

OCD- 6

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/91/2024
IA NO. GA-COM/1/2024
SREI EQUIPMENT FINANCE LIMITED
VS
MR. PRADYUMNA SINHA AND ORS.

AND

AP-COM/857/2024
SREI EQUIPMENT FINANCE LIMITED
VS
MR. PRADYUMNA SINHA AND ORS.

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO
Hearing concluded on: 9th December, 2024.
Order on: 16th December, 2024.

Appearance:

Mr. Jishnu Saha, Sr. Adv.
Mr. Soumya Roychowdhury, Adv. (VC)
Mr. Sankarsan Sarkar, Adv.
Mr. Aditya Kanodia, Adv.
Ms. Suparna Sardar, Adv.
...for the plaintiff/petitioner.

Mr. Anirban Ray, Sr. Adv.(VC)
Mr. Shounak Mitra, Adv.
Mr. Vishwarup Acharyya, Adv.
Mr. Sannidhya Dutta, Adv.
...for the respondent nos. 1 to 4.

Mr. Suddhasatya Banerjee, Adv.
Mr. Surojit Dasgupta, Adv.
Mr. Aniket Chaudhury, Adv.
...for the Intervenor
(Ashika Stock Broking Ltd.)

ORDER

1. The petitioner has filed the present application under Section 9 of the Arbitration and Conciliation Act, 1996 praying for an interim order.

2. One India Power Corporation Limited had settled a Trust in the name of the Power Trust in which the respondents are the present trustees. By a common loan agreement dated 15th January, 2018 which was amended, modified, supplemented and renewed from time to time, one SREI Infrastructure Finance Limited had sanctioned and granted financial assistance of Rs.6,95,00,00,000/- to M/s. Power Trust. Under the loan agreement, the trustees of the Power Trust had agreed to execute proper documents as primary security for pledging- (a) 32, 37, 45, 165 numbers of the shares of India Power Corporation Limited, (b) 4.1 lac equity shares of IPCHL and (c) 19.6 crores fully compulsorily converted debentures of IPCHL held and owned by the Power Trust along with other documents for securing the financial assistance. By a Business Transfer Agreement dated 16th August, 2019 entered between SIFL and the petitioner herein, the lending business of SIFL stood transferred to the petitioner with effect from 1st October, 2019, resulting in the petitioner being considered the lender for the entire loan facility of the Power Trust, together with all underlying promises, securities and undertakings standing in favour of the SIFL. The trustees of the Power Trust failed to create pledge of shares as promised. They subsequently executed in favour of the petitioner a Deed of Hypothecation and a Deed of Undertaking both dated 6th May, 2022 for securing the financial assistance granted to the Power Trust. This resulted in a hypothecation charge on all its receivables i.e. the entire sale proceeds arising out of the sale of 32, 37, 45, 165 shares of India Power Corporation Limited held and owned by the respondents as the trustees of the trust. Some payments were made by the respondents till the financial year 2020-21,

the respondents thereafter failed to pay and adhere to the payment terms and conditions resulting in the loan account becoming irregular.

3. By a letter dated 24th March, 2023, the respondents, through their Advocates contended that the respondents had not been able to sell the shares. But no dispute was raised with regard to the petitioner's unpaid dues under the loan agreement. The respondents continued to fail to make payment in terms of the loan agreement, the SIFL through its Advocate by a letter dated 14th September, 2023 recalled the entire loan and called upon the respondents to pay the entire outstanding dues which was as on 12th September, 2023 stood at Rs.6,33,63,64,709/-. On receipt of the said letter dated 1st November, 2023, the respondents by a letter dated 17th November, 2023 did not deny the existence of the loan or the default in repayment of the same. On the contrary, there was a clear admission that the respondents have failed to make payment of loan.
4. The petitioner had called upon the respondents to make payment of its outstanding dues under the loan agreement by a demand notice dated 29th January, 2024. Despite receipt of the said notice, the respondents have failed and neglected to repay the loan amount. In the circumstances, the petitioner had filed an application being AP-COM/91/2024 before this Court under Section 9 of the Arbitration and Conciliation Act, 1996. The said application was taken up for hearing on 20th February, 2024 wherein this Court had appointed a Special Officer to take appropriate steps in respect of the sale of 32, 37, 45, 165 number of shares of the India Power Corporation Limited held by the

respondents in Power Trust by issuing appropriate directions on the depository participant, namely, Ashika Stock Broking Limited.

5. The Ashika Stock Broking Limited, instead of complying with the directions contained in the order dated 20th February, 2024 has filed an application for vacating the order dated 20th February, 2024.
6. Learned Senior Advocate, Mr. Jishnu Saha representing the petitioner submits that the respondents are liable to pay a sum of Rs.6,33,63,64,709/- to the petitioner as on 12th September, 2023. He submits that in spite of several demands, the respondents failed to pay the said amount.
7. Mr. Saha submits that the petitioner came to know that Power Trust is the owner of 74% shares of the Hiranmaye Energy Limited and the trust is holding Rs.19.60 crores Fully Compulsorily Convertible Debentures of Hiranmaye Energy Limited. He submits that the Hiranmaye Energy Limited and Fully Compulsorily Convertible Debentures are extremely valuable. He further submits that the petitioner further came to know that the said Trust through the respondents, is now seeking to deal with its share-holdings and also the FCCD in the said HEL for raising funds to resolve its insolvent state.
8. He submits that the HEL has defaulted in repayment to its lenders, Rural Electrification Corporation Limited for which the lender had initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 in which an order of admission has been passed on 2nd January, 2024. Mr. Saha further submits that by the order dated 20th February, 2024, this Court passed an order for sale of 32, 37, 45, 165 numbers of the shares of IPCL but the sale has not taken place. He

submits that the respondent-Trust has not been able to sell the shares for the last several years and SEBI has initiated proceeding in respect of the same which is pending in appeal before this Court. Mr. Saha submits that from the loan agreement dated 15th January, 2018 executed for the loan granted to the Power Trust, the petitioner has a charge on all moveable assets of the Trust.

9. Mr. Anirban Ray, learned Senior Advocate appearing for the respondents no. 1 to 4 submits that in terms of the order passed by this Court dated 20th February, 2024, the respondents have provided all the details to Ashika Stock Broking Limited to sell the shares but the Ashika Stock Broking Limited one or the other reasons failed to sell the share due to which the respondents are not in a position to sell the shares of the petitioner. Counsel for the respondents submits that the petitioner has already been secured by the order dated 20th February, 2024 wherein this Court has already directed to sell the shares of the petitioner and this Court has also appointed a Special Officer for taking appropriate steps in respect of the sale of 32, 37, 45, 165 numbers of shares of IPCL. Counsel for the respondents further submits that as the shares of the petitioner has already been secured and as such, the petitioner cannot pray for dual benefits.
10. This Court considered the order dated 20th February, 2024 passed in AP-COM/91/2024 wherein this Court has appointed a Special Officer for taking appropriate steps in respect of the sale of 32, 37, 45, 165 shares of IPCL held by the respondents in Power Trust by issuing appropriate direction on the depository participant i.e. Ashika Stock Broking Limited.

11. In terms of the order passed by this Court dated 20th February, 2024, the Special Officer had issued notice to the concerned parties and in the meeting dated 6th March, 2024, the Special Officer recorded that the depository participant i.e. Ashika Stock Broking Limited is not willing to comply with the order dated 20th February, 2024 and he has informed the Special Officer that he will be moving for recalling of the application of the order passed by this Court dated 20th February, 2024.
12. At the time of hearing, this Court has called for the learned Advocate appearing for the Ashika Stock Broking Limited and enquired about the compliance of the order passed by this Court dated 20th February, 2024 and in reply, the learned Advocate appearing for the Ashika Stock Broking Limited submits that the respondents have not submitted the proper documents in spite of several requests due to which the depository participant is not in a position to sell the shares of the IPCL.
13. The Ashika Stock Broking Limited has filed the list of documents required on behalf of the depository participant from the respondents wherein altogether eleven documents have been described out of which the documents appearing in serial nos. 2, 5, 6, 8, 9, 10 and 11 were found in order and the documents appearing in serial nos. 1, 3 and 4 found some defects due to which Ashika Stock Broking Limited could not be able to sell the shares of the IPCL.
14. As regard document no. 3, the depository participant raised objection that the "Board Resolution" for the acceptance of resignation of the erstwhile Trustees were not provided.

In reply to the said objection the counsel for the respondents submits that as per clause 6.4.2 of the Trust Deed, the Trustee(s) may

retire at any time without assigning any reason provided that /she shall have given a written notice of at least six (6) months to the other Trustees. The other Trustees shall have the right to relax the aforesaid notice period in their sole discretion.

He submits that two Trustees have tendered their resignations on 26th May, 2021 and in the meeting of the Board of Trustees dated 8th November, 2021, the resignations were accepted. He further submits that on 8th November, 2021 after acceptance of resignations of two Trustees, the third trustee has also submitted resignation on 8th November, 2021 and the newly appointed trustees have accepted the resignation of third trustee, accordingly, three new trustees have been appointed on the same day.

15. As regards to document no. 4, it is submitted by depository participant that invalid Board Resolution provided which is signed by the new trustees and the erstwhile trustees signatures are not available in the copy of the Resolution. They also raised objection that as per clause 6.5.7 of Trust Deed “the quorum for any meeting of the Board of Trustees shall be the presence of any two (2) trustees. The quorum must be present at the beginning and throughout the meeting.” He further submits that as per clause 6.1 of the Trust Deed there shall be minimum of three (3) trustees wherein as per minutes there was only one trustee who chaired the meeting and appointed two new trustees. He also refers to clause 6.4.1 and submitted that the resolution is not legal and valid.

16. In reply to the documents and the objection raised by Ashika Stock Broking Limited, counsel for the respondents submits that as per the

trust deed dated 10th May, 2013, the word “beneficiary” has been defined. “Beneficiary” means IPCL and its successors and assigns for clarity, post the effectiveness of the scheme, DPSC shall be deemed to be the successor of IPCL. He submits that as per the Circular of SEBI dated 24th January, 2013, the case of the Ashika Stock Broking Limited is covered under clause 6 of the said Circular and he submits that clauses 5 and 6 of the Circular has to be read together.

17. As regards the objection no. 3 with regard to the Board Resolution for the acceptance of resignation of erstwhile trustees, the counsel for the respondents has relied upon clauses 6.1, 6.4, 6.4.1 and 6.4.2 and submitted that two of the trustees have tendered their resignations from the Power Trust on 26th May, 2021 and the other trustee has tendered his resignation on 8th November, 2021. He has relied upon the Minutes of the Meeting dated 8th November, 2021 wherein the resignations of all the three trustees have been accepted and new trustees have been appointed. He submits that as per clause 6.4.1 (iii) of the trust deed, the trustees of the Trust shall not be less than three trustees and if any of the trustee expresses his/her desire to be discharged or retire from the Trust, in every such case, when so often, as the case may be, it shall be lawful for the remaining trustees to appoint other person as trustee with the liberty upon such appointment to increase or decrease the original number of trustee. He submits that in the present case, initially two trustees have tendered their resignations on 26th May, 2021 and their resignations were placed in the meeting of the Board of Trustees dated 8th November, 2021 and on the same date the other trustee has also

tendered his resignation and in the said meeting all the three resignations were accepted and three new trustees have been appointed.

18. In reply to the objection of document no. 4, the learned counsel for the respondents submits that in the meeting dated 8th November, 2021 initially resignation of two trustees were accepted by one trustee and subsequently, the said one trustee has appointed three trustees and immediately, he has submitted his resignation and the said newly appointed three trustees have accepted the resignation of the third trustee and as such, there is no illegality in the Board meeting in which the resignation of the old trustees and acceptance of the new trustees were occurred.

19. This Court considered the objection raised by Ashika Stock Broking Limited and the clarification of the respondents. Altogether eleven (11) documents were required by depository participant from the respondents to sell the share of IPCL. Out of eleven documents, three documents were not found in order to proceed to sale of shares of IPCL by the depository participant.

As regard to the document no. 1, it is found that as per SEBI Circular dated 24th January, 2013 for the client which is trust clause 5 of the circular is applicable which reads as follows:-

“5. Where the client is a trust, the intermediary shall identify the beneficial owners of the client and take reasonable measures to verify the identity of such persons, through the identity of the settler of the trust, the trustee, the protector, the beneficiaries with 15% or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership”

As per clause 6 of circular listed companies as exempted which reads as follows:-

“6. Where the client or the owner of the controlling interest is a company listed on a stock exchange, or is a majority-owned subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies.”

As per Trust Deed, the IPCL is an unlisted public limited company incorporated under the Companies Act and is a settler. The settler has established the investment Trust in accordance with Trusts Act. The respondents are required to identify the ultimate beneficial owners but have not identified the same due to which, the depository participant is not accepting the document no. 1 of the respondents. The objection raised by the depository participant with respect to the document nos. 3 and 4, the respondents have relied upon Minutes of Meeting of the Board of Trustees dated 8th November, 2021 wherein it reveals that on 26th May, 2021, two of the trustees out of three trustees have submitted resignation and the respondent no. 3 being the sole trustee accepted the resignation of two trustees on 8th November, 2021 and subsequently, on the same day the third trustee has submitted resignation and on the same day his resignation was accepted.

20. It is very astonished to see that the third trustee has conducted the meeting as Chairman of the meeting and accepted his resignation.

As per clause 6.4.1 (iii) of the Trust Deed the number of Trustees shall not be less than three trustees. As per Minutes of Meeting of the Board on 8th November, 2021 only one trustee was present before approval of three new trustees and only one trustee has accepted the resignation of

other two trustees which is in violation of clause 6.4.1 (iii) of the Trust Deed.

It also appears that on 8th November, 2021, the third trustee has submitted his resignation and on the same day his resignation was accepted by the new trustees but he had chaired the said meeting as Chairman of the said meeting.

Clause 6.5.7 speaks about quorum of the meeting of Board of Trustees and quorum of Board of Trustees shall be in the presence of any two trustees but as per the Minutes of Meeting, only one trustee was present and accepted resignation of two trustees which is not permissible.

21. The respondents have also filed an affidavit stating that, at present, the trust has 32, 37, 45, 165 IPCL shares which are held in dematerialized form from the Ashika Stock Broking Limited. In the said affidavit, it is further stated that IPCL shares listed on the National Stock Exchange based on the price of the said shares for the last 12 months, the average price works out to be around Rs.21/- per share and considering the average price over the last few months and the Benchmark, the total value of the IPCL shares held by the respondent no. 4 is around 685, 26, 47, 823. It is further mentioned as on date, that the IPCL shares are valid at around Rs.17.09/- per share.

22. By an order dated 27th January, 2017 this Court has passed the following order in CA/565/2013 in CP No.206 of 2012 :-

“By an order passed nearly two years back on March 20, 2015, it was proposed that the shares held by the trust in DPSCL, or such complement thereof as would suffice for the purpose of the minimum public shareholding threshold to be reached, would be sold and the sale

would be conducted by a committee under the aegis of a nominee of SEBI. The order was made despite the amalgamated company filing affidavits to demonstrate that SEBI had made exceptions in several cases, including in the celebrated case of Wipro Limited. SEBI has, however, maintained that the circumstances leading to the exception being made in the case of Wipro were different. SEBI submits that apart from anything else, Wipro had not attempted to negate the mandatory requirement of the minimum public shareholding by resorting to a scheme and informing SEBI ex post facto. SEBI has also indicated its unwillingness to be directly involved in the sale.

The parties have also referred to a freezing order of June 4, 2013 passed by SEBI in respect of such part of the promoters' shareholding in the amalgamated company that exceeds 75% of the paid-up capital by treating the shares held by the trust to be a part of the promoters' quota, till such time that the minimum public shareholding was achieved by the amalgamated company.

There is no dispute that 4.32% of the paid-up capital in DPSCL is held by members of the public who have no connection with the promoters. For the public shareholding in the amalgamated company to reach the 25% mark, a further 20.68% of the shares in DPSCL has to be offered to the public by some transparent mechanism so that the holders thereof cannot be seen or regarded as persons acting in concert with the present promoters of the amalgamated company. The amalgamated company reports that out of the 40% shares in the amalgamated company held by the trust, 32, 63, 16, 563 shares need to be sold to the public for the 25% minimum public shareholding in the amalgamated company to be achieved. Such 32, 63, 16, 563 shares should be sold by April 30, 2027. The trust should also transfer the balance shares held by the trust in the amalgamated company in favour of such entities as the trust may, on its own or at the direction of the promoters, deem fit. The transfer of the balance shares, other than the 32, 63, 16, 563 shares, should be completed by March 31, 2017 such that upon the sale of the shares to the public, the trust does not own or control any further shares in the amalgamated company as to whether the trust will continue for the purpose of the other investment under the scheme, is not required to be gone into for the present purpose.

The trust will cite this order and make a public offer for sale of the said 32, 63, 16, 563 shares. Advertisements in such regards will be published in such newspapers as may be suggested SEBI within a week of the form of the advertisement being forwarded to the office of SEBI in Kolkata. Such form of the advertisement should be forwarded to the relevant office within three weeks from date. The directions herein are in modification of the interim order of February 20, 2015 that restrains the amalgamated company from dealing with its shares. However, the interim order will continue for all other purposes till such time that the trust transfers the balance shares, other than those to be sold to the public, and the shares meant to be sold to the public are so sold.

It is made clear that the sale of the 32,63,16,563 shares may be in several tranches as long as the entire quantum is sold by April 30, 2017. At any rate, the entire quantum of the said shares should be offered to be sold to the public at least a fortnight before April 30, 2017. The sale of the shares will be in accordance with the rules and regulations governing the same.”

23. Subsequently, another Co-ordinate Bench in CA No. 5 of 2022 in CP No. 206 of 2012 passed the following order :-

“By an order dated 27th January, 2017, the Trust had been directed to offload 32,63,16,563 shares. Thereafter, by an order dated 31st December, 2017. Admittedly, the sale of the share has not yet been completed. This position has been continuing since 27th January, 2017. It is submitted on behalf of the Trust that though some shares aggregating to 25,71,398 shares have been sold in terms of the order dated 27th January, 2017, the Trust has been unable to sell the remaining shares. The grounds for being unable to sell the shares are immaterial. The responsibility for ensuring minimum public shareholding in terms of Rules 19(2)(b) and 19(A) of the SCRR is on the “listed entity”. In order to ensure equitable participation in the affairs of a listed company, and a level playing field it is mandatory that the promoter/promoter group of such companies ensure compliance with the public shareholding requirement.

As a last chance, the time to sell the shares in terms of the order dated 27th January, 2017 stands peremptorily extended by a period of 3(Three) months from date. In default of effecting the aforesaid sale, there shall be an order in terms of prayers (a) and (b) of the Judge's Summons."

24. As per common loan agreement dated 15th January, 2018, it is agreed between the parties that :-

- 3.1 *The Obligations of the Borrower shall be secured by way of:-*
- 3.1.1. *an exclusive first charge on all fixed and current assets of the Borrower under the Deed of Hypothecation;*
- 3.1.2. *an exclusive first charge on the Receivables of the borrower under the Deed of Hypothecation;*
- 3.1.3. *Pledge of a) 32.4 crore equity shares of IPCL (erstwhile Dishergarh Power Supply Company or DPSC); b) 4.1 lakh equity shares of IPCHL; and c) 19.6 crore fully compulsorily convertible debentures ("**FCCD**") of IPCHL;*
- 3.1.4. *Demand Promissory Note;*

25. This Court finds that since the year 2017, this Court directed to sale of 32, 63, 16, 563 shares of IPCL but till date the sale is not done. This Court by an order dated 20.2.2024 appointed Special Officer for sale of shares but the respondents are not providing required documents to the depository participant due to which the depository participant is not in a position to sell the shares.

26. The documents provided by the respondents to the depository participants clearly reveals that the said documents are not in conformity of SEBI Circular and in violation of several clauses of Trust Deed.

27. Considering the above, this Court finds that the petitioner has made out prima facie case and balance of convenience and inconvenience is in

favour of the petitioner. Accordingly, the respondents are restrained from dealing with or encumbering or diluting their shareholding and shareholding of Power Trust in Hiranmaye Energy Limited till 10th January, 2025.

28. The respondents are directed to file affidavit in opposition within two weeks, reply, if any, within one week thereafter.

29. List the matter on 10th January, 2025.

(KRISHNA RAO, J.)

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