
(2012) 05 DEL CK 0286
In the Delhi High Court
Case No : O.M.P. 172 of 2012

CVCIGP II Client Rosehill Limited and Others APPELLANT
Vs
Sanjay Jain and Others RESPONDENT

Date of Decision : 01-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2012) 05 DEL CK 0286

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Rajiv Nayar, with Mr. Neeraj Sharma, Ms. Roopali Singh and Ms. Archana Lakhotia, for the Appellant; Neeraj Kishan Kaul with Mr. Vineet Malhotra and Mr. Vikas Arora, Advs, for the Respondent

Judgement

G.S. Sistani, J.

IA.No.3411/2012 (EXEMPTION)

1. Allowed, subject to just exceptions. Application stands disposed of.

O.M.P. 172/2012

2. This is a petition u/s 9 of the Arbitration & Conciliation Act, 1996 seeking interim relief.

3. Facts of the case, as stated in this petition, are that petitioner nos.1 and 2 are companies incorporated under the laws of Mauritius. Petitioner Nos.1 and 2 are private equity investors and are part of the Citi Venture Capital International, a business unit of Citigroup. Petitioner No. 3 to 6 are the trust funds existing and registered under the laws of India. All the petitioners are shareholders of respondent No. 4. Respondent Nos. 1 and 2 are the promoters and principal shareholders of respondent nos. 3 and 4 and directly or indirectly own, control and manage respondent nos.3 and

3. Respondent nos. 1 and 2 are designated Chairman and Vice Chairman of both

Respondent Nos. 3 and 4. Respondent No. 3 is a public limited company incorporated in India under the provisions of the Companies Act, 1956 and is primarily engaged in manufacturing sandalwood oil and perfumery. Respondents No. 4 is a public limited company incorporated in India under the provisions of the Companies Act, 1956 with the object to engage in the business of mining and sale, including treating, converting, marketing export and import of marble. The petitioners and the respondents executed a restated share purchase agreement dated 11.03.2011 ("Restated SPA"). As per the Restated SPA respondents No. 1, 2 and 3 agreed to purchase 662,600 equity shares of respondent No. 4 from the petitioners for the aggregate purchase consideration of Rs. 1,500,000,000.25. The purchase consideration was to be paid in the following manner:

Tranche No.

Date

Total Tranche Shares

Total Tranche Consideration (INR)

1.

March 12, 2011

55,216

124,998,490.97

2.

March 22, 2011

55,216

124,998,490.97

3.

April 30, 2011

110,434

250,001,509.31

4.

May 30, 2011

198,780

450,000,000.00

June 30, 2011

242,954

550,001,509.00

TOTAL

662,600

1,500,000,000.25

4. Simultaneously with the execution of the Restated SPA, respondent No. 3 issued post dated cheques to petitioner Nos.1 and 2 for the payment of purchase consideration for tranche No. 1 and 2 shares. Subsequently, respondents No. 1, 2 and 3 paid part purchase consideration for tranche Nos.1 and 2 for the aggregate sum of Rs. 249,996,981.93 to the petitioner nos.1 and 2 on 22.03.2011, 04.05.2011 and 07.05.2011 through respondent No. 3. However, despite issuance of post dated cheques, which stand dishonoured, the balance amount totaling to Rs. 1,244,947,936 has not been cleared. To secure the balance purchase consideration of Rs. 1,250,003,018.31 due and payable by respondents No. 1, 2 and 3 in terms of the Revised SPA, the petitioners have filed the present petition inter alia with the prayer that respondents No. 1 to 4 be restrained from alienating, disposing of, dealing with, encumbering or creating any third party rights over their assets and properties.

5. While issuing notice in this matter, this court had restrained respondents No. 1 to 4 from alienating, disposing of, dealing with, encumbering or creating any third party rights over their assets and properties, except in the ordinary course of business. After receiving notice, respondents filed application (I.A. No. 6991/2012) seeking modification of the order dated 22.02.2012. In the said application filed, respondent No. 4 gave an undertaking that it would not dispose of the fixed assets of the company during the pendency of the present petition. It was further stated that respondent No. 4 is a limited company and has fixed assets in the form of land and building for about 420 crores, as per the audited balance-sheet. A separate undertaking in the form of affidavit has also been filed. Subsequently the respondents have filed undertaking of Sh.Sanjay Jain and Sh.Rajiv Jain, who are arrayed as respondents No. 1 and 2 in this petition. Paragraphs 2 to 5 of the undertakings given by Sh.Sanjay Jain and Sh.Rajiv Jain, read as under:

Affidavit of Sh. Sanjay Jain

2. I state that I presently hold 23.93% shares of SVIL Mines Ltd. in my own personal name. That M/s. Surya Vinayak Hospitalities Pvt. Ltd. in which I along with Rajeev Jain are major shareholders hold 31.02% shares of SVIL Mines Ltd.

3. Sh.Rajiv Jain holds 16.48% shares in his own name and M/s. Surya Vinayak Hospitalities Pvt. Ltd hold 31.02% shares of SVIL Mines Ltd. That presently our collective joint holding in SVIL Mines Ltd. is 71.43%.

4. M/s. Surya Vinayak Hospitalities Pvt. Ltd. is a company in which about more than 98% shareholding is with me and /or Rajiv Jain.

5 I undertake to this Hon''ble Court that I along with Rajiv Jain and/or M/s.Surya Vinayak Hospitalities Pvt. Ltd. jointly and /or singly shall always hold at least 50% shareholding in SVIL Mines Ltd. throughout the pendency of this petition and/ or as otherwise directed by this Hon''ble Court am attaching a board resolution of M/s. Surya Vinayak Hospitalities Pvt. Ltd. authorizing furnishing of an undertaking to this Hon''ble Court is attached herewith as U-1."

Affidavit of Mr.Rajiv Jain

2. I state that I presently hold 16.48% shares of SVIL Mines Ltd. in my own personal name. That M/s.Surya Vinayak Hospitalities Pvt. Ltd. in which I and Sanjay Jain hold 31.02% shares of SVIL Mines Ltd.

3. Sh.Sanjay Jain holds 23.93% shares in his own name and M/s.Surya Vinayak Hospitalities Pvt. Ltd hold 31.02% shares of SVIL Mines Ltd. That presently our collective joint holding in SVIL Mines Ltd. is 71.43%.

4. M/s. Surya Vinayak Hospitalities Pvt. Ltd. is a company in which about more than 98% shareholding is with me and /or Sanjay Jain.

5. I undertake to this Hon''ble Court that I along with Sanjay Jain and/or M/s.Surya Vinayak Hospitalities Pvt. Ltd. jointly and /or singly shall always hold at least 50% shareholding in SVIL Mines Ltd. throughout the pendency of this petition and/ or as otherwise directed by this Hon''ble Court am attaching a board resolution of M/s.Surya Vinayak Hospitalities Pvt. Ltd. authorizing furnishing of an undertaking to this Hon''ble Court is attached herewith as U-1."

6. Paragraph 2 of the undertaking given by Mr. Manmohan Garg, Director of respondent No. 4, reads as under:

2. The respondent undertakes to this Hon''ble Court that until the pendency of the present petition or as directed by this Hon''ble Court, the Respondent will not create any further third party rights of any kind whatsoever including but not limited to mortgage, lien or any other charge and will also not transfer or alienate the said fixed assets of respondent No. 4 company as shown in the balance sheet until further orders of this Hon''ble Court. A copy of balance is annexed hereto and marked as Annexure-A.

7. Counsel for the respondents submits that without admitting that any amount is due or there is a valid arbitration agreement between the parties, the respondents are willing to secure the interest of the petitioner. Mr.Kaul, learned senior counsel for the respondents submits that the fixed assets of respondent No. 4 company are over 420 crores, although the assets have been mortgaged to PNB as also other banks, but the total outstanding is not more than Rs. 300 crores, and still leaves the balance of Rs. 120 crores; and in case the petitioner succeeds the interest of the petitioner would stand fully secured.

8. Mr. Nayar, learned senior counsel for the petitioner submits that respondents have failed to get no objection from the Bank, allowing them to create a second

charge over the properties and further the respondents No. 1 and 2 as also director of respondent No. 4 are not empowered to give the undertaking.

9. I have heard counsel for the parties and perused the undertakings, which have been filed in this court and extracted above. While issuing notice in this matter, this court had restrained respondents No. 1 to 4 from alienating, disposing of, dealing with, encumbering or creating any third party rights over their assets and properties, except in the ordinary course of business. At that stage, counsel for the petitioners was specifically asked to give the details of the assets, however, the counsel was unable to do so and in view thereof, a general order granting protection, was passed. As per the affidavits filed and submissions made, the assets of the respondents are far more than the liabilities, which are sought to be recovered by the petitioner. Accordingly in my view a general order cannot be passed, restraining the respondents from selling of their assets especially when the petitioner has not disclosed the list of assets of the respondents, however, it is also necessary to balance the equities and to ensure that the petitioners should not suffer, in case the respondent sells its assets to defeat the claim of the petitioner of Rs. 120 crores. As per the affidavits and the undertakings which have been filed on record, the fixed assets of respondents are more than 420 crores. No doubt the properties have been mortgaged to banks, but as per the respondents, even after the limit provided by the banks more than 95 crores is available. As per the undertakings of Sh.Sanjay Jain and Sh.Rajiv Jain, they along with M/s.Surya Vinayak Hospitalities Pvt. Ltd. shall jointly or singly always hold at least 50% shareholding in SVIL Mines Ltd. throughout the pendency of this petition or as directed by the Court. As per the undertaking of Mr.Manmohan Garg, Director of respondent No. 4, the respondent will not create any further third party rights of any kind whatsoever including but not limited to mortgage, lien or any other charge and will also not transfer or alienate the said fixed assets of respondent No. 4 company as shown in the balance sheet until further orders of this Court. The undertakings of the Sh.Sanjay Jain (respondent No. 1), Sh. Rajiv Jain (respondent No. 2) and Sh.Manmohan Garg (Director of respondent No. 4) are accepted and taken on record. The respondents shall be bound by the undertakings given. Counsel for the respondents submits that respondents have been explained the consequences of breach of undertaking. The respondents shall also inform the bank about the second charge created in view of the orders passed today. Interim order is modified accordingly. Undertakings shall remain in force, unless the interim order is modified by the arbitrator. Liberty is also granted to the parties to approach the arbitrator when appointed for modification or for seeking further orders, if so advised. Petition is accordingly, disposed of.