

(2021) 11 DEL CK 0023

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 213, 222, 225 Of 2021, Miscellaneous Application No. 12291 Of 2021

Shipra Estate Limited

APPELLANT

Vs

Indiabulls Housing Finance Limited & Ors

RESPONDENT

Date of Decision : 08-11-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11, 17

Citation : (2021) 11 DEL CK 0023

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Amit Sibal, Ankur Chawla, Gauri Rishi, Srishti Juneja, Sanampreet Singh, Vinamra Kopariha, Kaustubh Prakash, Aishwarya Vikram Rajiv Nayar, Sandeep Sethi, Rishi Agrawal, Manish K. Jha, Karan Luthra, Ankit Banati, Vishrutyi Sahni

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

Introduction

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act')

inter alia, praying that Indiabulls Housing Finance Limited (arrayed as respondent no. 1 in these petitions and hereafter referred to as 'Indiabulls') be restrained from giving effect to the Legal Notice dated 03.07.2021 (hereafter the 'impugned notice') for the sale of 100% of the equity shares of Kadam Developers Private Limited (hereafter 'Kadam').

2. Kadam is a wholly owned subsidiary of Shipra Estates Limited (hereafter 'SEL'). SEL held 9,800/- shares constituting 98% of the issued and paid-up equity shares of Kadam. Mohit Singh and Bindu Singh, two individuals, held 100 equity shares each of Kadam constituting the balance 2% of the issued equity

shares as nominees of SEL. Kadam is also a part of the Shipra group of companies. The shareholders of Kadam (SEL, Mr Mohit Singh and Ms Bindu Singh) pledged their equity shareholding in Kadam (hereafter the 'Pledged Shares') to secure financial loans extended by Indiabulls to SEL, Shipra Leasing Private Limited (hereafter 'SLPL') and Shipra Hotels Limited (hereafter 'SHL'). SEL, SLPL and SHL are collectively referred to as the 'Borrowers'.

3. By the impugned notice, Indiabulls informed Kadam, Ms Bindu Singh and Mr Mohit Singh that it had sold the entire one hundred percent shares of Kadam to Creative Souls Technology India Private Limited, (hereafter 'Creative'), which was a group company of M3M India Private Limited (hereafter 'M3M'), in terms of a Share Sale Purchase Agreement dated 01.07.2021 for a sum of Rs. 900 crores.

4. Essentially, the petitioners seek that the said transaction be interdicted.

5. The present petitions were initially heard along with a petition filed by DFL Home Developers Limited (hereafter 'DLF') under Section 9 of the A&C Act [DLF Home Developers Limited v Shipra Estate Limited and Others: OMP(I) (Comm) 209/2021] whereby DLF had inter alia sought an order restraining Indiabulls and Kadam (and its shareholders) from alienating or creating any third party rights in a land admeasuring 73 acres [2,95,421 square meters] situated in Section 128, Noida, District Gautambudh Nagar, Uttar Pradesh (hereafter 'the Property')

Factual background

6. On 31.03.2008, Kadam entered into a sub-lease agreement along with Jaypee Infratech Limited and Jaiprakash Associates Limited in respect of the Property. In terms of the said sub-lease agreement, Kadam enjoyed absolute and unrestricted right, title and interest in respect of the Property. The property constitutes the sole substantial asset of Kadam and admittedly it owns no other tangible asset.

7. The Borrowers sought financial assistance from Indiabulls and it sanctioned fourteen separate loans aggregating Rs. 2,478 crores in favour of the Borrowers. Eight loans were sanctioned in favour of SEL; four loans were sanctioned in favour of SHL; and two loans were sanctioned in favour of SLPL. It is stated by the petitioners that against the aforesaid sanctioned loans, Indiabulls disbursed an aggregate amount of Rs. 1,686.15 crores to the Borrowers. It also claimed that the Borrowers have since paid a sum of Rs. 759 crores for repayment and servicing the aforesaid loans. In terms of the subject Loan Agreements, it was agreed that security interest would be created in favour of Indiabulls in respect of various assets, including by mortgage of immovable properties, pledge of shares, hypothecation of certain assets and personal guarantees by the promoters. In terms of the Loan Agreements, the Borrowers executed twenty-two separate Pledge Agreements in terms of which shares of certain group companies were pledged to secure the loans advanced by Indiabulls. In terms of the Pledge Agreements, 100% shares of Kadam; 25% shares of SEL; 100% shares of SHL; 100% shares of SLPL; 100% shares of Verve Homes Private

Limited; and 100% shares of Regalia Properties Private Limited, were pledged in favour of Indiabulls by the concerned shareholders.

8. In addition to the above, six separate immovable properties were also mortgaged in favour of Indiabulls. This included the Property, which was mortgaged by Kadam to Indiabulls on 25.01.2018. The mortgaged properties also included plot numbers GH-1B and GH-1C, Sector-43, Noida, Uttar Pradesh. These properties were mortgaged by Regalia Homes LLP and Verve Construction LLP, respectively, in favour of Indiabulls.

9. In terms of Clause 2.3 of the Loan Agreements, the Borrower companies were obliged to ensure a security cover by creating security interest in a manner so as to ensure that the value of the mortgaged properties would at all times be at least twice the amount due from the Borrowers.

10. Initial controversy arose, inter alia, between the Shipra Group of entities (Borrowers, Kadam and its promoters) and Indiabulls, as New Okhla Industrial Development Authority (NOIDA) cancelled the NOC to mortgage Plot No.GH-1B and 1C, Sector 43, Noida, Uttar Pradesh on account of non-payment of the dues of Rs. 38,19,24,525/- in respect of the said properties. As noted above, the said properties were mortgaged by two of the Shipra Group entities (Regalia Homes LLP and Verve Construction LLP) in favour of Indiabulls. According to Indiabulls, the same impaired its security and also reduced its security cover below the threshold of twice the amount due from the Borrowers.

11. Indiabulls issued a Cure Notice dated 20.10.2020, inter alia, calling upon the Borrowers and other persons (including Kadam), who had provided the security cover, to cure the impairment of the securities available with Indiabulls within a period of fifteen days. Indiabulls claims that no steps were taken by the concerned entities to cure the impairment or provide additional security to comply with the conditions of the Loan Agreement.

12. On 05.11.2020, Indiabulls issued fourteen separate Loan Recall Notices whereby it recalled the entire outstanding loan and demanded repayment of Rs. 1763,61,85,815/- and tax deducted at source (TDS) amounting to Rs. 28,49,15,141/-, within seven days from the date of receipt of notice. According to Indiabulls, the said amount was the outstanding liability at the material time. Thereafter, on 14.01.2021, Indiabulls issued a notice communicating its intention to invoke the pledge in respect of the Pledged Shares, in terms of the Pledge Agreements.

13. Verve Construction LLP and Regalia Homes LLP filed separate Writ Petitions (being W.P.(C) 2686/2021 and W.P.(C) 2737/2021) before the Allahabad High Court impugning the action of NOIDA of cancelling/ revoking the permission to mortgage the properties in question. This Court is informed that the said petitions are pending.

Previous Litigation

14. The Loan Recall Notices as well as the notice invoking pledge of the Pledged Shares, were subject matter of the proceedings before the Court.

14.1 On 23.03.2021, the Borrowers and Kadam filed their respective petitions under Section 9 of the A&C Act [being OMP(I)(COMM) 113/2021 to 116/2021], inter alia, seeking orders restraining Indiabulls "from transferring/selling/ alienating and/or disposing off or creating any third party rights or otherwise parting with the shares pledged" in its favour. These petitions were listed on 26.03.2021 and, a coordinate bench of this Court passed an order impleading New Okhla Industrial Development Authority (NOIDA) as a respondent and further directed Indiabulls to maintain status quo with respect to the equity shares as mentioned in the petition. This included the Pledged Shares (the entire issued and paid-up equity shares of Kadam).

14.2 In the meanwhile, cheques of an aggregate value of Rs. 75,03,86,792/- issued by the Borrowers were presented by Indiabulls and were dishonored. In view of the same, Indiabulls preferred applications for vacation of the above-mentioned ad interim orders granted on 26.03.2021. On 08.04.2021, notice was issued in respect of the said applications and the same were directed to be listed on 12.04.2021. On 12.04.2021, the applications were directed to be listed on 20.04.2021 for further proceedings. Indiabulls challenged the said order dated 26.03.2021 by filing appeals before the Division Bench of this Court [being FAO(OS)(COMM) 59/2021 to 62/2021].

14.3 By a common order dated 16.04.2021, the Division Bench of this Court disposed of the said appeals by suspending the order dated 26.03.2021 and remanding the matter to the Single Judge as the Court was of the view that it was incumbent on the Court to give reasons for passing the interim orders. During the said proceedings, the learned counsel appearing for the Borrowers and Kadam expressed an apprehension that suspension of the orders dated 26.03.2021 passed under Section 9 of the A&C Act would leave Indiabulls free to invoke the pledge in respect of the Pledged Shares and, this would irreparably prejudice the interest of the Borrowers and Kadam. In response to the aforesaid contention, it was stated on behalf of Indiabulls that "the invocation of pledge of shares will be undertaken in a completely transparent manner, on a fair evaluation of the shares and that the same would also be placed before the learned Single Judge". The Division Bench noted the aforesaid contention and also observed that any such invocation would be open to challenge before the Court.

14.4 On 16.04.2021, Indiabulls issued "Notice for Sale of Pledged Shares" (hereafter the 'Sale Notice') informing the Borrowers and other concerned persons that it would proceed to sell/dispose of/transfer 10,000 equity shares of Kadam (9800 pledged by SEL and 100 each by Mohit Singh and Bindu Singh), which were cumulatively valued at Rs. 840 crores. Indiabulls further stated that although, one day prior notice was agreed to be a reasonable notice in terms of Clause 18.5 of the Pledge Agreements however, it would sell the

Pledged Shares only after 12 p.m. on 19.04.2021 in view of its commitment to maintain transparency and to sell the Pledged Shares on a fair valuation, as made to the Division Bench on 16.04.2021.

14.5 On receiving the aforesaid Sale Notice, Kadam filed an application [IA No. 5689/5690 of 2021] in its petition under Section 9 of the A&C Act [OMP(I) (COMM) 114/2021], inter alia, seeking a stay order on the Sale Notice. The said application was listed on 19.04.2021 but no interim orders were passed by this Court and the matter was listed on 20.04.2021 - the date already fixed.

14.6 In the meanwhile, the Borrowers (SEL, SHL and SLPL) and Kadam filed their separate petitions under Section 11 of the A&C Act for appointment of an arbitrator to adjudicate the disputes between them and Indiabulls. The said petitions (Arb. P. Nos. 513/2021 to 516/2021) were listed on 20.04.2021. Notice was issued in the said petitions and the matter was listed on 22.04.2021. The petitions under Section 9 of the A&C Act [OMP(I)(COMM) 113/2021 to 116/2021] were also listed on the said date. In those proceedings, the court directed the counsel to take instructions with regard to the appointment of an arbitrator and for treating the petitions as applications under Section 17 of the A&C Act.

14.7 On 22.04.2021, this Court allowed the applications filed by the Borrowers and Kadam under Section 11 of the A&C Act (Arb. P. Nos. 513/2021, 514/2021, 515/2021 and 516/2021) and appointed a former Chief Justice of India as the Sole Arbitrator.

14.8 In the proceedings relating to the petitions filed by the Borrowers and Kadam under Section 9 of the A&C Act [OMP(I)(COMM) 113/2021 - 116/2021], which were also listed on 22.04.2021, a statement was made on behalf of Indiabulls that it had sold the entire shareholding in Kadam to DLF for a sum of Rs. 900 crores. The same was disputed on behalf of the Borrowers/Kadam. In view of the controversy, this Court directed Indiabulls to produce the entire record relating to the sale of shares of Kadam in a sealed cover before the learned Arbitrator. This Court further directed that the Arbitrator would consider its effect on the prayer sought by the petitioner in terms of the observations made by the Division Bench in paragraph 10 of its order dated 16.04.2021. As noted above, in paragraph 10 of the order dated 16.04.2021, the Division Bench had noted the statement made on behalf of Indiabulls that the pledge of shares would be undertaken in a transparent manner on a fair valuation of the shares. The court had also observed that since the lis between the parties was pending before the learned Single Judge, the invocation of pledge would "obviously be open to challenge before the Court". The petitions under section 9 of the A&C Act were disposed of with the aforesaid directions and by directing that the same be considered as applications under Section 17 of the A&C Act.

14.9 Aggrieved by the aforesaid directions passed by the court in its order dated 22.04.2021, Indiabulls preferred appeals before the Division Bench of this Court [being FAO(OS)(COMM) 71/2021 to 74/2021]. The said appeals were listed on

29.04.2021. After some arguments, Indiabulls sought to withdraw the appeals and stated that it would pursue its contentions in appropriate proceedings. The appeals were, accordingly, dismissed as withdrawn.

14.10 Indiabulls filed Special Leave Petitions against the common order dated 22.04.2021 passed in Arb. P. Nos. 513/2021 to 516/2021. By a common order dated 06.05.2021 passed by the Supreme Court, the Special Leave Petitions were allowed - leave was granted; the order dated 22.04.2021 passed by a Coordinate Bench of this Court appointing the Arbitrator was set aside; and, the matter was remanded to this Court to decide the petitions under Section 11 of the A&C Act, after a reply had been filed by Indiabulls. The Supreme Court also observed as under:

"In the meanwhile, it will be open to either side to apply for urgent interim reliefs under Section 9 of the Arbitration and Conciliation Act. The Statement made by Mr. Rohtagi's client before Hon'ble Sh. T. S. Thakur, J. (Retd.) in the Section 17 application to continue until the learned Single Judge takes up and decides the Section 9 application. The Section 9 application will be decided on its own merits."

14.11 It is relevant to note that in the meantime, the matter had come up before the learned Arbitrator on 03.05.2021 and the procedural order passed by the Arbitral Tribunal, inter alia, records as under:

"8. Mr. Rohatgi makes a statement at the bar that till the matters are disposed of by the Supreme Court and till the hearing of these Applications is resumed by this Tribunal, the Respondent shall not take any precipitate action in regard to the sale / transfer of the shares of Claimant Kadam Developers Pvt. Ltd. pledged with the Respondent. That submission is recorded making it unnecessary for this tribunal to pass any further orders at this stage."

14.12 In view of the aforesaid order passed by the Supreme Court, the petitions filed under Section 9 of the A&C Act before this Court were revived [OMP(I) (COMM) 113/2021 to 116/2021].

14.13 In addition to the said petitions, the Borrowers and Kadam filed a fresh set of petitions [OMP(I)(COMM) 154/2021 to 157/2021] under Section 9 of the A&C Act seeking further interim relief with regard to all assets offered as security to Indiabulls including the mortgaged properties. As noted above, the mortgaged properties also included the Property owned by Kadam.

14.14 The said petitions were heard together and were disposed of by a common judgment dated 20.05.2021. The Court while dismissing the petitions as unmerited clarified that all observations made by the Court were prima facie and only for the purpose of deciding the said petitions.

14.15 The Court was of the prima facie view that an event of default had occurred as the security in respect of the immovable properties, which were mortgaged with Indiabulls had been impaired as the permission to mortgage certain properties was cancelled by NOIDA. The Court noted that there was a

dispute with regard to whether the Borrowers had committed a financial default, however, without going into the said dispute, an event of default on the date of issuance of the legal notice had occurred as the security in respect of the immovable properties mortgaged to Indiabulls was impaired.

14.16 Next, the Court noted a statement made on behalf of Indiabulls that the shares of Kadam had been sold to DLF. The Court prima facie found that the sale of Pledged Shares was done in a transparent manner. It noted that "Indiabulls has disclosed the purchaser and also the amount at which the sale has been done". An offer was made on behalf of Indiabulls for the Borrowers to redeem the Pledged Shares on a payment of a sum of Rs. 900 crores. However, the Borrowers had not done so. Insofar as the dispute regarding valuation of the shares is concerned, the Court observed that the same could be adjudicated only by the Arbitral Tribunal and the Court cannot interfere in this aspect. The Court further noted that a notice of invocation of pledge (Sale Notice) had been issued by Indiabulls to the Pledgors providing them an opportunity to redeem the Pledged Shares before proceeding with its sale. They had also failed to pay/deposit the sum of Rs. 900 crores, which was the stated sale consideration for the Pledged Shares of Kadam. Accordingly, the petitions were dismissed as unmerited.

15. The Borrowers and Kadam have filed appeals against the Judgment dated 20.05.2021 before the Division Bench of this Court [being FAO(OS) (COMM) Nos. 78-80 of 2021] and the said appeals are pending.

The Prior Agreement for Sale of Pledged Shares

16. After issuing the Sale Notice (Notice for Sale of Pledged Shares dated 16.04.2021), Indiabulls and DLF entered into an agreement dated 20.04.2021 (hereafter the 'DLF Share Sale Agreement') whereby Indiabulls agreed to sell the Pledged Shares (entire shareholding comprising of 10,000 equity shares of Kadam) for a consideration of Rs. 900 crores. Indiabulls and DLF also agreed that out of the said amount, DLF would pay Rs. 750 crores to Indiabulls and would infuse a sum of Rs. 150,22,85,089/- in Kadam, which in turn would be utilised by Kadam to repay the amount owed by Kadam to SEL. This would ensure that DLF acquires shares of a debt free company (Kadam). The DLF Share Sale Agreement also records the agreement between DLF and Indiabulls that they would mutually discuss and negotiate a definitive Share Sale Agreement within a period of twenty-one days from the date of the DLF Share Sale Agreement subject, to fulfillment of certain conditions including completion of the legal, financial and business due diligence of Kadam. DLF paid a sum of Rs. 100 crores as advance against the purchase consideration and the balance was agreed to be paid on the closing date. DLF was entitled to terminate the DLF Share Sale Agreement at any time prior to twenty-one days from the date of the said agreement, including on account of non-fulfilment of the condition precedents. Indiabulls retained absolute right to terminate the DLF Share Sale Agreement at any time after thirty days. DLF claims that it pursued Indiabulls to enter into a definitive Share

Sale Agreement as contemplated under the DLF Share Sale Agreement but Indiabulls failed to do so. Accordingly, by a notice dated 11.05.2021, DLF exercised its right to terminate the DLF Share Sale Agreement and demanded refund of the advance of Rs. 100 crores made against the purchase consideration. Indiabulls accepted the same and refunded the sum of Rs. 100 crores on 15.05.2021.

Agreement to Sell the Property to DLF

17. DLF claims that thereafter, in May 2021, Kadam and Indiabulls approached it for the sale of the Property instead of DLF indirectly acquiring any interest in the same by acquiring the Pledged Shares. However, Indiabulls claims that the promoters of the Shipra Group had approached Indiabulls with the proposition to sell the Property to DLF.

18. On 26.05.2021, Indiabulls issued a No Objection Certificate (NOC) for Kadam and its promoters to enter into an agreement to sell the Property to DLF subject to a sum of Rs. 900 crores being deposited directly into its bank account within a period of fifteen days from entering into the said agreement to sell. Indiabulls further specified that the said no objection would be valid till 15.06.2021.

19. Thereafter, on 30.05.2021, DLF, Kadam, Indiabulls, SEL, and Mr Mohit Singh entered into the Agreement to Sell, whereby DLF agreed to purchase the Property for a consideration of Rs. 1,250 crores subject to the terms and conditions as set out therein. In addition, DLF also agreed to pay all charges and dues to Yamuna Expressway Industrial Development Authority (hereafter 'YEIDA'). Out of the aforesaid consideration, Rs. 1 crore was paid immediately and Rs. 899 crores was to be paid directly to Indiabulls upon execution and registration of the sale deed in respect of the Property. The remaining Rs. 350 crores was to be paid by way of allotment of plots and/or built-up floors in the real estate project which was proposed to be developed by DLF on the Property.

20. On 02.06.2021, Kadam and DLF signed an application for submission to YEIDA for issuance of permission for transfer of allotment rights with respect to the Property. YEIDA sought certain compliances, including a clear No Objection Certificate from Indiabulls.

21. On 11.06.2021, the concerned parties entered into a letter agreement extending the 'Long Stop Date' as mentioned in Clause 1.1 of the Agreement to Sell the Property by a further period of seven days from 14.06.2021.

22. In the meanwhile, on 03.06.2021, Indiabulls filed affidavits before this Court in the petitions filed by the Borrowers and Kadam under Section 11 of the A&C Act (Arb. P. Nos. 513/2021 to 516/221) which were pending at the material time. It was affirmed in the said affidavits that in view of the settlement between the parties, the Agreement to Sell dated 30.05.2021 in respect of the Property was executed and an application had been made to YEIDA for transfer of the allotment rights of the Property; therefore, nothing survived in the petitions and

the same had become infructuous.

23. The sale of the Property in favour of DLF was not completed as agreed.

24. On 26.06.2021, Indiabulls sent a legal notice to DLF as well as to Kadam, SEL and Mr Mohit Singh, inter alia, stating that the sellers had failed to fulfil their obligations within the extended period (that is, till 21.06.2021). And, the NOC issued by it as well as the Agreement to Sell the Property, stood terminated and dissolved, as the timelines agreed between the parties had expired. Indiabulls also sent another letter dated 26.06.2021 to YEIDA requesting it not to transfer the Property.

25. DLF also sent a letter dated 26.06.2021 to YEIDA stating that all the conditions as set out in its letter dated 17.06.2021 were being complied with and requested YEIDA to not allow or grant any permission, consent or approval for sale and transfer of the Property to any other party whether by invocation or mortgage or otherwise.

26. In the meanwhile, DLF sent a legal notice dated 23.06.2021 to SEL, Kadam and Mohit Singh calling upon them to specifically perform their obligations under the Agreement to Sell the Property.

27. As is apparent, there is a dispute between the concerned parties regarding performance of the Agreement to Sell dated 30.05.2021. Indiabulls claims that since the condition as stipulated in the NOC issued by it was not complied with, it had no obligation to proceed with it. It also claims that Kadam, SEL and Mr Mohit Singh had failed in their obligations to close the transaction as agreed. Kadam, SEL and Mr Mohit Singh claim that Indiabulls has failed to perform its obligations. According to them, Indiabulls had agreed to accept the consideration for sale of the Property in full and final settlement of its dues but had failed to honour the bargain. DLF claims that both Kadam and Indiabulls had failed to perform their obligations and seeks to enforce the same.

Sale of Pledged Shares to Creative

28. On 26.06.2021, Indiabulls sent a notice purporting to invoke the pledge of shares of SHL.

29. DLF responded to Indiabulls' letter dated 26.06.2021 and objecting to its decision to withhold the consent for extension of the Agreement to Sell the Property. Indiabulls responded to the said letter dated 28.06.2021 reiterating its stand that its consent was conditional on receipt of money within the specified period of fifteen days and the said condition was not met.

30. On 01.07.2021, Indiabulls entered into an agreement with Creative and M3M (hereafter the 'Share Sale Agreement') for sale of the Pledged Shares (the entire issued equity shares of Kadam) for a total sale consideration of Rs. 900 crores. It was agreed that out of the aforesaid sum, a sum of Rs. 749,77,14,911/- (Rupees Seven Hundred and Forty-Nine Crores Seventy-Seven Lakhs Fourteen Thousand

Nine Hundred and Eleven Only) would be paid to Indiabulls on the closing date and, in addition M3M would infuse a sum of Rs. 1,50,22,85,089/- in Kadam which would be utilized for repayment of the loans availed by Kadam from SEL.

31. On the same date, that is, on 01.07.2021, M3M/Creative and Indiabulls entered into a Memorandum of Understanding (hereafter the 'MoU') which provided that if Mr. Mohit Singh consents to the sale of the Pledged Shares as agreed between Indiabulls and M3M/Creative, SEL would be entitled to allotment of certain immovable properties to be developed by M3M on the Property.

32. Indiabulls asserts that on 03.07.2021, M3M paid the entire consideration of Rs. 749.77 crores by a bank transfer and the transaction for sale of the Sale Shares was complete. On 05.07.2021, the Pledged Shares were duly credited in the Demat Account of M3M. On 03.07.2021, Indiabulls also informed the Borrowers and other concerned persons that the sale of 100% equity capital of Kadam was consummated. Certain additional documents were filed by Indiabulls which indicate that Creative had transferred a sum of Rs. 749,77,14,911/- from its bank accounts in fifteen tranches of Rs. 49 crores each and one tranche of Rs. 14,77,14,911/-. The bank account of Indiabulls indicate that prior to receipt of the aforesaid amount from Creative, Indiabulls had transferred a sum of Rs. 750 crores to another entity. There is some controversy with regard to this payment. Whereas, Indiabulls states that the said amount was paid to M3M; it is contended on behalf of Mr. Mohit Singh that the said payments were routed through another entity to M3M. However, it is conceded by Indiabulls that the sale of Pledged Shares on 03.07.2021 has in effect been funded by it by advancing the amounts to M3M.

33. It is in the aforesaid context that the petitioners have filed the present petition.

Submissions

34. Mr. Dave, learned senior counsel appearing for Creative submitted that the present petition was without any cause of action as the case set up by the petitioners for interdicting the sale of the Pledged Shares was concluded by the judgement dated 20.05.2021, rendered by a Coordinate Bench of this Court in OMP(I)(COMM) No.113/2021 and other connected matters. He submitted that the Court had found that there was a default on the part of the Borrowers, which entitled Indiabulls to invoke the pledge in respect of the Pledged Shares. The Court had also found that Indiabulls had invoked the pledge in a transparent manner and also made an offer for the Borrowers to redeem the Pledged Shares on payment of Rs. 900/- crores. He submitted that in view of the findings of this Court in the earlier round of litigation, there is no new ground to interdict the sale of the Pledged Shares. He contended that the question whether sale of the Pledged Shares is in violation of the order passed by the Division Bench directing Indiabulls that the shares would be sold in a transparent manner, was not relevant for the purpose of the present petition. He submitted that if the

petitioners were aggrieved by the disobedience of any order, it was open for them to initiate proceedings for contempt of court but they cannot seek an injunction on the sale of Pledged Shares on the said ground.

35. He further submitted that the transaction between Creative and Indiabulls is a commercial transaction and it could not be deprived of its bargain.

36. Mr. Sethi, learned senior counsel appearing for Indiabulls submitted that Indiabulls had already invoked the pledge in respect of the Pledged Shares by issuing a Sale Notice dated 16.04.2021. He submitted that the petitioners had sought an interim order of protection in respect of the Sale Notice by filing petitions under Section 9 of the A&C Act [OMP(I)(COMM) No.113/2021 and OMP(I)(COMM) No.116/2021] but their petitions were dismissed. He stated that the invocation of pledge had become final and therefore, the petitioners' prayer to interdict the sale of the Pledged Shares is liable to be rejected.

37. He submitted that after the disposal of the petitions filed by the petitioners under Section 9 of the A&C Act, they had approached Indiabulls for permitting them to sell the Property and in terms of the Agreement to Sell dated 30.05.2021, it was agreed that the Property would be sold for a total consideration of Rs. 1250/- crores out of which Rs. 900/- crores was to be paid immediately and the remaining Rs. 350/-crores would be provided by way of inventory of developed properties to SEL/Kadam. He submitted that the price at which the Pledged Shares were sold to Creative is identical to the consideration for the Property as agreed under the Agreement to Sell dated 30.05.2021. The consideration for the Pledged Shares is Rs. 900/- crores approximately. Creative had agreed to pay Rs. 749.11 crores to Indiabulls and to further infuse Rs. 150.22 crores by way of Inter-Corporate Deposit into Kadam for repayment of loans to SEL. He submitted that in terms of the MOU dated 01.07.2021, Creative had also agreed to provide SEL inventory of the developed property valued at Rs. 350 crores in the event SEL and its promoters agreed to the sale of the Pledged Shares. He submitted that therefore, there was no difference between the consideration as agreed for sale of the Property to DLF and for sale of the Pledged Shares to Creative.

38. Mr. Amit Sibal and Mr. Dayan Krishnan, learned senior counsels appeared for the petitioners. They contended that it was ex facie clear that Indiabulls was attempting to sell the Pledged Shares to usurp Kadam's property. It was attempting to do so by withholding the NOC for sale of the Property to DLF and, on the other hand, selling the Pledged Shares of Kadam at a value which is, ex facie, below its real value.

39. They submitted that the decision of this Court in the earlier round of litigation does not in any manner preclude the petitioners from seeking relief in these petitions in view of the events that had transpired subsequent to passing of the said order. He submitted that the parties had thereafter, negotiated and agreed to sell the Property to DLF but Indiabulls had resiled from performing its

obligations. Indiabulls had agreed to accept the consideration payable by DLF in full and final settlement of its claims but had resiled from the said understanding.

40. Further, they submitted that it is also clear from the bank accounts produced by Indiabulls that it had in a circuitous manner funded the sale of shares to Creative and the same is a benami transaction.

Reasons & Conclusions

41. The petitioners' case for an ad-interim measure of protection is mainly premised on their contention that (i) there is no default of the Loan Agreements; (ii) Indiabulls had agreed to accept the consideration for sale of the Property from DLF in full and final settlement of all claims and disputes but had resiled from its agreement; (iii) the Pledged Shares had been sold at an under value and in a non-transparent manner in violation of the order dated 16.04.2021 passed by the Division Bench of this Court; (iv) the entire exercise of sale of the Pledged Shares is to usurp a valuable property of Kadam and Indiabulls has attempted to do so by a subterfuge by creating a sale and purchase transaction and routing the consideration through Creative; (v) the purported sale of the Pledged Shares is a benami transaction; and (vi) the sale of Pledged Shares is violative of SEBI (Depositories and Participants) Regulations, 2018.

42. At the outset, it is necessary to note that both Creative and Indiabulls had addressed arguments on the premise that the sale of the Pledged Shares was in fact an indirect sale of the Property owned by Kadam. As noted above, the loans advanced by Indiabulls to the Borrowers were secured by several assets including the Pledged Shares (the entire paid-up and equity shares of Kadam) as well as by mortgage of the Property. The invocation of pledge in respect of the Pledged Shares and the invocation of security interests in the Property are not mutually exclusive. Thus, the question whether sale of the Pledged Shares is required to be interdicted must be considered independent of the disputes between Indiabulls, Kadam/SEL and DLF regarding enforcement of the Agreement to Sell dated 30.05.2021 in respect of the Property.

43. This aspect has been considered by this Court in its decision in OMP(I) (COMM) No. 209/2021 delivered today and for the sake of brevity the said reasoning is not repeated in this judgment.

44. The contention that there is lack of transparency in the manner in which the Pledged Shares have been sold to Creative is prima facie merited. Although it is stated that Mr. Mohit Singh was a party to the discussions between Indiabulls and Creative/M3M for sale of the Pledged Shares, there is no document on record to establish that any notice/letter had been issued by Indiabulls informing the petitioners that it intends to sell the Pledged Shares to Creative. Thus, prima facie, it is difficult to accept that SEL/Kadam/Mohit Singh were either informed of the intended sale of the Pledged Shares to Creative or the agreed consideration.

45. In addition to the above, Indiabulls had not disclosed that it has, in fact,

funded Creative for purchase of the Pledged Shares. The bank accounts produced by Indiabulls to show that transaction for sale of the Pledged Shares was complete and it has received the sale consideration also indicated that it had on the same date - that is, on 03.07.2021 paid a sum of Rs. 900 crores to another entity. During the course of the arguments, Indiabulls had conceded that it had funded M3M and the said loan was secured by mortgage of certain assets belonging to M3M. However, the same is also not free from controversy as the documents in respect of creating of charge in respect of those assets were filed with the concerned authorities much after 03.07.2021.

46. Mr. Sethi's contention that the Pledged Shares have been sold for a consideration of Rs. 900 crores is also not entirely correct. The sale consideration for the Pledged Shares paid by Creative is only Rs. 749.11 crores. The Pledged Shares have been sold on 'as is where is basis'. Creative had agreed to infuse a sum of Rs. 150.22 crores into Kadam. Post-acquisition of the Pledged Shares, Kadam would be the wholly owned subsidiary of Creative. It is difficult to accept that this payment would constitute the purchase consideration for the Pledged Shares. It was conceded by Mr Sethi that the same would be correctly reflected as an Inter Corporate Deposit by M3M/Creative and not as the cost of the Pledged Shares. Kadam would utilize the funds of Rs. 150.22 crores to repay its debt as this would ensure that Creative acquires Kadam as a debt free company. It is relevant to note that Kadam has not entered into any agreement with Indiabulls that would discharge its loan to SEL. However, it is apparent from the arrangement worked out between Indiabulls and Creative that, Creative would infuse Rs. 150.22 crores and the said money would be used to repay the debt owed by Kadam to SEL, which in turn would be appropriated by Indiabulls against repayment of the loans extended by Indiabulls to the Borrowers. Senu Stricto, the payment of Rs. 150.22 crores cannot be considered the consideration for the sale of Pledged Shares. Although the Pledged Shares are stated to have been sold, this amount has not been paid to Kadam.

47. Although, it is contended that in terms of the MOU dated 01.07.2021, Creative had also agreed to provide SEL inventory of developed real estate valued at Rs. 350 crores. Clearly, the same is not the agreed consideration for sale of the Pledged Shares. In terms of the impugned notice, the Pledged Shares have been sold at Rs. 900 crores.

48. It was also contended on behalf of Indiabulls that the value of Kadam's shares is derived from the value of the Property. Concededly, the value of the Property is at least Rs. 1250 crores. This is clear because DLF had agreed to pay an amount of Rs. 900 crores besides agreeing to allot developed property of a value of Rs. 350 crores to SEL/Kadam. In addition, DLF had undertaken to pay the dues and other transfer charges to YEIDA. Thus, prima facie, the consideration for the Pledged Shares does appear to be at an under-value.

49. Having stated above, this Court is also of the view that the prayers as sought for cannot be granted. This is, essentially, for two reasons. First, that there is a

finding returned by a Coordinate Bench of this Court [Judgement dated 20.05.2021 in OMP(I)(COMM) No.113/2021 and other connected petitions] that prima facie the Borrowers had defaulted in complying with the obligations under the Loan Agreements inasmuch as the security provided to Indiabulls against the loans extended to the Borrowers was impaired and the same was not cured, despite notice to do so.

50. The Court had also held that Indiabulls had invoked the pledge in respect of the Pledged Shares and was entitled to do so. Indiabulls had also filed an affidavit regarding the sale of the Pledged Shares. There is merit in Mr. Dave's contention that the prima facie finding of the Coordinate Bench of this Court in the given facts, would also be binding on this Court at this interim stage. It is thus, not open for this Court to take a different prima facie view in these proceedings.

51. Indiabulls is not required to repeatedly invoke the pledge in respect of the Pledged Shares. It was Indiabulls unambiguous stand in the earlier round of proceedings under Section 9 of the A&C Act, that it had invoked the pledge of the Pledged Shares in terms of the Sale Notice. The invocation of pledge cannot be made on multiple occasions. During the course of the proceedings before this Court in OMP(I)(COMM) No.113/202 and other connected matters (which culminated in the judgement dated 20.05.2021), SEL and other entities of the Shipra Group had sought for further time to pay the dues. However, Indiabulls had not accepted the same and insisted that its action regarding invocation of the pledge was complete. The Coordinate Bench of this Court had accepted the same and not interfered with the Sale Notice. Thus, insofar as the sale of the Pledged Shares are concerned, it would not be apposite to interdict any transaction regarding the same. This Court is prima facie of the view that the Pledged Shares have been sold to Creative at an under-value and in a non-transparent manner. Notwithstanding the same, the sale of the Pledged Shares is not required to be interdicted for the aforesaid reason. In view of the above, it is also not necessary to decide whether the invocation of pledge of the Pledged Shares is violative of the SEBI (Depositories and Participants) Regulations, 2018 in these proceedings.

52. Second, that any dispute regarding the value of the Pledged Shares would be required to be adjudicated by the Arbitral Tribunal. Once it is accepted that, prima facie, Indiabulls has rightly invoked its pledge, as held by the Coordinate Bench of this Court, the remaining issues regarding the value of shares can be agitated before the Arbitral Tribunal.

53. The issue whether Indiabulls had agreed to accept the consideration for the Property in terms of the Agreement to Sell dated 30.05.2021 as full and final settlement of all dues is also a contentious issue that is required to be adjudicated by the Arbitral Tribunal.

54. In view of the above, the present petitions are dismissed. All pending

applications are also disposed of.

55. It is clarified that all rights and contentions of the parties are reserved and any observations made by this Court are only prima facie and solely for the purposes of these petitions.