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

% Judgment delivered on: 18.09.2017

\+ O.M.P. (I) (COMM.) -71/2016

KAL AIRWAYS PRIVATE LIMITED. ..... Petitioner

versus

SPICEJET LIMITED & ANR. ..... Respondents

\+ O.M.P. (I) (COMM.) -72/2016

KALANITHI MARAN ..... Petitioner

versus

SPICEJET LIMITED & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Rajiv Nayar, Sr. Advocate and Dr. Abhshiek Manu Singhvi, Sr. Advocate with Mr. Anirban Bhattacharya, Mr. Bharat Chugh, Mr. Aditya Vikram and Mr. Abhishek Gupta, Advocates.

For the Respondent : Mr. Neeraj Kishan Kaul, Sr. Advocate and Mr. A.S. Chandhiok, Sr. Advocate with Mr. Samar Kachwaha, Ms. Hansa Kaul, Mr. Deepak Joshi, Mr. Viplav Acharya, Mr. Abhishek Sharma, Ms. Shweta Kakkad, Ms. Pallavi Kumar and Mr. Angad Baxi, Advocates.

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT
18.09.2017

SANJEEV SACHDEVA, J. (ORAL)

IA No.10805/2017 in OMP(I) (COMM) 71/2016 & IA No.10804/2016 in OMP(I) (COMM) 72/2016 (seeking extension of restraint imposed by way of order dated 18.05.2016 (as amended by order dated 27.05.2016)

1. By these applications the petitioners are seeking extension of operation of order dated 18.05.2016 (as modified by order dated 27.05.2016), whereby the respondents were restrained from dealing with the shares of Mr. Ajay Singh and SpiceJet Limited, in any manner whatsoever, till publication of the Award by the Arbitral Tribunal.

2. The Original petitions were filed under Section 9 of the Arbitration & Conciliation Act (hereinafter referred to as 'the Act') by the petitioner.

3. By OMP(I) (COMM) 71/2016, the petitioner *inter alia*, sought the following reliefs:-

"a. *pass an ad-interim ex-parte order restraining Respondent No.1 and Respondent No.2 from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the Company;*

b. pass an ad-interim ex-parte order directing the Respondents to deposit a sum of Rs. 835,00,00,000/- (Rupees Eight Hundred and Thirty Five Crores only)in the Court i.e. the value of the shares due to the Petitioner against the Warrants and CRPS shares;"

4. By OMP(I) (COMM) 72/2016, the petitioner *inter alia*, sought the following reliefs:-

"a. *pass an ad-interim ex-parte order restraining Respondent No.1 and Respondent No.2 from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the Company;*

b. pass an ad-interim ex-parte order directing the Respondents to deposit a sum of Rs. 250,00,00,000/- (Rupees Two Hundred and Fifty Crores only)in the Court i.e. the value of the shares due to the Petitioner against the Warrants and CRPS shares;"

5. By order dated 18.05.2016, this Court directed as under:-

"List on 27th May, 2016. In view of averments and submissions made at this stage, limited relief is granted in favour of the petitioner against respondent Nos.1 and 2 restraining them from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the petitioners. Parties are also allowed to file written synopsis of arguments by the next date."

6. On account of a typographical error in order dated 18.05.2016, the same was corrected by order dated 27.05.2016 and, after the correction, the order read as under:-

"List on 27th May, 2016. In view of averments and submissions made at this stage, limited relief is granted in favour of the petitioner against respondent Nos.1 and 2 restraining them from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the respondent No.2. Parties are also allowed to file written synopsis of arguments by the next date."

7. By a detailed judgment dated 29.07.2016, this Court disposed of these petitions and, *inter alia*, directed as under:-

"110. The petitioners at this stage are also claiming compensation and interest on the amount which is in possession of by the respondents. <u>However, in the facts and circumstances of the present case, the entire amount as asked by the petitioner cannot be secured</u>. The petitioner is also seeking the relief of amount to a total loss of huge amount on account of difference between Rs.16.30 in terms of SPA and Rs.66.30 (price of the shares at the time of filing of petitions) together with interest @12% per annum which comes to more than three hundred crores. <u>This Court is of the view at this stage only undisputed amount should be secured.</u> <u>The claim of compensation and interest would be considered by the Arbitral Tribunal after evidence and hearing of the parties as there are some disputed facts. Therefore, this Court is not inclined to secure the entire amount as prayed for while deciding the petition under Section 9 of the Act.</u>

111. Barring Rs.100 crores which is not received by the respondents as informed during the hearing, <u>the respondents are in possession of Rs.579 crores towards</u>

value of warrants and shares of CRPS. The amount was paid towards their contractual obligation under the SPA. The respondents agreed to comply the terms of Clause 3 of SPA.

112. Thus in the facts of the present cases, that if the respondents will dispose of the shares of respondent No.1 to the third party, award if passed in favour of the petitioners, the same will become merely paper decree.

113. Without expressing anything on merit, as all the disputes have to be decided by the Arbitral Tribunal the part prayers in both petitions are allowed. The said amount of Rs.579 crores shall be deposited by the respondents without prejudice in five equal monthly installments by way of fixed deposit for twelve months in the name of Registrar General of this Court. The first instalment amount shall be deposited by the respondents on or before 7th August, 2016. Thereafter, the remaining installments shall be deposited on every succeeding month. Till the time all five installments are deposited, the interim order shall continue. As and when the amount is deposited, the petitioners would be at liberty to file the application for releasing of amount, the same would be considered on merit as well as the issue of interim orders.

114. Both the parties shall take the necessary steps for the purpose of constitution of Arbitral Tribunal and once the Tribunal is constituted, it is expected that Arbitral Tribunal would publish the award within the period of twelve months. Liberty is also granted to move the application under Section 17 of the Act before the Arbitral Tribunal if so necessary or under any change of circumstances."

(underlining supplied)

8. The respondents impugned the order dated 29.07.2016 before the Division Bench. The Division Bench, though did not interfere with the directions of securing the sum of Rs.579 crores, directed that the respondents shall deposit a sum of Rs.250 crores by ways of a cash deposit and shall secure the balance Rs.329 crores through a bank guarantee.

9. The respondents thereafter impugned the order of the Division Bench by filing a Special Leave Petition before the Supreme Court. The special leave petition was dismissed, however, an extension of two weeks was granted to the Respondents to comply with the order of the Division Bench.

10. In terms of the directions of the learned Single Judge, as contained in paragraph 113 referred to above, the interim order was to continue till the entire amount was secured.

11. As per the petitioners, security for the entire amount has been deposited on 14.09.2017 and bank guarantee has been furnished subject to acceptance by the Registrar General of this Court.

12. The present applications have been filed seeking extension of interim order dated 18.05.2016 (as corrected by order dated

27.05.2016). It is contended that since the respondents were restrained from allotting, transferring, issuing, alienating and/or creating any third party interest and/or encumbrance on any of the shares transferred by the petitioners to the respondents, the interim order should be extended till the Arbitral Tribunal pronounces an award on the claims and counter claims of the parties.

13. Learned senior counsel for the petitioners contends that by order dated 29.07.2016, this Court had granted liberty to the petitioners to file an application seeking release of the amount deposited by the respondents and on such an application being filed, the same would be considered on merits as well as on the issue of interim orders. Learned senior counsel for the petitioners contends that the issue with regard to the grant of interim order is still open.

14. It is contended that the interim protection had continued till 14.09.2016 as the respondent had to comply with the order of deposit and in terms of the order dated 29.07.2016, the interim order has ceased on 14.09.2016 on furnishing of the security by the Respondents.

15. It is contended that the Arbitral Tribunal is to hold sittings commencing from 22.09.2017 and, accordingly, there would be no protection in the *interregnum.* It is submitted that there is a threat that the respondent may, in the meanwhile, transfer the shares.

16. In my view, the petitioner are not entitled to any relief, by way of these applications.

17. Perusal of the prayers of the main petitions under section 9 shows that the prayers (a) and prayer (b) (extracted hereinabove), were in the nature of alternative prayers.

18. By prayer (a), the petitioners had sought a restraint on the Respondent No.1 and Respondent No.2 from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the Company. By prayer (b), the petitioners had sought a direction to Respondents to deposit the sum of Rs. 835,00,00,000/- (in OMP(I) (COMM) 71/2016) and a sum of Rs. 250,00,00,000/- (in OMP(I) (COMM) 72/2016) in the Court which was stated to be the value of the shares due to the petitioners.

19. After considering the prayers, the Court, by order dated 18.05.2016 (as corrected by order dated 27.05.2016) deemed it appropriate to grant a limited relief of restraining the respondents from alienating, transferring or encumbrance on the shares of the respondent company.

20. By the detailed judgment dated 29.07.2016, the Court, while noticing in paragraph 107, the reliefs sought by the petitioners, i.e. *inter alia,* seeking a restraint on the encumbrance of the shares and the

directions to the respondents to deposit the sums stated to be value of the shares, the Court was of the view that a direction/security could be directed only with regard to the undisputed amount which the Court held to be Rs.579 crores. Accordingly, the respondents were directed to deposit the said amount of Rs.579 cores (as noticed above, the order of deposit stands modified in terms of the order of the Division Bench).

21. It is a settled proposition of law that the interim order merges with the final order[1]. This Court while passing the final order in the petitions has only deemed appropriate to protect the undisputed amount and thus issued a direction to secure the sum of Rs.579 crores.

22. The interim order dated 18.05.2016 (as corrected by order dated 27.05.2016) was not extended while disposing of the petitions. The interim order dated 18.05.2016 (as modified by order dated 27.05.2016) accordingly, stands merged in final judgment dated 29.07.2016.

23. The Court in paragraph 107 specifically noted the prayers sought i.e. a restrain on transfer of shares and a direction to deposit the value of the shares has only issued a direction with regard to the protection of the undisputed amount. It is thus implicit that the judge,

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[1] ***Amarjeet Singh & Ors vs Devi Ratan & Ors (2010) 1 SCC 417***

who has specifically referred to the prayer seeking a restraint and has not granted the same, is deemed to have rejected the same. For a relief claimed but not granted is deemed to have been rejected.[2]

24. Further, it is an admitted position that the petitioners did not assail the said judgment dated 29.07.2016. It is only the respondents, who had filed the appeal against the final judgment dated 29.07.2016.

25. Perusal of paragraph 114 of the Judgment dated 29.07.2016 shows that the parties have also been given liberty to move an application under Section 117 of the Act before the Arbitral Tribunal, if so necessary or under changed circumstances.

26. In case the petitioners were aggrieved by judgment dated 29.07.2016 or were aggrieved by the express or implied rejection of the relief sought by the petitioners, the petitioners could have always filed an appeal or even approached the Arbitral Tribunal by way of an application under Section 17. Admittedly, the petitioners have neither filed an appeal nor filed an application under Section 17 seeking a restraint on the transfer of the shares.

27. The mere fact that the interim order operated only till 14.09.2017 i.e., the date on which the respondent furnished the security, is of no consequence. The judgment dated 29.07.2016 is very

[2] ***State Bank of India v. Ram Chandra Dubey, (2001) 1 SCC 73***

clear and specifically directed that the interim order was to continue only till the time the respondents deposited the amount. The writing was clear on the wall that the moment the deposit would be made by the respondents, the interim order would stand vacated. The direction is also very much clear to the petitioners and that is why they have filed these applications as soon as the respondents have complied with the directions of securing the said amount.

28. In view of the above, the Petitioner are not entitled to an order for extension of interim order dated 18.05.2016 (as modified by order dated 27.05.2016) by way of these applications. Accordingly, the applications are dismissed.

29. It is clarified that the rejection of the applications would not come in the way of the petitioners filing an application under Section 17 before the Arbitral Tribunal in terms of the liberty granted by order dated 29.07.2016. It is further clarified that in case such an application is filed, it would be open to the parties to raise such pleas as may be available in law.

30. Order *Dasti* under the signatures of the Court Master.

SANJEEV SACHDEVA, J

SEPTEMBER 18, 2017/st