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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on :11.03.2020

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Pronounced on:10.06.2020

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O.M.P. (I) (COMM) No. 35/2020 and I.A. 3251/2020

BLUE COAST INFRASTRUCTURE DEVELOPMENT

PVT. LTD.

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Advocate
with Ms. Simran Brar, Mr.
Naman Joshi, Ms. Deveshi
Mishra and Ms. Apoorva Neral,
Advocates.

versus

BLUE COAST HOTELS LTD. & ANR.

.....Respondents

Through: Mr. Rajiv Nayar, Sr. Advocate
with Mr. Saket Sikri, Mr. Vikalp
Mudgal and Ms. Samprikta
Ghosal, Advocates for R-1.
Mr. Nitin Dahiya, Advocate for
R-2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking interim directions for securing the money lying with Respondent No. 2 from the sale proceeds of the auction of the hotel in Goa, earlier owned by Respondent No. 1, in favour of the Petitioner. The prayers in the petition are as under: -

“a. Direct the Respondent No. 2 to deposit the amount as stated in its letter dated 06.02.2019 along with interest accrued thereon as on date with the Registry of this Hon’ble Court and not disburse any part thereof to the Respondent No. 1;

b. Alternatively, direct the Respondent No. 2 not to release the amounts lying with it into the account of the Respondent No. 1 or otherwise, without the prior permission of this Hon’ble Court;”

2. Respondent No. 1 is a Public Listed Company in hotel business and previously owned the Park Hyatt Hotel in Goa. The case of the Petitioner is that Respondent No. 1 had participated in a bidding process and secured the right from Delhi International Airport Limited (hereinafter referred to as ‘DIAL’) to develop a commercial space at Asset Area No. 3 measuring 5.3 acres at Aerocity, New Delhi International Airport (hereinafter referred to as ‘Aerocity Project’).

3. A Special Purpose Vehicle (hereinafter referred to as ‘SPV’) was floated by Respondent No. 1, namely, Silver Resort Hotel India Private Limited (hereinafter referred to as ‘Silver Resorts’) to develop the Aerocity Project. A Development Agreement dated 26.02.2010 and an Infrastructure Development and Service Agreement dated 26.02.2010 were executed between DIAL and Silver Resorts.

4. Contemporaneously Silver Resorts and the Petitioner entered into a Joint Development Agreement (hereinafter referred to as ‘JDA’) dated 10.03.2010, amended on 15.03.2010 and further amended on 30.03.2017. Under the JDA, Silver Resorts authorized the Petitioner to collect monies

for construction of the Aerocity Project from prospective buyers, by leasing or sub-leasing the commercial spaces in the Project.

5. Petitioner avers that acting under the JDA, Petitioner raised monies from various investors and allotted them commercial shops and premises in the Aerocity Project. Majority of the investors invested their monies between the years 2010-2013.

6. It is further averred that pursuant to the aforesaid events, a Letter of Comfort and Recourse dated 15.03.2010 was issued by Respondent No. 1 in favour of the Petitioner undertaking as under: -

“a. That the monies collected by the Petitioner for the development of the Aerocity Project by Silver Resorts will be put to use for the specified purposes and shall not be utilized for any other purpose;

b. That in the event Silver Resorts is unable to deliver the Aerocity Project to the space holders within the stipulated time (subject to force majeure), the Respondent No. 1 will suitably compensate the Petitioner;

c. That the Respondent No. 1 shall indemnify the Petitioner for any loss/damage including however limited to refund of monies arranged by the Petitioner for the Aerocity Project;

d. That as the original allottee of the plot at Delhi Aerocity and owners of Silver Resorts, the Respondent No. 1 undertook by way of the First Letter of Comfort to abide by all the terms and conditions of the JDA.”

7. Owing to certain disputes between Silver Resorts and DIAL, the Agreement was terminated by DIAL on 16.07.2015 and the Project was never completed. As a result, the investors who had given their money to the Petitioner sought refund by filing litigations in various Fora.

8. It is further averred that Respondent No. 1 had undertaken a Corporate Loan for the development of the Aerocity Project, vide a Corporate Loan Agreement (hereinafter referred to as 'CLA') dated 26.02.2010, executed between Respondent No. 1 and Respondent No. 2. The Loan was secured by way of a first charge on the immovable property of Respondent No. 1, being Park Hyatt Goa Resort & Spa, Goa. A Debenture Subscription Agreement (hereinafter referred to as 'DSSA') was executed on 08.12.2010 between PACL Limited (hereinafter referred to as 'PACL') and Respondent No.1, to subscribe 12% of 10,000 Secured Redeemable, Non-convertible Debentures (hereinafter referred to as 'NCD'), aggregating to Rs. 100 crores with a premium of 8% p.a. on redemption. The said NCDs were secured by way of a second charge on the Goa property and SBI Markets Limited was appointed as the Debenture Trustee.

9. It is stated that Respondent No. 1 defaulted in its obligations under the CLA and the DSSA and accordingly Loan recall notices were issued by Respondent No. 2 and PACL and proceedings were initiated by Respondent No.2 under Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act'). Pursuant to the SARFAESI Proceedings, Respondent No. 2 auctioned the Goa property and sold it to the ITC

Group on 23.02.2015 for an amount of Rs. 515.44 crores. Out of the sale proceeds, Respondent No. 2, being the first charge holder appropriated Rs. 3,11,71,85,424/- towards its loan and equity in Respondent No. 1 and Silver Resorts, respectively.

10. It is averred that on 10.01.2015, 88 unit holders of commercial spaces in the Aerocity Project, filed a Representative Suit bearing No. CS (OS) 176/2015 before this Court against the Petitioner, Respondent No. 1, Respondent No. 2, Silver Resorts, DIAL and others, seeking a refund of the booking considerations paid by them, alleging failure of the obligations to complete the Aerocity Project. Vide order dated 31.07.2015, Court directed Respondent No. 2 herein not to disburse an amount of Rs. 85 crores, out of the surplus funds available with it from the auction of the Goa property and to place the same in a Fixed Deposit for six months. At that stage, an amount of Rs. 195,20,08,434/- was lying with Respondent No. 2, after appropriation of sale proceeds towards its outstanding dues and those of the State Bank of Mysore. Accordingly, Respondent No. 2, transferred the balance sale proceeds of Rs. 126,78,37,602/- to SEBI and Rs. 8,52,07,142/- to State Bank of Mysore.

11. In 2018, an application was filed by SEBI being IA No. 9292/2018, seeking recall of the order dated 31.07.2015, to enable Respondent No. 2 to release Rs. 85 crores in favour of SEBI. Vide order dated 27.08.2018, Court recalled the order dated 31.07.2015 but directed Respondent No. 2 and SEBI not to disburse the amount for a period of six weeks, giving liberty to the parties to file independent legal proceedings for their claims.

12. It is further averred that Petitioner was informed by Respondent No. 1 that it has filed a writ petition being W.P. (C) No. 924/2018 before the High Court of Bombay at Goa, which is pending and wherein Respondent No. 1 has sought to exercise its right to Redemption of the Goa property, under Section 60 of the Transfer of the Property Act, 1882 and wherein Respondent No. 2, and ITC Group, are parties.

13. It is stated that apart from 88 investors who had filed the Representative Suit, 94 investors who were subsequently impleaded as parties to the Suit and whose post-dated cheques issued by the Petitioner were dishonored, filed criminal complaints under Section 138 of the Negotiable Instruments Act, 1881. Mediation settlements took place between the parties, which acquired the force of consent decrees and were taken on record by the Criminal Courts. At present, execution petitions and contempt petitions, as well as several complaints are pending against the Petitioner initiated by the investors.

14. Mr. Sandeep Sethi, learned Senior Counsel for the Petitioner contends that the Petitioner had been authorized by Silver Resorts under the JDA to collect monies from the investors for allotment of commercial spaces in the Aerocity Project. Respondent No. 1 had issued a Letter of Comfort on 15.03.2010 clearly undertaking that monies collected by the Petitioner would be put to the specified purpose of developing the Aerocity Project and in case Silver Resorts was unable to deliver the units to the unit holders, within the stipulated time, Respondent No. 1 will suitably compensate the Petitioner and indemnify for any loss/damage, limited to refund of monies arranged by the Petitioner. As an original

allottee of the plot at the site and owners of Silver Resorts, Respondent No. 1 undertook to abide by all the terms and conditions of the JDA.

15. Learned Senior Counsel next contends that another Letter of Comfort was issued by Respondent No. 1 on 28.03.2018, undertaking to the Petitioner that as soon as any money is remitted by Respondent No. 2, out of the said Rs. 85 crores, including interest thereon, the same shall be passed on to the Petitioner for liquidation of the claims of the investors. Respondent No. 2 vide its letter dated 06.02.2019 informed Respondent No. 1, that an amount of Rs. 105.96 crores is lying with Respondent No. 2 which includes the interest accrued on Rs. 85 crores. The Letter also mentions that the balance proceeds have not been deposited with SEBI in view of Writ Petition of Respondent No. 1 pending before the Bombay High Court for redemption of the Goa property. Learned Senior Counsel further submits that referring to the earlier two Letters of Comfort as well as the letter of Respondent No. 2 dated 06.02.2019, Respondent No. 1 issued another letter dated 08.02.2019 and assured the Petitioner that any amount remitted by Respondent No. 2 will be passed on to the Petitioner.

16. Learned Senior Counsel draws the attention of the Court to the JDA dated 10.03.2010 between the Petitioner and Silver Resorts, more particularly, recital A and recital E which are as under: -

“A. Silver Resort Hotel India Private Limited (hereinafter referred to as Developer) has entered into a Development Agreement with Delhi International Airport Private Limited (“DIAL”) whereby Developer has been granted the right and authority to design, develop, finance, construct, own, operate and maintain the Assets

(“hereinafter defined”) in Asset Area 3 (“hereinafter defined”) at the hospitality district, Delhi Aerocity. Indira Gandhi International Airport, New Delhi together with the full and free right and liberty of way and passage and other rights in relation to the said assets for a period ending May 2, 2066 with an initial term of 26 years and extendable by an additional period of 30 years at its option in accordance with and subject to the terms and conditions of the Development Agreement dated 26th February, 2010.

E. Based on the representations, warranties and covenants made by the developer, the Parties intend to enter into an alliance pursuant to which the Developer will offer the FSI of 146,000 Sq. Fts out of FSI of 730,000 Sq. Fts in the Asset Area 3 for development of the Commercial Area and the Co-Developer shall provide the financing for the development of the Commercial Area, marketing, leasing and sub leasing of the Commercial Area and assisting in obtaining the requisite statutory approvals for the construction by the Commercial Area.”

17. Respondent No. 1 has not filed any response while a short affidavit has been filed on behalf of Respondent No. 2. Learned counsel appearing on behalf of Respondent No. 2, at the outset submits that the present petition is not maintainable against Respondent No. 2, as the dispute which is the subject matter of the present petition is primarily between the Petitioner, Respondent No. 1, SEBI and the investors who are Plaintiffs in the Representative Suit being CS (OS) No.176/2015, pending in this Court. There is no privity of contract between the Petitioner and Respondent No. 2 and in fact Respondent No. 1 also does not have any contract with the Petitioner. The present petition has been filed on the

strength of an Arbitration Clause 17.8 which is incorporated in the JDA, entered into between the Petitioner and Silver Resorts. Since, Respondent No. 2 is neither a party nor a signatory to the Arbitration Agreement, the present petition needs to be dismissed qua Respondent No. 2 being a third party.

18. Learned counsel further contends that the issues raised before this Court are *sub-judice* before the Bombay High Court at Goa in W.P. (C) 924/2018 filed by Respondent No. 1 and an application has been filed by Respondent No. 1 therein seeking the relief of restraining Respondent No. 2 herein from disbursing the balance sale consideration, till the pendency of the writ petition.

19. Without prejudice to the said contention, learned counsel submits that even on merits, the Petitioner can have no Claim against Respondent No. 2. Respondent No. 1 had taken a loan from Respondent No. 2 and the property at Goa had been mortgaged as a first charge. Respondent No. 2 has auctioned and sold the mortgaged assets under the provisions of SARFAESI Act in favour of ITC Limited. From the sale proceeds, Respondent No. 2 has appropriated the amounts due to it towards the loan taken by Respondent No. 1. Some portion of the amount has been released in favour of the second charge holder of the mortgaged assets i.e. the State Bank of Mysore. Pursuant to the directions of this Court in CS (OS) No. 176/2015 Respondent No. 2, after retaining Rs. 85 crores had released Rs. 126,78,37,602/- in favour of SEBI. Respondent No. 1 had filed the above mentioned Writ Petition in the Bombay High Court seeking redemption of the mortgage property and other reliefs. The High

Court while issuing notice to Respondent No. 2 had directed that in case Respondent No. 2 proceeds to disburse the balance amount, it shall give notice of 8 working days to Respondent No. 1. Vide letter dated 31.10.2018, SEBI raised a demand of Rs. 85 crores payable to PACL and pursuant thereto Respondent No. 2 gave advance notice of 8 working days to Respondent No. 1, in terms of the order of the Bombay High Court.

20. It is further submitted that vide letter dated 14.12.2018, Respondent No. 1 objected to the release of the above money and informed Respondent No. 2 that it would be taking necessary steps before the High Court against the release of Rs. 85 crores. Learned counsel submits that after receipt of the said letter, Respondent No. 2 communicated the current status and the objection of Respondent No. 1, to SEBI. It is submitted that writ petition is still pending adjudication and Rs. 85 crores are lying in the form of Fixed Deposit Receipts with HDFC Bank and IDBI Bank. Learned counsel thus prays that the petition be dismissed qua Respondent No. 2 as no relief can be claimed against Respondent No. 2.

21. Learned counsel for Respondent No. 2 has relied on a judgment of a Division Bench of the Bombay High Court in ***Girish Mulchand Mehta and Ors. v. Mahesh S. Mehta and Ors., [2010 (1) BomCR 31]***, to argue that Section 9 of the Act can be invoked even against a third party who is not a party to an Arbitration Agreement, if he were to be a person claiming under the party to an Arbitration Agreement and likely to be affected by the interim measures, which is not the case here.

22. Mr. Sethi, arguing in rejoinder reiterates that Respondent No. 1 has undertaken to pay to the Petitioner its dues as soon as the monies are remitted to it by Respondent No. 2. Learned Senior Counsel further argues that it is an admitted case of Respondent No. 2 that it is not entitled to the sum of Rs. 85 crores, as it has already appropriated what was due to it from the sale proceeds of the auction. Mr. Sethi further argues that the Bombay High Court has granted no stay in favour of Respondent No. 1 against disbursement of the money lying with Respondent No. 2 and even in the Suit pending in this Court, there is no order which restrains Respondent No. 2 from releasing any money in favour of Respondent No. 1. Mr. Sethi argues that there is no dispute that Respondent No. 1 owes money to the Petitioner and by various Letters of Comfort has undertaken to do so in the event of the SPV unable to perform its obligations. The factum of Respondent No. 1 having approached the Bombay High Court for redemption of its property can only enure in favour of the Petitioner as it is the Petitioner who has to receive money from Respondent No. 1.

23. Learned Senior Counsel relies on the judgment of this Court in *M/s Value Advisory Services v. M/s ZTE Corporation & Ors., 2009 SCC OnLine Del 1961*, where the Court has held that no general principle of maintainability or non-maintainability of a petition under Section 9 of the Act against a third party can be laid down. It is also held by the Court that if as a general Rule, it is laid down that in exercise of power under Section 9 of the Act, no direction can be issued to non-parties to an Agreement containing the Arbitration Clause or non-parties to Arbitration

Proceedings, the same will hamper the efficacy of the said provision. Attention is specifically drawn to para 16 of the judgment where the Court while dealing with the provisions of CPC, at pre-decretal stage held that the attachment under Order 38 Rule 6 CPC can also be of the property of the Defendant, not in possession of the Defendant, but belonging to it and is for the present in possession of another person in trust for or on behalf of the Judgment Debtor. Such attachment of property is permissible under Section 60 CPC. The Court further held that there is no reason for holding that if the Claimant, in an Arbitration, had been a Plaintiff in a Suit and could have obtained Attachment before Judgment of the property of the defendants, in the hands of a third party then merely because he is before an Arbitrator, he is not entitled to such an order.

24. I have heard the Learned Senior Counsels for the Petitioner and Respondent No.1 and Learned Counsel for Respondent No. 2.

25. Respondent No. 1, as noticed above, did not file its reply and has more or less taken a neutral stand. The question posed by Respondent No.2 is the scope and sweep of Section 9 Proceedings qua a non-party and a non-signatory to an Arbitration Agreement. Bombay High Court in the case of ***Girish Mulchand Mehta (supra)***, relied upon by Respondent No. 2 itself, held as under: -

“12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can

be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.”

26. In ***Gatx India Pvt. Ltd v. Arshiya Rail Infrastructure Limited, 2015 VAD (Delhi) 190***, this Court again examined the legal position regarding the power of a Court under Section 9 of the Act to issue interim orders against third parties to the Arbitration. The Court clearly drew a distinction between Section 9 of the Act and Section 17 of the Act and the powers of the Court and an Arbitral Tribunal thereunder respectively. It was held that unlike Section 17 of the Act which specifically allows for measures to be directed only against parties to the Arbitration, there is nothing in Section 9 of the Act which restricts the power of a Court from passing orders against non-signatories to the Arbitration Agreement. The Court did notice that there was a divergence of opinion of this Court on the maintainability of a petition under Section 9 of the Act against the third party and referred to a few of those judgments in which divergent views were taken. The Court then referred to another judgment of this Court in the case of ***Value Advisory (supra)***, which has been relied upon by the Petitioner in this case and has been noticed in the earlier part of

this judgment. Relevant paras of the judgment in *Gatx India (supra)* are as under: -

“66. While the section explicitly provides that only a party to the arbitration agreement can apply to the court for interim measures, it does not say against whom any such relief can be claimed. Unlike section 17 which specifically allows for measures to be directed only against parties to arbitration, there is nothing in section 9 which expressly restricts a court from passing orders against non-signatories to arbitration agreement. Pertinently, there has been a divergence of opinion in this Court on the aspect of maintainability of a petition under section 9 of the Act against a third party. On one hand, there are cases where the learned single judges of this court have endorsed the view that section 9 of the Act is applicable only inter se/between the parties to the arbitration agreement....”

67. In *Value Advisory Services v. ZTE Corporation and Ors*, OMP no. 65/2008 decided on 15.07.2009, learned single judge after considering numerous conflicting judgments of single-judge benches of the High Court, inter-alia, concluded that:

"13. A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein. In my view, no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of

protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.

14. In my view, if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under Clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under Clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties - further orders against such third parties may also be required in connection with such sale; under Clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party - the scope cannot / ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also."

71. Undoubtedly, section 9 provides that the court shall have the same powers for making interim orders under section 9 as a civil court has for the purpose of, and in relation to, any proceedings before it, and the powers of a civil court in this regard are very wide. The civil courts as and when required, and deemed appropriate in the facts and circumstances of a particular case have been making interim orders in respect of third parties, such as: interim injunction restraining third party- banks from honouring bank guarantees; attaching defendant's monies/property in hands of third party trustee, debtor, agent etc; restraining third party-subsequent transferee/person claiming rights in suit property from

disposing of the same, and the like. As a corollary, the power of the court to issue interim orders under section 9 cannot be confined only to the parties to arbitration agreement. However, a significant parameter inherent in section 9, for exercise of this power against a non-signatory to arbitration agreement, is that the purpose of section 9 is to aid arbitration between the parties thereto, and the interim orders there under have to be with regard to subject matter of arbitration/in connection with the arbitral proceedings. In this context, it is relevant to draw a distinction between orders granting interim relief against a party to the arbitration agreement which incidentally affects a third party, on one hand, and orders granting relief directed against a third party, on the other. While the former is ordinarily acceptable as being within the scope of section 9, the power with respect to the latter should be exercised sparingly. For instance, an order appointing a third party as a receiver or guardian of a minor/person of unsound mind is not an order against the third party, or detrimental to its rights as such. Rather, it is a relief granted to the petitioner in support of the arbitral proceedings and affects the party to the arbitration agreement. Similarly, when a subsequent transferee, or a person claiming title under a party to arbitration is ordered to maintain status quo, or not to dispose of property which is subject matter of arbitration, it is again ancillary to arbitral proceedings in as much, as, it is for protection of the subject matter of arbitration that the order is passed. An injunction, or order of attachment with respect to the properties belonging to/monies owed to a party to arbitration, but in hands of a third party for/on behalf of the said party, is effectively a relief against the said party, which incidentally affects the third party. Pertinently, it is expressly provided in the C.P.C. that attachment before judgment shall not affect the prior existing rights of third parties in the property of the defendant sought to be attached.

Injunction against a third party bank from honouring a bank guarantee is consequential to interim relief of restraining a party from encashing the same against the petitioner. To sum up, the court may issue interim orders against the third parties to arbitration only in exceptional circumstances which are such that denial thereof might frustrate the petitioner's rights in arbitration; defeat the very object of arbitration between the parties thereto; render the arbitration proceedings infructuous; lead to gross injustice; and/or, leave the petitioner remediless, depending on facts of each case.”

27. Reading of Section 9 of the Act as well as the judgments in ***Value Advisory (supra)*** and ***Gatx India (supra)*** makes it clear that the scope of power of a Court under Section 9 of the Act is not limited to parties to an Arbitration Agreement and the Court can issue interim directions even against a third party. The distinction between the powers under Section 9 of the Act and Section 17 of the Act has a clear rationale. An Arbitrator is a creature of the contract between the parties and therefore cannot venture outside the contract to issue directions to parties who are non-parties to the Arbitration Agreement. This limitation is not applicable to a Court exercising power under Section 9 of the Act.

28. In so far as the principal of Order 38 Rule 6 CPC is concerned, the Court in ***Value Advisory (supra)*** has clearly observed that the right of a Claimant in an Arbitration Proceeding to seek Attachment before Judgment against a third party who holds possession on behalf of the Respondent cannot be inferior to a right if he was a Plaintiff in a Suit.

29. The proposition in my view is well settled and can hardly be debated. Thus, on the legal proposition Mr. Sethi is right that it cannot be contended by Respondent No.2 that in no case interim directions can be passed against a non-party to the Arbitration Agreement, under Section 9 of the Act.

30. Relevant facts are also more or less undisputed in the present case. Respondent No. 1 pursuant to a tender floated by DIAL had submitted a bid for commercial spaces in the Aerocity Project. For the purpose of development, it had constituted Silver Resorts as an SPV. Admittedly, through the GDA, Silver Resorts had authorized the Petitioner to collect monies from the proposed Lessees of the commercial units for the purpose of investment in the project. On account of certain disputes between Silver Resorts and DIAL, the project could not be completed and it is not disputed by Respondent No. 1 that it has outstanding liabilities towards the Petitioner. The Petitioner has in fact placed on record three Letters of Comfort issued by Respondent No. 1 assuring remittance of money to the Petitioner as and when the same is remitted by Respondent No. 2. To this extent, there is no dispute between the parties herein.

31. The only question that now arises is whether the relief claimed by the Petitioner for directing Respondent No. 2 to deposit the amount of Rs. 85 crores along with accrued interest, lying in the banks in the form of FDRs, in the custody of Respondent No.2, in this Court and a further direction not to disburse the same to Respondent No.1, can be granted. In fact, the alternative relief claimed is for a direction to Respondent No. 2

not to release the amounts lying with it into the account of Respondent No. 1, without the permission of this Court.

32. Respondent No. 2 has categorically admitted that the amount of Rs. 85 crores is lying with it along with interest accrued thereon in the fixed deposits in the Banks. Respondent No. 2 has also candidly admitted that this money does not belong to Respondent No. 2, as it has already appropriated what was due to it against the loan that it had advanced to Respondent No. 1. Admittedly, one of the second charge holder, Bank of Mysore has also been paid its dues. The charge of PACL/SEBI is what remains to be satisfied. It is also undisputed that Respondent No. 1 has filed a writ petition in the Bombay High Court for redemption of the property in Goa sold by Respondent No. 2, in auction under the SARFAESI Act.

33. It is undisputed that the Representative Suit in this Court and the writ petition in Bombay High Court are still pending and the rights of the parties therein are yet to be adjudicated. The suit as noticed above was filed by the investors and on 31.07.2015, the Court had passed the following order:

“I.A. No.5001/2015 (by the plaintiffs u/S 151 CPC)

1. The present application has been filed by the plaintiffs praying inter alia that the defendant No.10/IFCI be directed to deposit the balance sale proceeds received by it from the ITC group after conducting an auction of a hotel property situated at Goa and owned by the defendant No.3.

2. Counsel for the plaintiffs states that the aforesaid hotel property has been purchased by the ITC group in an auction held by the IFCI for a total sale consideration of Rs.515 crores and after adjusting the amounts payable to it, a sum of Rs. 178.46 crores is still left as surplus with the IFCI and it is vital that to secure the interest of the plaintiffs, the said amount may be directed to be deposited in court.

3. Notice was issued on this application as long back as on 13.3.2015. However, no reply has been filed by the IFCI till date.

4. Learned counsel appears on behalf of the non-applicant/IFCI and seeks further time to file a reply. On a query, she submits that she is unaware as to the status of the surplus amount, if any, presently available with IFCI.

5. Mr. Rajive Mehra, learned Senior Advocate appears for the defendants No.1 & 2 and states on instructions that after adjusting the amounts receivable by the IFCI from the defendant no.3, presently, a sum of a sum of Rs. 189 crores (approx.) is available with it.

6. Having regard to the fact that the present suit has been filed by 88 plaintiffs in a representative capacity and it has been specifically averred in para 18 of the plaint that the defendant No.1 is liable to pay the plaintiffs amounts that have mounted to a sum of Rs.84,03,54,425/- and further, noting that the defendants No.1 & 2 are the signatories to the Agreements to Lease, executed with the plaintiffs and the defendant No.3 is stated to be a group company of the defendants No.1 & 2, till the next date, IFCI is directed not to disburse an amount of Rs.85.00 crores from out of the surplus funds available with it after conducting the auction of the Hotel property. The said amount shall be placed by the IFCI in a fixed deposit for a period of six months, till further orders.

7. In the meantime, a reply to the application shall be filed by the defendant No.10/IFCI within three weeks wherein it shall be clarified as to the exact amount received by it pursuant to the auction of the defendant No.3's hotel project at Goa and the extent of the surplus money available with it. Rejoinder, if any, shall be filed within three weeks thereafter.

8. List for arguments on 30.10.2015.”

34. Subsequently, SEBI filed an application for recall of the order to enable IFCI, who was a party therein, to release the sum of Rs. 85 crores in favour of SEBI. Vide order dated 27.08.2018, Court vacated and recalled the order dated 31.07.2015 so that the said sum could be released in favour of SEBI. However, parties were given time to take recourse to their other legal remedies and thus the order was put in abeyance for 6 weeks and IFCI was directed not to disburse the amount to SEBI for a period of 6 weeks. It is pertinent that Petitioner herein is a party to the suit and was represented when this order was passed. It is not the Petitioner's case that the order was challenged and has been set aside. Under the said order at present SEBI has acquired a right to claim this sum of Rs. 85 Crores. Thus, any direction by this Court in the present petition to encumber the said amount by directing deposit in this Court and/or imposing a condition on IFCI/SEBI to withdraw with the said amount with leave of this Court, would be in direct conflict with the said order and will amount to negating and setting aside the effect of the order. Not only would this be beyond the jurisdiction of this Court but also wholly inappropriate. Contention of the Petitioner to secure this sum of

Rs. 85 crores in aid of Arbitration between the Petitioner and Respondent No.1 is thus rejected. Relevant part of the order dated 27.08.2018 is as under:

“I.A. 9292/2018

Present application has been filed for recall of the order dated 31st July, 2015 to enable release of Rs. 85 crores by IFCI in favour of SEBI.

Learned senior counsel for the plaintiffs as well as learned counsel for defendant no. 3 state that they have no objection if the order dated 31st July, 2015 restraining IFCI from disbursing an amount of Rs. 85 crores from out of the surplus funds available with it after conducting the auction of the Hotel property, is vacated, provided they are given liberty to file independent legal proceedings in accordance with law and for a period of six weeks the said amount is not disbursed by either IFCI or SEBI.

In the opinion of this Court, the request made by learned senior counsel for by the plaintiffs and learned counsel for defendant no. 3 is fair, and reasonable.

Accordingly, the order dated 31st July, 2015 is vacated. However, IFCI as well as SEBI are directed not to disburse the aforesaid amount for a period of six weeks. The rights and contentions of all parties are left open.

With the aforesaid directions, present application stands disposed of.”

35. As brought out by IFCI, pursuant to Order dated 27.08.2018, SEBI has already written to IFCI seeking release of the money and the same is pending due to a communication of Respondent No.1 that it would be taking steps in the pending writ petition against the release of money.

Petition filed by Respondent No.1 in Bombay High Court for redemption of his property is still pending and its claims are yet to be adjudicated against Respondent No.2. Therefore, at present it cannot be argued by the Petitioner that Respondent No.2 is holding the sum of Rs.85 Crores as a Custodian of Respondent No.1, so as to be entitled to the reliefs sought herein. The judgments relied by the petitioner cannot come to his aid in these facts.

36. In view of the above, the objection raised by Respondent No.2 on its being a non-party and non-signatory to the Arbitration Agreement, becomes irrelevant and does not require any further adjudication.

37. Reliefs sought by the petitioner cannot be granted by this Court and the petition is accordingly dismissed. Pending application is also dismissed.

JYOTI SINGH, J

JUNE 10th, 2020

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