

Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (LODGING) NO.2179 OF 2019

IN

COMMERCIAL SUIT (LODGING) NO.955 OF 2019

Adani Properties Pvt. Ltd., AhmedabadApplicants

In the matter between

Adani Properties Pvt. Ltd., AhmedabadPlaintiffs

V/s.

Bid Services Division (Mauritius) Ltd.,
Ebene, Mauritius and Ors.Defendants

ALONG WITH

INTERIM APPLICATION NO.1 OF 2019

IN

COMMERCIAL SUIT (LODGING) NO.955 OF 2019

Adani Properties Pvt. Ltd., AhmedabadApplicants

In the matter between

Adani Properties Pvt. Ltd., AhmedabadPlaintiffs

V/s.

Bid Services Division (Mauritius) Ltd.,
Ebene, Mauritius and Ors.Defendants

And

GVK Airport Developers Ltd.,
Secunderabad, Telengana and Anr.Respondents

Mr. Daraius Khambata, Senior Advocate, with Mr. Vikram Nankani, Senior Advocate, Mrs. Ferzana Z. Behramkamdin, Ms. Shivani Khanna, Ms. Bharti Bhansali and Mr. Feroz Mehta, i/by FZB & Associates, for the Applicants-Original Plaintiffs.

Mr. Janak Dwarkadas, Senior Advocate, with Mr. Venkatesh Dhond, Senior

Advocate, Mr. Rajendra Barot, Mr. Arvind Ramish, Mr. Tutunjay Singh, Ms. Nafisa Khandeparkar, Ms. Neeraja Balakrishnan and Mr. Muqheet Drabu, i/by AZB & Partners, for Defendant No.1.

Mr. S.D. Shetty, with Ms. Kavita Anchan and Mr. Arsh Misra, i/by M.S. Keny & Co., for Defendant No.2.

Ms. Shoma Maitra, with Mr. Nikhil Apte, i/by Wadia Ghandy & Co., for Defendant No.3.

Mr. Pratik Parmar, i/by India Law LLP, for Defendant Nos.5 and 6.

Mr. Ravi Kadam, Senior Advocate, with Mr. Kunal Dwarkadas, Mr. Joran Diwan, Mr. Rahul Dwarkadas and Ms. Sanaya Contractor, i/by Veritas Legal, for Defendant No.7.

Mr. Mustafa Doctor, Senior Advocate, with Mr. Rahul Dwarkadas, Mr. Kunal Dwarkadas, Mr. Joran Diwan and Ms. Sanaya Contractor, i/by Veritas Legal, for Respondent Nos.1 and 2.

CORAM : A.K. MENON, J.

DATED : 6TH NOVEMBER, 2019.

P.C. :

1. This order disposes Interim Application No.1 of 2019 while declining to grant ad-interim relief in that application and Notice of Motion (Lodging) No.2179 of 2019. These two applications are filed in a suit filed by the plaintiffs seeking specific performance of a Share Purchase Agreement (*plaintiffs-SPA*) dated 5th March 2019 between defendant no.1-Bid Services Division (Mauritius) Limited (*Bidvest*) and the plaintiffs-Adani Properties Pvt. Ltd. is valid and subsisting and binding upon Bidvest. The plaintiffs also seek a direction to defendant no.3-Mumbai International Airport Limited to do all the things necessary and submit all the necessary documents to ensure that

defendant nos.2, 4, 5 and 6 and other unspecified lenders of defendant no.3 to grant all approvals for enabling completion of transfer of shares listed in Exhibit-B to the plaint in effect to ensure that the plaintiffs get good title to the subject shares. A direction is also sought against defendant nos.2, 4, 5 and 6 and other lenders of defendant no.3 to grant all approvals required to ensure a valid transfer of the shares. Pending disposal of the suit, the plaintiffs seek an order restraining Bidvest from transferring, selling, encumbering, parting with possession or dealing with the Sale Shares. The plaintiffs also seek an injunction restraining defendant nos.2 to 6, their employees and Directors from granting approval to the transfer of the Sale Shares in favour of any third party.

2. A brief description of the parties will be necessary to appreciate the scope of the suit, notice of motion and the interim application.

The 1st defendant-Bidvest along with defendant no.2-Airports Authority of India (**AAI**); defendant no.7-GVK Airport Holdings Private Limited (**GVK-AHPL**) and; one ACSA Global Limited (**ACSA**), who is not a party to the suit, are the shareholders of defendant no.3-Mumbai International Airports Ltd. (**MIAL**). Defendant no.4 is the Ministry of Civil Aviation. Defendant nos.5 and 6 are the State Bank of India (**SBI**) and SBICap Trustee Company Limited (**SBICaps**), who among others are believed to be the lenders to defendant no.3-MIAL. The shareholding of defendant no.3 is as follows :-

Shareholder	Number of Shares	Percentage Holding
AAI (along with AAI Nominees)	5,20,00,000	26%
<u>Private Participants</u>		
GVK	7,40,00,000	37%
BSDML	5,40,00,000	27%
ACSA	2,00,00,000	10%

3. The aforesaid shares are owned by the concerned shareholders pursuant to an Inter se Consortium Agreement dated 2nd April 2006. In pursuance thereof, the AAI entered into an Operation Management and Development Agreement (**OMDA**) in favour of MIAL, whereunder MIAL was appointed for operating, maintaining, developing and otherwise managing the Mumbai Airport. In pursuance of the OMDA, a Shareholders' Agreement (**SHA**) dated 4th April 2006 came to be entered into between AAI, Bidvest, GVK and ACSA, the shareholders, recording the rights and obligations in relation to MIAL. The relevant clauses of the SHA dated 4th April 2006 contained certain restrictions on transfer. These are to be found in clause 3.6. In addition to clause 3.6 and subject to certain lock-in provisions set out under clause 2.5 in the OMDA, if any, these shareholders described as 'Private Participants' contemplated transfer, directly or indirectly, of any or all of its equity shares or voting rights, they were subject to a 'Right of First Refusal' (**ROFR**) under clause 3.7. The transfer restrictions were thereafter

incorporated in the Articles of Association (**AOA**) of MIAL and therefore are binding upon MIAL.

4. It is the plaintiffs' case and as canvassed by Mr.Khambata that Bidvest was desirous of transferring their shareholding comprising of 16,20,00,000 equity shares, described in the plaint and hereafter as 'Sale Shares', representing their 13.5% holding in the paid-up equity share capital of MIAL. On 26th January, 2019, Bidvest issued notice to GVK and ACSA, with a copy to AAI, informing them that it was ready to transfer the Sale Shares for a consideration of Rs.12487.50 lakhs i.e. a price of Rs.77.083 per share. The notice specified terms and conditions of the proposed sale. GVK is said to have exercised the ROFR, but failed to purchase the Sale Shares within the time specified. Mr. Khambata submitted that on 19th February 2019, GVK contended that the offer notice dated 26th January 2019 was defective and did not comply with the SHA and therefore not a valid offer. On 22nd February, 2019, GVK changed its position and exercised its option to purchase the Sale Shares. Consequently, on 4th March 2019, Bidvest is believed to have written a letter to GVK contending that the offer notice was not defective, however it enclosed a draft Share Purchase Agreement and set a date 30 days thereafter for completing the sale by Bidvest and purchase of the Sale Shares by GVK. The period of 30 days was to commence on 4th March 2019. According to Mr.Khambata, discussions were held between the plaintiffs and Bidvest for purchase of shares and on 5th March 2019, Bidvest entered into a Share

Purchase Agreement (*SPA*) with the plaintiffs, under which the plaintiffs were entitled to acquire the Sale Shares for a consideration equivalent to that offered to GVK, ACSA and AAI. This was subject to (i) GVK, ACSA and AAI not exercising their respective rights to acquire the Sale Shares pursuant to the ROFR; (ii) that the ROFR stood waived and; (iii) if despite exercising the ROFR, the shareholder concerned had not completed the purchase within the time specified in the SHA and AOA of MIAL.

5. Under the plaintiffs' SPA, upon expiry of the ROFR of the Private Participants, Bidvest was prohibited from selling the Sale Shares. Mr.Khambata further submitted that on 7th March 2019, AAI addressed a letter to Bidvest and GVK, calling upon the parties to comply with the timeline specified in clause 3.7 of the SHA; reference being had to the requirement of completing the transactions within 30 days from the date of the offer notice. While recording that GVK had exercised conditional acceptance on 22nd February 2019, Bidvest had, on 4th March 2019, once again renewed their offer to transfer the Sale Shares within 30 days, which period expired on 3rd April 2019. Bidvest highlighted the fact that if the rights under SHA were not exercised within the timeline prescribed, the preemptive right to acquire the sale shares would expire. Mr. Khamata further submitted that on 14th March 2019, GVK replied to AAI that it had already exercised its right under clause 3.7 (ii). On the next day, i.e. on 15th March 2019, Bidvest wrote to GVK pointing out that the draft SPA was in compliance with the provisions of the

SHA, but if GVK fails to complete the purchase within 30 days from 4th March 2019, Bidvest would be entitled to offer Sale Shares to AAI. On 16th March 2019, GVK called upon Bidvest to execute the SPA, as modified. On 20th March 2019, the Bidvest disagreed with the changes proposed to the draft SPA and specified that 4th April 2019 would be the “Long Stop Date” for completing the transaction. On 26th March 2019, GVK wrote to Bidvest, enclosing a signed copy of the SPA, and also sent an e-mail calling upon Bidvest to countersign the SPA and return the same. GVK contended that the “Long Stop Date” contemplated in clause 4.3 had not been entered since neither the SHA nor the AOA of MIAL contained reference to a Long Stop Date inter alia contending that the proposed Long Stop Date would be contrary to clause 4.1 of the SPA, which require that completion of purchase/transfer of Sale Shares should not take place after expiry of the time window contemplated in clause 3.7 of the SHA and Article 36 of the AOA of MIAL.

6. According to Mr. Khambata on 27th March 2019, Bidvest, after receiving the signed SPA from GVK, wrote to the lenders, being defendant nos.5 and 6, namely, SBI and SBICaps, seeking approval for the proposed transfer. SBI contended that MIAL was required to give 60 days prior notice to enable SBI to consider the grant of approval. On 29th March 2019, Bidvest wrote to MIAL recording the fact that GVK had exercised the ROFR and requested MIAL to seek approval from the lenders. On 30th March 2019,

MIAL called upon Bidvest to provide documents along with term sheet of the purchasers' shares. MIAL also called upon Bidvest to make a formal request with the supporting documents for considering grant of approval for transfer under the OMDA.

7. Apparently, unknown to the plaintiffs, GVK filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 against Bidvest and ACSA and AAI. In that application, the GVK sought a temporary injunction restraining Bidvest from selling its shareholding to any person other than GVK. That petition under Section 9, as it transpires, came to be dismissed, keeping open the contentions of the parties on merits. In an appeal from the said order, the Delhi High Court permitted GVK and other parties to file an application under Section 17 of the Arbitration and Conciliation Act before the Arbitral Tribunal to seek relief with a request to the tribunal to decide the application as expeditiously as possible.

8. In the meanwhile, on 3rd April 2019, Bidvest addressed a letter to the lenders-defendant nos.5 and 6 once again seeking approval to the proposed sale of shares to GVK. On 4th April 2019, the 30 days period for completing the sale by GVK expired. Yet, GVK did not complete the purchase and therefore according to Mr. Khambata, GVK lost its rights to acquire the shares. Consequently, Bidvest is believed to have given notice to AAI, pursuant to clause 3.7(iv) of the SHA, notifying proposed sale of the shares. On 18th

April 2019, a letter was addressed by GVK to the Bombay Stock Exchange Limited and National Stock Exchange Limited and a Press Release came to be issued of a term sheet and exclusivity agreement. A term sheet had been entered into between one GVK Power & Infrastructure Limited (**GVKPIL**), GVK Airport Developers Limited (**GVKADL**) and GVK Airport Holdings Limited (defendant no.7) with the Abu Dhabi Investment Authority and the National Investment & Infrastructure Fund for an investment in new shares of defendant no.7, representing a 49% stake and informing all concerned that GVK had also initiated a process to identify preferred investors to raise capital to reduce its debt obligations. These two companies GVKADL and GVKPIL have since been sought to be impleaded in the above interim application, Mr.Khambata submitted that this attempt at raising capital and allotment of shares to those two companies GVKADL and GVKPIL was nothing but a transfer of shares, which was prohibited by virtue of the SPA. It is submitted that this indirectly affects the proposed sale of shares to the plaintiffs and Bidvest.

9. In the meantime, on 25th April 2019, Bidvest informed defendant no.5-SBI that it was not necessary to provide any term sheets under the relevant agreements and Bidvest requested the lenders to consent to proposed transfer. Meanwhile, the 30 days period of completing purchase of Sale Shares having expired, AAI lost its right to acquire the Sale Shares.

10. Mr. Khambata submitted that the present suit came to be filed on 4th September 2019 and an ad-interim application came to be moved on 24th September 2019, on which date GVK submitted to the court that the Arbitral Tribunal passed an order on 15th September 2019, under Section 17 of the Arbitration and Conciliation Act, 1996, whereby GVK was directed to deposit the purchase price of the Sale Shares being Rs.1248.75 lakhs in an interest bearing no lien Escrow Account in SBI on or before 31st October 2019. It will be useful to reproduce the relevant portion of the interim order passed under section 17 of the Arbitration and Conciliation Act, 1996, the relevant portion of which reads as under :-

- “(i) We have been informed that respondent no.1 has an agreement with a third party for the sale of shares. That third party is not before us and is expected to make the payment for shares on or before 30.09.2019 as informed by learned counsel for the respondent no.1. If the payment or deposit is made by the third party, the respondent no.1 will not transfer the shares in favour of the third party until the next date of hearing i.e. 24.11.2019.*
- (ii) The above order is passed subject to the conditions that the Claimant will deposit the purchase price of the shares (i.e. Rs.1248,75,00,000/-) in an interest bearing no lien Escrow Account on or before 31.10.2019.*
- (iii) In case the deposit is not made by the Claimant on or before 31.10.2019, the interim order passed by us today will automatically stand vacated and the respondent no.1 is at liberty to sell the shares to any third party, subject to necessary approvals, without making an offer to the Claimant.*

(iv) This order is passed without prejudice to the rights and contentions of the parties and only as an interim measure.”

11. I had on that day, at the request of the plaintiffs, adjourned the matter to 1st October 2019, on which date I was informed that the ‘Long Stop Date’ contemplated in the plaintiffs’ SPA was extended upto 7th November 2019. Accordingly, the matter came to be adjourned to date and meanwhile the plaintiffs have moved the present interim application seeking amendment to the plaint and also seeking a direction to defendant no.1–Bidvest to write to GVK informing them that GVK cannot issue / transfer its shares or the shares of respondent nos.1 and 2, namely, GVKADL and GVKPIL, without giving ROFR notice to Bidvest, ACSA and AAI and to offer GVK’s shares in MIAL and that offering GVK’s shares in MIAL would be indirectly transferring shares to third parties. The interim application also seeks to restrain GVK, GVKADL and GVKPIL from issuing, transferring and/or registering or recognizing any transfer of shares in GVKADL or GVKPIL to any third party, without first offering such portion of GVK’s shares in MIAL, as it would amount to indirect transfer to such third parties to the other shareholders of MIAL in accordance with clause 3.7 of the SHA, read with Article 36 of the AOA of MIAL. Further, the interim application seeks a direction to Bidvest to give 48 hours notice before taking any steps in relation to transfer of shares to GVK or its affiliates, in the event GVK deposits the purchase price.

12. Mr. Khambata further submitted that in view of the further

developments, in addition to Schedule annexed to the interim application and the amendment sought, certain further amendments are being sought in terms of the Schedule tendered in the course of the submissions today. This would bring into focus the case of the plaintiffs and this being at the very preliminary stage of the suit, the amendment may be allowed and ad-interim application will be amended. In support of his contention, Mr. Khambata submitted that the Bidvest is enjoined with the role of a constructive trustee and that till the transaction of sale and transfer of Sale Shares is completed by Bidvest in favour of the plaintiffs, Bidvest would be a constructive trustee in respect of the Sale Shares and that Bidvest is liable to hold the Sale Shares for the benefit of the plaintiffs and take all steps necessary to protect the rights that may directly or indirectly arise out of or be linked to the Sale Shares, including those rights which would accrue thereunder to the plaintiffs. That the issuance of shares by GVK or GVKADL or GVKPIL to any third party would amount to an indirect transfer, as contemplated in clause 3.6.1 of the SHA and would require GVK to issue ROFR notices contemplated in clause 3.7 of the SHA and Article 36 of the AOA of MIAL. That since the plaintiffs are ready and willing to purchase the shares, Bidvest is bound to sell the Sale Shares to the plaintiffs, but only reason preventing Bidvest thus far from doing so is the order of the Arbitral Tribunal dated 15th September 2019. However, according to Mr. Khambata, that interim order stands vacated since GVK had failed to comply with the order of the tribunal.

13. According to Mr. Khambata, the plaintiffs were kept in the dark by Bidvest and GVK as to whether the amount of purchase price of Rs.1248.75 crores was in fact deposited within the time and manner specified by the tribunal. He submitted that efforts to collect information whether or not such a deposit has been made has not yielded any results and the plaintiffs are entitled to proceed on the footing that the order of deposit has not been complied with and if that be so, the interim order dated 15th September 2019 would stand automatically vacated, as evident from paragraph 7(iii) of the order of the arbitral tribunal. Mr. Khambata submitted that they are ready and willing to complete the purchase of the Sale Shares and that Bidvest is now holding Sale Shares as a trustee of the GVK pending completion of sale and therefore it is necessary to grant urgent ad-interim reliefs in terms of prayer clauses (b) and (c).

14. Mr. Khambata further submitted that GVK had lost its rights to acquire the shares since according to him, GVK had not complied with the order of the tribunal. The last date having gone by, there is no indication of the money having been paid into the interest bearing, no lien escrow account and, therefore, there is no occasion to now contend that they are bound by the interim order passed by the arbitral tribunal. The order of the arbitral tribunal, it is submitted, was self-operative and therefore on failure to deposit the amount, the interim restraint against transferring the shares stands vacated. It was also canvassed that the third party, namely, the plaintiffs were

interested in purchasing the shares and this found recognition in the order of the tribunal in paragraph 7(i), which stipulates that the third party, which was not before the tribunal, was expected to make payment of the shares on or before 30th September 2019 and if the payment was made or deposited, Bidvest will not transfer the shares in favour of the third party until the next date of hearing. The next date of hearing of the arbitration proceedings was fixed on 24th November 2019. He, therefore, submitted that presently the plaintiffs are willing to secure the amounts by way of purchase price and he tendered today an affidavit dated 1st October 2019 of one Aravind Balajee, wherein the deponent encloses an undertaking of the promoter of the plaintiffs and group companies to earmark unencumbered shares to meet the obligation to pay the purchase price. Mr.Khambata submitted that GVK has not made a full disclosure before this court regarding the compliance with the tribunal's order, nor have documents executed between GVK and other investors, to whom shares are said to be allotted, been shown to the plaintiffs or to the court. Even assuming that purchase price had been deposited, no particulars of the deposit is coming forthwith, let alone the deposit being made in an interest bearing no lien escrow account. He submitted that GVK has only made a statement that it has arranged for deposit of the funds, without providing any particulars. In addition to the aforesaid, he submitted that the plaintiffs are willing to secure the amount of the purchase price by way of an undertaking contained in an affidavit of Mr. Balajee, as aforesaid. It

is therefore contended by Mr. Khambata that the reliefs prayed for in the interim application be granted at this ad-interim stage, as otherwise Bidvest will avoid complying with its obligation notwithstanding the fact that GVK is not now entitled to acquire the shares from Bidvest and in effect Bidvest must be bound and liable to perform the plaintiffs' SPA.

15. Mr. Khambata has relied upon an affidavit dated 1st October 2019, in which the plaintiffs have contended that the promoters have earmarked equity shares held by it in companies, the market value of which is in the region of Rs.4,178 crores. This undertaking has been signed by a trustee of the S.B. Adani Family Trust. In view thereof, Mr. Khambata submitted that Bidvest is fully secured and the undertaking of the promoters would ensure that the equity shares of those entities are kept unencumbered and will ensure that the plaintiffs can complete the purchase of the Sale Shares and pay the purchase price, as contemplated in the plaintiffs' SPA.

16. Mr. Kadam appearing for GVK opposed grant of any relief. He submitted that the amendment sought to be made by the interim application alters the cause of action of the suit and if granted would result in misjoinder of causes of action. The suit is primarily filed against defendant no.1-Bidvest for specific performance of the plaintiffs' SPA and the subject matter of the suit is 16,20,00,000 shares, which defendant no.1-Bidvest has agreed to sell to the plaintiffs. That no consideration has been paid for these shares and

these Sale Shares continue to belong to Bidvest. The plaintiffs are entitled to the shares only if it secures the decree in the suit, whereas the amendments now proposed seek to direct the reliefs against defendant no.7-GVK and the respondents-GVKADL and GVKPIL, represented by Mr. Doctor. The proposed amendments proceed on the basis that the plaintiffs are entitled to exercise their right as a shareholder and the subject matter of the dispute and that the amendments proposed to introduced a new case, which relates not to a specific performance against defendant no.1 alone but against group companies and defendant no.7-GVK. He submitted that the plaintiffs are seeking to enforce rights as if they are already the shareholders of MIAL, which they are not and therefore it would amount to a different cause of action being introduced and the nature of the suit would stand altered from a suit for specific performance to a suit for enforcement of shareholders' rights based on the principle of trust. Apart from resulting in misjoinder of causes of action, Mr. Kadam submitted that the sale of shares by Bidvest to the plaintiffs is conditional upon the proposed sale between Bidvest and GVK. He further submitted that what the plaintiffs are now seeking to do is to get an order, which will have the effect of interfering in the process of arbitration as between the GVK and the plaintiffs. That the order dated 15th September 2019 passed by the arbitral tribunal has been complied with. Mr. Kadam submits that GVK had already filed a affidavit of compliance with the interim order before the tribunal, a copy of which he submits has been provided to the

Advocates for the Bidvest. That is a fact which is not now in dispute. Mr.Kadam, therefore, submits that once having stated on oath that GVK has complied with the interim order, it is not open for the plaintiffs to suggest that the interim order stands vacated. In this view of the matter, he submitted that there is no occasion to pass any orders on the interim application granting any relief, as sought in prayer clauses (b) and (c), or granting any relief in the notice of motion. Mr. Kadam, therefore, submits that the notice of motion is liable to be dismissed.

17. On behalf of the GVK, Mr. Kadam has relied on the decision of the Supreme Court in *Khoday Distilleries Ltd. Vs. Commissioner of Income Tax and Another*¹ in support of his contention that the plaintiffs seek to interfere with the creation of new shares by seeking to implead GVKADL and GVKPIL. He submitted that the SHA only prevents transfer of shares and the ROFR and the restrictions would apply only in the case of transfer of existing shares and not creation of new shares, which are sought to be allotted by the GVK entities/respondents in the Interim Application to third parties. He, therefore, submitted that there can be no restraint on the allotment of new shares as juxtaposed against transfer of existing shares. When the words ‘allotment of shares’ have been used to indicate creation of shares by appropriation out of unappropriated share capital and it is not the case of transfer of existing shares, in this behalf, he also placed reliance on the decision of the Supreme

1 (2009) 1 SCC 256

Court in *Sri Gopal Jalan & Co. Vs. Calcutta Stock Exchange Association Ltd.*² in support of his contention, which is being quoted with approval in the case of *Khoday Distilleries Ltd. (supra)*. In paragraph 7 of *Sri Gopal Jalan (supra)*, the Supreme Court quoted *Farwell, L.J. in Mosely Vs. Koffyfontein Mines Limited*³ to the extent that it dealt with the words ‘creation’, ‘issue’ and ‘allotment’, which are used with three different meanings and which are familiar to people in business as well as to the lawyers. The Supreme Court then had observed that there are three steps with regard to new capital; first, it is created; till it is created, the capital does not exist; when it is created, it may remain unissued for years; when it is issued, it may be issued on such terms as appear for the moment expedient. The allotment would only follow thereafter. Reference was also made in *Sri Gopal Jalan (supra)* to the observations of Lord Greene M.R. in *V.G.M. Holdings Limited*⁴ that the term ‘purchase’ cannot be applied to a legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. He does not “purchase” anything, when he does that. Relying upon the aforesaid observations, Mr. Kadam submitted that there is no case of transfer of shares and that GVK is not in breach of its obligations and the restrictions of transfer. The definition of “transfer” in the SHA does not, in my view, cover issuance and allotment of shares to any third party other than the plaintiffs. The issuance and allotment of shares is not prima facie a transfer,

2 (1964) 3 SCR 698

3 (1911) ILR Ch 73, 84

4 (1942) 1 Ch D 235

which could fall foul of the prohibition made in the SHA or the order of the arbitral tribunal. In view of the fact that the expression 'transfer' does not specifically contemplate creation of new shares, GVK, prima facie, is not in breach of this obligation. In that view of the matter, no relief can be granted.

18. On behalf of the Bidvest, Mr. Dwarkadas submitted that his clients are being targeted for no reason. According to him, the plaintiffs are only seeking to obtain orders against Bidvest without actually performing their part of the SPA. He submitted that the plaintiffs had not deposited the money, nor have offered to pay the money. Merely offering to secure the amount of the purchase price by an undertaking is of no consequence. According to Mr. Dwarkadas, even in the current imbroglio, the defendants are put to tremendous loss inasmuch as the payment of the purchase price has not been forthcoming. As far as the GVK is concerned, he is not aware whether the purchase price has been deposited in compliance with the interim order of the arbitral tribunal. As far as Bidvest is concerned, Mr. Dwarkadas submitted that Bidvest has already suffered a loss of about Rs.70 crores by way of loss of interest, since the price of Sale Shares had not been brought in within the time specified. If the money is still not brought in, the loss would be higher. On the other hand, it is submitted on one occasion and at the request of the plaintiffs that Bidvest has already extended the "Long Stop Date" to 7th November 2019 and is now unable to extend the date any further. He submitted that he is the seller of the share and is willing to comply with this

obligation and he could have sold the shares earlier, if GVK had not invoked the arbitration agreement. He submitted that while GVK had been directed to deposit the amount in no lien escrow account, he has no confirmation that the deposit has actually been made. All that the affidavit filed in the arbitration proceedings, copy of which is provided to Bidvest, states that the direction of the arbitral tribunal has been complied with and that the amounts have been deposited. There are no particulars whatsoever forthcoming from that affidavit. On a query from the court, he submitted that since the next hearing of the arbitral tribunal is on 24th November 2019, Bidvest has called upon GVK to give particulars of how and when the amount has been secured by the deposit.

19. Mr. Dwarkadas further submitted that unless the purchase price is forthcoming, a mere undertaking, as sought to be relied upon by Mr.Khambata, is of no consequence. He submitted that the structure of the SHA is such that the plaintiffs are the outsiders. AAI, Bidvest, GVK and ACSA are the shareholders of MIAL and by virtue of clause 3.6 of the SHA, only the shareholders can off-load the shares in favour of a co-shareholder. In other words, the ROFR is to be exercised by a co-shareholder and an outsider cannot interfere in the operation of the ROFR. The fact that the Bidvest has signed an SPA with the plaintiffs on 5th March 2019, cannot interfere with the operation of the ROFR under the MIAL's SHA. Furthermore, the GVK holds 13.5% of MIAL and was obliged to pay the purchase price within 30 days, but

it had failed to do so. After accepting the offer notice, GVK had failed to pay the purchase price. Later, disputes had arisen between GVK and Bidvest. Mr.Dwarkadas submitted that he was unable to confirm whether the order of the arbitral tribunal had been complied with for want of information.

20. In the meantime, on a query from the court as to whether Bidvest was willing to extend the Long Stop Date, Mr. Dwarkadas submitted that he has instructions to state that the Long Stop Date cannot be further extended. Mr.Dwarkadas further submitted that AAI had contended that they were not interested in acquiring the shares and that is now a matter of record. It is GVK who filed a Section 9 application and since March, 2019, Bidvest has been dragged into litigation. The shares are of worth Rs.1248.75 crores and interest being lost on the said amount, he reiterated that Rs.70 crores had already been lost. According to him, Bidvest has complied with clauses 3.6 and 3.7 of the agreement and as presently advised, the plaintiffs have no right to interfere with the SHA as between co-shareholders. The plaintiffs are seeking to act as if they are shareholders and they also seek to enforce the plaintiffs' SPA against the co-shareholders, namely, GVK, ACSA and AAI through Bidvest. This he submitted is clearly not permissible. As far as principle of constructive trust is concerned, Mr. Dwarkadas has relied upon the decision of the Supreme Court in *Life Insurance Corporation of India Vs. Escorts Limited and Others*⁵, and invited my attention to paragraph 84 of the

5 (1986)1 SCC 264

judgment, in which the Supreme Court had occasion to deal with the rights of a transferee to get his name on the register, which must be exercised with due diligence, and observes that a constructive trustee does not extend to a case where a transferee takes no active interest “to get on the register”. He further submitted that for a transfer to be effective between a transferor and transferee, what must be ascertained is whether a share transfer form had been executed. Without a transfer form being executed, there is no question of any constructive trustee coming into effect. The contention of the plaintiffs that Bidvest is constituted as a constructive trustee for and on behalf of the plaintiffs is therefore refuted by Mr. Dwarkadas.

21. Having heard the learned counsel at length, there are two aspects to be considered; firstly, whether the amendments sought should be allowed and, secondly, whether the plaintiffs are entitled to ad-interim relief in the interim application and/or in the notice of motion. On the first, I am of the view that the amendments can be allowed. On the second, however, I find that the plaintiffs have neither a prima facie case against the contesting defendants, nor is the balance of convenience in their favour. The suit seeks specific performance of the plaintiffs’ SPA, which I find must be subject to the provisions of the SHA between the shareholders of MIAL. The plaintiffs must therefore succeed in showing, prima facie, that Bidvest is bound to issue the notice contemplated in prayer clause (b) of the interim application and that the plaintiffs can seek relief against respondent nos.1 and 2 under the

plaintiffs' SPA. The plaintiffs must also succeed in showing that there is an apprehension of imminent breach of the plaintiffs' SPA by Bidvest transferring the Sale Shares to "any party other than the plaintiffs", as sought in prayer clause (a) to the notice of motion and that there is a likelihood of defendant nos.2 to 6 viz. AAI, MIAL, the Ministry of Civil Aviation or the lenders (SBI and SBICaps) granting approvals to a party other than the plaintiffs.

22. On all these counts, I am of the view that the plaintiffs have not made out a prima facie case. Bidvest appears to be certain that it intends to divest itself of the Sale Shares. It appears to have acted in accordance with the SHA and thus far in accordance with the plaintiffs' SPA. Given the fact that disputes have arisen between Bidvest and GVK under the SHA, these shareholders are now subject to orders in the reference pending before the arbitral tribunal. The interim order dated 15th September 2019 appears to be still in force. Bidvest has not been able to demonstrate non-compliance, the plaintiffs understandably even less. On the other hand, GVK has contended and apparently on oath contended that it has complied with the arbitral tribunal's interim order. Bidvest has been provided with a copy of the compliance affidavit, but none of the documents to support the statement that GVK has complied have been provided yet. The plaintiffs are obviously not privy to further information that would enable it to confirm compliance or establish non-compliance. There were suggestions as between the plaintiffs

and Bidvest counsel of the probability of extending the Long Stop Date, but Bidvest has not agreed to extend the Long Stop Date. In any event, that does not concern us for the present. Thus, today I will be justified in proceeding on the basis that the interim order of the arbitral tribunal operates and binds GVK and Bidvest. The plaintiffs then cannot claim entitlement to immediate performance of their SPA. In fact, the plaintiffs' SPA is premised on the fact that it is subject to probability of the ROFR exercised by GVK being taken to its logical end by Bidvest transferring the Sale Shares. The arbitral tribunal's order, in fact, recognizes the fact that a "third party", being the plaintiffs in this case, is scheduled to make payment for the Sale Shares on or before 30th September 2019 and that even if the payments were to be made or if the price was deposited, GVK is restrained from transferring the Sale Shares till 24th November 2019. The plaintiffs have neither paid nor deposited the price. All that has been done is that an affidavit sworn on 1st October 2019, but which was tendered only in the course of the hearing, offers an undertaking to keep aside shares of several of the plaintiffs' group companies held through a trust as security for the price. That surely is not a satisfactory demonstration of a party's willingness to perform the offer to purchase the Sale Shares.

23. Despite Bidvest complaining that it has suffered on account of the shareholders' inter se dispute, the plaintiffs do not offer to deposit the price in court. If the plaintiffs believe, which they did canvass as a possibility, that the interim arbitral order stands vacated, they would be expected to offer to

deposit the amount. What however has transpired is that Mr. Khambata on behalf of the plaintiffs made an offer to pay the price, if the shares were to be transferred. The transfer we know cannot actually take place de hors provisions of the SHA. The approvals are still not in place, moreover the interim arbitral order further prohibits transfer of shares even if the price were to be paid or deposited. If the order stands vacated, there is nothing to prevent the transfer but the facts, as they stand prima facie, indicates that the restraint operates against GVK. In the light of GVK's apparent compliance, Bidvest is entitled to benefit of the doubt and I am therefore of the view that, as on date, the plaintiffs have not made out a case for grant of ad-interim relief.

24. On the aspect of constructive trust, I believe that argument is premature. The Sale Shares are not free of transfer restraints, which have been in force since 15th September 2019, soon after the suit was filed, but before the plaintiffs first sought relief on 24th September 2019. Prima facie, the restraint operates. Bidvest has not disputed the provisions of the plaintiffs' SPA and has also extended the Long Stop Date by more than a month, probably to ascertain compliance by GVK with the interim order but the facts as obtaining today will not justify grant of a mandatory order to issue notice as per prayer clause (b) of the interim application. GVK or the respondents in the interim application are not parties to any agreement with the plaintiffs. They are third parties. If the plaintiffs acquire the Sale Shares, the plaintiffs

will be shareholders along with GVK and others. The plaintiffs seek to act as if they are entitled to act as parties to the MIAL SHA. They are not shareholders and as on date the plaintiffs cannot seek an order in terms of prayer clause (c) of the interim application. The respondents are independent legal entities, who are stated to be controlling GVK, but that cannot justify the plaintiffs' attempt to prevent them from exercising rights under their organizational documents and corporate structures. As far as Mr. Doctor's contention that the respondents are not necessary or proper parties and the opposition to the proposed amendments are concerned, I am unable to agree with him that the present interim application seeking amendments present themselves as an exclusion to the liberal approach that a court takes to an early amendment to the plaint. I am there of the view that that the interim application must succeed to the extent it concerns prayer clause (a).

25. Now to deal with the reliefs in the notice of motion. Prayer clause (a) seeks to restrain Bidvest from transferring/selling/encumbering or creating third party rights in the Sale Shares. According to me, as on date, there is nothing to indicate Bidvest's unwillingness to perform the plaintiffs' SPA, including any inclination to renege from the said SPA. Far from it, Bidvest had extended the 'Long Stop Date' till 7th November 2019. Prayer clause (b) seeks to restrain the lenders, the company, the Ministry of Civil Aviation and AAI from granting approvals under the MIAL SHA, which are also stated to be incorporated in the Articles of Association of MIAL. I have not heard any

submissions on behalf of the plaintiffs that the said defendants are about to grant approvals that may be required. AAI has apparently expressed no interest in exercising their ROFR under the SHA. Absent any such apprehension of imminent grant of approvals, no case is made out for grant of ad-interim relief in the notice of motion.

26. In view of the above, I pass the following order :-

- (i) Interim Application No.1 of 2019 is made absolute in terms of prayer clause (a). Amendment shall be carried out in terms of the Schedule being Exhibit-A to the interim application.
- (ii) The additional draft amendment to the Schedule to the interim application tendered today are taken on file and marked as "A-1" for identification. Amendment to be carried out within a period of two weeks from today. Amended copy of the plaint, along with notice of motion, to be served on the other side forthwith thereafter.
- (iii) Additional replies to the Notice of Motion (Lodging) No.2179 of 2019, if any, to be filed within a period of

two weeks, after service of the amended copy of the
plaint.

- (iv) Ad-interim reliefs sought in the interim application and the notice of motion are declined.
- (v) Place the Interim Application and Notice of Motion in accordance with its turn.

(A.K. MENON, J.)