IN THE COMMERCIAL HIGH COURT OF THE WESTERN PROVINCE (EXERCISING CIVIL JURISDICTION) HOLDEN IN COLOMBO

Celestial Aviation Trading 10
Limited
Aviation House
Shannon, Co, Clare
V14 AN29
Ireland

PLAINTIFF

Case No:**CHC126/2022/MR**

Nature: Money Recovery

Procedure: Regular

Value: LKR 90,000,000/-

-Vs-

1. Public joint stock company
"Aeroflot – Russian Airlines"
Arbat str., build 10 Moscow
119002
Russia

2. N C Abeywardena,
Acting Head of Air Navigation
Services, Airport and Aviation



Services (Sri Lanka) (Private)

Limited,

Bandaranaike International

Airport, Katunayake

DEFENDANTS

Before : T.G.S.A.Perera, High Court Judge

Decided on : 15/07/2022

ORDER

The Plaintiff has instituted this action mainly against the 1st Defendant seeking reliefs as prayed for in the plaint. It has sought certain injunctive reliefs whilst claiming a sum of US Dollars 250,000, for the damage that would be caused to the Plaintiff in the future.

According to the Plaintiff the 2nd Defendant has been made a party to this action only for the purpose of giving notice of the action.

On 02.06.2022 the Learned President's Counsel for the Plaintiff has made submissions supporting for an enjoining order and having satisfied with the same this Court has granted two enjoining orders enjoining the 1st Defendant from doing the acts as mentioned in the paragraphs D and G of the prayer to the plaint with notice of interim injunction.

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Having come to know about the said order the 1st and 2nd Defendants have taken steps to file a motion with limited objections and made oral submissions before this Court to get that order vacated on the basis that it had been obtained suppressing important material facts while abusing the power of this Court.

Having satisfied with the submissions made by the Learned Counsel for the Defendants this Court by the order dated 06.06.2022, has suspended the operation of the said enjoining orders and granted the Defendants the opportunity to file their objections in respect of the application for interim injunction.

Both the Defendants have filed their respective objections followed by their affidavits before the date fixed for inquiry on which date the Learned President's Counsel for the Plaintiff informed Court his client does not wish to pursue with the application for interim injunction.

In that context this Court dismissed the application for interim injunction subject to taxed cost. At this point the Learned Counsel for both Defendants made oral submissions regarding the maintainability of the action on the basis of lack of jurisdiction.

This Court permitted all the parties to file their written submission on this point and fixed the matter for order. The Learned

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Counsel for the Plaintiff and the Defendants have filed their written submissions with annexures.

I have perused all the proceedings including the plaint, objections and written submissions with supportive documents.

As revealed in the plaint a dispute has arisen between the Plaintiff and the 1st Defendant upon the failure on the part of the 1st Defendant to comply with the letter of termination marked P10 and the dispute has been referred to the London Court of International Arbitration for Arbitration as per P24.

There is no doubt that it is an arbitrable dispute since the parties have agreed to refer it to be resolved through an arbitration process as evident by the clause 15.6 .....in the purported agreement which the parties have entered into; It is pertinent to reproduce the relevant part of clause 15.6 (b) .

"Any dispute arising out of or in connection with this lease, including any question regarding its existence validity or termination (a"dispute") shall be finally resolved by binding arbitration, under the London Court of International Arbitration ("LCIA") Rules except as otherwise provided herein, which Rules are deemed to be incorporated by reference in to this clause"

i. the arbitral tribunal shall consist of.....

ii. the seat or legal place.....

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iii. The only language of the arbitration.....

iv. Upon the request of the party.....

v. There shall be no right of appeal.....

On perusal of the relevant averments and the prayer in the plaint, it appears that the plaintiff has filed this action invoking the jurisdiction of this court to seek interim reliefs against the 1st Defendant pending the constitution of the arbitral tribunal.

The Plaintiff has relied on paragraph (vi) of the clause 15.6 (b) in 'P5' where the parties have agreed to seek the intervention of Court for such purpose.

Clause 15.6 (b) (vi) is reproduced herewith.

15.6 (b) (vi) "Lessor and Lessee shall each be entitled to at any time from any Court in any jurisdiction (whether before or after the commencement of any arbitration proceedings) any provisional interim or conservatory relief against the other. The relief sought may include but shall not be limited to, attachment, taking possession under clause 14.2 preservation, custody or detention of property and injunctive relief.....

It is clear that the Plaintiff has instituted this action mainly for the purpose of getting interim relief until the arbitral tribunal is constituted whilst claiming some monetary relief as evident by the relevant averments and the prayer to the plaint.

It is pertinent to re-produce them in the following manner.

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12.

Paragraph 36

In the circumstances the Plaintiff respectfully seeks the assistant and intervention of your Honor's Court for the limited purpose of providing redress and relief of the causes of action pleaded below pending of the constitution of the arbitral tribunal and their determination thereon.

Paragraph 44

The Plaintiff therefore states that grave, irreparable and irremediable loss, harm, damage and mischief shall be caused to the Plaintiff unless the interim relief hereinafter prayed for is granted to the Plaintiff.

Prayer B

a permanent injunction restraining and preventing the 1st Defendant from and /or the 1st Defendant's servants, agents, assigns and /or those authorized to permit the 1st Defendant from permitting the 1st Defendant to operate (whether commercially or otherwise) handle, use, takeoff ground and/ or fly aircraft described in the schedule hereto, pending the constitution of the Arbitral Tribunal pursuant to Request for Arbitration marked "P24" and award by the Arbitral Tribunal regarding the delivery and possession of the said Aircraft.

Prayer C

an Interim Injunction until the final determination of this action restraining.....an Award by the Arbitral Tribunal regarding the delivery and possession of the Aircraft ;

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Prayer D

an Enjoining Order until the determination of the application for Interim Injunction, restraining..... an Award by the Arbitral Tribunal regarding the delivery and possession of the Aircraft ;

Prayer E

a Permanent Injunction restraining and preventing the 1st Defendant and/ or its servants, agents, assigns from removing any Air-Craft documentation (including certificates, air-craft log, records, books or manuals) or any parts, equipment, components, systems or modules from the Air-Craft described in the schedule hereto, pending the constitution of the Arbitral Tribunal pursuant to Request for Arbitration marked 'P24' and an award by the Arbitral Tribunal in that regard.

Prayer F

an Interim Injunction until the final determination of this action restraining..... an Award by the Arbitral Tribunal in that regard ;

Prayer G

an Enjoining Order until the determination of the application for Interim Injunction, restraining..... an Award by the Arbitral Tribunal in that regard.

As held in ***Backsons Textile Industrial Limited Vs Hydro Industries (1997)CA 51/97*** and ***Elgitread Lanka (Pvt) Ltd Vs. Bino Tyres 2010.S.C Appeal 106/08*** our apex Courts have recognized the



necessity of granting interim relief for the purpose of maintaining the status quo pending the constitution of the arbitral tribunal.

There is no doubt that the Plaintiff has placed much reliance on the clause 13(b)(vi) hereinbefore mentioned in making an application for enjoining order in the first instance and this Court has granted that relief in view of the legal principal recognized in those two authorities.

However, this Court has decided to dissolve the enjoining order by its order dated 06.06.2022 on the basis that the manner of serving enjoining orders to the Defendant was contrary to the procedural law and the past conduct of the Junior Counsel for the Plaintiff was unethical.

With the suspension of the enjoining orders the subject matter in question, the air-craft has left this country. It is obvious that the air-craft now is out of the jurisdiction of this Court. In an event of such kind it is questionable as to the existence of cause of action in relation to further interim reliefs. Needless to state that seeking for further interim relief under such situation is futile as the cause of action is no longer within the jurisdiction of this Court.

Apart from that it is to be noted that on the date of inquiry relating to the application for interim injunction, the Learned President's Counsel informed Court that the Plaintiff does not pursue with that application which resulted the dismissal of that application for interim injunction application.

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Therefore it is manifest that out of the reliefs as sought by the Plaintiff in the plaint those in paragraphs C, D, F, G of the prayer have already been dismissed by this Court. At that stage the Learned Counsel for the 1st and 2nd Defendants have invited this Court to dismiss the whole action on the question of its maintainability due to the lack of jurisdiction. The both Counsel have raised preliminary objections with regard to this issue in their objections filed in relation to the interim injunction application and made lengthy written submissions on this point.

In his written submissions the Learned President's Counsel has also addressed to those objection with supportive authorities.

However it is to be noted that in terms of Sec.5 of the Arbitration Act No.11 of 1995 when there is an arbitration agreement in the agreement between parties, any dispute arising out of it has to be resolved by arbitration as the Court has no jurisdiction. On an application made by a party to such agreement court may intervene by granting interim relief for the only purpose of maintaining the status quo until the arbitral tribunal is constituted as held in Backsons and Elgitread cases. However the principle recognized in those cases have no application to the matter at hand under the present situation since the subject matter in respect of which a permanent injunctive relief is sought is out of the jurisdiction of this court as discussed herein before in this order.



Further it is to be noted that there is a bi-lateral agreement between the government of Sri Lanka and the government of Russian Federation with regard to the rights and privileges of the respective aero nautical authorities of the two states in operation of International Air Services. There's no doubt that violation of any of such clauses mentioned in that bi-lateral agreement is a violation of public policy of the country.

The relief sought by the Plaintiff with regard to the monetary claim can be resolved by the arbitral tribunal. Permanent solution in that nature can be obtained accordingly.

Apart from that it is to be noted that in terms of Article 9A of the Arbitration Rules of the London Court of International Arbitration (Y2) it provides as follows:

Article 9A **Expedited Formation of Arbitral Tribunal**

9.1 In the case of exceptional urgency any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal under Article 5.....

On perusal of P24 it appears that the plaintiff has never made a special request to get it expedited the formation of the Arbitral Tribunal under such urgent circumstances as stated by the Plaintiff.



In that context it is my considered view that at present this Court has no jurisdiction to continue with this action as it is under the purview of the Arbitral Tribunal.

Hence this action is dismissed subject to taxed costs.

[SGD.]
T.G.S.A.Perera

Judge of the Commercial High Court

Colombo 12.

I do hereby certify that the foregoing is a true copy of the order dated 15.07.2022 filed of record in Case No. CHC-No. 126/2022 MR issued to the Attorney's General Department - free of charge (11-pages)

Prepared by :- (Thilini)

Com. with :-

R/Kapuwesa
2022.07.15
Registrar

REGISTRAR
COMMERCIAL HIGH COURT
COLOMBO 12.

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