

(2015) 01 SC CK 0071

In the Supreme Court Of India

Case No : I.A. Nos. 31-33, 34-36, 43-44 in Compt. Pet. (C) Nos. 412, 413/2012 in C.A. Nos. 9813 and 9833/2011, I.A. Nos. 90-91 in C.A. Nos. 9813 and 9833/2011, C.P.(C) No. 260/2013 in C.A. No. 8643 of 2012 and T.C.(C) Nos. 83, 87, 86, 84 and 85/2014

S.E.B.I.

APPELLANT

Vs

Sahara India Real Estate Corpn. Ltd. and Others

RESPONDENT

Date of Decision : 09-01-2015

Acts Referred:

Citation : (2015) 1 SCALE 769 : (2015) 131 SCL 584

Hon'ble Judges : Arjan Kumar Sikri, J.;Anil R. Dave, J.;T.S. Thakur, J.

Bench : Full Bench

Final Decision : Dismissed

Judgement

I.As. No. 37-39:

1. Taken on Board. By our order dated 22.07.2014 we had allowed I.As. No. 10 - 12 of 2014 filed by the contemnors and permitted Saharas to transfer, sell or encumber three offshore hotel properties owned by them subject to the condition that the entire sale consideration received by the Saharas after repayment of the loan outstanding towards the Bank of China is deposited with SEBI in compliance with the directions contained in the conditional bail order of this Court dated 26.03.2014. We had further directed that the excess amount, if any, shall be deposited by the Saharas in a separate account to await orders from this Court regarding their utilisation and that the sale of offshore properties shall not be at a price lesser than the value estimated by CBRE and JLL for the said properties reduced at the most by 5% of such value.

2. Pursuant to the above order Saharas had started negotiations with the parties willing to purchase the said offshore properties. In the course of the said negotiations a certain "In Principle Agreement" was also it appears drawn up but before the deal could be finalised difficulties appear to have arisen on account of adverse publicity and demonstration by a section of the public against the

proposed sale of the properties to a particular entity. To cut the long story short the proposed sale of the property in terms of the in Principle Agreement has in due course fallen through leaving no option for the Saharas except to explore alternative methods of sale/transfer or mortgage of the said properties to raise the requisite amount. It is in that backdrop that Saharas have filed I.As. No. 37-39 in which among others they have sought from this Court the following two reliefs:

a) Grant its permission, whether by Oasis or by some other arty, of Bank of China's loans to Sahara (including the related securities) and the amendment of the terms and conditions applicable to such loans.

b) grant its permission for raising of additional junior loans of up to US \$ 650 million and the creation of subordinate charges on the said 3 foreign hotel properties (or on Sahara's shareholding in the relevant hotel owning companies)

3. When these I.As. came up for hearing before us on 02.12.2014 we were informed by M/s. Rajeev Dhawan and S. Ganesh senior advocates that in terms of the fresh proposal mooted by Sharas the Bank of China's outstanding loan shall be repaid by substituting another lender in its place with the permission of this Court. Besides Sharas propose to raise an additional junior loan for a sum of Us 640 millions against the offshore properties mentioned above. M/s. Arvind Datar, appearing for SEBI and Shekhar Naphade as an Amicus Curiae had sought some time to examine the proposed transactions and the documents relating thereto. They had also asked for certain further information in regard to certain aspects before they make their submissions. We are told by Mr. Ganesh that queries raised by the learned Counsel opposite have since been answered and explained in writing and that what remains is only an apprehension expressed by M/s. Naphade and Datar regarding the permissibility of bringing into India the money that may be raised towards proposed junior loan against the said properties. Mr. Naphade holds the view that no amount borrowed from outside the country can be brought into India with a view to repaying any outstanding liability. He urged that apart from statutory and other complications in the matter. Sahara may have to seek the permission of the competent authority in the Reserve Bank of India under the provisions of FEMA and the regulations framed thereunder.

4. On behalf of Saharas it was argued by M/s. Dhawan and Ganesh that there is a certain amount of urgency in the finalisation of the proposed deals by which Bank of China has to exit upon repayment of the loan outstanding towards it, by arranging funds from a new lender introduced as a mortgagee of the properties. They have placed before us a communication dated 05.01.2015 addressed by the Bank of America to Sahara India Pariwar inter alia stating that under directions from M/s. Mirach Capital Group LLC an amount of USD 1050 million remains blocked and earmarked till February 20, 2015 for the transactions being processed between Mirach and Sahara. The letter further states that Mirach Capital Group LLC has advised Bank of America to disburse USD 650 million out

of the said unencumbered funds of USD 1050 million for junior loan transaction as agreed between Amby Valley (Mauritius) Limited and Mirach Capital Group LLC after the execution of necessary legally binding definitive agreements and in accordance with the terms as mentioned in offer letter dated December 15, 2014 issued by Mirach Capital Group LLC and accepted by Amby Valley (Mauritius) Limited. The letter further affirms that Mirach Capital Group LLC has advised Bank of America to disburse USD 400 million out of the said unencumbered funds of USD 1050 million for the purpose of making an investment in Sahara Hospitality Limited as per offer letter dated December 15, 2015 issued by Mirach Capital Group LLC after the execution of necessary investment and ancillary agreements. What is significant is that according to the communication aforementioned Bank of America is also under instructions from Mirach Capital Group LLC to unblock the said funds of USD 1050 million if the junior loan agreement for USD 650 million and investment agreement with Sahara Hospitality Limited for USD 400 million is not executed by the end of business on February 20th, 2015. It was argued that although funds required for finalising the deal between the companies aforementioned have been blocked up to February 20, 2015 keeping in view the huge amount involved and the fact that blocking of the said amount would deprive the parties concerned of the beneficial use thereof, there is a great deal of urgency in finalising the transactions which are bound to take some time before the same are clinched by February 20, 2015, the date fixed under the instructions.

5. As regards the apprehension expressed by M/s. Naphade and Datar regarding repatriation of the amount so raised from America to India for being utilised in the manner directed by this Court, it was argued that the amount in question will first be credited in the account of Ambey Valley (Mauritius) Limited which is a wholly owned subsidiary company of Ambey Valley Limited incorporated in India. It was also submitted that any apprehension regarding misutilisation or diversion of those funds can be allayed by a direction from this Court to the Saharas to issue specific instructions to its subsidiary Ambey Valley (Mauritius) Limited not to deal with the said money or utilise the same in any manner without the permission of this Court. Insofar as the legal impediments arising out of the provisions of FEMA and other related regulations governing transfer of funds from outside India to this country for liquidation of any outstanding liability are concerned it was argued that so long as the funds remain parked with Ambey Valley (Mauritius) Limited which is the subsidiary of Ambey Valley Limited, the funds are secure against any misdirection or misutilisation. It was submitted that according to the Petitioner's understanding there was no impediment in transferring the funds to India as Ambey Valley (Mauritius) Limited owes an amount of USD 540 million towards a loan which Ambey Valley (Mauritius) Limited has borrowed from its 100% holding company in the year 2010. The amount available to Ambey Valley (Mauritius) Limited pursuant to the proposed transactions will enable the said company to repay the loan outstanding against it at least partly, if not in full. Any such repayment would not attract any

statutory or other bar as is being contemplated by the Respondents or the learned Amicus Curiae. At any rate the Saharas are ready to move the authorities concerned including the Reserve Bank of India at the appropriate level for a clear cut direction that transfer of money to India pursuant to the transactions mentioned above will not attract any provision of FEMA or the regulations framed thereunder. It was urged that Saharas will not also claim any equity in its favour in the matter of obtaining such clearance or seeking any declaration from the concerned authority nor will it place reliance upon the order passed by this Court to suggest that this Court has either expressly or any necessary implication permitted the funds to be brought into India in the teeth of any legal impediment against such movement.

6. We have given our anxious consideration to the submissions made at the bar. There is no gainsaying that the earlier proposal for sale of the off shore hotel properties mentioned earlier has not materialized. It is unnecessary for us to go into the reasons for the failure of the proposed sale but the fact remains that such sale has not fructified. In the circumstances Saharas could and indeed have come forward with an alternative proposal which as mentioned earlier involves substitution of the Bank of China by another lender and raising of a junior loan. This will according to the Saharas enable them to raise an amount that is sufficient for Saharas to provide the balance 5,000/- crores in cash and arrange for a bank guarantee of an equivalent amount. The transactions so proposed do not involve sale of the offshore properties. They simply involve an additional burden in terms of creation of a second charge on such properties. The proposed transactions have been critically examined by the learned Counsel for SEBI and by Mr. Naphade, learned Amicus Curiae appointed by this Court who have not found any fault in this Court allowing the transactions to go through subject to the condition that the amount so raised can be brought into India under the provisions of FEMA and regulations concerned.

7. In the circumstances therefore and keeping in view the submissions made at the Bar as also the safeguards that have been suggested by learned Counsel for the parties we see no reason to decline prayers (a) and (b) made in I.As. 37 and 39 as extracted in the earlier part of this order. We accordingly allow these applications to that extent but subject to the following conditions:

1) The entire amount raised pursuant to the proposed transactions less processing and other incidental expenses shall be deposited with the Ambey Valley (Mauritius) Limited with a direction from Ambey Valley Ltd., the holding company that the former shall not utilise the same except for the purpose of depositing the amount with SEBI in terms of the orders of this Court.

2) Saharas will approach the Reserve Bank of India at the appropriate level with an appropriate representation to have a suitable clarification issued as to the permissibility of bringing in the amount that may be transferred into the account of Ambey Valley (Mauritius) Limited in consequence of the transactions permitted by this Court. The representation shall be made within one week from today,

upon receipt whereof the competent authority may look into the same and pass an appropriate orders and/or issue clarification in accordance with law as expeditiously as possible but preferably within a period of two weeks from the date the representation is received. Saharas shall furnish to the competent authority all such information and documents as may be demanded by the competent authority in connection with the representation. We leave it open to the competent authority to decide in its discretion whether it would like to afford an opportunity of being heard to Saharas in the matter before issuing any such clarification.

3) In the representation as at (2) above or at any stage in the course of these proceedings or any other proceedings for that matter will not Saharas be entitled to claim any equity on the basis of this order in their favour nor will it be suggested that we have by permitting the proposed transactions presented the government or the competent authority with a fait accompli as regards transfer of the money received pursuant to the proposed transactions to India is concerned. We make it clear that we have neither examined nor expressed any opinion on the question whether the amount raised can be conditionally or unconditionally brought into India which aspect we have left for the competent authority to decide.

8. At the oral prayer made before us by Dr. Rajeev Dhawan, we direct that the facility provided to the contemnors by the jail authorities in terms of our order dated 01.08.2014 as continued from time to time shall be once again provided to the contemnors by the said authorities w.e.f. 12.01.2015 up to 20.02.2015 subject to all such conditions as have been stipulated in those orders. I.As. No. 37-39 are disposed off with the above directions.

I.A. No. 90-91:

Mr. Venugopal is permitted to file an additional affidavit setting out the details of the expenditure under different heads and disbursement thereof as claimed by the SEBI in terms of our order dated 31.08.2012 and 04.06.2014. Saharas shall be free to file a reply to the supplementary affidavit as and when the same is filed.