

(2012) 11 DEL CK 0178

In the Delhi High Court

Case No : FAO (OS) 538 and 507 of 2012

CPI India Limited

APPELLANT

Vs

BPTP Limited and Others
 BPTP Limited Vs CPI India
Limited and Others

RESPONDENT

Date of Decision : 09-11-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 9

Citation : (2012) 11 DEL CK 0178

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : N.K. Kaul and Mr. Rajiv Nayar, Instructed by Ms. Bindi G. Dave, Mr. Sameer Pandit, Mr. Aman Raj Gandhi, Mr. Kapil Rustagi, Mr. Karan, Ms. Naomi and Mr. Rohan Jaitley, in FAO OS 538/2012 and Mr. Harish Salve and Mr. Sandeep Sethi, Instructed by Mr. Rudreshwar Singh, Mr. Hardeep Sachdeva, Mr. Kamal Shankar, Mr. Kaushik Poddar, in FAO OS 507/2012, for the Appellant; Harish Salve and Mr. Sandeep Sethi Instructed by Mr. Rudreshwar Singh, Hardeep Sachdeva, Kamal Shankar, Kaushik Poddar, Advocates for R.1 in FAO (OS) 538/2012 and Mr. N.K. Kaul and Mr. Rajiv Nayar Instructed by Ms. Bindi G. Dave, Sameer Pandit, Aman Raj Gandhi, Kapil Rustagi, Karan, Ms. Naomi and Mr. Rohan Jaitley, Advocates for R.1 in FAO (OS) 507/2012, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—CPI India Ltd., the appellant of FAO(OS) No. 538/2012 had filed a petition u/s 9 of the Arbitration and Conciliation Act 1996 impleading 25 respondents, three of which are BPTP Ltd. and its directors Kabul Chawla and Anjali Chawla. The other 22 respondents are companies stated to be affiliates of BPTP Ltd. It was the case of CPI Ltd. that relying upon representations and warranties made by Kabul Chawla, it had invested Rs. 322.5 crores in BPTP Ltd. by subscribing to 13,551,971 equity shares as well as 22,500,000 Compulsorily Convertible Preference shares on the terms set out in the Share Subscription Agreement dated August 10, 2007 (SSA), and as on the date of the petition it held 5.67% of the Paid Up Capital of BPTP Ltd. It was asserted that the rights are

further governed by a Memorandum of Understanding (MOU) dated December 19, 2009. The dispute projected was that on the respondents failing to achieve the Qualified Initial Public Offering by July 08, 2011, a requirement under clause 4 and 10 of the MOU dated September 19, 2009, followed by unauthorized debts being raised, CPI India was entitled to the remedies of the Swap Option rights or under the Put Option or to enforce the right under clause-10 of the MOU; as per which the eight projects listed in Schedule-A to the Agreement had to be executed by putting the money generated in an escrow account and share of CPI India in the profits generated would be as listed in Schedule-A. We highlight that CPI's share in the profits range between 50% to 58%. Grievance made was that out of the 8 projects, the respondents had commenced unilateral development and booking pertaining to project "M" at Faridabad and "A" at Gurgaon. In a nutshell the case was that the last alternative i.e. right under clause-10 of the MOU was violated by BPTP Ltd. and funds were being siphoned away. Resolutions passed on June 29, 2012 at the Board Meeting were prayed to be stayed alleging that the effect thereof would be to dilute the interest of CPI India.

2. On July 4, 2012, which was the first date of hearing and on which date counsel appeared for BPTP, the following interim order was passed:-

1. Notice. Mr. Kamal Shankar, learned counsel accepts notice on behalf of the Respondents.

2. During the course of the arguments it has been agreed by learned Senior counsel for the Respondents, on instructions, that within the next week, a meeting will be held between the representatives of Respondent No. 1 BPTP Limited and the Petitioner CPI India Limited to examine what alternative options can be explored including reworking the shareholders agreement which is the subject matter of the present petition. Respondent No. 1 will disclose to the Petitioner the exact amounts of statutory and government dues which are to be paid by Respondent No. 1. The Petitioner will also be informed as to which unencumbered properties/assets of Respondent No. 1 company will be earmarked to secure the investment made by the Petitioner thus far. It is made clear that this would be without prejudice to rights and contentions of either party.

3. List on 26th July 2012.

4. Till the next date of hearing, Respondent No. 1 will not give effect to the Resolution passed by the Board of Directors of Respondent No. 1 at the meeting held on 29th June 2012. It is clarified that none of the "Selected Projects" the list of which is at page 138 of the documents volume, shall be sold, alienated or otherwise encumbered by Respondent No. 1 till the next date.

3. The OMP filed by CPI India Ltd. has been disposed of vide impugned order dated October 03, 2012 by passing the following directions:-

41. In conclusion, it is directed as under:-

(i) The interim order passed by this Court on 4th July, 2012 is directed to continue till such time the arbitral Tribunal passes an order, including by way of modification or variation of this order, in accordance with law in an application that may be filed by either party u/s 17 of the Act.

(ii) BPTP will furnish to CPI, within two weeks from today, the accounts of the monies collected by it by sale of units in Projects A and M, including the manner of disbursing of such monies collected by it. Till further orders that may be passed by the arbitral Tribunal, BPTP will cease further activity in relation to Projects A and M and maintain status quo in relation to the Selected Projects.

(iii) It will be open to the parties to rely on the pleadings, documents and reports forming part of the record of the present petition in the arbitral proceedings.

4. Whereas Kabul Chawla and the associate companies have filed FAO(OS) No. 508/2012 challenging the final order passed disposing of the OMP, BPTP Ltd. has joined in the challenge by filing FAO(OS) No. 507/2012. CPI India Ltd. has also challenged the impugned order by filing FAO(OS) No. 538/2012.

5. The principal grievance of BPTP Ltd. and Kabul Chawla and others is that the result of the impugned order is that the two ongoing projects have been stayed as per direction No. (ii) and this would cause injury to the company and as a consequence to all its shareholders which would include CPI India Ltd. Further grievance was that as per direction No. (i), interim order passed on July 04, 2012 was continued and since on July 04, 2012 interim order was to restrain BPTP to give effect to the Board Resolution dated June 29, 2012, the said company was prohibited from obtaining a loan which was sanctioned by IFCI in sum of Rs. 125 crores which was to be utilized to pay dues to the Government of Haryana with respect to the other six projects listed in Schedule "A" to the MOU. It was highlighted that if the dues were not paid, the value of the land would fall causing injury to all. The backdrop of the principal grievance urged was the express recording by the learned Single Judge that he was not going into the merits of the rival versions because the parties had already appointed a Sole Arbitrator to decide the substantive disputes and Section 17 of the Arbitration and Conciliation Act 1996 would be the proper forum for the parties to obtain interim measures. It was argued that the sine qua non for an interim order is a prima facie finding recorded in favour of the party in whose favour an interim order is passed.

6. The grievance of CPI India is that admittedly, as per the documents filed by BPTP, it had collected Rs. 213 crores for projects "A" and "M" and had not deposited the same in an escrow account as per the MOU. With reference to a cash flow statement showing status of the projects up to September 30, 2012 it was highlighted that it appears to be a case where Rs. 111.3 crores out of Rs. 213 crores generated from projects "A" and "M" had been diverted by BPTP Ltd. It was thus urged that the appeals filed by BPTP Ltd. and Kabul Chawla deserved to be dismissed and appeal filed by it need to be allowed and directions be issued

that Rs. 213 crores generated by BPTP Ltd. be directed to be deposited with this Court.

7. In response, BPTP Ltd. and Kabul Chawla urged that letters written by RBI to them would reveal that the Swap Option, put option as also the condition of the MOU creating interest in land (8 projects) on the strength of which CPI India has laid a claim, are contrary to Foreign Exchange Management Act.

8. We had heard learned counsel for the parties on October 31, 2012 for some time and had adjourned the matter to November 07, 2012. Though not recorded in the order-sheet, during arguments certain proposals had emerged from both sides so that the appeals could be disposed of with consent directions and we had impressed upon learned counsel that this would be the best solution keeping in view the fact that on the one hand the learned Single Judge has expressly declined to deal with the merits of the contentions urged by both parties by observing that the parties would be free to approach the learned Arbitrator by way of an application u/s 17 of the Arbitration and Conciliation Act 1996, but has given some prima facie findings, but making it expressly clear that these would not influence the learned Arbitrator and thereby limiting the directions till such time the learned Arbitrator passed interim orders.

9. Now, it is apparent that notwithstanding the pious intention of the learned Single Judge, a problem in law has arisen inasmuch as the fulcrum of the challenge in the appeals filed by BPTP and Kabul Chawla is that the half baked order has caused prejudice to them and that the sine qua non for passing interim orders is prima facie findings being recorded; not in the manner as done by the learned Single Judge, but by considering the rival viewpoints.

10. Indeed, the signature tune of the impugned order is that Rs. 322.5 crores invested by CPI India in BPTP Ltd. needs to be protected and that there is a violation of the MOU. But, the learned Single Judge has just not discussed whether the shareholders agreement and the MOU foul Foreign Exchange Management Act.

11. We do understand the dilemma faced by the learned Single Judge, who was advised not to delve deep into the matter considering the voluminous record and thought it advisable that keeping in view that the parties had appointed an arbitrator he would be the best Fora where interim orders could be obtained.

12. But a hiatus has come into existence as noted above.

13. We were keen not to reflect upon the merits and find a workable solution till the Arbitrator could decide on the interim measure. We were informed that the learned Arbitrator has fixed the schedule by which pleadings have to be completed and the date is mid March 2013. In other words, by April 2013 the learned Arbitrator would be in a position to hear the parties on interim measures and pass directions.

14. The only problem would be, what to do till April 2003? In other words, what

should be the ad-interim order and not the interim order? "Ad-interim" we have used the phrase for the reason parties agreed before us that the Arbitrator would be the best Fora to pass "interim" orders.

15. Since parties could not agree to a consent interim arrangement, we had heard learned counsel for parties on November 07, 2012, limited to the issue of balance of convenience alone and notwithstanding learned counsel for parties repeatedly attempting to urge on the merits, we had repeatedly brought them about to address arguments on balance of convenience.

16. Now, the blanket restraint order as per direction No. (ii) in the final order dated October 03, 2012, that BPTP will cease further activity in relation to projects "A" and "M" and maintain status quo in relation to the selected projects has adversely affected rights of third parties. Nearly 50% of flats in one project and 70% flats in the other project have been booked. Third parties have made payments to the tune of Rs. 213 crores. It is settled law that interim orders affecting third party rights should normally not be passed. Balance of convenience requires interim orders of a kind which affect third parties not to be passed.

17. Pending adjudication of the dispute, whether clause-10 of the MOU fouls Foreign Exchange Management Act or not and whether letters to said effect obtained by BPTP from RBI are self-serving letters, procured on selective information made available to RBI; a charge levied by CPI India Ltd., which would be debated by the parties before the learned Arbitrator, only on balance of convenience, the second direction in direction No. (ii) in the order dated October 03, 2012 needs to be vacated. But upon the term that further money received with respect to projects "A" and "M"; which would include further installments payable by the existing flat buyers would be put in an escrow account, details whereof would be made available to the Arbitrator within two weeks from today and utilization of the said amount would be only with the permission of the learned Arbitrator.

18. We note that the learned Single Judge, in the first part of direction No. (ii), has directed accounts to be furnished with respect to monies collected by sale of units in projects "A" and "M" and in the second part of direction No. (ii) has restrained BPTP Ltd. from continuing with any activity in relation to the two projects. This would mean that BPTP cannot collect any further money payable towards installments by the flat buyers and construction activity has to cease with respect to the under-construction flats. This direction is likely to invite litigation by the flat buyers against BPTP Ltd. and would be detrimental to the interest of even CPI India Ltd.

19. As a result of our proposed direction, third party litigation would be avoided. Money which has been prohibited to be received by BPTP Ltd. would be received by BPTP Ltd. and put in an escrow account; operation whereof would be subject to orders which may be passed by the learned Arbitrator and this would be

beneficial to CPI India Ltd. as well.

20. Now we highlight the problem with respect to direction No. (i) in the order dated October 03, 2012.

21. It continues the injunction passed on July 04, 2012 i.e. prohibits BPTP to give effect to the resolution passed by the Board of Directors on June 29, 2012.

22. With respect to the various resolutions passed at the Board Meeting on June 29, 2012, Sh. Rajiv Nayar, Sr. Advocate and Sh. N.K. Kaul, Sr. Advocate conceded that such resolutions which were passed unanimously need not be stayed and suitable orders be passed. However, learned counsel submitted that the resolution permitting the company to raise a loan from IFCI Ltd. be stayed in view of the fact that Kabul Chawla and other majority directors have siphoned away the funds thereby diminishing the interest of their clients and any further encumbrance on the assets of the company would be detrimental to the interest of CPI India Ltd.

23. The contention urged by Sh. Harish Salve, learned senior counsel for BPTP Ltd. was that the loan was sanctioned by IFCI Ltd. on June 20, 2012 for the purpose of running the business of BPTP Ltd. and discharge government dues which was vital for the survival of the company. The interim order, on the principle of balance of convenience, would jeopardize the running and established business of the company which is executing 25 projects by itself or through its subsidiary companies. Learned senior counsel highlighted that the land of the other six projects was available and other lands available with the company, as per valuation by Cushman & Wakefield were in sum of Rs. 1176.6 crores. Learned senior counsel urged that the interest of CPI India Ltd. is fully protected and that the loan would be strictly used to pay government dues, payment whereof would enhance the value of the lands held.

24. Once again, the suggestion and the argument was met by projecting merits of the controversy, an area which we refused to enter and caution counsel repeatedly not to enter.

25. Now, we have already highlighted that only such interim measure needs to be put into place which would enure for the next four months because by then the learned Arbitrator would be in a position to pass interim orders. We have already highlighted that except for balance of convenience, nothing else would and should weigh with the Court when the mode of disposal of the matter adopted is not to decide even prima facie the rival contentions.

26. Now, whatever may be the dispute on the evaluation by Cushman & Wakefield, we have to keep in mind that the investment by CPI Ltd. is in sum of Rs. 322.5 crores and the date of the investment is August 10, 2007. As a thumb rule, even if we were to take interest at a reasonable rate to secure its interest on equitable principles, the interest which needs to be secured is around Rs. 500 crores.

27. Discounting by 50% the valuation by Cushman & Wakefield where the assets have been valued at Rs. 176.6 crores, assets available with BPTP Ltd. would be around Rs. 500 crores. It may be true that BPTP Ltd. has received Rs. 213 crores from projects "A" and "M" and it has acted as a Judge of its own cause by breaching the MOU on the reasoning that clause-10 of the MOU violates Foreign Exchange Management Act, but CPI India Ltd. can be well protected by directing the balance amounts realizable which we are informed would be to the same amount i.e. Rs. 213 crores from the flat buyers to be put in the escrow account and simultaneously permit BPTP Ltd. to raise the loan from IFCI but upon the condition that existing shareholding in the company would not be altered and the loan would be utilized for paying government dues and particulars thereof be disclosed to the learned Arbitrator; clarifying that the loans could be paid with respect to lands held in the associate companies as well inasmuch as they are more in the nature of Special Purpose Vehicles.

28. We highlight that the interim order passed by the learned Single Judge is likely to stop vital oxygen supply to BPTP Ltd. and if the company dies it would be prejudicial to the interest of CPI India Ltd.

29. We accordingly dispose of all the three appeals modifying the directions issued by the learned Single Judge resulting in the OMP filed by CPI India Ltd. being disposed of by directing that subject to the learned Arbitrator passing interim orders, BPTP Ltd. and its directors shall:-

(i) be permitted to raise Rs. 125 crores by way of loan from IFCI Ltd. but without altering the shareholding of BPTP Ltd.;

(ii) the loan would be used to pay Government dues by BPTP Ltd. or its associate companies and details would be furnished to the learned Arbitrator;

(iii) BPTP Ltd. shall continue with the ongoing projects pertaining to the lands mentioned as Project "A" and Project "M" in the Schedule to the MOU, which would entitle BPTP Ltd. to enlist further flat buyers for the remaining towers proposed to be constructed in the two projects and BPTP Ltd. would be permitted to receive money from the existing flat buyers and further enroll flat buyers but would open an escrow account within a week from today, details whereof would be furnished to the learned Arbitrator and the amounts realized would be deposited in the said account; utilization whereof would be as per interim orders obtained from the learned Arbitrator;

(iv) BPTP Ltd. would not take any further decision pertaining to obtaining loans or encumbering any of its asset and likewise neither associated company, which has been impleaded as a respondent in the OMP, would do so;

(v) BPTP Ltd. shall provide, by filing an affidavit of Sh. Kabul Chawla before the learned Arbitrator within four weeks from today, a detail of the existing flat buyers who have booked flats in the two projects "A" and "M" with details of the amounts received from them including the details as to how the money received

was utilized; and

(vi) BPTP Ltd. shall not commence any booking of flats in the remaining six projects enlisted in the Schedule to the MOU dated December 19, 2009.

No costs.