

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 718 of 2012

Reserved on: 20th December 2012

Decision on: 10th January 2013

LALEA TRADING LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Saurabh Seth, Mr. Vijay Kaundal, Mr. Ajay Bhargava, Mr. Sushmit Pushkar, Mr. Sumit Roy, Ms. Udisha Sahey and Mr. Anchit Oswal, Advocates.

versus

ANANT RAJ PROJECTS PVT. LTD. & ANR. Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Vivek Sibal and Ms. Pooja M. Saijwal, Advocates for R-1.

Mr. C.S. Vaidhyanathan and Mr. Vibhu Bakhru, Senior Advocates with Mr. Gyanendra Kumar, Ms. Anuradha Mukherjee and Ms. Jyoti Dastidar, Advocates for R-2.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

10.01.2013

1. Lalea Trading Limited ('LTL'), Cyprus has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act')

seeking certain interim reliefs against the Respondents arising out of a Share Subscription Agreement ('SSA') dated 26th June 2008, a Share Holders Agreement ('SHA') dated 26th June 2008, an Exit Agreement ('EA') dated 12th July 2010 and a Share Purchase Agreement ('SPA') dated 12th July 2010 entered into between the parties.

Background Facts

2. It must be mentioned at this stage that in the SSA the parties are described as LTL, Anant Raj Industries Ltd. and Anant Raj Projects Private Limited. In the memo of parties, Respondent No.1 has been described as Anantraj Projects Pvt. Ltd. and Respondent No.2 as Anantraj Industries Pvt. Ltd. However, both in its reply and in the affidavit in support thereof Respondent No.1 describes itself as Anant Raj Projects Ltd. ('ARPL'). That is how it is shown in the cause title in the first page of the petition. Likewise both in its reply and in the affidavit in support thereof Respondent No.2 describes itself as Anant Raj Industries Ltd. ('ARIL'). Consequently, for the purposes of the present case, Respondent No.1 is hereinafter referred to as ARPL and Respondent No.2 as ARIL.

3. ARPL is the owner of immovable property at 67, Industrial Area, Najafgarh Road, Kirti Nagar, New Delhi (hereinafter referred to as 'the project land'). The 100% share capital of ARPL was, prior to the execution of the SSA, held by AIPL which has its registered office in Haryana. The project land had been transferred by AIPL to ARPL for a total sale consideration of Rs.216.32 crores. The sale consideration was paid by ARPL to AIPL by allotment of 4,50,000 equity shares of face value of Rs.10 each at an aggregate premium of Rs.5.20 crores; 20 lakh Optionally Convertible

Redeemable Preference Shares ('OCRPS') of Rs.10 each at par in ARPL. The balance amount of Rs.208.67 crores was recorded as a loan due by ARPL to AIPL.

4. Around January/February 2008, ARPL and AIPL through an international private consultant named DTZ International Property Advisers Private Limited, India approached LTL with a proposal to invest in the said project of ARPL which was in the process of developing a retail mall ('mall') on the project land. Pursuant thereto the SSA was entered into between the parties on 26th June 2008 whereby LTL agreed to subscribe to equity shares representing 26% of the total working share capital of ARPL.

5. In terms of the SSA, LTL was to hold 26% of the total working share capital of ARPL, and Compulsorily Convertible Preference Shares ('CCPS') and fully convertible debentures ('FCD') in accordance with the SSA. It is stated that by way of the said SSA, the arrangement of the Foreign Direct Investment ('FDI') by LTL in ARPL was arrived in terms of Press Note 2 of 2005 issued by the Department of Industrial Policy and Promotion, Government of India.

6. Under Clause 2.3 of the SSA, LTL was required to transfer a sum of Rs.216.38 crores in two tranches:

“(i) INR 37,59,45,900 towards subscription of investor FCD and

(ii) INR 178,78,54,100 towards subscription on Investor equity shares and CCPS.”

7. Under Clause 2.4 of the SSA, ARPL was to allot LTL:

- “(i) 1,75,676 equity shares of Rs.10 each at a premium of Rs.2025.40 per equity share,
- (ii) 7,02,703 CCPS of Rs.10 each at a premium of 2025.40 per CCPS and,
- (iii) 37,59,459 FCD of Rs.100 each.”

8. LTL states that it infused funds in ARPL as under:

“Date of Transfer	INR/US\$	US\$ Invested	INR
03.07.08	43.15	\$5,00,88,000	2,16,12,95,906
15.07.08	42.62	\$58,032	24,73,350
23.07.08	42.45	\$762	32,347
	43.15	\$5,01,46,794	2,16,38,01,603”

9. Pursuant to the allotment of the above instruments in favour of LTL by ARPL, the following was the share holding pattern of ARPL:

“Name of Shareholder	Number and Type of Shares	Voting Interest
Investor (Petitioner, herein)	<u>1,75,676 Equity Shares</u> 7,02,703 CCPS	26.0 %
	37,59,459 Fully Convertible Debentures.	
ARIL (Respondent No.2,herein)	<u>5,00,000 Equity Shares</u> <u>20,00,000 OCRPS</u> Allot up to 107,00,000 NCDs (of which 69,04,175	74 %”

	NCDs have been allotted as of March 31, 2011.)	
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10. Simultaneous with the execution of the SSA, the parties entered into the SHA containing specific representations and warranties given by both ARPL and ARIL. In the SHA, LTL was defined as an ‘Investor’, ARPL as ‘Company’ and ARIL as such. The equity shareholding of the Investor and ARIL was at all times to be maintained as 26%:74% unless changed in accordance with Clause 3.1.6 or at the ‘Exit Event’ as provided in the SHA. Under Clause 4.2 of the SHA it was agreed that the Distributable Net Profits of ARPL would be distributed by it in the order of priority under Clause 4.4 of the SHA other than the Exit Event. The order of priority of distribution was recorded as under:

“(i). First, simultaneously to ARIL and the Investor agreed coupon rate on ARIL NCDs cumulative, in every financial year and repayment of ARIL NCDs as per the terms of issuance of NCDs and to the investor, agreed coupon rate on the Investor FCDs cumulative, in every financial year. Provided that in case of inadequate of cash flows, ARIL will be entitled to the coupon on ARIL NCDs in that financial year and coupon rate on the Investor FCDs shall accrue and be payable to the Investor on exit as provided in Clause 4.4 of this Agreement, subject to overall agreed rate of distribution as provided in Clause 4.4 of this Agreement.

(ii). Second, to the Investor a preferred return at 8% (eight percent) IRR on the Investor Investment. Provided, however, the preferred return at 8% IRR on the Investor Investment shall be inclusive of the coupon rate payable on the Investor FCDs to the Investor by the Company (the “Investor Return”) in (i) above and also coupon rate payable on CCPS to Investor in any financial year.

(iii). Third, to ARIL a return at 8% (eight percent) IRR on ARIL Investment (the “ARIL Return”). Provided, however, the preferred return at 8% IRR on the investment by ARIL in the Company shall

not be inclusive of the coupon rate payable to ARIL on ARIL NCDs by the Company in (i) above but shall be inclusive of the coupon rate payable on OCRPS to ARIL in any financial year. It is hereby clarified that unless the Investor receives the distributions as stated in (ii) above, no distributions will be made to ARIL. It is hereby further clarified that in the event of shortfall of the funds, if the return under this clause is not paid to ARIL, along with the return paid to the Investor under (ii) above the same shall keep on accruing and shall be payable to ARIL on exit as provided in Clause 4.4 of this Agreement.

(iv). Fourth, the repayment of any third party debt.

(v). Fifth, the repayment of Shareholder Loans other than ARIL NCDs and Investor FCDs, if any, and interest thereon.

(vi). Sixth, the balance of the Distributable Net Profits to be shared by both the Investor and ARIL in the ratio of their shareholding in the Company.”

11. Under Clause 4.3.1 of the SHA, it was agreed that LTL’s return and ARIL’s return as defined in Clause 4.2.1 of the SHA was to be paid by exercise of the following options:

“(a) buy back by the Company of the Investor Equity Shares and ARIL Equity Shares;

(b) Payment of coupon rate cumulative on the Investor FCDs to the Investor;

(c) Payment of coupon rate on ARIL NCDs to ARIL;

(d) Payment of dividend on the CCPS and OCRPS to the Investor and ARIL, respectively, by the Company;

(e) Payment of dividend on the Equity Shares to the Investor and ARIL, respectively, by the Company.”

12. If LTL chose to participate in the buyback pursuant to Clause 4.3.1(a)

then CCPS would be converted into Equity Shares so as to achieve equity share holding of 26% in ARPL.

13. In terms of Clause 4.6 of the SHA, ARIL assured LTL 8% Investment Return Rate ('IRR') in every financial year. In the event of failure to receive such returns, ARPL would make good the same as soon as the funds would be available. Schedule V to the SHA recorded that LTL would receive an IRR of 18% on its investment at the time of exit. Under Clause 6 of the SHA, ARIL undertook to implement the entire project in one phase and agreed to complete the said project not later than 9 months from the date of execution of the SHA dated 26th June 2008. The respective covenants of ARIL and ARPL were in Clause 7 of the SHA.

14. Under Clause 10.2.1 of the SHA, LTL could nominate one nominee Director and ARIL could nominate two Directors on the Board of Directors of ARPL. Under Clause 10.14 no 'Major Decision' could be taken in respect of the items mentioned in the said clause by ARPL at any General Meeting or by the Board or Committee or by the Managing Director ('MD') of ARPL unless the said item was consented to by the nominee Director of LTL.

15. According to LTL, the construction of the mall was inordinately delayed. Both ARPL and ARIL expressed inability to adhere to the 18% preferred IRR and asked for it to be reduced. According to LTL after several discussions it was agreed mutually by the parties that ARPL and ARIL would return the US Dollar ('USD') component of LTL's investment in ARPL with 8% IRR on or before the expiry of the three year lock-in period

applicable on such items in terms of Press Note 5 of the FDI Policy. Acceding to the above request, the EA was executed on 12th July 2010 between the parties. Simultaneous with the execution of the EA, the SPA was also executed. ARIL also gave a corporate guarantee in favour of LTL agreeing that in case ARIL failed to comply with the obligation under the EA and the SPA, LTL could invoke the corporate guarantee. In order to facilitate the complete exit, ARIL agreed to purchase LTL's equity shares, CCPS and FCD in the manner contemplated in the EA. In the event the CCPS or FCD could not be bought back as such, they were to be converted into equity shares before such buy back.

16. Clause 1 of the EA defines 'Complete Exit' as under:

“Complete Exit shall mean purchase of all the Investor Securities by ARIL or buying back by the Company of all the Investor Securities, on or before the Definitive Exit Window or such other date in terms of this Agreement, to the satisfaction of the Investor, at such price which shall ensure payment of Investor Sale Securities Consideration to the Investor, in such a manner that the Investor shall have received the amounts from the Company for buyback or from ARIL for purchase of Investor Sale Securities, whatsoever in respect of this Agreement and the Investor ceases to be a Shareholder of the Company.”

17. In terms of Clause 2.1 read with Clause 2.3 of the EA, ARPL was to convene a meeting of its Board to declare payment of 8% IRR on the Total Invested Capital (in USD), as Investor Semi Annual Coupon ('ISAC'), to LTL. The ISAC was to be calculated in USD from 13th June 2008 to 31st March 2010. The ISAC was to be put on or before 15th August 2010. Until LTL achieved complete exit from ARPL there was to be no repayment of

the promoter's loan or any interest thereon and the payment of interest or dividend to ARIL on its NCDs, OCRPS and equity shares was to remain under suspension till the time LTL received a return on its total invested capital.

18. Under Clause 3.1 of the EA, it was agreed that the parties would jointly apply to the Foreign Investment Promotion Board ('FIPB') within seven days of the execution of the EA for approval for the exit of LTL from ARPL prior to the expiry of the lock-in period. Under Clause 3.2 of the EA, the parties envisaged a complete exit of LTL from ARPL by 8th August 2011. At a meeting held on 12th August 2010 it was resolved that in order to enable LTL to receive the agreed 8% coupon rate, LTL's 64,739 fully paid equity shares of the face value of Rs.10 each, representing 9% of the paid up equity share capital of ARPL would be purchased for an aggregate sum of Rs.23,27,48,358.02 being the exchange value of USD 4,184,165. It was agreed that the buy-back would be implemented in one or more tranches, from time to time as considered appropriate. A letter of offer was issued by which ARPL offered to buy back 64,739 equity shares in accordance with Section 77A of the Companies Act, 1956 and the Private Listed Company and Unlisted Public Limited Company (Buy-back of Securities) Rules, 1999 ('PLC Rules 1999') at the above price.

19. Since LTL was located outside India along with the tendering of 64,739 equity shares it also submitted Form FCTRS along with certain other documents to the authorised dealer i.e. State Bank of India ('SBI') in terms of the Foreign Exchange Management (Transfer of Issue of Security by a

Person Resident Outside India) Regulations 2000 ('FEM Regulations 2000') on 15th September 2010. SBI then sought clarifications and a letter was sent by ARPL to SBI on 29th September 2010 clarifying that the term 'original investment' meant the minimum capitalization amount which was 5 million USD in case of a joint venture. It is stated that while the buy-back was in the process, the Department of Industrial Policy and Promotion ('DIPP') introduced a revised and consolidated FDI Policy on 1st October 2010. It was clarified that as far as FDI in development of townships, housing, built up infrastructure and construction development projects was concerned, the 'Original Investment' meant the entire amount invested which could not be repatriated before a period of three years from the date of investment. It was clarified that the lock-in period of three years would be computed from the date of receipt of each instalment/tranche of FDI or from the date of completion of minimum capitalisation whichever was later. LTL states that in view of the changed policy the parties decided to put the buy-back process on hold and wait for the completion of the three years lock-in period. Consequently, it was decided not to approach the FIPB.

20. On 27th July 2011 the Janpath Branch of the SBI wrote to the Chief Manager alleging defaults by ARPL in complying with the FDI Policy and asking it to first seek approval of the appropriate authority. Meanwhile, LTL requested ARPL to appoint another authorised dealer in view of the delays being caused for the exit process to be completed. At a Board meeting held on 4th August 2011, ARPL stated that even the Hongkong and Shanghai Banking Corporation ('HSBC') had taken the view that the investment of LTL in ARPL which was under the 'Automatic FDI route' had lost the status of automatic route and hence certain regulatory approvals had to be

obtained in order to remit the consideration to LTL for the said buy back. The reason was that LTL had sought the buy-back of its shares by ARPL within the three year lock-in period.

21. Disputes arose between the parties when LTL alleged that there were discrepancies in the minutes of the Board meeting held on 5th, 6th, 8th and 18th August 2011. The stand taken by LTL was that the views expressed by the HSBC were only in relation to the buy-back process of 64,739 equity shares and not for purchase of shares by ARIL from LTL. According to LTL at the meeting held with the SBI on 8th August 2011 it became clear that there was no requirement to obtain any approvals from the FIPB/DIPP/RBI since the three year lock-in period had come to an end on 21st July 2011. LTL states that the delay thereafter in the Respondents facilitating the complete exit of LTL was not justified. LTL also informed ARPL and ARIL by e-mail dated 7th September 2011 that it was willing to adjust the exit remittance amount with the potential capital gains liability under the Income Tax Act, 1961 ('IT Act').

22. According to LTL despite exchange of correspondence between the parties thereafter the impasse was not resolved. LTL states that despite extending its full cooperation and expressing preparedness to fulfil its obligations under the EA, ARPL and ARIL were unnecessarily harassing it and delaying its exit from ARPL on baseless grounds. Further they were also delaying the remittance of the buy-back amount of Rs.23,27,48,358.02 on unjustified grounds despite the lock-in period of three years having expired.

The present petition

23. In the above circumstances, the present petition was filed by LTL for a direction to ARIL to secure the sum of Rs.3,38,79,83,250 (being the amount of USD 60,771,000) which is equivalent to 8% IRR on LTL's investment, to secure the sum of approx. Rs.23.27 crores by depositing it in the Court, to cooperate and allow the Chartered Accountant nominated by LTL to conduct regular internal financial audits of ARPL and ARIL, to direct ARPL and ARIL to file records and particulars of the relevant bank accounts by way of which the remittance amounts were secured, to disclose the details of the statutory filings with the Government departments, to direct ARIL not to alienate/encumber/sell/create charge on the shares held by ARPL and ARIL, directing ARPL not to create charge/alienate/ encumber/sell shares with respect to the 26% shareholding of LTL, directing ARIL and ARPL not to create any liability, mortgage, lien, encumbrance in any manner on the properties and assets of ARPL until adjudication of the disputes between the parties. It was stated in the petition that LTL was in the process of initiating arbitral proceedings under Clause 10.14 of the EA.

24. Pursuant to an order passed by this Court on 8th August 2012, LTL filed an affidavit dated 13th August 2012 of Mr. Sanjay Lal, its authorised representative. In the said affidavit it was stated that LTL was established for the purpose of carrying on the business of an investment holding company and had a single Director who was based in Cyprus. The 100% issued and paid up capital of LTL was at present held by Acacia India Retail Limited ('AIRL'), a company incorporated under the laws of Territory of the British Virgin Islands. It was stated that amongst the shareholders of AIRL were Taib Bank B.S.C. (C), a private bank based in Bahrain, Acacia

Investments B.S.C. (c), a real estate investment company incorporated in Bahrain and other prominent business/royal families in the GCC. A subsidiary of Dubai Group, namely-Dubai Ventures L.L.C., held a 51% equity stake in AIRL. LTL has no permanent establishment in India.

25. On 17th August 2012, in the presence of learned counsel for the Respondents, the Court passed the following order:

“1. Affidavit stated to have been filed by the Petitioner on 13th August 2012 vide Diary No. 130087 in terms of the order dated 8th August 2012 be traced out by the Registry and placed on record.

2. This Court has heard the submissions of Mr. Neeraj Kishan Kaul, learned Senior counsel for the Petitioner, Mr. Sudhir Nandrajog, learned Senior counsel for Respondent No. 1 and Mr. Vibhu Bakhru, learned Senior counsel for Respondent No. 2.

3. On behalf of the Petitioner Mr. Kaul expresses apprehension that the board meetings of Respondent No. 1 company are not being held with the full participation of the nominee director of the Petitioner. Mr. Kaul states that the minutes of the Board meeting are not being properly recorded.

4. In response to the above submission, it is stated by Mr. Nandrajog as well as Mr. Bakhru, learned Senior counsel for Respondent Nos. 1 and 2 that a board meeting of Respondent No. 1 company can be convened within a fortnight which can be attended by the nominee director of the Petitioner, currently located in Bahrain, or any of the alternate directors nominated by the Petitioner who are residing in India. They are prepared to have the board meeting recorded on video to allay any apprehension.

5. It is agreed between the parties that a meeting of the Board of Directors of Respondent No. 1 Company will be convened on 19th September 2012, which can be attended by the nominee director of the Petitioner or any of the alternate directors. It is directed that the proceedings of the said meeting will be videographed. The minutes

of the board meeting and the video recording will be produced in Court on the next date.

6. Mr. Nandrajog and Mr. Bakhru further state that the nominee director of the Petitioner would be entitled to exercise affirmative vote in terms of the Articles of Association of Respondent No. 1 company. It is directed that no action which requires the affirmative vote of the nominee Director of the Petitioner will be taken without such affirmative vote.

7. Independent of whatever issues that the nominee director of the Petitioner may raise at the said Board meeting, the Petitioner will, within one week from today, address a letter to Respondent Nos. 1 and 2 listing the issues that it wishes to discuss and have resolved.

8. As regards the apprehension expressed by Mr. Kaul that the Petitioner is not aware of the manner of utilization of the moneys invested by the Petitioner in Respondent No. 1 company, Mr. Nandrajog and Mr. Bakhru state that copies of numerous documents have been furnished to the Petitioner as requested by it. As regards the further request made by the Petitioner in its letter dated 9th August 2012, it is stated by them that those documents will also be provided to the Petitioner prior to the board meeting to be held on 19th September 2012. It is directed that Respondent Nos. 1 and 2 will keep ready for inspection by the nominee Director of the Petitioner at the board meeting, such documents as will be indicated by the Petitioner to it at least one week in advance.

9. Mr. Kaul submitted that the sum equivalent to the amount invested by the Petitioner together with the expected return thereon should be placed by the Respondents in an escrow account. On this aspect, both Mr. Bakhru and Mr. Nandrajog state that they wish to file detailed replies to explain the factual as well as legal position. Mr. Nandrajog, on instructions, states that within thirty days of all approvals and clearances being granted, Respondent No. 1 is prepared to pay the Petitioner the buy-back amount. On behalf of Respondent No. 2 Mr. Bakhru states that Respondent No. 2 has sufficient reserves and there can be no room for any apprehension by the Petitioner that Respondent No. 2 will not be able to meet its financial obligations arising out of the Exit Agreement entered into with the Petitioner.

10. Respondent Nos. 1 and 2 should file their respective replies within four weeks. Rejoinders thereto, if any, be filed before the next date.

11. List on 8th October 2012.”

26. Pursuant to the above directions, an affidavit was filed by the MD of ARPL on 10th October 2012 enclosing a copy of the compact disc containing the video recording and transcript of the meeting of the Board of Directors of ARPL on 19th September 2012 along with its transcript. ARPL and ARIL claim that the necessary documents and information was provided to the nominee director of LTL. On 5th October 2012 both ARPL and ARIL filed their respective replies. Rejoinders to both affidavits have been filed by LTL on 7th December 2012.

Submissions of counsel

27. This Court has heard the submissions of Mr. Rajiv Nayar and Mr. Neeraj Kishan Kaul, learned Senior counsel appearing for LTL, Mr. C.S. Vaidyanathan and Mr. Vibhu Bakhru, learned Senior counsel appearing for ARIL and Mr. Sudhir Nandrajog, learned Senior counsel appearing for ARPL.

28. On behalf of LTL it is contended by Mr. Rajiv Nayar and Mr. Neeraj Kaul that there was no justification for ARIL and ARPL not to honour their commitments under the EA and the SPA. Referring to Clause 4.1(b) of the SPA it was submitted that the purchase price calculated in terms of Schedule I had to be deposited by the purchaser (ARIL) on or before the completion date “in a separate no-lien bank account” and “an authorised representative

of the Seller (LTL) shall be the signatory to such no-lien bank account”. In terms of Clause 2.1 Schedule IV of the SSA the CCPSs held by LTL was compulsorily convertible to equity shares at the time of exit. Going by the definition ‘complete exit’ under the EA read with Clause 4.1(b) of the SPA, ARIL was eligible to purchase all three instruments i.e. equity shares, CCPS and FCDs. One CCPS is equivalent to one equity share. It is pointed out that according to M/s. SBD and Co. the valuation of one equity share of ARPL was Rs.3595.18 as on 31st March 2010. It is on that basis that the buy-back of 64,739 CCPS was initiated by ARPL by converting it into equity shares. The same Auditors had now valued one equity share of ARPL as on 31st July 2011 at Rs.2687.83. This was “on fully diluted basis on post conversion of convertible preference shares into equity shares”. It is submitted that even accepting the said valuation the payment owing was well above Rs.38 crores. LTL has also worked out a calculation by not converting the FCDs into the equity shares by selling them as such on their full value of Rs.100 each.

29. The total claim of LTL is as under:

“S.No.	Towards Type of Instrument	Total No.	Total amount (approx)
1.	Equity Shares	175,676 at Rs. 2687.83/- per share	Rs. 47.22 crores
2.	CCPS	702,703-64,739 (already converted by R/1 for buyback) = 637,964 at Rs. 2687.83/- per	Rs. 171.47 crores

		share	
3.	FCD	3,759,459	Rs. 37.59 crores
	TOTAL		Rs.256.28 Crores”

30. Reference is made to Clause 2.1 of Schedule IV to the SHA which reads as under:

“2.1 CCPSs shall be fully and mandatorily converted into Equity Shares of Rs. 10 each at such premium as may be decided by the Board at the time of exit under clause 4.4 of the Shareholder Agreement but prior to expiry of 10 years from the date of its issuance at the option of the Investor.”

31. In short the argument is that LTL should be paid for its equity shares, CCPS and FCDs at the value of Rs.2,687.83 per share. Even if an FCD is taken only at its face value, the total claim of LTL at this stage would be to a sum of Rs.256.28 crores. It is submitted that the said amount should be directed to be deposited in a no-lien account by ARIL and ARPL which can be subject to the outcome of the arbitral proceedings. A reference is also made to the stand taken by both ARIL and ARPL in their replies where they do not actually deny the liability to pay LTL under the EA but identified the only barriers as the compliance with requirement of the law.

32. Relying on the decision in *National Shipping Company v. Sentrans Industries Ltd. AIR 2004 Bom 136* it is submitted Section 9 of the Act is much wider than Order XXXVIII Rule 5 Code of Civil Procedure, 1908 (‘CPC’) and is designed to do complete justice between the parties. Reliance

is placed also on the decision in *Aditya Birla Retail Ltd. v. Ashapura Developers 2009 (6) MHLJ 154*. It is added that LTL has already issued a Cure Notice dated 12th September 2012 and is agreeable to submit to the jurisdiction of any retired judge of the Supreme Court appointed by this Court as sole Arbitrator to adjudicate various disputes between the parties including valuation of shares of ARPL. It is clarified that LTL “is not seeking directions for repatriation.” However it is urged that the Respondents should be directed to deposit the sum in an interest bearing no lien account or with the Court. The sum payable by ARPL is asked to be deposited in a special bank account even according to the PLC Rules 1999. As far as ARIL was concerned, it is submitted that the sum payable by should be directed to be deposited in a no-lien account in terms of Clause 4.1 (b) of the SPA. Reference is made to the decision in *Numero Uno International Ltd. v. Prasar Bharti 2008 (5) RAJ 1*.

33. On behalf of ARPL and ARIL it is first contended that there is, in fact, no dispute between the parties which requires to be referred to arbitration and that in any event the arbitration clause till date has not been invoked by LTL. Therefore the claim was itself pre-mature. It is further submitted that assuming that as stated in the Court during the course of hearing LTL did not desire to repatriate the money immediately, even for placing the monies in a no-lien account, approvals would have to be obtained. It is submitted that since LTL had sought the buy-back of shares even prior to the lock-in period it could no longer avail of the ‘automatic route’ and had to necessarily seek FIPB approval.

34. On behalf of ARIL it is submitted by Mr. Bakhru, learned Senior counsel, that there were no pleadings to the effect that ARIL was siphoning off the funds in any unlawful manner. There was not even an averment to that effect in the petition. Relying on the decisions in *ITI Ltd. v. Siemens Public Communications Network Ltd.* (2002) 3 SCR 1122, *Raman Tech. & Process Engg. Co. v. Solanki Traders* (2008) 2 SCC 302, *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.* 2008 (2) Arb LR 242 (Del), *Global Company v. National Fertilizers Ltd.* AIR 1998 Del 397 and *Goel Associates v. Jivan Bima Rashtriya Avas Samiti Ltd.* 114 (2004) DLT 478, it is submitted that the provisions of Order XXXVIII Rule 5 CPC ought not to be likely invoked in the absence of any case being made out by LTL for grant of any relief similar to an adjudication. It is submitted that although the scope of Section 9 of the Act was wide and the Court could exercise all the powers vested in it, the pleadings in the main petition were insufficient for grant of any such relief.

35. It is submitted that while converting the CCPS held by LTL, the “simultaneously converted securities” of ARIL would also have to be considered such that the percentage share holding between the securities held by LTL and that by ARIL remain at 26%:74%. It is accordingly submitted that the share valuation would have to be adjusted to account for the increase in the total number of shares upon conversion and the claim of Rs. 256.28 crores is “on the face of it, erroneous.” It was further submitted that the shares of LTL itself had changed hands several times. If there was to be a buy-back of shares from LTL then ARIL would become a ‘representative assessee’ for the purposes of Section 163 of the Income Tax Act 1961 (‘IT Act’). According to him, LTL had already applied to the

Advance Ruling Commission for a decision on its possible liabilities under the IT Act. It is submitted that ARIL was a going concern with high turnover and had several ongoing projects, requiring it to place such a huge amount in a no-lien bank account would badly affect its liquidity position and there was nothing warranting such an extreme step. Mr. Bakhru stated that without prejudice to any of the above contentions, ARIL was willing to undertake that it will not alienate, encumber, sell, transfer or otherwise create any third party interest or charge in relation to the Project Land and the Mall. ARIL was willing to deposit their title deeds in the Court.

36. Mr. Nandrajog, learned Senior counsel appearing on behalf of ARPL supplemented the above submissions on behalf of ARPL. He pointed out that the assets of ARPL could not be alienated without the consent of LTL and, therefore, they were more than secure as regards their claims. Therefore, there was no occasion for any direction for deposit of moneys in a no-lien account. He too submitted that the title deeds of the Project Land and the Mall could be deposited in this Court and be kept as such till the conclusion of the arbitral proceedings.

Buy back of 64, 739 shares

37. At the outset a distinction requires to be made between the two distinct prayers in the petition. The first concerns ARPL's liability to pay Rs. 23,27,48,358.02 for the buy-back of 64,739 CCPS into equity shares. There is no dispute about the valuation of the said shares at Rs. 3595.18 per equity share. The only reason for ARPL not yet remitting the said sum to LTL or even placing it in a separate no-lien account is due to the stand taken by the

Authorised Dealers, SBI and HSBC, that the 'automatic route' is not available to LTL. In light of the change in the FDI Policy of the DIPP and considering that the lock-in period is over, this objection prima facie does not appear to be justified. Further LTL has made it clear that it does not wish to repatriate the sum as of now. ARPL does not deny that the said shares have been surrendered by LTL and have been defaced. In the considered view of the Court therefore, there can be no difficulty in directing ARPL to keep the aforementioned sum in a separate no-lien interest bearing account or better still in a fixed deposit with the SBI and not encash or raise loans on it or deal with it in any manner without previous orders of the arbitral Tribunal.

Relief under Order XXXVIII Rule 5 CPC

38. That brings to fore the main dispute between the parties at this stage. This concerns the prayer of LTL that the Respondents should be directed to deposit a sum of Rs. 256.28 crores in a separate account to facilitate LTL's exit from ARPL. The legal issue that arises in this connection is whether LTL has made out a case for issuing a peremptory injunctive order analogous to one under Order XXXVIII Rule 5 CPC?

39. The narration of facts shows that LTL has been seeking a complete exit from ARPL but has been unable to do so because of the stand taken by ARPL and ARIL that certain legal and statutory requirements require to be met. In the rejoinder filed by LTL, the following submissions of ARPL in its reply have been highlighted:

“...It may be appropriate to mention that the Respondent No.1 has, on two occasions arranged for the requisite

amount towards remittance however on both the occasions the authorised dealer has advised that FIPB approval is required to proceed further with the request for remittance. (See page 6 of the Reply)”

“...The Respondent No.1 is financially sound company holding assets in excess of Rs.300 crores and is in fact earning annual lease rentals rental from the project in question of over 20 crores per annum alone. As already submitted the Respondent No.1 is committed to its obligations and covenants as regards the exit arrangement of Petitioner. The Respondent No.1 reiterates that it is committed to ensure that the remittance of Rs.23,27,48,358.02 amount is carried out within the agreed time period and without delay once the approval from FIPB are received.”

40. On its part ARIL has in para 5 (l) & 6 (f) of its reply stated as under:

“5(1) That it is therefore submitted that the Respondent No.2 has always been ready and willing to purchase the shares of the Petitioner and has taken all steps required. The inability of the Respondent No.2 and the Petitioner to (conclude the transfer of shares) is on account of restrictions in law and the actions of the Petitioner itself, which cannot be attributed to the Respondents.”

“6 (f) It is submitted that the above factors exposes the Respondents, to being treated as ‘representative assesses’ under the Income-Tax Act, 1961 which would make them liable for the taxes which the Petitioner would be found in default of. It is submitted that the above factors would have a remarkable bearing on the consideration sought to be remitted to the Petitioner abroad.”

41. While neither ARPL nor ARIL has denied the liability to honour the commitments under the SPA, SHA and EA, there is justification in their contention that there is no specific averment made in the petition by LTL that either of them is trying to siphon off the funds or transfer the properties of ARPL which is one of the prerequisites for the grant of relief under Order XXXVIII Rule 5 CPC. No doubt Section 9 of the Act gives wide powers to the Court including “the same power for making orders as it has for the purpose of and in relation to any proceedings before it”. Nevertheless that discretion is not to be exercised lightly. The Court must be satisfied that the essential conditions for the grant of such relief have been met by the party seeking it.

42. Order XXXVIII Rule 5 reads as under:

“5. Where defendant may be called upon to furnish security for production of property.---(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.”

43. The scope of the power under the above provision was explained by the Supreme Court in ***Raman Tech & Process Engg. Co.*** in para 5 as under:

“5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.”

44. The following observations of the Division Bench of the Bombay High Court in ***National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.*** are also relevant:

“.... Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the Arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such

order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under Section 9(ii)(b). The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under Section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5, CPC are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under Section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Civil Procedure Code cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. The power of the Court under Section 9(ii)(b) cannot be restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind.”

45. In para 73 of the petition it is stated by LTL that ARIL and ARPL have been “unnecessarily harassing the Petitioner by delaying the exit of the Petitioner from Respondent No.1 on baseless and frivolous grounds”. It is further stated that they were seeking to “delay the remittance on various frivolous issues”. In para 74 it is alleged that the information being provided by both ARIL and ARPL was inadequate and that LTL has no option but to move the Court to “secure and protect its investment and returns”. These averments do not satisfy the requirement of the law that there is a genuine apprehension that the Respondents will divert the assets of ARPL and

frustrate the relief that is likely to be granted to LTL in the arbitral proceedings.

46. As explained in *National Shipping Company of Saudi Arabia* the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) of the Act “outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure.” However, it has also been pointed out that “each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience.” Therefore, even while the Court is not inclined to grant the prayer of LTL for a direction to the Respondents at this stage to deposit a sum of Rs. 256.28 crores in a separate no-lien account, the Court takes on record the offer of the Respondents that they will deposit in the Court the title deeds of the project land and the Mall constructed thereon. Additionally it has been stated by the Respondents on 17th August 2012 that no action which requires the affirmative vote of LTL will be taken without such affirmative vote.

47. Although it was repeatedly urged by Mr. Neeraj Kaul that LTL was willing to go in for arbitration and that this Court could itself appoint an arbitral Tribunal, the fact remains that till date LTL has not formally invoked the arbitration clause. It has only issued a Cure Notice to the Respondents.

48. The Court is not inclined at this stage to express any view on the contentious issues concerning the proper valuation of the shares, the CCPS

and the FCD, the requirement of obtaining FIPB approval, and the other contentions which have noted earlier. These are left open to be decided by the arbitral Tribunal. Further it is clarified that the arbitral tribunal will decide the issues that arise before it in accordance with law independent of the tentative views of the Court in this order.

Directions

49. The petition is disposed of with the following directions:

(a) Within a period of ten days from today, LTL will write formally to the Respondent invoking the arbitration clause and seek the constitution of an arbitral Tribunal in terms of the agreements executed. Thereafter it will be open to LTL to take further steps in accordance with law for constitution of such arbitral Tribunal.

(b) Within one week from today ARPL will deposit with the Registrar General of this Court a fixed deposit receipt (FDR) issued in its name by the SBI for a sum of Rs. 23,27,48,358.02 valid initially for a period of not less than one year and which FDR will be kept renewed during the pendency of the arbitral proceedings and subject to orders that may be passed by the arbitral Tribunal.

(c) Within one week from today ARPL and ARIL will deposit with the Registrar General of this Court the original title deeds of the Project Land and the Mall. The title deeds so deposited will be kept in a sealed cover by the Registrar General till such time appropriate orders are passed by the arbitral Tribunal in that regard at any stage of the arbitral proceedings.

(d) All contentions of the parties on merits are left open to be urged before the arbitral Tribunal. It will be open to either party to seek appropriate interim reliefs, not limited to variation or modification of the present order, under Section 17 of the Act before the arbitral Tribunal.

S. MURALIDHAR, J.

JANUARY 10, 2013

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