

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

% *Judgment reserved on: 6th April, 2016*
Judgment pronounced on: 29th April, 2016

+ **O.M.P.(I) No.214/2015**

UNITECH REALTY PROJECTS LIMITED Petitioner
Through Mr.Amit Sibal, Sr. Adv. with
Mr.Sanjeev Kapoor, Mr.Rajat
Jariwal & Mr.Aakash Bajaj, Advs.

versus

ATEN PORTFOLIO MANAGERS PRIVATE LIMITED Respondent
Through Mr.Rajat Navet, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 for seeking various interim orders/ directions of this Court.

2. Brief facts of the case as per the petition are that the respondent-Company approached the petitioner-Company to manage the investments/funds/assets of the petitioner. Pursuant to the same, the petitioner accepted the request of the respondent-Company.

2.1 Thereafter, a Portfolio Management Services Agreement dated 2nd April, 2014 (hereinafter referred to as the "PMSA") was entered between the petitioner-Company and the respondent-Company whereunder the respondent-Company was authorized to act on behalf of the petitioner as the portfolio manager and manage the

funds/assets/portfolio of the petitioner. It is pertinent to mention that the PMSA was for an investment upto Rs. 50 crores.

2.2 Pursuant to the PMSA, an investment of Rs. 30 crores was made by the petitioner. The details of the investments made under the PMSA is as follows:

S.No.	Date of Investment	Amount of Investment (Rs. in crores)
1.	22.05.2014	10
2.	26.05.2014	10
3.	27.05.2014	10
Total		30

2.3 Under the PMSA, the respondent-Company was authorized to act on behalf of the petitioner and to *inter alia* carry out the following functions:

- (i) Opening, operating and closing one or more bank accounts and one or more depository accounts;
- (ii) Transferring the funds and portfolio (deposited by the petitioner with the respondent-Company) to the bank account and depository account;
- (iii) Purchasing, subscribing to or otherwise acquiring or investing in securities and paying the consideration for the same;
- (iv) Selling, redeeming, transferring or otherwise dealing with or disposing of securities and receiving the consideration for the same;
- (v) Holding the assets in the name of the petitioner-Company;

- (vi) Appointing and instructing brokers, sub-brokers, custodians, depository participants, lawyers, accountants and others in relation to the PMSA and entering into agreements with them on behalf of the petitioner-Company;
- (vii) Demand/collect/receive dividend, interest and other accretion and amounts in respect of the assets and generally attend to and act in terms actions, matters and deeds in connection with sale/purchase/transfer/delivery/other dealings pertaining to the securities/monies/assets of the petitioner, and
- (viii) Debit the account of the petitioner for all the service charges, fees, out of pocket expenses, etc.

2.4 The relevant clause of the PMSA has been reproduced herein below:

"The Client hereby authorizes the Portfolio Manager, either by itself or through any person appointed by it, to do all such acts on behalf of the Client as the Portfolio Manager may in its absolute discretion consider necessary or advisable for the purpose of rendering Discretionary Portfolio Management Services including, without limitation: (i) opening, operating and closing one or more bank accounts and one or more depository accounts (ii) transferring the Funds and Portfolio (deposited by the Client with the Portfolio Manager) to the Bank Account and Depository Account (iii) purchasing, subscribing to or otherwise acquiring or investing in Securities and paying the consideration for the same (iv) selling, redeeming, transferring or otherwise dealing with or disposing of Securities and receiving the consideration for the same (v) holding the Assets in the name of the Client or any custodian, nominee or agent of the Client as the Portfolio Manager

considers appropriate (vi) appointing and instructing brokers, sub-brokers, custodians, depository participants, lawyers, accountants and others in relation to the Discretionary Portfolio Management Services and entering into agreements with them on behalf of the Client (vii) Dematerializing physical Securities and rematerializing Securities (viii) executing such documents as may be necessary (ix) apply for the issuance of duplicate certificates (x) receiving contract notes, if any (xi) perform rebalancing of Portfolio (xii) make necessary applications/representation to any governmental/regulatory and quasi-judicial authority on behalf of the Client (xiii) apply/correspond/intimate/instruct/perform/execute as may be necessary under the Depositories Act, 1996 and the SEBI (Depository & Participants) Regulations, 1996 for the purpose of carrying out the transactions pertaining to Portfolio Management Services (xiv) demand/collect/receive dividend, interest and other accretions and amounts in respect of the Assets and generally attend to and act in transactions, matters and deeds in connection with sale/purchase/transfer/delivery/other dealings pertaining to securities/monies/assets (xv) paying all amounts required to be paid in connection with the Discretionary Portfolio Management Services and/or this Agreement including the Portfolio Management Fees and expenses incurred for or in connection with rendering Discretionary Portfolio Management (xvi) debit the Client's account for all the service charges, fees, out of pocket expenses, conveyance expenses, postage, telephone/fax charges, franking charges, stamp duty, audit, etc. (xvii) pay or allow all taxes, rates, charges, deductions, expenses and outgoings whatsoever due and payable or to become due and payable on Client account or in respect of the securities (xviii) undertake or perform such other functions as may be necessary in performance of Portfolio Management Services."

2.5 Under Clause 3 (8) of the PMSA, the respondent-Company was obligated to provide reports to the petitioner-Company every six months and act as and when reasonably requested by the petitioner-

Company to furnish to it a report, *inter alia*, containing the following details:

- (i) The composition and the value of the portfolio, description of the securities of the Petitioner, number of securities of the Petitioner, value of such securities which form part of the portfolio of the Petitioner, cash balance and aggregate value of the portfolio as on the date of the report;
- (ii) Beneficial interest received during that period in respect of interest, bonus shares, rights shares and debentures, etc.;
- (iii) Transactions undertaken during the period of the report including the date of the transaction and details of purchases and sales;
- (iv) Expenses incurred in managing the portfolio, etc.;

2.6 As per Clause 4(D) of the PMSA, the respondent-Company was contractually bound not to lend securities held on behalf of the petitioner-Company to a third person except with the written authorization of the petitioner-Company to participate in such securities lending activity.

2.7 As per Clause 4 (H) of the PMSA, the respondent-Company was required to keep confidential all proprietary/personal/portfolio related information exchanged between the petitioner-Company and the respondent-Company in the course of the respondent's engagement unless the respondent-Company was legally compelled or required to disclose such information.

2.8 The PMSA also provides that the period of the said Agreement is perpetual and the minimum period of investment shall ordinarily run adjacent to the term of placement of funds in a specific product offering until its maturity and until such time and on such terms

agreed upon in relation to the product offering to which the account assets are invested. Therefore, the term of the PMSA Agreement was dependent on the maturity of the funds invested by the respondent-Company. However, it is understood that the indicative term sheet provided that the petitioner-Company can exercise the put option on the entire outstanding debentures on the expiry of three months from the date of investment and on every month thereafter. Furthermore, Clause 7 of the PMSA Agreement also empowers the petitioner-Company to prematurely terminate the said Agreement.

3. It is submitted that the respondent-Company in complete breach of the PMSA has never provided any detail to the petitioner-Company regarding the portfolio, transaction undertaken or the interest received during the period of the PMSA, let alone submitting any report as per Clause 3 (B) of the PMSA. No payment in the form of interest or return etc. has been made by the respondent-Company to the petitioner-Company.

4. The petitioner-Company vide its letter dated 1st August, 2014, brought to the notice of the respondent-Company that the investment of Rs. 30 crores has been made by the petitioner under the PMSA. In view of the same, the petitioner-Company requested the respondent-Company to repay the entire investment amount (along with the pending interests etc.) to it at the earliest and in no case later than 30 business days from the date of the said letter. However, neither did the respondent-Company repay the investment amount nor did it respond to the said letter.

5. It is alleged by the petitioner that the respondent-Company in order to cover up the gross delay on their part to refund the

securities/investment in the petitioner's account under the PMSA, issued a letter on 25th August, 2014 to the petitioner, wherein it was stated that the respondent-Company has decided not to seek renewal of its Certificate of Registration and therefore it desired to terminate the PMSA as per Clause 7 of the PMSA. The said letter further stated that the date of the termination of the PMSA would be considered as 30th September, 2014. It is contended by the petitioner that the said letter required the petitioner to choose one of the following two options within seven days of the receipt of the said letter, otherwise option No.1 would be exercised:

- (i) The respondent-Company will transfer all the securities (as defined under the PMSA) to the designated participant of the petitioner-Company under the PMSA and transfer the funds to the designated bank account of the petitioner-Company; or
- (ii) The petitioner-Company will make best efforts to liquidate the securities upon receipt on the written confirmation from the petitioner-Company to exercise this option, along with the funds, to the designated bank account (under the PMSA) of the petitioner-Company. Further, if the respondent is unable to liquidate any or all of the securities by 30th September, 2014, then it will transfer such remaining securities to the depository participant account of the petitioner under the PMSA and transfer the funds to the designated bank account of the petitioner under the PMSA.

6. As the letter dated 1st August, 2014 of the respondent-Company was an afterthought and made with an attempt to render

the claims of the petitioner-Company unrecoverable, the said option provided in the said letter was rejected by the petitioner-Company.

7. Thereafter, on 8th September, 2014, Unitech Corporate Parks PLC (erstwhile indirect holder of 60% of equity share capital in the Petitioner-Company) and IDFC Limited (erstwhile owner of 40% of equity share capital in the petitioner-Company), specifically instructed the respondent to refrain from taking any actions/steps pursuant to the letter dated 25th August, 2014. By way of the said letter, Unitech Corporate Parks PLC and IDFC Limited also sought information regarding the securities/ investment made by the petitioner-Company under the PMSA.

8. It is alleged that despite the various meetings held and communications made by the petitioner to the respondent for repayment of the investment and to amicably settle the matter, the respondent has remained non-cooperative and has not paid any heed to the requests of the petitioner.

9. Counsel for the petitioner submits that in view of casual approach of the respondent-Company and the consequent default under the PMSA, on 9th January, 2015 a legal notice was sent to the respondent-Company on behalf of the petitioner, wherein it was categorically stated that the respondent-Company is obligated to repay the entire investment amount (along with all accruals, benefits, entitlements, or any other beneficial interest), to the petitioner-Company. In view of the same, the respondent-Company was called upon to repay the entire investment amount along with the beneficial interest etc., to the petitioner-Company at the earliest and in no case later than 7 business days from the date of this letter.

10. In response to the notice dated 9th January, 2015, the respondent-Company vide its letter dated 20th January, 2015 stated that the claims raised by the petitioner are false, incorrect and baseless. It was stated that the respondent is in the process of obtaining relevant data in order to provide a detailed response. It was also stated that they will revert within three weeks with a response.

11. After the expiry of the said period on 10th February, 2015, as per the petitioner, no detailed response as specified in the letter dated 20th January, 2015 has been received from the respondent. It is submitted that the respondent-Company is in breach of Clause 3(8) of the PMSA, as it has failed to provide the petitioner-Company with the report which was due to be submitted on or before 2nd October, 2014. It is submitted that such report was to contain the details of the transactions undertaken by the respondent-Company and the value and composition of the portfolio of the petitioner-Company etc. It is also submitted that despite repeated requests of the petitioner-Company, the respondent-Company has failed to give the details of the securities/investment made by the petitioner-Company.

12. The petitioner apprehends that the respondent-Company in breach of Clause 4(D) of the PMSA has lent securities held on behalf of the petitioner-Company to third person without written authorization from the petitioner-Company and the respondent may have divulged proprietary/ personal/portfolio related information exchanged between the petitioner-Company.

13. In terms of the said PMSA executed between the petitioner and the respondent-Company, the investment of Rs. 30 crores (along with the beneficial interest etc.) is due from the respondent-Company in favour of the petitioner-Company.

14. The petitioner-Company relies on Clause 18 of the PMSA for invocation of arbitration which reads as under:

"18. SETTLEMENT OF GRIEVANCES, DISPUTES AND PROVISIONS FOR ARBITRATION

A) The Portfolio Manager shall not be under any liability on account of anything done or omitted to be done or suffered by the Client in good faith in accordance with or in pursuance of any request or advice of the investments made by the Portfolio Manager or any agents.

B) The Client in case of any grievance in relation to the performance of Portfolio Management services shall approach the in-house administrative mechanism for its redressal/resolution:

(i) Complaints shall be acknowledged and responded to within a period of 5 working days from the date of receipt of the complaints;

(ii) The officer-in-charge of grievance redressal shall endeavour to resolve the dispute within one week from its admittance and if the matter still remains unresolved, the matter may be escalated to the Principal Officer;

(iii) The Principal Officer shall try and resolve any dispute with the client in a period of one week, failing which, it shall be liable to refer the matter to inter-party mediation, failing which, the dispute shall be referred to a binding Arbitration between the parties and all disputes, differences, claims and questions whatsoever arising between the Client and the Portfolio Manager and/or their respective representatives shall be settled in accordance with and subject to provisions of the Arbitration and Conciliation Act, 1996 or any statutory requirement, modification or re-enactment thereof for

the time being in force. Such Arbitration proceedings shall be held at Delhi or such other place as the Portfolio Manager thinks fit and in terms thereof, the dispute shall be referred to the sole arbitration of a person to be nominated/appointed by the Portfolio Manager. The parties agree that during the pendency of arbitration proceedings, no party shall seek to defeat the ongoing arbitration by approaching a civil court for adjudication of disputes relating to such matter as may be pending before the arbitrator.

(iv) While resolving the Grievance, the officer/arbitrator shall give due consideration to acts done in good faith or risk or losses arising out of normal business practices, which have been disclosed in the Agreement or have bearing on the normal operations as valid justifications absolving the Portfolio manager of any unintentional act leading to the grievance."

15. After filing of the present petition, the Court on 13th May, 2015 and 19th May, 2015 passed the following orders:-

Order dated 13th May, 2015 reads as under:

"Learned proxy counsel for the petitioner has drawn my attention to para C at page 19 of the petition, wherein it has been averred that pursuant to the PMSA, an investment of Rs.30 Crores was made by the petitioner on May 22, 2014, May 26, 2014 & May 27, 2014. He has also drawn my attention to para F of the petition, wherein it is averred that under Clause 3(B) of the PMSA, the respondent company was obligated to provide reports to the petitioner company every six months and act as and when reasonably requested by the petitioner company to furnish to it a report containing various information like composition and value of the portfolio, description of the securities, number of securities, value of the securities, beneficial interest received, bonus shares, right shares and debentures etc.

It is the case of the petitioner that the respondent has failed to provide the above details. The communications of the petitioner to the respondent to repay the

investments have not been responded even though they had sought time.

Issue notice to the respondent, returnable on 19th May, 2015. Dasti in addition.

The respondent shall bring to the Court statement giving details/information about the composition and value of the portfolio of the petitioner company, description of the securities, number of securities, value of securities, which forms part of the portfolio of the petitioner company."

Order dated 19th May, 2015 reads as under:

"Mr.Rajat Navet, counsel appears for the respondent on notice. He has placed before me a compilation of documents, and has referred to page 10 of that compilation, which is a letter dated October 1, 2014 addressed by the respondent to the petitioner, wherein, in para 6 & 8, the respondent has stated as under:

"6. Your Securities (as defined in the Agreement) will continue to remain in your depository participant account with ILFS Securities Services Limited as detailed below ("URPL DP Account"):

Depository Participant's Name: ILFS Securities Services Limited

Depository Participant's ID: IN300095

URPL's ID: 11746211

Contact Person: Ms. Sripriya Kannan

Phone : 022-42493211/3207

Email : dp.team@issl.co.in

XXX XXX XXX

8. With termination of the Agreement, we will no longer act as your attorney under the Power of Attorney to maintain and operate the above said URPL DP Account. You are advised to immediately provide alternate and new set of authorized signatories to ILFS

Securities Services Limited to access, maintain and operate the above said URPL DP Account. We are writing to ILFS Securities Services Limited separately to apprise them of the above and termination of the Agreement”.

Mr.Navet states that in view of the position referred to in para 6 and 8 of the letter, the respondent cannot deal with the securities of the petitioner which are lying in the petitioner depository with ILFS Securities Services Limited. The statement is taken on record.

Mr.Sibal, learned Senior Counsel seeks some time to take instructions from his client on the documents filed by the respondent today.

Renotify on 20th July, 2015.”

16. In the connected petition being OMP (I) No. 542/2015 learned counsel for the respondent filed the affidavit of Mr. Chandra Prakash Srivastava wherein it was mentioned that the petitioner is fully aware of the status of its investments after the signing of the Portfolio Management Services Agreement, the respondent had time and again kept the petitioner informed of the status of the investments made by the respondent on behalf of the petitioner in various securities by way of emails, letters and quarterly reports. The respondent gave details of all documents executed with respect to the said investments as well as the portfolio appraisal as on 30th September, 2014. The statement of the respondent's counsel has also been recorded in the order dated 17th March, 2016.

It is submitted by Mr. Rajat Navet that in fact the respondent has dispatched to the petitioner and its Officers/Directors, by way of registered post and said letters have been duly received by the petitioner which is evident from the postal receipts and the certificate issued by the postal department with regard to delivery of

the said letters. Proofs of dispatch of letters along with certificate issued by the postal department confirming delivery thereof have been placed on record. It is stated on account of some *inter se* disputes between the erstwhile shareholders and present shareholders of the petitioner Company (with which the respondent has no connection whatsoever) the petitioner has filed the present petition in order to harass the respondent.

17. The petitioner by letter dated 9th January, 2015 asked the respondent-Company to give information/documents within 7 days from the date of this letter:

- (i) All information about the securities/investments made by the petitioner, as on the date of the receipt of the said letter;
- (ii) Copy of the Portfolio Management Services Agreement dated 2nd April, 2014;
- (iii) Copy of the Indicative Term Sheet executed between the petitioner-Company and the respondent-Company;
- (iv) Details of the designated bank account under the PMSA;
- (v) Details of the designated depository participant account under the PMSA.

18. Learned Senior counsel appearing on behalf of the petitioner submits that the respondent has still not provided the full details in compliance with the orders passed by this Court and thus, deficient in disclosing the particulars regarding the portfolio investment of the petitioner.

19. In view of peculiar circumstances in the matter wherein two different versions are made by the parties before the Court, if any of the details as per petitioner is not provided by the respondent, in

order to avoid any controversy, let the same be provided again by the respondent, as no harm may cause to them. In view of the above, the respondent is directed to provide complete details of documents as desired by the petitioner within the period of eight weeks from today. After the said compliance, the respondent shall file an affidavit within two weeks thereafter.

20. The petition is disposed of accordingly.

(MANMOHAN SINGH)
JUDGE

APRIL 29, 2016

