

OD-2

ORDER SHEET

AP/254/2022

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[COMMERCIAL DIVISION]

ADITYA BIRLA FINANCE LTD.
VS
MCLEOD RUSSEL INDIA LTD. & ORS.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : May 17, 2022.

Appearance:

Mr. S. N. Mookherji, Sr. Adv.
Mr. Rudraman Bhattacharyya, Adv.
Mr. Dwaipayan Basu Mallick, Adv.
Ms. Suchismita Ghosh Chatterjee, Adv.
Mr. Avishek E. Kisku, Adv.
Mr. Subhankar Das, Adv.
Ms. Amrita Mukherjee, Adv.
...for the petitioner

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Rajarshi Dutta, Adv.
Mr. Ritoban Sarkar, Adv.
Mr. Prasun Mukherjee, Adv.
Mr. Deepak Agarwal, Adv.
...for the respondent nos. 1, 3 to 9

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Rishad Medora, Adv.
Ms. Ramya Harihara, Adv.
Mr. Soumava Mukherjee, Adv.
Ms. Asmita Rakhecha, Adv.
...for IL&FS

The Court :

1. The petitioner prays for a direction on the respondents to forthwith tender 16,63,289 shares of Eveready Industries India Ltd. in the Open Offer in

respect of a takeover bid of Eveready (the Target Company) by three Acquirer Companies (the Burman Group) as indicated in a public announcement dated 28.02.2022 in relation to the Open Offer.

2. The right to seek such prayer is based on a charge registered on the said block of shares on 23.07.2019. The petitioner also relies on a Consent Order recorded in the arbitration between the petitioner and the respondents in the Minutes dated 15.07.2019 and an affidavit affirmed by respondent nos. 1, 4 to 9 Companies recording certain rights in favour of the petitioner in connection with the said 16.63 lakh Eveready shares held by the said respondents. The arbitration arose out of a claim made by the petitioner on the petitioner's investment in Compulsorily Convertible Preferential Shares of the respondent no. 2 (McNally Bharat Engineering Company Limited) in March 2018 with a Put Option on respondent nos. 3 – 5, exercisable after 12 months. The Put Option was secured by certain transaction documents executed by and between the parties. Since there was a margin deficiency in security cover under the agreement in relation to the put option, the petitioner claimed additional security and other reliefs on the transaction documents. The petitioner also claims the relief on the strength of an interim Award dated 30.06.2020 made in an application by the petitioner under section 31(6) of The Arbitration and Conciliation Act, 1996 by which, inter alia, the respondents, jointly and severally, were directed to make payment of INR. 81,68,22,672.87/- within a certain time frame in case of non-performance of the obligations under the put option agreement. The respondent no. 1 (Mcleod Russel India Limited) applied

for stay of the interim Award and by an order dated 04.08.2020 passed by the learned judge of this Court, as his Lordship then was, the interim Award was directed to remain stayed upon the respondent no. 1 furnishing security of Rs. 40 crores. The order of stay records that the petitioner was already secured to the extent of 40 crores in terms of an order passed in the arbitration.

3. The submissions made by learned counsel appearing for the petitioner, the respondents and IL&FS Infrastructure Debt Fund can be summed up thus. The petitioner relies on the charge of the 16.63 lakh shares created in its favour and the affidavit affirmed by the respondent nos. 1, 4 to 9 in the arbitration by which the respondents undertook to grant certain rights to the petitioner in respect of the said shares. The respondents oppose the relief claimed in the present application on the ground of the limited right given to the petitioner in respect of the 16.63 lakh shares as also the mode through which such relief is claimed. According to counsel, the interim Award is an executable award and the petitioner cannot claim interim protection of the nature as prayed for by way of an application under section 9 of the Act. IL&FS has been served with a copy of the application although not being a party to the arbitration proceedings and has been represented in the application. According to counsel, IL&FS has a prior right to the same block of shares in terms of a Non Disposal Undertaking (NDU) and also a subsisting order passed in a suit and an interlocutory application filed by IL&FS by which the respondents were restrained from creating any third party rights on the said shares without obtaining leave of the court.

4. I have considered the submissions made on behalf of the petitioner, the respondents and IL&FS. The adjudication of the matter should be made on two counts; First, whether the relief claimed can be made in an application under Section 9 of The Arbitration and Conciliation Act, 1996 Act; and second, whether the facts established on record support the relief claimed by the petitioner. These issues are being dealt with in sequence.

I. Can the petitioner claim the relief for sale of the shares/monetising the shares under Section 9 of the 1996 Act?

5. The petitioner has prayed for a direction on the respondents to forthwith tender 16,63,289 shares of Eveready Industries in the Open Offer to the public shareholders of Eveready by the acquiring Companies for acquisition of a certain number of fully paid-up equity shares of Eveready. The petitioner has also prayed for the sale proceeds of the said shares to be kept in a separate account until further orders and alternatively, for a direction on the respondent nos. 1, 3 to 9 to deposit an amount equal to the value of 16,63,289 Eveready shares at the rate of Rs.320/share amounting to Rs.53,22,52,480. In essence, the petitioner has prayed for a direction on the respondents to offer their Eveready shares for sale to the Acquirers in the Open Offer or in the alternative for securing the value of the 16 lacs shares to the credit of the petitioner upon monetising the same.

6. The question is whether relief of this nature can be made in an application under Section 9 of the 1996 Act.

7. Section 9 of the 1996 Act contemplates the grant of interim measures before/during the arbitral proceedings or after making of the arbitral award but before the award is enforced under Section 36 of the Act. The five sub-clauses to 9(1)(ii) provide for a wide spectrum of interim measures for protection of the subject matter of the arbitral proceedings until the award is put into execution by the award holder. The finite sense of the words “*interim measure of protection*” is reinforced by 9(1) where the application for interim relief by a party may only be made until the award is enforced under Section 36. The array of interim reliefs which are available to a party include preservation, interim custody or sale of any goods as well as securing the amount which is in dispute in the arbitration. The options also extend to detention, inspection of any property and interim injunction and appointment of a receiver. The last sub-clause, 9(1)(ii)(e), stretches the possibilities of the interim measure of protection to cover every other instance of threat to the subject matter of the arbitration limited only by the discretion of the Court.

8. The extended bouquet of protection contemplated under Section 9 are for the protection and preservation of the property which is the subject matter of an arbitration which is to commence or is continuing or has even concluded with publishing of the award. The intended benefit is to the party who has enforced or opposed an arbitration agreement and participated in the arbitral proceedings or has obtained (or suffered) an arbitral award. The protection is for the prevention of the property in dispute from being wasted or dissipated before the award holder can put the execution process in motion. In other

words, the property which has undergone the adjudication process through arbitration should not be reduced in value until the whole of the property is subjected to enforcement proceedings. Each of the five sub-clauses for interim protection, read separately and together, reinforce the aforesaid.

9. In the present application, the petitioner seeks a direction on the respondents to put their Eveready shares for sale in the Open Offer. The consequence of such a direction is for the Acquirer Companies to purchase these shares in aid of their bid to takeover the Target Company - Eveready Industries. The sale of the shares held by the respondents in Eveready to the Acquirers would hence be sale of the shares to an outsider who was not a party to the arbitral proceedings. Admittedly, the shares would go out of the girdle of the arbitration to a third party and the sale would therefore be an antithesis of the protection envisaged under Section 9 of the Act. As of today, the respondents hold the shares of Eveready without any evidence of the respondents seeking to divest themselves of such shares to a third party. Had the petitioner prayed for a restraint on the respondents from selling these shares to the Acquirers, such prayer would have been in line with the object of Section 9.

10. The alternative prayer for keeping the monetary equivalent of the 16.63 lakh Eveready shares in a separate account is a consequential relief which can only be granted if this court is convinced that the petitioner has made out a prima facie case for grants of reliefs in the present application.

11. This Court is therefore of the view that the relief claimed in the present application for a direction on the respondents to tender 16,63,289 Eveready shares in the Open Offer is in conflict with and sits unhappily with Section 9 of the Act.

12. The other point is the time frame. The petitioner has an interim Award in its favour from 30.06.2020. By the said interim Award, the respondents, jointly and severally, were directed to pay INR.81,68,22,672.87 to the petitioner in default of the respondents failing to perform their obligations under the Put Option Agreement. The petitioner was also given the liberty of recovering the amount by enforcing the Award under the Put Option Agreement. The respondent no.1 applied for stay of the interim Award and by an order dated 04.08.2020, a learned Single Judge of this Court, as His Lordship then was, directed to furnish an additional security of 40 crores; the petitioner already being secured to the extent of 40 crores. The Supreme Court, by an order dated 12.10.2020, directed the parties to maintain status quo as on the date of the order. Thus, the interim Award remained inert till the Special Leave Petition of the respondent no.1 was withdrawn on 02.05.2022. As of today, the petitioner has an interim Award in its favour, without any stay of the said Award and is at liberty of enforcing the interim Award under Section 36 of the 1996 Act. Although, the petitioner is yet to take steps for enforcement, the interim Award, doubtless, is an enforceable award without the fetter envisaged under Section 36; that of stay of the award under Section 36(3) read with the proviso.

13. Notably, an application for setting aside of the award under Section 34 is pending before the Court without any decision in favour of the respondent/applicant. This Court is of the view that the petitioner is seeking to enforce a part of the interim Award by resorting to a Section 9 route when the petitioner has a clean and unobstructed path for enforcing the Award under Section 36 of the Act. The petitioner may have been permitted to take this route had the relief claimed been amenable to the options for interim protection provided under Section 9.

II. Whether the petitioner is entitled to the relief on merits

14. The entire controversy arises from the rival claims of the parties on the 16,63,289 shares of Eveready held by the respondents. It is evident from the documents before the court that the petitioner's right to these shares arises from the affidavit and Consent Order dated 15.07.2019 and the charge created on the shares in favour of the petitioner. The relevant paragraph of the affidavit which forms the basis of the petitioner's case should be and is set out below :

“That instead of creation of pledge on the 16,63,289 shares of EILL, the Respondent No. 9 undertakes and agrees that all receivables, proceeds, cashflow and other rights attached to and / or in connection with the said 16,63,289 EILL shares including the right to receive dividends, distributions and / or any other accretions thereto, shall be and stand secured/ charged in favour of and for the benefit of the claimant and the claimant shall be the sole and exclusive beneficiary of all rights, titled and interest in relation to the said shares including the right to receive dividends, distributions or any other accretions thereto and of any proceeds arising out of the said EILL shares.”

15. It is clear from the above that the respondent no. 9 (Woodside Parks Limited) undertook that all receivables and the proceeds including the right to receive dividends shall stand charged in favour of and for the exclusive benefit of the petitioner. Although, the words “other rights” have been used without any specific demarcation, the words can contextually be construed to mean all benefits, proceeds and profits arising out of the use and existence of the said shares. The undertaking can also be read as the petitioner being entitled to all the benefits from the corpus of shares, that is, the usufruct of the shares while the shares remain in existence. In other words, the right of the petitioner to these shares would continue to exist as long as the shares, being the source of the right, remain in the possession of the respondents and charged to the petitioner. The undertaking also makes it clear that the petitioner’s right is to the extent of the receivables from the shares and does not extend to a pledge on the said shares.

16. Two things may hence be concluded from the above; First, the petitioner’s right is inferior to a right exercisable under Section 176 of The Indian Contract Act, 1872 which allows a pawnee to sell the thing pledged upon giving reasonable notice of the sale to the pawner. Second, the charge on the shares, as defined under section 100 of The Transfer of Property Act, 1882, and under section 2(16) of The Companies Act, 2013, does not give the petitioner the right to direct the respondents to sell the shares to an outsider / Acquirer Company. It also appears that the beneficial interest in the shares being given is to ensure that the petitioner investor can choose the time of its

exit from the contractual obligations at the best possible bargain. Further, Form No. CHG – 1 executed by the respondent no. 1 for creation of charge in favour of the petitioner on 23.07.2019 describes the type of charge as “immovable property or any interest therein”, as opposed to the un-ticked box of “movable property”.

17. Besides the nature of the right given to the petitioner as discussed above, this court also finds substance in the contention that even if the petitioner’s right can be equated to a simple mortgage over the said shares, the remedy of sale of such shares would be available under Order XXXIV Rule 4 of The Code of Civil Procedure, 1908, under which, in a suit for sale, the Court can pass a preliminary decree in favour of the plaintiff. Order XXXIV Rule 14 further makes it clear that the mortgagee who has obtained a decree for payment of money can only bring the mortgaged property to sale by instituting a suit for sale in enforcement of the mortgage. *The Co-operative Hindusthan Bank Ltd. v Surendranath De; ILR Vol. LIX 1931 Calcutta 667* and *Union Bank of India vs Eshani Rubber Industries; (1990) 1 Cal LJ 8* support the proposition urged by the respondents that Order XXXIV should also be applied on mortgages for movables. *Dattatreya Shankar Mote versus Anand Chintaman Datar; (1974) 2 SCC 799* would assist the respondents on the proposition laid down therein that a decree for sale as in a suit for mortgage should have been passed in a suit for enforcement of a charge under Section 100 of the T.P. Act read with Order XXXIV Rule 15 of the CPC. This court is hence of the view that the right given to the petitioner by way of a charge on the 16.63 lakh shares cannot

extend to a right for sale of the shares to an outsider and that too in the form of the present application .

III. Balance of convenience

A. The case of IL&FS :

18. IL&FS has a rival claim over the 16,63,289 lakh shares which form the subject matter of the relief prayed for by the petitioner. These shares were encumbered by the respondent no.1 by way of a Non-Disposal Undertaking in favour of IL&FS. This is the admitted position and would be apparent from a letter of the respondent no.1 to the BSE on 15.7.2021 where the date of the NDU is stated to be 27.3.2018. There are several other admitted facts which must be taken into account for deciding the case made out by the petitioner. First, this NDU encumbrance created on the shares is prior to the charge created on the same block of shares in favour of the petitioner by the Minutes of Meeting and affidavit dated 15.7.2019. Second, IL&FS filed a suit against the respondents for appropriate relief for giving effect to the NDU in which the application for interim relief was disposed of by a judgment and order dated 23.2.2021 restraining the respondents from creating any third party rights on the shares without leave of the court. IL&FS was further given the liberty of pursuing its claims over the shares in an appropriate forum. The petitioner was the defendant no.7 in the said suit and was given the liberty of pursuing its remedies against the respondents in the arbitration. The order has not been challenged by any of the parties before this Court.

19. IL&FS is not a party to the arbitration but has been made a party to the present proceeding by reason of an order subsisting in its favour.

B. Urgency :

20. The urgency shown for the relief claimed is the Open Offer which was due to be concluded on 10.05.2022 and was later extended to 17.05.2022. The petitioner urges prejudice after closing of the window for the Open Offer.

21. Is this contention supported by the facts on record?

22. It is submitted on behalf of the petitioner that the Offer Price of Rs.320/offer share is the best option available for the petitioner as the Lender and is required to be monetised during the period of the Open Offer. The NSE Market Summary of Eveready shares as of May, 2022 however shows that the shares hit a peak of Rs.400/share twice in 2021 and came near to the 400-Mark in March, 2022. The shares were valued at INR.317.00 as on 9 May, 2022. The apprehension that the market price of the said shares would go down or that the Offer Price of INR.320/Offer share is the best possible price at which the shares can be monetised is hence belied from the aforesaid.

23. There is also every likelihood that the valuation of the shares would increase upon the Acquirers taking over the Target Company. Thus, there does not appear to be any immediate cause for directing the respondents to put their shares on the table for sale to the Acquirers when the possibility of the shares becoming more valuable in the near future cannot be discounted

altogether. Apart from the fact that the petitioner would have the statutory remedy of enforcement of the interim Award available to it until and unless the award is stayed, the petitioner can also seek monetisation of the shares at a better price beyond the period of the Open Offer.

C. Nature of the relief :

24. The nature of the interim relief prayed for cannot also be overlooked. The interim relief is for a direction on the respondents to forthwith tender the 16.63 Eveready Shares and for the respondent no. 1 to execute all documents in that respect. The relief is also for the sale proceeds of the shares to be kept separately until further orders. The interim orders, if granted, would amount to final relief and an irreversible chain of events. Hence, such relief can only be considered upon affidavits being called for from the parties who would be affected from such interim orders. The apprehension that the other respondents, like the respondent no. 2 McNally Bharat, would also go into insolvency – the order of the National Law Tribunal Calcutta Bench dated 29.04.2022 has been placed in this regard – is an apprehension that is speculative and no material has been placed in corroboration of such.

Conclusion:

25. Balance of convenience is all about weighing the comparative gain and hardship of the parties before a Court in the event an interim order is granted or refused. In the present case, granting the order as prayed for may also not inure to the best advantage of the petitioner. The order may result in

irreversible prejudice to the respondents if the respondents succeed in obtaining a stay of the award or setting aside of the award.

26. Any order passed in favour of the petitioner in the present application would thus be in conflict with the order passed by the Suit Court subsisting in favour of IL&FS. While the respondents have been restrained from emanating the 16.63 lakh shares to a third party, the petitioner invites this court (the Arbitration Court) to do the very opposite, that is directing the respondents to offer the 16.63 lakh shares as security for the investment / money lent and advanced. In the absence of further particulars for deciding who has the better right on the shares, this court is not inclined to make an order for sale of the shares when IL&FS continues to have a right on the shares. IL&FS can therefore also decide when and at what price the shares should be sold to the acquirers, if at all.

27. These considerations persuade the Court to hold that the petitioner has not discharged its onus of establishing a case where the balance of convenience for grant of the interim order tilts definitively towards the petitioner. This Court therefore sees no ground made out for the direction on the respondents to tender their Eveready shares for sale within the window of the Open Offer till 17th May, 2022.

28. In view of the above reasons, this court is not inclined to grant the interim relief as prayed for. The respondents and IL&FS should be given a chance to bring their defence on record before any irreversible changes are put

in motion. Affidavit-in-opposition within two weeks after the court reconvenes in June, 2022, Reply within a week thereafter.

29. List this matter on 30.06.2022.

Urgent Photostat certified copies of this order, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(MOUSHUMI BHATTACHARYA, J)

bp./sg