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

Decided on: 28.05.2024

\+ **O.M.P.(COMM) 136/2024**

AURUM VENTURES PVT. LTD. ..... Petitioner

versus

HT MEDIA LTD & ORS. ..... Respondents

\+ **O.M.P.(COMM) 137/2024**

IOL TELECOM PVT. LTD. ..... Petitioner

versus

HT MEDIA LTD. & ORS. ..... Respondents

Appearances:

Mr. Sandeep Sethi and Mr. Prateek Seksaria, Senior Advocates with Ms. Niyati Kohli, Mr. Pratham Vir Agarwal & Ms. Manavi Agarwal, Advocates for petitioner in O.M.P.(COMM) 136/2024.

Mr. Jaideep Gupta and Mr. Dayan Krishnan, Sr. Advocates with Ms. Niyati Kohli, Mr. Pratam Vir Agarwal, Ms. Manvi Agarwal & Mr. Shrudhar K., Advocates for petitioner in O.M.P.(COMM) 137/2024.

Mr. Sanjiv Bahl, Mr. Madhur Dhingra, Ms. Harleen Kaur & Ms. Apoorva Bahl, Advocates for respondent No. 1.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

I.A. 6812/2024 (*stay*) in O.M.P.(COMM) 136/2024
I.A. 6814/2024 (*stay*) in O.M.P.(COMM) 137/2024

1. In O.M.P.(COMM) 136/2024 and O.M.P.(COMM) 137/2024, filed under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioners challenge an arbitral award dated 18.12.2023, by which disputes between the parties, under a "Debenture Subscription Agreement" dated 30.12.2008 ["the DSA"], have been adjudicated. The learned arbitrator has made an award in favour of respondent No. 1, HT Media Ltd. ["HTM"], and against six entities, including the petitioners herein. The award is for a sum of Rs. 7.5 crores, alongwith pre-award interest at the rate of 6% per annum, further interest at the rate of 7.5% per annum and costs of Rs. 20 lakhs. By way of I.A. 6812/2024 and I.A 6814/2024, the petitioners seek interim stay of the impugned award.[1]

2. The principal ground upon which the award is assailed by the petitioners is that they have erroneously been held to be bound by the DSA. It is their submission that the DSA has purportedly been signed on their behalf by one Mr. Siddhartha Srivastava ["SS"], who was neither an officer nor an employee of the petitioner-companies, and had no authority from the petitioner-companies to sign the DSA on their behalf. They contend that the learned arbitrator has erroneously held the petitioners to be bound by the DSA, on a finding of alleged ostensible authority of SS to sign the DSA on their behalf.

[1] Notice was issued in these petitions on 05.04.2024. HTM entered appearance, and directions were given for service upon the other respondents. Although service upon the other respondents remained incomplete, the stay applications were taken up for hearing, as the impugned award is only in favour of HTM, and a decision on the applications will thus affect only the petitioners and HTM.

3. The description of the parties in the DSA consists of three parts: (i) A company by the name IOL Netcom Ltd. ["IOLN"]; (ii) HTM; and (iii) "*Promoters*" of IOLN, listed in "*Exhibit 1*" of the DSA. The petitioners represent four of those entities, which are hereafter referred to as "the Promoters".[2]

4. The DSA provided for HTM to subscribe to a fully convertible debenture to be issued by IOLN, for a sum of Rs. 7.5 crores, on the terms and conditions provided therein. Article 8 provided for indemnity by the promoters against any losses, liabilities, claims and damages incurred by HTM, on account of breach of the DSA by IOLN. It also contained an arbitration clause [Clause 11.13], and an exclusive jurisdiction clause [Clause 11.14] vesting jurisdiction in Courts at Delhi.

5. The DSA was signed by SS as the "*Authorized Signatory*" of IOLN. His designation in this connection is mentioned as "*President/CEO*". It was signed by Dinesh Mittal – Vice President, Legal, Tax and Company Secretary – on behalf of HTM. The authority of the signatories on behalf of IOLN and HTM is not disputed in the present petitions. The difficulty arises from the fact that SS has also signed the DSA as the purported "*Authorized Representative*" of the "*Promoters*".

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[2] Two of the purported promoters of IOLN, as listed in Exhibit 1 of the DSA, being Goodluck Millennium & Marketing Pvt. Ltd. and Kohinoor Merchandise Pvt. Ltd. [which held 0.80% and 0.55% of IOLN's shares, respectively], alongwith one other entity listed in Exhibit 1, Premier Millennium Marketing & Trading Pvt. Ltd. [which did not hold any shares in IOLN], have since merged to form Aurum Ventures Pvt. Ltd., being the petitioner in O.M.P.(COMM) 136/2024. Regal Millennium Marketing & Trading Pvt. Ltd., which held 0.37% of IOLN's shares and is also listed in Exhibit 1 as a purported promoter of IOLN, is now known as IOL Telecom Pvt. Ltd., which is the petitioner in O.M.P.(COMM) 137/2024.

6. According to HTM, IOLN breached its obligations under the DSA, as a result of which it invoked arbitration by a notice dated 25.11.2011, addressed to IOLN. IOLN is stated to have since been wound up, pursuant to an order of the Bombay High Court dated 03.05.2012 in Company Petition 439/2010.

7. HTM, thereafter, approached this Court under Section 11 of the Act [in ARB.P. 27/2014], for appointment of an arbitrator to adjudicate the disputes under the DSA. The petitioners were party to the Section 11 petition, which was disposed of on 07.01.2019, appointing the learned arbitrator. In the course of the proceedings, this Court passed an order dated 18.12.2018, after recording a statement of SS, who stated that he was authorised by the Board to sign the DSA on behalf of the Promoters as well. The Court came to the conclusion that SS was duly authorised by the Promoters. The petitioners carried the matter to the Supreme Court by way of SLP(C) 3614/2019. The Supreme Court, by order dated 11.02.2019, declined special leave to appeal, but granted liberty to the petitioners to argue on maintainability before the learned arbitrator, who was to decide this question first, without being bound by the observations contained in the judgment of this Court.

8. An application filed by the petitioners under Section 16 of the Act was dismissed by order of the learned arbitrator dated 06.02.2021. As noted above, the learned arbitrator had thereafter, in the impugned award, rejected the petitioners' contention on maintainability, and held that they were bound by the DSA, on account of SS' ostensible authority to represent them.

9. Mr. Sandeep Sethi and Mr. Jaideep Gupta, learned Senior Counsel for the petitioners, submitted that SS had no authority whatsoever to sign the DSA on behalf of the Promoters. They argued that the learned arbitrator rightly found that there was neither any express authorisation vested in SS on behalf of the Promoters, nor any implied authority upon which he could bind them. They contended that the learned arbitrator has, nonetheless, held the petitioners liable on an erroneous conclusion that SS had "*ostensible authority*" to act on their behalf.

10. Learned Senior Counsel drew my attention to the fact that, in the description of parties in the DSA itself, it was specifically provided as follows:

> "*Note: If any of the Promoters is a company, a board resolution authorising the representative will be required. If an individual, a duly notarised power of attorney, authorising the signatory, to execute this Agreement, as a representative will be required.*"

They submitted that no board resolutions were furnished in terms of the above provision, and the learned arbitrator ought not to have entered into an inquiry with regard to ostensible authority, in the face of the express provision quoted above. They pointed out that the arbitration clause had not even been invoked against the petitioners by HTM.

11. Without prejudice to this contention, they argued that the findings of the learned arbitrator on this point, are in excess of any pleadings of HTM, and are *ex facie* perverse and unsustainable.

12. It was therefore submitted that, in the facts of the present case, the Court ought to grant an unconditional stay of the impugned award. Learned Senior Counsel submitted that such a course is permissible under

Section 36 of the Act, read with Order XLI Rule 5 of the Code of Civil Procedure, 1908 ["CPC"]. They relied upon a Division Bench judgment of the Bombay High Court in *Ecopack India Paper Cup (P) Ltd. v. Sphere International*[3] in support of this contention.

13. Mr. Sanjiv Bahl, learned counsel for HTM, on the other hand, argued that the impugned award is a money award, and the Court ought not to grant an unconditional stay. He submitted that Section 36(3) of the Act provides for grant of unconditional stay only when the contract, arbitration agreement, or making of the award, are vitiated by fraud or corruption. He contended that no such plea has been taken or established in the present case. In all other cases, Mr. Bahl submitted, the Court is bound to require security to be furnished or a deposit to be made, for grant of stay of a money decree. He submitted that such a conclusion flows from Order XLI Rule 1 and Rule 5 of the CPC, which the Court is statutorily required to bear in the mind.

14. On facts, Mr. Bahl argued that the predecessors-in-interest of the petitioners were promoters of IOLN, which had received the amount of Rs. 7.5 crores from HTM towards subscription of the debenture under the DSA. The obligations of IOLN were guaranteed by its promoters, upon which HTM relied for making its claims. He submitted that the learned arbitrator has found, on a construction of the DSA and the evidence before him, that SS had authority to act on behalf of the Promoters, which finding was not liable to be disturbed in exercise of the limited

[3] 2018 SCC OnLine Bom 540.

jurisdiction of the Court under Section 34 of the Act. Mr. Bahl cited the judgment of the Supreme Court in *Sepco Electric Power Construction Corpn. v. Power Mech Projects Ltd.*[4], of this Court in *Italian Thai Development v. NTPC Ltd.*[5], and of the Bombay High Court in *Balmer Lawrie & Co. Ltd. v. Shilpi Engineering Pvt. Ltd.*[6], in support of his submission.

15. Section 36(3) of the Act provides as follows:

> "*36. Enforcement.—*
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> *xxxx* *xxxx* *xxxx*
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> *(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*
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> *Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).*
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> *Provided further that where the Court is satisfied that a prima facie case is made out that,—*
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> *(a) the arbitration agreement or contract which is the basis of the award; or*
> *(b) the making of the award,*
> *was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.*
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> *Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the*

[4] 2022 SCC OnLine SC 1243.
[5] 2023 SCC OnLine Del 7395.
[6] 2024 SCC OnLine Bom 758.

arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)."

16. The provision requires the Court to keep in mind the principles laid down in the CPC, while considering the question of whether to grant stay of a money award. The relevant principles in the CPC, contained in Order XLI, are as follows:

"

ORDER XLI
APPEALS FROM ORIGINAL DECREES

1. Form of appeal. What to accompany memorandum.—

xxxx *xxxx* *xxxx*

(3) ***Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.***

xxxx *xxxx* *xxxx*

5. Stay by Appellate Court.—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation.—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

xxxx *xxxx* *xxxx*

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) ***that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.***

(4) Subject to the provision of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree."[7]

17. These provisions have been explained by the Supreme Court in *Malwa Strips Private Limited v. Jyoti Limited*[8]. The appellate Court may impose such conditions as it considers appropriate for grant of stay. Discretion must be exercised judicially, on the basis of the facts of the case. The appellate Court does possess discretion to grant an unconditional stay, even of a money decree, albeit one that would be exercised only in a rare case of a very strong *prima facie* error that goes to the root of the decree. Section 36(3) of the Act qualifies this position with the further provision that where the Court finds the contract, arbitration agreement, or the making of the award, to be tainted by fraud or corruption, an unconditional stay should follow.

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[7] Emphasis supplied.
[8] (2009) 2 SCC 426.

18. The Division Bench judgment of the Bombay High Court in *Ecopack*[9], cited by Mr. Sethi and Mr. Gupta, clearly holds that the Court retains discretion in this regard, even under Section 36(3) of the Act. The said judgment was challenged in SLP(C) 16605/2018, but the Supreme Court declined to interfere. I have not been shown any direct authority to the contrary.

19. The judgments cited by Mr. Bahl do not, in my view, hold to the contrary. In *Sepco*[10], the Supreme Court reiterated adherence to the aforesaid principles, and emphasised on the sound exercise of judicial discretion while determining the conditions to be imposed. In *Italian Thai Development*[11], a coordinate Bench of this Court has declined unconditional stay on facts, but expressly noted that the question decided was not about the power to grant such an order. The same is the position in the judgment of the Bombay High Court in *Balmer Lawrie*[12].

20. The following *prima facie* findings persuade me that, in the facts and circumstances of the present case, it is not appropriate to call for a deposit of the entire awarded amount:

a. The learned arbitrator has found in favour of the petitioners herein that SS "*had no authority in actuality*" to sign the DSA on behalf of the Promoters.[13]

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[9] Supra (note 3).
[10] Supra (note 4).
[11] Supra (note 5).
[12] Supra (note 6).
[13] Paragraph 124 of the impugned award.

b. The "*Note*" in the DSA, reproduced in paragraph 10 hereinabove, clearly required board resolutions in support of SS' authorisation to sign the DSA on behalf of the Promoters. It is the admitted position that no such board resolutions were provided by the Promoters, which held a combined stake of 1.72% in IOLN as on the date of the DSA. No evidence emanating from the petitioners or their predecessors-in-interest has been cited to support the case that SS was authorised by them.

c. The letter of HTM dated 25.11.2011, invoking arbitration, was addressed to SS only as President and CEO of IOLN, and not as the representative of the Promoters.

d. In the statement of claims filed by HTM before the learned arbitrator, there was a bare assertion that SS was authorised by the Promoters, but no further details or factual foundation were pleaded, despite the fact that SS' authority had been put in issue by the petitioners, both before this Court and in the Supreme Court. In the statement of defence filed by the petitioners before the learned arbitrator, they clearly pleaded that SS had no authority to sign the DSA on behalf of the Promoters, and they had notice of the DSA only from the proceedings under Section 11 of the Act before this Court. They also contended that the arbitration had not been invoked against them. HTM filed a rejoinder before the learned arbitrator, in which it reiterated that SS was duly authorised on behalf of the Promoters. For this purpose, it relied upon the statement made by SS before this Court and contended that the

requirement of the board resolution was "*only a formality*" and not a "*condition*".

e. HTM also relied upon the doctrine of indoor management to cast liability upon the petitioners, but this argument was rejected by the learned arbitrator.[14]

f. The learned arbitrator has rested his conclusions with regard to SS' authority on behalf of the Promoters, upon principles of agency and estoppel, although no plea of estoppel was taken in the statement of claims or the rejoinder filed by HTM. While dealing with the question of agency, the learned arbitrator has found that the agent must be clothed with delegated authority by the principal, and held that, in the present case, SS did act as an agent of the Promoters. However, I am unable to discern the factual basis upon which the learned arbitrator has come to this conclusion. The learned arbitrator has referred to a notice of postal ballot[15], issued by IOLN on 28.01.2009 to its shareholders, including the Promoters, to come to the conclusion that the Promoters were aware that the DSA had been signed by SS on their behalf. However, the postal ballot itself, only states that IOLN was entering into the DSA, and does not refer to any potential liability against the promoters of IOLN.

21. The question of authority for entering into the DSA on behalf of the Promoters, is foundational to HTM's claims against them, as

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[14] Paragraph 58 of the impugned award.
[15] At page No. 1209 of the paper-book in O.M.P.(COMM) 136/2024.

recognised by the learned arbitrator himself.[16] In my view, the petitioners have made out a strong *prima facie* case with regard the findings of the learned arbitrator on this foundational issue.

22. On a balance of these factors, I am of the view that the interest of justice would be served by granting stay of enforcement of the impugned award, subject to the petitioners depositing into Court the sum of Rs. 3.75 crores, being 50% of the principal amount claimed, or furnishing a bank guarantee for the said amount to the satisfaction of the learned Registrar General. The petitioners will also file letters of undertaking, signed by their directors and supported by resolutions of their respective Boards, to pay the balance amount, if their petitions under Section 34 are ultimately unsuccessful. The same be done within six weeks from today.

23. I.A. 6812/2024 and I.A. 6814/2024 are disposed of in these terms.

24. It is made clear that the observations made in this judgment are only for disposal of these applications, and will not prejudice the parties at the final hearing of these petitions.

<u>O.M.P.(COMM) 136/2024 & O.M.P.(COMM) 137/2024</u>

List on the date fixed, 05.08.2024.

PRATEEK JALAN, J

MAY 28, 2024
'*pv*'/

[16] Paragraph 92 of the impugned award.