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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL SUIT NO. 1447 OF 2018

ICICI Bank Ltd ...Plaintiff

Versus

State Bank of India & Ors ...Defendants

WITH

INTERIM APPLICATION NO. 1 OF 2020

IN

COMMERCIAL SUIT NO. 1447 OF 2018

WITH

COMM DIVISION NOTICE OF MOTION NO. 2453 OF 2018

IN

COMMERCIAL SUIT NO. 1447 OF 2018

WITH

COMM DIVISION NOTICE OF MOTION NO. 1377 OF 2019

IN

COMMERCIAL SUIT NO. 1447 OF 2018

Mr Sharan Jagtiani, Senior Advocate, *with Ms Manini Bharati, Ms Uttara S, Ms Sakshi S, i/b Trilegal, for the Plaintiff/Applicant.*
Mr Karl Tamboly, *with Ms Nidhi Singh, i/b India Law LLP, for Defendants Nos. 1 and 2.*

Mr Rakesh Singh, *i/b MV Kini & Co, for Defendant No.4.*
Ms Aradhana Latne, *for Defendant No.3.*
Mr Gaurav Joshi, Senior Advocate, *with Mr Vivek Shetty and Ms Anushka Shah, i/b AZB & Partners, for Defendant No.5.*
Ms Radhika Indapurkar, *i/b Shardul Amarchand Mangaldas & Co, for Defendant No.6.*

CORAM: G.S. PATEL, J
DATED: 12th March 2020

PC:-

IA NO. 1 OF 2020 IN COMM SUIT NO. 1447 OF 2018:

1. The Defendants are served. Defendants Nos. 1, 2, 3, 4, 5 and 6 are represented.

2. The limited ad-interim relief that Mr Jagtiani for the Plaintiff seeks is in terms of prayer clause (c) at page 11, which reads thus:

> "(c) Direct the Defendants to immediately disclose on oath the current status of the substitution process."

3. The Plaintiff, ICICI Bank, brought suit to safeguard its interest as a secured creditor of the 5th Defendant under a Rupee Facility Agreement dated 13th June 2012 read with the registered Deed of Hypothecation dated 16th December 2015. The Plaintiff first filed a Notice of Motion No. 2453 of 2018 and then another Notice of Motion No. 1377 of 2019. In these Motions, the Plaintiff sought an injunction against Defendants Nos. 1 and 2, viz., State Bank of India and Dena Bank, from exercising what is called their 'right of substitution' of the 3rd Defendant as the concessionaire of a highway toll road project with another entity (called a "Putative Selectee") under a Substitution Agreement to the alleged exclusion and prejudice of the Plaintiff's rights as a secured creditor of the 3rd Defendant under the two documents referred to above.

4. According to the ICICI Bank, it held a hypothecation of the 3rd Defendant's right, title and interest in all movable assets, project documents, insurance contracts and receivables in the project in question. ICICI Bank claims that an amount of over Rs. 130 crores was outstanding and due to it from the 3rd Defendant.

5. At the time of the first two Motions, some statements were made to Court and some documents were tendered. According to ICICI Bank, this made it clear that the 5th Defendant, the 'Putative Selectee' (the entity to be substituted) was required to clear ICICI Bank's dues as a precondition to it being the substituted concessionaire (in place of the 3rd Defendant). The reference to the 5th Defendant was, according to the contesting Defendants, to be understood as including its affiliates and special purpose vehicles. There were apparently other conditions that, ICICI Bank says were applicable, including that a total amount of Rs. 385.9 crores was to be infused by the 5th Defendant before fresh project documents and financing documents were executed; the Aggregate Transaction Consideration was subject to a reduction of Rs. 15 lakhs per day; and the prior approval of National Highways Authority of India ("**NHAI**"), the 4th Defendant, was required.

6. According to ICICI Bank, since there was a disclosure that Defendants Nos. 1 and 2 had already entered such an agreement with the 5th Defendant without accounting for ICICI Bank's dues there came to be made an order of injunction on 31st October 2018 restraining NHAI giving its consent to this substitution.

7. Later, in 2018 and in early 2019, Affidavits were filed by which the 3rd Defendant assured ICICI Bank that its dues would be paid once it received the Aggregate Transaction Consideration from the 5th Defendant into the designated escrow account. On 18th February 2019, parties signed consent minutes and this was made an order of the Court. This recorded that NHAI had granted in-principle approval to allow the substitution of the 5th Defendant as the concessionaire. The consent order had further conditions requiring the execution of some documents. There was apparently a requirement that the 5th Defendant would deposit the Aggregate Transaction Consideration of Rs. 385.9 crores (subject to reduction) in this Court. ICICI Bank then filed the second Notice of Motion on which an order was made on 11th June 2019 recording NHAI's statement that a decision would be taken within one month, i.e. by 12th July 2019.

8. Now ICICI Bank says it does not know whether NHAI has taken such a decision. On 30th January 2020, ICICI Bank requested the State Bank of India for a waiver of the reduction in the Aggregate Transaction Consideration on account of the delay in the substitution process being beyond ICICI Bank's control. According to ICICI Bank, this reduction is today in the region of approximately Rs. 77.85 crores.

9. This is the factual background as portrayed by the Plaintiff. At this stage not all these facts are necessarily admitted. I am leaving contentions open. The one unclear area is the exact status of the substitution process. This information obviously will not come from either State Bank of India or Dena Bank but more properly come from Defendants Nos. 3 and 5 on one hand and the 4th Defendant, NHAI, separately. The reason is that any substitution process required NHAI approval in any case. While prayer clause (c) is generally worded, I am making it clear that I will require specific disclosures in the following manner:

(a) NHAI will disclose on Affidavit whether it has in fact granted an approval to the substitution as a Concessionaire of the 3rd Defendant by 5th Defendant or any SPV or Assignee of the 5th Defendant. Full particulars of the application made in that behalf and the name and constitution of the final Concessionaire must be disclosed.

(b) NHAI will also disclose any additional terms and conditions that it may have imposed on the new Concessionaire. In this context, I note Mr Joshi's statement on behalf of the 5th Defendant that final approval from NHAI was granted on 30th January 2020 in the name of the 5th Defendant. The application for NHAI approval was however in the name of some other entity described as an SPV yet to be constituted. NHAI will disclose the exact particulars of that permission and its terms and conditions.

(c) There will be a separate disclosure by Defendants Nos. 3 and 5 specifying not only the nature of application made to NHAI but also the details in regard to the SPV. In particular Defendants Nos. 3 and 5 will in the disclosure Affidavit explain whether the amounts required to be brought in under the consent minutes of the order have in fact being brought in and if not, when they are proposed to be brought in. The Affidavit from Defendants Nos. 3 and 5 will also set out the amount that according to those Defendants is to be brought in and the reduction in the aggregate transaction consideration, if any.

10. At present these disclosures will be treated on a without prejudice basis with all rights and contentions being kept open.

11. The Affidavits are to be filed and served on or before 30th March 2020.

12. List the matter on 2nd April 2020.

(G. S. PATEL, J)