personality can be pierced under Indian law. The existence of the principle, however, does not in itself justify its application to the case at bar.

[35] On the contrary, because the appellant was unable to demonstrate that SCI is being used by India for the purpose of committing a fraud, or more precisely, to offer any evidence to show that India is employing SCI to avoid its debt, piercing SCI's corporate veil is not justified here. Whatever fraud is alleged by the appellant, it was committed by the shareholder India, separate and apart from the respondent SCI. The appellant is seeking to extend a shareholder's liability to the corporation in which it owns shares, a corporation which it did not use in committing this alleged fraud.

[36] The implications of lifting the corporate veil in such circumstances are numerous. Companies and individuals contracting with states would be able to pick and choose assets belonging to other corporations with which they did not do business simply because the government has a controlling share of the stock.

[37] What the appellant is asking this Court to do is to disregard the respondent's distinct legal personality, disregard the principles of limited liability as accepted in Indian law and force a company that is not even owned in full by India to take on the burden of India's actions and liability.

[38] In my opinion, it would be wrong to allow this seizure, thereby ignoring the state of the law in India and essentially punishing the respondent's minority shareholders. There is no evidence before this Court that India has ever interfered in the respondent's operations in order to protect itself or its agencies, nor is there any evidence that the respondent was involved in any fraud or illegal transaction.

[39] For these reasons, the second argument advanced by Foresight in favour of execution must also fail.

iii) Execution

[40] One final aspect of this case deserves comment. The appellant relied heavily on the decision in *Med Coast, supra* to support its claim for execution. Because the present case involves the asset of a third party (SCI), which the appellant has failed to show is in effect the respondent India, I find that the *Med Coast, supra* decision has no application. There, the Court found that the asset in question was in reality held for, and owned by the Cuban government. In the case at bar, there is no evidentiary basis here for treating the assets of SCI and India as one and the same. Moreover, in direct contrast to the present matter, in *Med Coast, supra* the company whose ship was seized was a defendant in the action, and the judgment was therefore also executory against it.

[41] For these reasons, the appeal is dismissed with costs.

ORDER

THIS COURT ORDERS that the appeal be dismissed with costs.

"Danièle Tremblay-Lamer"

J.F.C.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-455-02

STYLE OF CAUSE: Foresight Shipping Co. Ltd.

and

Union of India and Food Corporation of India

and

The Shipping Corporation of India Ltd.

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 29, 2004

REASONS FOR ORDER

AND ORDEROF THE HONOURABLE MADAM JUSTICE DANIÈLE TREMBLAY-LAMER

DATED: October 26, 2004

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