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

\+ O.M.P.(I) (COMM.) 300/2016

IL&FS TRUST COMPANY LIMITED & ANR.

..... Petitioners

Through : Mr Abhinav Vashisht, Sr Adv with Mr Jatin Pore, Mr Aditya Dewan, & Ms. Pooja Nuwal, Advs.

versus

ARIA HOTELS AND CONSULTANCY SERVICES PRIVATE LIMITED & ORS.

..... Respondents

Through : Mr Arun Kathpalia, Sr Adv with Mr Siddarth Aggarwal, Adv.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **18.07.2016**

IA No.8324/2016

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P.(I) (COMM.) 300/2016

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia,* praying as under:-

"a. Pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court be pleased to pass an order of injunction restraining the Respondents jointly and severally by themselves, their servants and/or agents or in any manner whatsoever from taking any steps towards converting the First Tranche of 18,69,360 CCPS held by the Petitioner No.2 into equity shares of the Respondent No.1 in any manner, ratio or number other than as set out in the letter of the Petitioner No.2 dated 10th June, 2016;

b. Pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court be pleased to pass an order of injunction restraining the Respondents by themselves, their servants and/or agents or in any manner whatsoever from taking any steps towards issuing equity shares of the Respondent No.1 to the Petitioner No.1, making any statutory filing or cancellation of the existing share certificates of the First Tranche of CCPS held by Petitioner No.1 on the basis of the purported but illegal conversion of the CCPS into equity shares as claimed by the Respondent No.1 in its letter dated 4th July, 2016.

c. In the alternative to (a) and (b) above, pending the hearing and final disposal of the arbitration proceedings between the Petitioners and Respondents, this Hon'ble Court be pleased to pass an order of injunction directing the Respondents by themselves, their servants and/or agents to maintain the status quo as on 30th June, 2016 with regard to the equity shares of the Respondent No.1 as well as the CCPS held by the Petitioners and the Respondent No.2 and the OCPS held by the Respondent No.2, in the Respondent No.1 Company and not to make any changes or alterations therein;

d. Pending the hearing and final disposal of the arbitration proceedings between the Petitioners and Respondents, the Respondents be directed to request the Reserve Bank of India to keep the application made by the Respondent No.1 for conversion of the CCPS held by the Petitioners, in abeyance."

2. It is asserted by the petitioners that petitioner no.1 holds 4,83,455/- Compulsory Convertible Preference Shares (hereafter 'CCPS') and

petitioner no.2 holds 1,68,24,236/- CCPS issued by respondent no.1 company in two tranches pursuant to the Investment Agreement dated 17.06.2010 (hereafter 'the Investment Agreement') executed between the petitioners and the respondents. The petitioner has filed the present petition alleging that the respondents propose to convert the CCPS into equity shares in the ratio of 1:0.2771 which according to the petitioners is in gross violation of the terms of the Investment Agreement. It is asserted that till June 2016, the respondents were proposing to convert CCPS into equity shares in the ratio of 1:1 and even the 'notes to accounts' to the audited accounts for Financial Year 2015-16 had indicated the said conversion ratio.

3. The petitioners state that respondent no.1 had entered into a development agreement with Delhi International Airport Private Limited in the year 2009 for acquiring developing rights over certain land situated at Aerocity, New Delhi. Since the respondents required funds for the said project, they had approached the petitioners for raising finances for the project. Accordingly, the petitioners entered into the Investment Agreement pursuant to which the petitioners invested an amount of Rs.80 crores in respondent no.1 on the terms and conditions as set out in the Investment Agreement. In terms of the said Agreement, the petitioners were allotted 13,461,538 equity shares of Rs.10/- each at the rate of Rs. 26 per share and 17,307,692 CCPS of Rs.10/- each at the rate of 26 per CCPS.

4. The CCPS were allotted in two tranches; first tranche being allotted on 03.07.2010 and the second tranche on 07.10.2010. The CCPS allotted to the petitioners were at a coupon rate of 0.01% p.a. and for a term of six years from the date of issuance.

5. Mr Abhinav Vashisht, Senior Advocate appearing for the petitioners has referred to Schedule II of the Investment Agreement which contained the terms for conversion of the CCPS. He drew the attention of this Court to clause 1 of Schedule II which required the *'Investors CCPS'* to be converted into such number of equity shares which would result in the holder of such *Investors CCPS* to own in aggregate 32.65% of the equity share capital of the company on a fully diluted basis. He further contended that the petitioner's shareholding in respondent no.1 stands at 35.65% of the equity share capital and the proposed conversion would result in reduction of the said holding. He contended that this would be in breach of the Investment Agreement.

6. Next, Mr Vashisht contends that conversion of CCPS and any other dilution of the equity share was agreed as one of the 'reserved matters' which could not be transacted by respondent except by an affirmative vote of the petitioners.

7. Mr Vashisht earnestly contended that conversion of CCPS into equity share would dilute the value of the petitioners' holding.

8. Mr Vashisht also drew the attention of this Court to the definition of 'Investor Securities' and 'Investor Shares' as provided in clause 1.88 and 1.89 of the Investment Agreement to contend that the expression 'Investor Securities' included 'Investor shares' which in turn meant all equity shares issued by the company and held by the investors. He submitted that the conversion of CCPS at an abysmally low ratio would result in lowering the value of the investor securities and, thus, adversely affecting the calculation

of the Buy Back Price.

9. I have heard Mr. Vashisht at some length.

10. At the outset, it is relevant to refer to Clause 16 of the Investment Agreement. The said Clause as quoted in the petition is reproduced below:-

> "16. **INVESTOR LIQUIDITY OPTION AND EXIT RIGHT**
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> The Investors and the Promoters shall in good faith hold discussions to implement the provisions of this Clause 16 in such manner (and at such number of times, as may be required) such that the commercial objectives set out in Clause 16 are met to the maximum extent possible. The Investors shall have right to exercise any or all of the options listed in Clause 16:
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> 16.1 Swap/Exit
>
> 16.1.1 Unless otherwise agreed in writing by the Investors, the Company and the Promoters undertake to provide an exit to the Investors from the Company after March 31, 2013, such that the Investors hold fully paid up equity shares of AHWL (in such inter se proportion as may be decided by the Investors), subject to a maximum of 14% (fourteen percent) of the issued and paid up equity share capital of AHWL on a Fully-Diluted Basis.
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> 16.2 Buy Back/Purchase
>
> 16.2.1 Without prejudice to the other rights that the Investors may have under Applicable Law and/or under the Transaction Documents, for any reason whatsoever in the event the Company and/or the Promoters are unable to complete the construction of the Project within 4 years of the date of the First Completion Date and/or the Opening Date (as defined under the Operating Agreement) does not occur within 4 years of the date of the First Completion Date and/or the exit options under Clause 16.1 are not completed for any reason whatsoever, for any reason whatsoever, by April 1, 2015 in the manner envisaged by the Investors and/or

pursuant to the provisions of Clause 18, the Investors shall have the right (but not the obligation) to sell and call upon the Company to buy back (the "Buy Back Option") and the Promoters shall cause the Company and the Company shall be bound to purchase the respective Securities issued by them and held by the Investors within a period of 60 (sixty) calendar days from the date of receipt by the Company of the notice issued by the Investors (the "Buy Back Option Notice"). The purchase price for the Investor Securities (the "Buy Back Price") shall be the Fair Value thereof or an amount equal to the Investment Amount plus an IRR of 15% (fifteen percent) per annum (compounded quarterly), whichever is higher (net of all Taxes payable in India). On receipt of the Buy Back Option Notice by the Company, the Company shall be obliged to, and the Promoters shall be obliged to cause the Company to, buy back the Investor Securities in accordance with the provisions of the Act at the Buy Back Price (net of all Taxes payable in India).

16.2.6 In the event, in the opinion of the Investors, the Company is unable fully to comply with the provisions of Clause 16.2.1 to 16.2.5 above and/or pursuant to the provisions of Clause 18, the Investors shall have the right (but not the obligation) to sell and call upon the Promoters ("Security Purchasers") to purchase (the "Purchase Option") and the Security Purchasers shall be bound to purchase all of the respective Investor Securities (offered by the Investors) within a period of 30 (thirty) calendar days from the date of receipt by the Promoters of the Purchase Option notice issued by the Investors (the "Purchase Option Notice"). The purchase price for the Investor Securities (the "Purchase Price") shall be the Fair Value thereof or an amount equal to the Investment Amount plus an IRR of 15% (fifteen percent) per annum (compounded quarterly), whichever is higher (net of all Taxes payable in India). On receipt of the Purchase Option Notice by the Security Purchasers, the Security Purchasers, shall be obliged to buy the Securities of such Investors at the Purchase Price (net of all taxes payable in India). Subject to the prior approval of the Investors, the Promoters shall be entitled to nominate one or more Persons as Security Purchasers for compliance of the provisions of this Clause 16.2.6."

11. It has been asserted in the petition that the petitioners have, by the

letters dated 23.03.2016, served a "Buy Back Option Notice" in terms of Clause 16 of the Investment Agreement. It is thus apparent from the above that the petitioners, having admittedly exercised the 'Buy Back Option', have already made a demand for the fair value of the securities held by them or an amount equal to the Investment plus IRR of 15% p.a. (compounded quarterly), whichever is higher.

12. The contention that the petitioner would be prejudiced by the conversion inasmuch as the conversion of CCPS at the rate as proposed by the respondent would adversely affect the petitioner's claim, as it would reduce the Fair Value of 'Investor Securities', is unmerited. The conversion of CCPS would in no manner prejudice the petitioners in claiming what they consider to be the correct 'Buy Back Price'. The petitioners are at liberty to urge all the issues on merits before the Arbitral Tribunal as and when constituted including the correct value of the securities held by them.

13. Since it is the petitioner's case that they have already exercised the Buy Back Option for exiting their investment, I am unable to appreciate as to how the interim prayer pressed on behalf of the petitioner - that is, for restraining the respondents from converting the CCPS - would be in aid of the petitioner's claim.

14. Section 9 of the Act enables a party to apply to a Court for interim measures of protection. An order restraining the respondents from conversion of CCPS - after the petitioners have exercised the Buy Back Option and demanded the 'Buy Back Price' in terms of Clause 16 of the Investment Agreement – would not afford the petitioners any protection as

far as their claim is concerned.

15. For the reasons stated above, the petition is dismissed. It is clarified that this order will not preclude the petitioners from approaching the Arbitral Tribunal as and when constituted for any interim relief under Section 17 of the Act. This order would also not preclude the petitioners from applying for an order for an effective measure of protection under Section 9 of the Act.

VIBHU BAKHRU, J

JULY 18, 2016
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