

(2020) 01 DEL CK 0619

In the Delhi High Court

Case No : Original Miscellaneous Petition (I)(COMM.) No. 459 Of 2019,
Miscellaneous Application No. 18200, 18202 Of 2019, 762, 4252 Of
2020

Kkr India Private Financial Services Litimited & Anr.

APPELLANT

Vs

Williamson Magor & Co. Limited & Ors

RESPONDENT

Date of Decision : 23-01-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Order 39 Rule 4
Arbitration & Conciliation Act, 1996 — Section 9
Companies Act, 213 — Section 42, 62

Citation : (2020) 01 DEL CK 0619

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Akhil Sibai, Yashvardhan, Murtaza Somjee, Shantanu Parashar,
Kritika Nagpal, Padam Khaitan, Jeevan Ballav Panda, Shalini Sati Prasad, Satish
Padhi, Shourya Sen Gupta, Srinjoy Bhattacharya, Mehra Tandon, Gaurav Sharma

Final Decision : Allowed

Judgement

V. Kameswar Rao, J

I.A. 4252/2020

1. This is an application filed by respondent No.7 for early hearing of application being IA 18200/2019, which has been filed by the said respondent for the vacation of order dated December 13, 2019, whereby this Court passed an order restraining respondent No. 7 from selling, transferring, alienating, disposing, assigning, dealing or encumbering or creating third party rights on their assets and from carrying out any change in its capital structure, or any corporate or debt restructuring.

2. Mr. Sandeep Sethi, learned Senior Counsel for the respondent No.7 would submit that this application has been necessitated in view of the extra-ordinary distressful situation in maintenance and upkeep of its business operations that

the respondent No. 7 is finding itself in as a result of the current pandemic situation which has arisen due to the spread of Covid-19, which is supplemented by way of operation of the order dated December 13, 2019 passed in the present matter. According to him, due to restrictions imposed by the Government, to contain Covid-19, factories are operating in a gradual and phased manner and not at their optimum level, on account of social distancing measures being adopted for ensuring safety. Furthermore, fund crisis has also been prevalent in the market because of restricted fund rotation on account of Covid-19 and on this account the respondent No. 7 has also squeezed its working capital limits to extend credit in the market. According to him in view of the grave financial hardships and the restrictions imposed by the interim order dated December 13, 2019 of this Court, the respondent No. 7 was left with no other alternative but to approach its bankers for extension and provision of additional credit facilities. However, due to the continued operation of the order dated December 13, 2019 and financial impact thereof upon the respondent No. 7, the lenders are unwilling to increase their exposure with respondent No. 7 by way of making further financial support, and thus, the respondent No. 7 is left with no option but to explore measures inclusive of capital infusion to raise immediate funds and cater to its requirements.

3. According to Mr. Sethi the application IA 18200/2019 was listed on January 12, 2020 and on February 06, 2020 when arguments were heard in part and even the directions to file affidavit of assets have been complied with. However, on subsequent dates, the matter could not be heard effectively due to paucity of time. As a result, the said application of the respondent No.7 has remained unadjudicated till date.

4. Mr. Sethi lay stress on the fact, on April 30, 2020, the respondent No.7 has filed an application seeking urgent listing and hearing of the matter due to the prejudice and harm being caused because of the operation of the order dated December 13, 2019. The matter was subsequently taken up on May 13 2020, when the matter was directed to be listed on the date previously fixed, i.e., on June 19, 2020 for hearing. He states, in the meanwhile, respondent No. 7 wrote to its bankers, i.e. RBL Bank, on May 27, 2020, requesting for grant of additional credit facilities to the tune of INR 100 Crore on mutually agreed terms and conditions to ease the ongoing and impending crisis being faced by respondent No. 7. The respondent No. 7 also apprised the bank that due to the operation of the nationwide lockdown, it had become exceedingly difficult for its distributors to pay respondent No. 7 various sums due and payable in view of the non-availability of working capital in the hands of such distributors. He states that since batteries are declared as essential goods, respondent No. 7 is in a dire need to overhaul its production which required funds for conducting operations and also for enhancement of overall capacity in a changed scenario of operation, whilst maintaining social distancing in order to manage high market demand.

5. In substance, request was made to the Bank for loan facility. He states, that

the Bank, vide its email dated May 28, 2020, replied to the request of the respondent No.7- applicant herein that; (i) need of the respondent No. 7 was understood by the bank in the current situation to meet the existing requirement of having a readily available reserve of working capital; (ii) the need to incur capex to capture the opportunity in the market created by potential work for import substitution was understood and acknowledged by the bank; (iii) the bank was 'in principle' cognizant of the need and opportunity of respondent No. 7, but was unable to step in to support respondent No. 7, given the deterioration in the respondent No. 7's financial position, as shown by various financial indicators, which reflected steadily deteriorating credit rating of respondent No. 7 which currently stands at a 'sub investment' grade, thereby meaning that no prudent financial institution/lender would be willing to provide capital / financial support to a company which is not deemed to be fit to make investments and give expected returns; (iv) Bank stated that such state of respondent No. 7 was indicative of increasing financial risk to any potential lender. Bank accordingly suggested that respondent No. 7 should consider raising fresh equity and accelerate the disposal of its non-core assets, which, in turn, would decrease the respondent No. 7's financial burdens significantly and also help enhance their profitability and debt service capability.

6. According to Mr. Sethi, from the Bank's reply, it is clear that it has suggested that in order to be eligible to be granted credit facilities, the respondent No. 7 must raise fresh equity, accelerate the disposal of its non-core assets and obtain a better credit ranking. However, the respondent No. 7 is unable to do so, on account of the subsistence and operation of the order dated December 13, 2019, which is causing undue hardship to the respondent No. 7's business operations and ability to fulfil its financial commitments and duties as a responsible employer / organisation. Mr. Sethi, in fact, has made a submission that in the absence of any arbitration agreement between the petitioner and the respondent No.7, the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 is not maintainable against the respondent No.7 and the ex-parte ad interim order dated December 13, 2019 is illegal and is bad in law and is liable to be vacated. That apart, it is his submission that the petitioners having obtained an ex-parte ad interim order, have deliberately taken all possible steps to derail the proceedings and ensure that the matter is not fully heard and disposed of in a timely manner. The petitioners in fact deliberately and intentionally did not provide consent for the listing of the matter despite the office order released by this Court on April 26, 2020 specifically provided that pending Section 9 petitions, which are ripe for final hearing during the suspension period can be heard during this period. He states, that the prayer as made in the application be granted.

7. Mr. Sudhir Makkar, learned Senior Counsel also appearing for respondent No.7, apart from adopting the arguments of Mr. Sethi also states that the application being IA 18200/2019 is an application akin to an application under Order 39 Rule 4 CPC and is required to be decided at the earliest. He states, the stand of the

petitioner in opposing the present application for early hearing of the said application is totally misconceived and liable to be rejected.

8. Mr. Jayant Mehta, learned Counsel appearing for the respondent No.5 also states that the respondent No.5 has also filed an application for vacation of the order dated December 13, 2019. He also joins Mr. Sethi and Mr. Makkar for the early disposal of the application on behalf of respondent No.5 as well.

9. Mr. Akhil Sibal, learned Senior Counsel appearing for the petitioners / non-applicants would state that applications for vacation of order dated December 13, 2019 have been filed by respondent Nos.5, 6 and 7 but the application for early hearing of an application for vacation of stay has only been filed by respondent No.7, which implies that there is no urgency in the matter for it to be heard during the suspended functioning. That apart, it is his submission that the application would show that no ground exist for early hearing of IA 18200/2019. He states, that the respondent No.7 has merely placed reliance on self serving e-mails unsupported by any document along with the instant application. The said e-mails themselves establish the poor financial health of the respondent No. 7 and that the purported refusal for extension of credit facilities is solely due to its weak financial health and not on account of the order dated December 13, 2019 passed by this Court or the current pandemic situation. In substance, it is his plea that respondent No. 7 is trying to take undue advantage of the current pandemic situation due to spread Covid-19 in a bid to get the order dated December 13, 2019 vacated without ensuring its compliance in full spirit.

10. In fact, it is his submission that the respondents' poor financial health, including that of respondent No. 7, is one of the factors which necessitated passing of order dated December 13, 2019 by this Court. Mr. Sibal also stated that the respondent No.7 has utterly failed to provide any details regarding the purported "capital infusion" and its compliance of various statutory requirements towards the same. He states, for a listed company any proposal to raise equity is subject to rigorous set of approvals and disclosures. Raising funds through equity issuance can be done either by way of a rights issue or a private placement. In each case, the proposal must first be approved by the Board of Directors and thereafter disclosed to the public shareholders under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. In addition to the above, the actual issuance and allotment of equity would require shareholders approvals under Section 42 and Section 62 of the Companies Act, 2013 as well as rigorous compliance with the rules framed thereunder. The respondent No. 7 has failed to put on record any such board approval, nor any disclosure has been made by the respondent No. 7 to its shareholders, disclosing its intention to issue and allot such equity shares. If the respondent No. 7 was genuine about its intentions it would have sought necessary approvals which would have been subject to the permission of this court. Therefore, the present application is nothing but a malafide attempt of the respondent No. 7 to take undue advantage of the current pandemic situation on

account of Covid-19. He also states that the respondent No.7 has failed to provide relevant details as to how and what non-core assets it intends to sell and has merely placed reliance on some self-serving mails, which by no means, display any urgency. In this regard, he has tried to draw an inference from the application filed by the respondent no.7 with regard to its property situated in Hyderabad and the order passed by this Court. In other words, no such application has been filed now. Hence, the ploy to infuse funds in the company is just an eye-wash. He has also drawn my attention to the proceedings initiated by the petitioner before the ICC, wherein the respondent No.7 has sought time from ICC to answer to the request of arbitration of the petitioners till June 30, 2020 to contend that the respondent No.7 has not shown any urgency to proceed with the matter before the ICC whereas in the present case, the respondent No.7 is contending urgency, which clearly and unequivocally proves that the respondent No.7 is approbating and reprobating at the same time and the present application has been moved with the sole and oblique motive of derailing and delaying the arbitral proceedings. He also states that the respondents undisputedly owe approximately Rs. 289 Crores to the petitioners and till date, the interests of the petitioners remain unsecured by the respondents, thus, clearly establishing their inability to satisfy arbitral award. Hence, the respondent No. 7 is merely attempting to take advantage of the current pandemic situation to somehow avoid its liability to secure the interests of the petitioners and restructure its assets in a manner prejudicial to the interests of the petitioners. He also states the policy order issued by this court stipulate with the consent of the other side, the matter can be fixed for final hearing and as the petitioners have not given consent, the application cannot be listed for hearing.

11. Having heard the learned counsel for the parties, it is clear from the above that the petitioners through Mr. Sibal are opposing the prayer of early hearing of IA 18200/2019 primarily on the ground that no urgency has been shown by respondent No.7, inasmuch as; (i) the ground of financial distress has been in existence before the passing of the order dated December 13, 2019; (ii) raising funds has to be done through a process recognized in law, which has not been substantiated by respondent No.7; (iii) in the reply of the bank, to the petitioners to infuse equity by selling its core assets has not been substantiated. The respondent No.7 has not filed any document in that regard. Even previously the respondent No.7 has falsely portrayed urgency for selling the land in Hyderabad and had obtained the order dated December 24, 2019. However, the respondent No.7 postponed the sale to January 30, 2020 clearly establishes no urgency; (iv) on one hand the proceedings before the ICC are being delayed on the ground of pandemic situation in view of Covid-19 but on the other, for the same reason, they are seeking early hearing of this application.

12. There is no dispute to the fact that on December 13, 2019, this Court had passed an order against the respondents, including respondent No.7 restraining them from taking certain measures. The very fact that an order has been passed and it is the case of the respondent No.7 - applicant that it is prejudiced with

that order is itself a ground, which indicates urgency. The grounds, as urged by Mr. Sibal are primarily opposing the vacation of stay. The same can be urged when the application being IA 18200/2019 shall be heard.

13. One of the submissions of Mr. Sibal is that in terms of policy of this Court, with the consent of the other party, the matter can be listed for hearing and no consent having given by the petitioners, this matter cannot be heard, is totally misplaced. The said order has to be read in the context that if in normal course, both the parties agree for hearing of a matter, the matter can be heard. But nothing precludes the respondent no 7 or any other party to file application for early hearing. Similarly nothing precludes the Court to consider such an application and pass appropriate orders including fixing the matter for hearing. In other words, nothing precludes the Court on the judicial site to consider an application for early hearing.

14. Having said that, this court deems it fit to allow the present application for early hearing of application being IA 18200/2019, which I have heard in the past as well, along with similar applications for vacation of stay. I accordingly, list the applications for hearing on 16th July, 2020.

15, Application disposed of.