IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2448 OF 2022

PKH Ventures Limited ..... Petitioner

Vs.

Union of India & Ors. ..... Respondents

Mr. Faazeen Pardiwalla i/b Mr.Amir Arsiwala for the petitioner

Mr.Niranjan P. Shimpi for the Respondent no.1/Union of India

Ms.Drishti Das a/w Ms.Roma Bhojani and Mr.Jayesh Karnawat i/b M/s.Cyril Amarchand Mangaldas for the Respondent nos.2 and 3

CORAM: S.V. GANGAPURWALA & S. M. MODAK, JJ.

RESERVED ON: JULY 11, 2022

PRONOUNCED ON: JULY 25, 2022

JUDGEMENT : (PER : S.V.GANGAPURWALA, J.)

1. The petitioner assails the advertisement and the invitation document dated April 29, 2022 published by respondent nos.2 and 3 concerning the sale of the combined 42.25% stake in the Company known as IL&FS Engineering and Construction Company Limited. The respondent no.2 Company is a Core Investment Company. It conducts its business from a network of subsidiaries and joint venture entities. Respondent no.3 is one of its subsidiaries. In the

month of September, 2018, the credit rating of respondent no.2 was downgraded to 'D'. On or about October 01, 2018, respondent no.1 filed Company Petition No.3638 of 2018 with the National Company Law Tribunal, Mumbai Bench (NCLT) under section 242 of the Companies Act, 2013. Under order dated October 01, 2018, the NCLT superseded the existing Board of Directors of respondent no.2 by appointing the nominees named by the respondent no.1. The new Board of Directors of respondent no.2 submitted a report titled 'Third Progress Report - Proposed Resolution Framework for IL&FS Group' dated December 17, 2018 (Resolution Framework Report). The said report was submitted to the NCLAT. The resolution framework report provided for monetizing the assets of respondent no.2 and its group companies. Pursuant to the same, the advertisement is issued for sale of 42.25% stake in the Company and the invitation document.

2. The learned advocate for the petitioner strenuously contends that the respondent no.1 has taken steps to ensure that respondent nos.2 and 3 monetize their assets in a way which is transparent and leads to the best possible recovery. However, the manner in which the respondent no.2 and 3 are proceeding leads to reasonable suspicion as to their intentions.

3. The impugned advertisement and the invitation document both state that the respondent nos.2 and 3 have already received a "binding offer" from a prospective buyer. The bids are required to be solicited in a fair and transparent manner which begins with publication of an advertisement calling for Expression of Interest. However, in the present matter, the process is beginning from the respondent nos.2 and 3 already having received a "binding offer" from an unnamed party. It is further contended by the learned counsel for the petitioner that there is nothing to suggest that the respondent nos.2 and 3 have conducted exercise of valuation of their shares in the target company, which was required to be done as per the scheme set out in the affidavit dated January 25, 2019 filed by respondent no.1 before NCLAT. The basis on which the eligibility criteria has been decided has not been clarified in the invitation document. The action of respondent nos.2 and 3 has resulted in an inequitable situation where the unknown 'initial bidder' has been effectively exempted from the transparent sale process and has had ample opportunity to conduct it with due diligence. The other bidder such as the petitioner shall begin with a disadvantage as they are entering into the sale process much after the unknown disclosed 'initial bidder'.

4. It is further contended by the learned counsel for the

petitioner that the entire purpose behind a fair and transparent sale process is to ensure that the best possible price is received and that it is not hijacked by the vested interests. The present sale of shares owned by respondent nos.2 and 3 in the target company has been undertaken by them in contravention of the scheme framed by respondent no.1 in its affidavit dated January 25, 2019 and to facilitate some unknown and undisclosed 'initial bidder'. The respondent nos.2 and 3 are applying dual standards. For all prospective bidders, respondent nos.2 and 3 have prescribed eligibility criteria. However, the initial bidder is allowed to participate in the sale process outside the so-called "Resolution Framework" and appears to have been exempted from the eligibility criteria.

5. According to the learned counsel for the petitioner, the respondent nos.2 and 3 propose to adopt the process akin to a "Swiss Challenge Method". This introduces a degree of uncertainty to the entire proceedings. The respondent nos.2 and 3 are acting contrary to the mandate of respondent no.1 and also against the public interest by attempting to sell their shares in the target company in an opaque and secretive manner.

6. The respondent nos.2 and 3 be directed to start afresh the

process of the sale of the combined 42.25% stake in the company known as IL&FS Engineering and Construction Company Limited.

7. The learned counsel for the respondents submits that the present Writ Petition is not maintainable. Respondent nos.2 and 3 are companies registered under the Companies Act. They are not amenable to the writ jurisdiction of this court. It is contended that earlier two times the advertisements were issued. However, no effective buyers were received. This is the third time advertisement is issued for the 42.25% stake. One offer has been received i.e. the binding offer from the prospective buyer for acquisition of 42.25% of the stake. If the price is known, the other bidders, if they want to quote a higher price, would thereafter be dissuaded from quoting higher price. The petitioner or the other bidders would not be at disadvantage. After the Expression of Interest is submitted by the tenderers, the interested party, subject to compliance with the rules of the data room, will be provided with the access to the data room. The sale is been done in a transparent manner. The learned counsel further submits that even otherwise the petitioner has a remedy before NCLAT.

8. We have considered the submissions. It appears that the petitioner has not submitted the Expression of Interest. The

petitioner could have submitted Expression of Interest without prejudice to its rights. From the record it appears that earlier also the advertisement and invitation document were published. However, the sale could not materialize. This is for the third time the advertisement and the invitation document are published. The sale of the 42.25% stake of respondent no.2 and 3 in the Company known as IL&FS Engineering and Construction Company Limited is published pursuant to the Proposed Resolution Framework for IL&FS group filed before the NCLT. Under Clause V proposed process for Asset Level Resolution is spelt out. In clause 10 there are 8 steps prescribed. Under Step 1, Expression of Interest for a company will be invited through a fair and transparent process to be approved by the New Board. Following the receipt of Expression of Interest from the potential investors, a request for proposal will be issued to the eligible applicants pursuant to which final financial bids will be sought from the eligible applicants and the eligible applicants will be provided access to information, memorandum and a data room containing material information relating to the Sale Company. Under step 3, pursuant to the due diligence exercise, the eligible applicants will be required to submit their binding financial offers. Under step 4, new buyer will follow the bids which shall contemplate various aspects. Under step 5, successful applicants are declared by the new board. Under step 6, approval of NCLT for conclusion of sale and transfer of title relating to shareholding of IL&FS group in that Sale Company would be required. Under step 6, payment of financial bid amount by the successful applicant to a designated account will be required to be made and under step 7, payment of financial bid amount by Successful Applicant to a designated account will be required to be made and under step 8, distribution of financial bid amount will be undertaken within 30 days of NCLT approving the sale.

9. The Proposed Resolution Framework provides for checks and balances. The respondents have adopted a “Swiss Challenge Method” which cannot be said to be impermissible.

10. As observed above, the petitioner has failed to submit Expression of Interest. If the petitioner has any legitimate objection to the sale, then it is for the NCLT to consider it as provided under step 6 and as observed above, it is for the NCLT to consider whether sale has been conducted in a fair and transparent manner and according to the resolution.

11. In the light of the above, we are not inclined to exercise our writ jurisdiction. It is made clear that we have not considered the

contention of the parties on merits as the appropriate authority to finalize the sale would be NCLT.

12. Writ Petition, as such, stands disposed of. No costs.

(S. M. MODAK,J.) **(S.V. GANGAPURWALA, J.)**