

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Pronounced on: August 07, 2012

+ **FAO(OS) No.256/2012 & C.M.No.10606/2012**

CVCIGP II CLIENT ROSEHILL LTD & ORS.

..... Appellants
Represented by: Mr. Sandeep Sethi, Sr. Advocate
instructed by Mr. Neeraj
Sharma, Mr. V. Seshagiri and
Ms. Roopali Singh, Advocates

versus

SANJAY JAIN & ORS Respondents
Represented by: Mr. Neeraj Kishan Kaul,
Sr. Advocate instructed by
Mr. Vineet Malhora, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present appeal under Section XXXVII of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) and Section 10 of the Delhi High Court Act, 1966 has been filed by the appellants against the order of the learned Single Judge dated 1st May, 2012 passed in OMP No.172/2012 whereby the appellants' petition under Section 9 of the Act was disposed of on the basis of undertakings given by the respondent Nos.1, 2 and 4.

2. The main grievance of the appellants is that the said undertakings are defective and insufficient which do not provide enforceable protection against each of the respondents. The appellants have challenged the impugned order by stating that they have been denied interim measure

of protection qua respondent No.3 despite of admitted fact that the cheques for ₹1,244,947,936/- issued by the respondent No.3 have been bounced and no undertaking was sought from the said respondent in order to secure the said amount.

3. Before dealing the rival contentions raised by the parties, it shall be useful to narrate the brief facts:

- a. In the year 2007, respondent Nos.1 and 2 contacted appellants with a proposal for equity investment in respondent No.4. The agreement was executed between the appellants and the respondents No.1, 2 and 4 as an investment agreement on 3rd September, 2007. In terms of the said agreement, the appellants subscribed to and were issued and allotted 662,600 equity shares of respondent No.4 of par value of ₹100/- at a price of ₹2,264/- per equity share, aggregating to a total capital investment of ₹1,500,126,400/-.
- b. Certain differences arose between them, as a result of which the appellants agreed to sell their shares in respondent No.4 to respondent Nos.1 and 2. They executed a Share Purchase Agreement (SPA) on 12th November, 2010 to record the terms and conditions of the sale and purchase of the said equity shares of respondent No.4. However, in breach of terms of SPA, the respondent Nos.1 and 2 failed to make the payment of the purchase consideration for the 1st and 2nd tranche of the shares payable on 15th December, 2010 and 31st January, 2011.

- c. After discussions, on the assurance of respondent No.3 who became one of the purchasers of the shares along with respondent Nos.1 and 2 and as the respondent No.3 had the financial ability to discharge obligation, the appellants agreed to execute a Restated Share Purchase Agreement. The said Restated Share Purchase Agreement was executed between the parties on 11th March, 2011. The said amount i.e. ₹1500,000,000.25 was agreed to be divided into five tranches payable on 12th March, 2011, 22nd March, 2011, 30th April, 2011, 30th May, 2011 and 30th June, 2011.
- d. In view of the said agreement, the respondent No.3 paid part of the purchase consideration for tranche Nos.1 and 2, though after considerable delay for a sum of ₹249,996,981.93/- to the appellants in installments on 22nd March, 2011, 4th May, 2011 and 7th May, 2011.
- e. As regard the remaining balance purchase consideration of ₹1,244,947,936/- for tranche Nos.3, 4 and 5 shares, the respondent No.3 issued 12 post-dated cheques. But, on each date of the cheques issued by the respondent No.3, the purchasers requested appellant Nos.1 and 2 not to bank the relevant cheques on the ground of financial distress which were accepted by the appellants.
- f. After the respondents failed to provide any confirmation when the cheques for the sale shares be banked, the appellants issued a notice to the respondents for payment of the balance purchase considered, who failed to respond the said notice.

Left with no other option, the appellant Nos.1 and 2 presented four cheques dated 27th June, 2011 and 7th July, 2011 for aggregate amount of ₹311,236,984/- on 22nd December, 2011. All the said cheques were returned on 22nd December, 2011 by the issuing bank with the advice “insufficient funds”.

- g. Similarly, when the remaining cheques were also presented, they were also returned with the remark ‘payment stopped by the drawer’. Thereafter, as the dispute arose, the appellants filed the petition under Section 9 of the Arbitration and Conciliation Act in view of the agreement which entitles a party to an arbitration agreement to approach a Court.

4. The said petition under Section 9 of the Act, being OMP No.172/2012, seeking interim measures of protection was listed on 22nd February, 2012. Notice was issued. The interim order was passed whereby the respondent Nos.1 to 4 were restrained 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.

5. Upon service, the respondents sought a modification of the injunction order dated 22nd February, 2012 on the basis of undertakings furnished by the respondent Nos.1, 2 and 4 and Surya Vinayak Hospitalities Private Limited.

6. The said undertakings filed before the Court on 30th April, 2012 were accepted and by order dated 1st May, 2012, the petition was disposed of with the direction that it would be open for the Arbitral Tribunal itself to modify the interim injunction issued in terms thereof.

7. We have heard the learned counsel for the parties. We have also been informed by them that the appellants have invoked arbitration under the London Court of International Arbitration Rules in terms of the restated Share Purchase Agreement and nominated Mr.S.K.Dholakia, Senior Advocate, as the nominee arbitrator on their behalf. The respondents have also their nominee arbitrator.

8. We have gone through the pleadings of the trial court, documents as well as the impugned order. There is no dispute that the respondents without admitting their dues were agreeable to secure the interest of the appellants by way of security/guarantee/undertaking to the tune of ₹1,244,947,936/-.

9. It was alleged by the respondents before the learned Single Judge that the fixed assets of respondent No.4 company are over ₹420 cores and total outstanding is not more than ₹300 crores and still remaining assets of respondent No.1 would be ₹120 crores, thus the appellants' interest would be fully secured. The submission of the respondents was opposed by the appellants' counsel that the respondent Nos.1 and 2 as directors of respondent No.4 are not empowered to give the undertaking offered by the respondents.

10. Learned Single judge modified the interim order passed on 22nd February, 2012 as he was of the view that the general order cannot be passed restraining the respondents from selling of their assets especially when the appellants have not disclosed the list of assets of the respondents. The undertakings filed by the respondent Nos.1, 2 and 4 were accepted in view of statement made in the affidavits that assets of the respondents are more than the liabilities which are sought to be recovered by the appellants.

11. The main contention of the appellants is that by the impugned order, the learned Single Judge has erred in accepting the undertakings/security offered by respondent Nos.1, 2 and 4 and passed the impugned order without putting respondent No.3 to terms. The learned Single Judge has overlooked the mandate of Clause 10.5 of the Restated Share Purchase Agreement which specifically precludes the assignment of the obligations of respondent Nos.1, 2 and 3 to any party. Thus, the undertakings were not only defective in form but also suffered from serious errors and the same was passed without considering the objections raised by the appellants in their reply dated 24th April, 2012 to the respondents' application.

12. From the pleading and documents produced before the learned Trial Court, it cannot be denied that the respondent Nos.1 and 2 were to pay the purchase consideration of ₹1500,000,000.25 which was not paid by respondent Nos.1 and 2 as agreed by them in the Share Purchase Agreement dated 12th November, 2010 and thereafter, the appellants entered into Restated Share Purchase Agreement dated 11th March, 2011 with the respondent Nos.1, 2 and 3 jointly and severally who agreed to purchase the equity shares of respondent No.4 from the appellants for the said amount and after some delay, the respondent No.3 paid part consideration of tranche No.1. However, for the remaining amount, the post dated cheques were issued by respondent No.3 and the same were dishonoured.

13. Learned Single Judge in the impugned order apparently precluded the respondent No.3 from its liability who admittedly accepted the same along with respondent

Nos.1 and 2 as joint and several liabilities under the Restated Share Purchase Agreement, although as per Clause 10.5 of the Restated Share Purchase Agreement, there were obligations and co-extensive liability as mentioned in Clauses 3.3, 5.2, 6.4, 7.1.1 and 7.1.2.

14. It appears from the record that the respondent No.4 gave the undertaking on 16th April, 2012 and had offered security for appellants' claim by agreeing not to alienate its fixed assets. Similarly, respondent Nos.1 and 2 by separate undertaking offered to maintain jointly or severally at least 50% share-holding in respondent No.4. There was no undertaking on behalf of the respondent No.3, who issued the cheques.

15. The appellants raised the objections, inter alia, on the grounds that the same were not supported by any authorization. Those were lacked in material particulars including suppression of respondent No.2's share-holding in respondent No.4 and without producing the share-certificates as according to them, the respondent No.2's share-holding in respondent No.4 is only approximately 16%. Further, the Articles of Association of respondent No.4 provide for 'Reserved Matters' requiring the Appellants' nominee director's affirmative vote on critical matters that include, inter alia, "Sale, Transfer, assignment, mortgage, pledge, hypothecation, grant of security interest in, subject to any lien other than in the ordinary course of business or otherwise disposed of any assets or securities of the Company or any of its subsidiaries, with a fair market value of such assets or securities exceeding INR 2 (two) crores in a single transaction, or INR 10(ten) crores on an aggregate basis, in any calendar year."

16. With regard to undertaking given by Mr. Manmohan Garg, who is the Director of respondent No.4, to the effect that “the said assets are not mortgaged and there is no third party rights of any kind whatsoever except bank limit/term loan with a consortium led by Punjab National Bank outstanding to the tune of ₹95 crores approximately.” The objection was raised by the appellants that the said statement is incorrect as the same was not corroborated by the documents annexed with the said statement and the figure of ₹95 crores being the only bank limit/term loan of respondent No.4 pending with the consortium led by the Punjab National Bank was incorrect and without any basis as reflected by respondent No.4’s annual report for the financial year 2010-2011.

17. According to the objections raised by the appellants before the learned Single Judge, the respondent Nos.1 and 2, amongst other guarantors, had also provided guarantees in the year 2010-2011 to the tune of approximately ₹750 crores towards the loan availed of by respondent No.4. Previous financial year 2009-2010, the respondent No.3 had provided guarantees to respondent No.4 in excess of ₹1000 crores. The objection was also raised that the undertaking given by the respondent No.4 was contrary to its Articles of Association as the respondent Nos.1 and 2 being interested parties who could not have validly participated and voted in the Board of Directors meeting of respondent No.4 to foist their independent and personal liability under the Restated Share Purchase Agreement. In view of the said objections, the contention was raised by the appellants before the learned trial court that the said undertakings filed by the respondent Nos.1, 2 and 4 did not specify the shares of respondent Nos.1

and 2. They also not disclosed that the said shares offered as security were not encumbered or pledged by them.

18. After having considered the rival submissions of the parties as well as the record of the case, we are of the considered view that the undertakings given by the respondent Nos.1, 2 and 4 in order to secure the amount of 1,244,947,936/- are not sufficient and do not secure the amount in order to protect the rights of the appellants, inter-alia on the following reasons:

- a. The said undertakings have not specified clearly the current value of the assets and the details of assets of respondent No.4 which were clearly encumbered. The same were not accompanied with the approval/no objection certificates from the bank and other financial institutions who admittedly held the primary charges at present and in future.
- b. Liability of respondent Nos.1, 2 and 3 are stipulated in the Restated Share Purchase Agreement on respondent on respondent No.1. It is the respondent No.3 who issued the cheques for impugned amount which were dishonoured. Respondent No.3 is a party to the agreement. No undertaking was sought or filed on behalf of respondent No.3 who may be held liable in the arbitration award if passed against the respondents.
- c. The offer of respondent No.4 to secure the interest of appellants with regard to buildings, plant and machinery is unspecified. It is not stated in the undertaking which are the assets

they were already encumbered with banks, the details of their charges and pari passu charge over the said fixed assets of respondent No.4. Merely stating in oral statement “that the fixed assets of respondent No.4 are over ₹400 crores and total outstanding is not more than ₹300 crores and still leave a balance of ₹120 crores are not enough in order to secure the interest of appellants. The respondents must understand that the arbitration proceedings would take reasonable period of time and who knows what would the value of the plant and machinery at the time of recovery of amount if the award passed is against the respondents.

19. Thus equity demands that respondents be directed to provide with adequate security/ guarantee/undertaking. Therefore, we are of the view that the undertaking given by the respondent Nos.1, 2 and 4 are sufficient to secure the amount involved. We must understand the spirit of securing the amount in favour of appellants was due to the fact that the cheques issued for the said amount by the respondent No.3 who is a party to Restated Share Purchase Agreement were bounced despite of various commitments made by the respondents to pay the said amount on previous occasions also. We are satisfied that the respondents have to secure the said amount till the decision of Arbitral Tribunal.

20. After having considered the facts and circumstances of the present case, we are of the view that the impugned order dated 1st May, 2012 is not sustainable in equity in order to secure the right of the appellants and is therefore, set aside. The appeal is allowed.

21. We direct that the petition filed by the appellants shall be treated as disposed of with the direction the respondents shall furnish within four weeks from today security or bank guarantees and/or undertakings of specified unencumbered assets solely to the appellants in order to secure the amount of Rs.1,250,003,018.31 to the satisfaction of Registrar General of this Court. The matter shall be listed before him on 7th September, 2012.

22. In failure to do so within the time granted, the respondents shall have to be restrained 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 unless the same is modified by the Arbitral Tribunal.

23. The appeal is accordingly disposed of.

**(MANMOHAN SINGH)
JUDGE**

**(PRADEEP NANDRAJOG)
JUDGE**

AUGUST 07, 2012/jk