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HON'BLE MS. JUSTICE INDERMEET KAUR

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3 M/s Hindustan Teleprinters Limited (HTL) was incorporated for manufacturing teleprinters to cater to the needs of the erstwhile post and telegraph department. In 1997, the Disinvestment Committee of the Government of India classified HTL in the non-core category and recommended the sale of either 100% or 50% of its shares through a competitive bidding. Government of India vide its decision dated 16.12.1998, decided to disinvest 50% of the equity in HTL to a strategic partner and on 26.05.2000 74% of the equity in HTL was disinvested. On 27.09.2001, bids were received by the Government from various applicants; valuation report was also submitted by the KMPG (global adviser) based on various pricing methodologies. As per the discounted cash flow (DFC) methodology, the appellant reconsidered the reserve price for the 74% equity value of HTL at Rs.38.802 crores. Himachal Futuristic Communication Limited (HFCL) one of the successful bidders offered Rs.55 crores for 74% of the equity shares in HTL.

4 Accordingly on 16.10.2001, a Share Purchase Agreement (SPA) was entered into between the appellant, HFCL and HTL. It is not in dispute that HFCL paid a sum of Rs.55 crores to the appellant pursuant

to this SPA. M/s S.R. Batliboi & Co. was appointed as Auditor for preparing the closing date statement and in terms of their report, the HFCL submitted a claim of Rs.3803.36 lakhs from the appellant on the basis that the net assets of HTL had become Rs.607.68 lakhs as on 16.10.2001 as against Rs.5747.36 lakhs as on 31.03.2001. However according to the appellant, since some advisory service had been rendered by the said Auditors to HFCL in the past and there being a conflict of interest, M/s Ray and Ray, Kolkata was appointed for preparing the closing date statement. They submitted their final report on 07.08.2002 in terms of which on the closing date Net Asset Amount (NAA) was (-) Rs.1886.57 lakhs as on 16.10.2001 instead of Rs.5747.36 lakhs as on 31.03.2001; the reduction in NAA was therefore (-) Rs.7633.93 lakhs.

5 M/s HFCL raised a claim by seeking a refund of Rs.56.49 crores which was more than sale consideration of Rs.55 crores; the appellant refused to entertain this claim. Matter was referred to arbitration. Award dated 12.10.2007 was pronounced by the Arbitral Tribunal wherein it was held that the report filed by M/s Ray and Ray was consistent with

the provisions of the SPA; it was also noted that the preparation of this report was highly technical and appellant had failed to call any witness in this regard. Appellant was held liable to pay to the claimants Rs.55,00,00,000/- with simple interest @ 9% per annum till payment or realization; cost of arbitration was quantified at Rs.5,00,000/- with simple interest @ 9%.

6 Against this Arbitral Award objections were filed by the Union of India before the learned Single Judge. The impugned order has dismissed these objections.

7 Before this Court, only one argument has been canvassed; submission being that the contract i.e. the SPA being without any consideration was void; it is hit by Sections 10 & 25 of the Contract Act. Submission being that in the absence of any consideration, the complete contract being a nullity, the parties cannot be bound by the Award as the entire Award is based on this contract; submission being that the learned Single Judge has in fact noted the submission of the appellant that the question whether the SPA was one without any consideration or not does not appear to have been specifically considered by the Arbitral

Tribunal and to advance this submission attention has been drawn to para 17 of the impugned order. Further submission being that the Award is also opposed to public policy and is thus liable to be set aside.

8 Record shows that this whole submission which has been advanced before us was also noted by the learned Single Judge who had in the aforementioned para (para 17) recorded the finding that the plea raised by the appellant that the SPA being without consideration had not been specifically answered by the Arbitral Tribunal. The learned Single Judge however thought it fit to examine the plea himself. Since this was only a legal plea emanating from the documentary evidence already available with the learned single Judge and based on the terms of the SPA, it only required an interpretation of the aforementioned clauses coupled with the submission of the learned counsel for the appellant on the definition of ‘consideration’ as has been defined under Section 2 (d) of the Indian Contract Act. There was no bar to this task having been taken upon it by the learned Single Judge.

9 The definition of ‘consideration’ is contained in Section 2(d) of the Indian Contract Act and reads as under:-

2(d) *When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.*

It is a reasonable equivalent or other valuable benefit passed by the promisor to the promisee or by the transferor to the transferee; it must be material and not imaginary; it must not be superficial. Monetary sums alone do not qualify as a ‘consideration’. In its broader and wider sense ‘consideration’ also includes any liability that may pass on to a party who is a beneficiary under the contract. The learned Single Judge had the occasion to examine the clauses of the SPA; a fact finding was returned that with the purchase of 74% shares by HFCL, the HFCL had taken over the HTL with all its liabilities as reflected in its balance-sheets and books of account. Under Article 5.3 (b)(v) one of the obligations was “to comply with all loan agreements, leases and other contracts or instruments to which it is a party or to which any of its assets are bound”. Article 8 was also examined. Clause 9 of the ‘Guidance Note on Terms used in Financial Statement’ and definition of ‘liability’ as contained therein having been examined, the learned Single Judge had noted that the purchase of 74% shares by HFCL resulted in not only taking over the assets of HTL but also its liabilities. As on

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31.03.2001, the price for the 74% shares at the time execution of the SPA was on the basis of the DCF method and both parties were conscious of this fact. Valuation report in terms of Article 2.4 was also prepared at the askance of the appellant and the respondent which would be final and binding between the parties. It was a result of this exercise that it was found that on the closing date, the NAA was less than the reserve price and as such it was obligatory on the part of the appellant to pay HFCL the differential amount, since the HFCL was taking over a company saddled with the liabilities outstanding as on the closing date which as per the report of M/s Ray and Ray were Rs.364.6687 crores.

10 In this background and keeping in view the amplitude which is to be afforded to the definition of ‘consideration’ which sets out an act or an abstinence or a promise on the part of promisee; it can in no manner be said that the SPA was without consideration.

11 This submission is thus wholly without any merit.

12 A bald submission made by the learned counsel for the appellant that such a contract would be opposed to the public policy has not really been advanced in the course of arguments. The whole argument being coined on the definition of the word ‘consideration’. This Court is not in

agreement with the learned counsel for the appellant on this score. Until and unless there is a patent illegality or a perversity on the face of the record, interference is not warranted under the scope of objections under Section 34 of the said Act. The learned Single Judge has noted that the approach adopted by the Arbitral Tribunal was a plausible approach; award being a reasoned award, it rightly did not call for any interference on any count.

13 Appeal is without any merit. Dismissed.

14 In view of the order passed in the appeal, pending applications have become infructuous; they are accordingly disposed of.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

FEBRUARY 25, 2013/A