

# **Integral Finvest (P) Ltd. vs Securities And Exchange Board Of India ... on 28 September, 2006**

**Equivalent citations: (2007)2COMPLJ433(DEL)**

**Author: Anil Kumar**

**Bench: Anil Kumar**

ORDER

Anil Kumar, J.

1. The petitioner has prayed for a writ against Securities and Exchange Board of India directing it to ensure that no transfer or variation in shareholdings of respondent No. 3, Indo Gulf Industries Ltd. take place until final adjudication of the matter in arbitration. The petitioner has also sought direction against respondent Nos. 1 and 2 to withdraw the publication of public offer relating to respondent No. 3 and a direction to respondent Nos. 1 and 2 not to allow any one to deal with the shares of respondent No. 3 or to allow change in control and management of respondent No. 3, subject matter of disputes between the parties under memorandum of understanding dated 14 August 2005.

2. The petitioner claimed that respondent No. 1 failed to implement directions contained in order dated 6 September 2006 passed by this Court in OMP No. 417 of 2006 wherein a learned Single Judge had directed respondent No. 3, Indo Gulf Industries Ltd. and respondent No. 4, Dr. S.K. Garg, to maintain status quo in respect of shareholdings of respondent No. 3 in a petition under Section 9 of Arbitration and Conciliation Act, 1996.

3. According to petitioner, the transfer of shares and the control and management of respondent No. 3 is subject matter of memorandum of understanding which is before this Court and, therefore, any action of any party including respondent No. 1 during the pendency of the proceedings before this Court is without any authority of law and especially because respondent Nos. 1 and 2 despite being aware of the order dated 6 September 2006 passed by this Court in OMP No. 417 of 2006 have knowingly and willingly allowed the publication of the said offer for purchasing the shareholdings of Indo-Gulf Industries Ltd. and the respondent Nos. 1 and 2 have, thus, acted in contravention of the said order directing status quo to be maintained with respect to shareholding of 'Indo Gulf Industries Ltd. These pleas, as detailed hereinabove, have been raised categorically by the petitioner in ground A, I and M of the present petition.

4. To comprehend the controversies properly, some of the relevant facts are that the petitioner entered into a memorandum of understanding dated 14 August 2005 with respondent No. 4 in

respect of shareholding and the control of respondent No. 3. Under the memorandum of understanding, the respondent No. 4 undertook to arrange acquisition and transfer of shareholding of respondent No. 3 to petitioner. Respondent No. 4 also agreed to arrange and transfer the shareholding of its associates and/or nominees which included shareholding of respondent No. 4 and his family members comprising of 17,15,620 fully paid up and 3397650 partly paid up share.

5. The memorandum of understanding dated 14 August 2005 also contemplated transfer of shareholding of respondent No. 4 and his other relatives and associates comprising of 4,71,547 fully paid up and 4,97,950 partly paid up shares and holding of HB Portfolio and its associates comprising of 17,60,219 fully paid up and 6,91,148 partly paid up shares.

6. Under the said understanding the respondent No. 4 had to provide to the petitioner a list of shareholders of respondent No. 3 within one week for verification and finalization. Memorandum of understanding contemplated finalization of acquisition subject to execution of agreement for acquisition of shares, control and management of respondent No. 3 after certain milestones by respondent No. 4 which included respondent No. 4 entering into one time settlement with financial institutions and banks and providing letters in respect thereto to petitioner.

7. The memorandum of understanding dated 14 August 2005 categorically stipulated in para-7 that a detailed formal agreement shall be executed between respondent No. 4 and the petitioner subject to completion of all the requirements under the Companies Act and SEBI Act, in particular SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1996.

8. Learned senior Counsel for petitioner, Mr. Jaitely, contended that the petitioner came to know from newspaper reports dated 19 August 2006 that respondent No. 4 is trying to sell the shares to others and later it transpired that respondent No. 4 has entered into an agreement dated 18 August 2006 with Balrampur Chini Mills Ltd., respondent No. 5.

9. The petitioner, therefore, gave a notice dated 5 September 2006 claiming damages for breach of agreement between petitioner and respondent No. 4 and suggested the name of a panel of arbitrators on account of arbitration agreement between the petitioner and respondent No. 4 and also filed a petition under Section 9 of the Arbitration and Conciliation Act being OMP No. 417 of 2006 where a learned Single Judge directed the petitioner and respondent No. 4 and respondent No. 3 to maintain status quo till the next date of hearing. The petition under Section 9 of Arbitration and Conciliation Act, 1996 was filed by the petitioner against respondent No. 4 and respondent No. 3 though the arbitration agreement is between the petitioner and respondent No. 4. In the petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner categorically contended in para-15 that the 'memorandum of understanding envisaged ultimate transfer of control, management of sugar unit to the petitioner, subject, of course, with the compliances of all regulator laws including that of SEBI Act and other by-laws and regulations on execution of formal agreement'. The prayers made by the petitioner in the petition under Section 9 of Arbitration and Conciliation Act, 1996 are as under:

(i) Restraining the respondent No. 1 (respondent No. 4 in this petition), his servants, agents, successors and officers, from selling and/or entering into any agreement and/or implementing any agreement for the sale of equity shares, the details of which are given in para-8 hereinabove in favor of any other party except to the petitioner or his nominee; or

(ii) In case an agreement has already been entered into, restraining the respondent Nos. 1 and 2 (respondent Nos. 3 and 4 in this petition) both from further executing share transfer deed and/or taking any action steps or measures for securing the transfer of the equity shares, the details of which are given in para-8 hereinabove; and

(iii) Restraining the respondent No. 2 (respondent No. 3 in this petitioner) from registering transfer of shares, the details of which are given in para-8 hereinabove in the name of any other person, company, body corporate, trust or society, firm;

(iv) Any other order or orders or relief or reliefs as this Hon'ble Court deem fit and proper, under the circumstances of the whole case, may also kindly be granted.

10. On the application of the petitioner, the following order dated 6 September 2006 was passed:

Fresh petition received. Issue notice to the respondents both by ordinary process as well as by registered post A/D, on petitioner taking necessary steps within three days, returnable on 29 September 2006. dusty as prayed. Status quo shall be maintained by the respondent till the next date of hearing with respect to shareholding.

IA No. 9852/06 (under Section 151 CPC) By this application the petitioner prays for grant of exemption from filing typed copies of the documents. Exemption is granted subject to petitioner filing the same before the next date of hearing.

IA stands disposed of accordingly.

11. The main contention of the learned senior Counsel, Mr. Jaitely, is that since for the principal transaction status quo has been granted, therefore, the subsidiary transactions should also be stayed and respondent Nos. 1 and 2, despite being aware of order dated 6 September 2006. have knowingly and willingly allowed the publication of the offer for purchase of shareholdings of Indo Gulf Industries Ltd. and have acted in contravention of the direction of the court directing status quo. His contention is that no order could be passed under Section 9 against respondent Nos. 1 and 2 and, therefore, present petition under Article 226 of the Constitution of India is maintainable against the respondents.

12. Per contra Dr. Singhvi, learned senior Counsel for respondent No. 4, very emphatically contended that the writ petition is not maintainable as the petitioner has suppressed the material facts and in any case for implementation of an order under Section 9 of Arbitration and Conciliation

Act, 1996, a writ petition under Article 226 of the Constitution of India is not maintainable. In the alternative, Dr. Singhvi contended that even if the writ petition is maintainable, this Court should not exercise its jurisdiction under Article 226 of the Constitution of India as this Court will not have territorial jurisdiction as petitioner is from Mumbai, so are respondent No. 1 and respondent No. 2 against whom the directions are prayed. It was further contended that prima facie there is no concluded agreement between respondent No. 4 and petitioner as the memorandum of understanding itself contemplated execution of an agreement for acquisition of shares and control and management of respondent No. 3 which was to be entered after following the milestones to be achieved by the parties and acquisition of shareholding and control and management of respondent No. 3 had to commence after execution of detailed formal agreement between the parties.

13. According to respondent No. 4 after entering into a memorandum of understanding dated 14 August 2005 nothing was done by the petitioner and the letter dated 14 November 2005 stipulating that a cheque No. 855871 for Rs. 25 lakhs drawn on ICICI Bank Ltd. towards token advance is also a manipulation. According to him, the said cheque has not been encashed either by the respondent No. 4 or any of his friends and associates as contemplated under the MoU dated 14 August 2005. It was further contended that this Court should not exercise its jurisdiction under Article 226 of Constitution of India since complicated disputed questions of fact are involved in the petition and even the complaints with respondent No. 1 are lying pending. It was also asserted that the agreement dated 14.8.2005 is not specifically enforceable and the remedy available to the petitioner is to claim damages and in fact in the notice dated 5.9.2006 in para-16 the petitioner has claimed damages.

14. Mr. Kapoor, learned senior Counsel for respondent No. 5, opposed the petition on the ground that the memorandum of understanding to enter into another agreement which has not been executed is not specifically enforceable. The shares could be transferred only pursuant to the agreement, which has not been executed. On the basis of memorandum of understanding the petitioner is not entitled to seek a specific performance against respondent No. 4 to transfer his shares and the shares of his friends and relatives. It was also contended that the agreement dated 14.8.2005 was not acted upon, as nothing was done in compliance with the terms and conditions after the execution of this memorandum of understanding. Reliance has been placed on Regulations 10, 18, 21, 22, 25 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 to contend that the petitioner did not make competitive bid as contemplated under Regulation 25. According to said respondent the mechanism under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, could be triggered only on the basis of petitioner and other friends and relatives having more than 15% share whereas petitioner has 6% share only. It was asserted that respondent No. 5 has already entered into an agreement with respondent No. 4, a promoter of Indo Gulf Industries, to acquire a 27.54% stake in the respondent No. 3. Emphasis has also been given on the misrepresentations made by the petitioner as by interim order passed on the application under Section 9 of the Arbitration and Conciliation Act, 1996, only the respondent Nos. 3 and 4 has been directed to maintain status quo and not the friends and relatives and other group companies as has been falsely claimed by the petitioner. The plea of the said respondent is that if respondent No. 3 could be imp leaded as a party with whom there was no arbitration agreement, to implement the rights of the petitioner under the memorandum of

understanding, other parties including SEBI could also be imp leaded and appropriate orders could be taken against them especially since it has been claimed that the SEBI has failed to implement and comply with the directions contained in order dated 6 September 2006. The enlargement and enforcement of the order dated 6 September 2006 of the learned Single judge will not be permissible and appropriate in a petition under Article 226 of the Constitution of India.

15. The memorandum of understanding executed between the petitioner and the respondent No. 4 has also been challenged on the ground that the detailed list of shareholders was not provided within one week and no agreement has been executed as contemplated under Clause 3 of said memorandum of understanding. There has been no completion of milestones as contemplated under Clause 7 nor there has been any mention of price at which the shares had to be purchased.

16. I have heard the counsels for the parties at length though the show cause notice was not issued. The respondent Nos. 4 and 5 had also filed counter affidavit without any show cause notice being issued. Considering the memorandum of understanding on the basis of which the petitioner is claiming rights it is apparent that the memorandum of understanding contemplates execution of another agreement for the purpose of acquisition of shares and control and management of respondent No. 3. The memorandum of understanding does not stipulate the price at which the shares are to be transferred nor has anything seems to have been done since 14.8.2005 when the memorandum of understanding was executed by respondent No. 4 in favor of petitioner nor has the petitioner taken any steps under the agreement. Though the petitioner has stated that a cheque for Rs. 25 lakhs was sent by letter dated 14.11.2005, however, nothing has been produced to show that the cheque was encashed. There is no averment also by the petitioner that the amount of Rs. 25 lakhs was sent by the petitioner but the cheque has not been encashed by the respondent No. 4. The petitioner has also not pleaded anything as to what was done by the petitioner, in case the petitioner had the knowledge that the cheque given by him has not been encashed by the respondent No. 4. There is no communication of any type by the petitioner to respondent No. 4 in this regard. The petitioner seems to have woken from slumber only after respondent No. 4 entered into another agreement with respondent No. 5 and the steps as contemplated under SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 were taken. Even under regulations no counter offer has been given by the petitioner as contemplated under Regulation 25 for acquisition of shares of the target company, respondent No. 3. Even in the petition invoking jurisdiction of this Court under Article 226 of the Constitution of India no such offer has been made on behalf of the petitioner company.

17. It cannot be doubted that the effect of breach of a contract by a party seeking to specifically enforce the contract is provided in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Section 41(e) of the Specific Relief Act, however, contemplates that injunction cannot be granted to prevent the breach of contract, the purpose of which could not be specifically enforced. The memorandum of understanding between the petitioner and the respondent No. 4 appears to be determinable. In any case memorandum of understanding is for execution of a formal agreement for acquisition and taking over the control of respondent No. 3. In the circumstances to hold that this memorandum of understanding is not determinable will not be justifiable in the facts and circumstances. The petitioner is also conscious of this and, therefore, in the notice dated 5.9.2006

the emphasis is on the damage and loss that will be caused to the petitioner rather than seeking specific performance for transfer of shares though feeble plea has been raised for transfer of shares in the said notice also.

18. Though the memorandum of understanding does not specifically stipulate that the same is determinable by either of the parties or on the happening of any event specified therein, however, from the very nature of this memorandum of understanding it is apparent that it is a private commercial transaction and consequently the same could be terminated. If it could be terminated and ultimately if it is found that the termination was not valid by respondent No. 4 or such termination is contrary to the terms of the agreement between the petitioner or respondent No. 4 or for any other reason the appropriate remedy of the petitioner is recovery of compensation but not a claim for specific performance of memorandum of understanding which itself contemplates execution of another agreement for formal transfer of shares and taking control of respondent No. 3. Reliance can be placed on *Rajasthan Breweries v. Stroh Brewery Co.* where a Division Bench had held that all revocable dues and voidable contracts fall within the determinable contracts and in accordance with the provisions of Specific Relief Act the specific performance of such an agreement would not be granted. The Division Bench of this Court had held as under:

Even in the absence of specific clause authorizing and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrong termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of k contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.

19. The petitioner is seeking specific performance of some of the rights claimed by him under the memorandum of understanding. According to the petitioner the rights which flow from memorandum of understanding between the petitioner and respondent No. 4 also include the rights to claim transfer of shares of petitioner's friends, relatives and other companies. If the disputes arising on account of alleged breaches on the part of respondent No. 4 are to be referred for arbitration the breach by respondent No. 4 for transfer of shares of his relative and other company should also be a subject matter of the arbitration. Merely because for transfer of the shares of friends, relatives and other company of respondent No. 4 would involve respondent Nos. 1 and 2, it

will not give a distinct and independent cause of action to the petitioner to claim enforcement of those rights or protection of those rights under Article 226 of the Constitution of India. In *Lotus Construction v. Government of Andhra Pradesh and Ors.* the apex court had held that the relief of specific performance on account of contractual obligation between the private parties cannot be enforced and should not be granted in exercise of jurisdiction under Article 226 of the Constitution of India. The observations of the Supreme Court are as under:

Be that as it may, the petitioner is virtually asking for the relief of specific-performance of a contract and such relief cannot be granted by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Rights if any accrued in favor of the petitioners are nebulous in nature and cannot form the basis of foundation for issuing a writ in the nature of mandamus. If the petitioner is complaining breach of an agreement/contract the forum is elsewhere.

20. What is also relevant is that the memorandum of understanding was executed on 14.8.2005 and the petitioner thereafter did not do anything nor has pleaded about anything done by the petitioner, except giving a cheque of Rs. 25 lakhs which is also denied by the respondent No. 4. The petitioner has not even pleaded that the cheque of Rs. 25 lakhs has been encashed by the respondent nor any other fact has been disclosed to show that the petitioner did anything pursuant to memorandum of understanding dated 14.8.2005 till the petitioner came to know about the agreement executed by respondent No. 4 with respondent No. 5 and the process initiated by respondent No. 1. The memorandum of understanding dated 14.8.2005 though details some of the obligations within a specified period but in totality it could not be construed for unspecified period.

21. When the matter for enforcement of rights arising out of memorandum of understanding dated 14.8.2005 is pending before another judge in a petition under Section 9 of the Arbitration and Conciliation Act, it could not be appropriate to execute some of the rights arising out of the same agreement or protection of some of those rights under the memorandum of understanding by exercise of jurisdiction under Article 226 of the Constitution of India. The petitioner has categorically claimed that the respondent No. 1 has failed to implement and comply with the directions contained in order dated 6.9.2006 passed by this Court in OMP No. 417/2006 directing respondent Nos. 3 and 4 to maintain status quo in respect of shareholding of Indo Gulf Industries Ltd. which has resulted in great prejudice to the petitioner and the respondent Nos. 1 and 2 despite being aware of the order dated 6.9.2006, have knowingly and willingly allowed the publication of the said offer. This plea of the petitioner that the order dated 6.9.2006 is also binding on respondent Nos. 1 and 2 or should be complied by them or respondent Nos. 1 and 2 should facilitate the implementation of the order dated 6.9.2006 cannot be enforced under Article 226 of the Constitution of India by a separate writ petition. If the said order has not been complied with or has not been implemented by the respondent Nos. 1 and 2 the remedy for the petitioner is the approach the appropriate court to seek implementation of order dated 6.9.2006 against respondent Nos. 1 and 2 and not to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

22. Mr. Jaitley, learned senior Counsel, has also tried to make a distinction regarding Regulation 10 and Regulation 12 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997.

According to him since the respondent No. 5 is taking control over a company, the Regulation 12 is to be invoked and not Regulation 10 which is only for acquisition of 15% or more of the shares or voting rights of any company. However, even on this ground the petitioner is not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India for implementation of rights of petitioner pursuant to order dated 6.9.2006 or any of the rights which have accrued to the petitioner under the memorandum of understanding dated 14.8.2005. Considering the pleas and contentions of the petitioner in the facts and circumstances it is not appropriate to exercise jurisdiction under Article 226 of the Constitution of India. There is no illegality, arbitrariness or procedural unreasonableness in the actions of the respondent Nos. 1 and 2. Therefore, for the reasons stated hereinabove I am not inclined to exercise the jurisdiction under Article 226 of the Constitution of India. Writ petition is, therefore, dismissed in limini.

23. It is, however, clarified that any observation made on the merits of the case is not the final expression of opinion on any of the matters in any of the arbitration proceedings between the parties.