

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CORAM

Shri V. P. Singh
Hon'ble Member (J)

I.A. No.305 of 2017 connected with C.P. No.134/2014

In the matter of:

The Companies Act, 2013;
-And-

In the matter of:

Sections 58, 59, 241, 242 and 244 and other applicable
Provisions of the Companies Act, 2013;

-And-

In the matter of:

Eskag Pharma Private Limited, a company incorporated under
the provisions of the Companies Act, 1956, having its registered
office at AG-112, Unit No.4, 8th floor, AMP Baisakhi, Sector-II,
Salt Lake, Kolkata- 700 091;

-And-

In the matter of:

Sushil Kumar Agarwal & 03 Others

.....Petitioners

-Vs-

Eskag Pharma Private Limited & 15 Others

.....Respondents/ Applicants

Parties last attended:

1. Mr Asif Ali, Advocate] For the petitioner
2. Mr Niladri Banerjee]

1. Mr Jishnu Saha, Advocate,] For the Respondents

ORDER

This I.A. has been filed for modification of order dated 9th January 2017 passed in C.P. no.134/2014 in the matter of Sushil Kumar Agarwal -vs- Eskag Pharma Private Ltd. In the said Company Petition an order was given to appoint Ernst and Young LLP as Valuer. It was further ordered that the amount of remuneration of the Valuer would be divided among the three brothers and all the parties involved in the C.P. to provide necessary information to the Valuer for proper valuation. A period of three months' time was given for completion of valuation exercise.

Brief facts as stated in the application are that the C.P. no.133,134 and 135 of 2014 and C.P. no.09 of 2016 were decided by a joint order dated 18th November 2016. A preliminary decree was passed in the for valuation of the principal business of the said companies, namely, West Bengal Chemical Industries Limited, Eskag Pharma Private Ltd., Eskag Sanjeevani Private Ltd. and La Chemico Private Ltd. The order was given for the appointment of Independent Valuer through consensus within 15 days from the date of the decree with cut off date for valuation as 31st March 2014.

Since all the parties failed to arrive at a consensus regarding the appointment of Valuer, therefore, Ernst and Young LLP was appointed as the Valuer.

The applicant contended that the fees of Ernst and Young LLP had been estimated at Rs.60 lakhs + taxes with additional fees, if the exercise is not completed within three to four months or if more than four meetings with each party are required.

The applicant has further contended that he requested Ernst and Young LLP for a break-up of valuation exercise while pointing out that not all methods for determination of value might apply to all the four companies. It is further stated that Eskag Sanjeevani Private Ltd. does not own any fixed assets of its own. As such, the net asset valuation method as proposed by Ernst and Young LLP for the said four companies would not be a proper and applicable method for assessment.

The applicant has further contended that Ernst and Young LLP refused to do further revision in their professional fees. He has alleged that on 8th December 2016, one Shri Nilesh Jain of Ernst and Young LLP had quoted fees of Rs.24 lakhs plus out of pocket expenses for the said valuation exercise. He has filed the copy of the e-mail, which is Annexure-I.

The applicant has further stated that Sunil Kumar Agarwal and Anil Kumar Agarwal would be liable to bear 2/3rd of the charges of Ernst and Young LLP and is so, likely to pay the lion's share of the fees for the exercise. It is surprising that Ernst and Young LLP would not consult the matter with the respondent no.1, instead ultimately negotiate with the petitioner and communicate final quote to the respondent no.1/applicant.

The applicant has further contended that he has approached amongst reputed valuers who have quoted the computation rates between Rs.1.20 to Rs.14 lakhs.

It is important to point out that on 19th May 2017, this Tribunal has passed an order that:-

"In this case, the appointment of valuer was ordered on 09/01/2017 vide preliminary decree passed on 18/11/2016 upon the consent of the parties. Now the Ld. Counsel for the respondents approached

this Court for directing the appointment of another valuer as the fees demanded by the Ernst and Young is too big and proportionate expenditure would be incurred by them will constitute a high amount.

We have gone through the earlier orders issued by this Tribunal, and we are of the opinion that after a lapse of almost five months after the order for appointing a valuer for valuation. It is not desirable to suggest a change at this juncture. It will only delay the valuation of the concerned companies. In case the respondent companies, which have raised this objection or unable to pay the amount the other party who is willing to do so may settle the fees with the audit firm and pay the amount as demanded by M/s. Ernst and Young and the amount paid more than the proportion of their portion will be taken into account and adjusted during the valuation by M/s. Ernst & Young.

The parties to this petition and other related C.Ps. Will cooperate with the audit firm in making available the relevant records and provide access to the factories, offices, books of accounts, etc."

It is apparent that after about five months of passing the preliminary decree the objection was subsisting regarding payment of fees of the valuer. Therefore, the direction was given to the other party to settle the amount with the audit firm and pay the amount as demanded by M/s. Ernst and Young LLP, in case the amount paid is more than their proportion, then it will be taken into account and adjusted during the valuation by M/s. Ernst and Young LLP.

Instead of complying with the terms of the preliminary decree passed in the order by this Tribunal, the respondent objected to the fees

of Ernst and Young LLP. Therefore, the order was further passed on 19th May 2017 for making the payment to valuer so that work of audit should start. It is also pertinent to mention that instead of complying the order dated 19th May 2017, the respondent/applicant has filed this I.A.

It also appears that the respondents are not interested in compliance of the order of this Tribunal and instead of complying with the order, he has given application on flimsy grounds. It is also important to mention that the respondent has objected to the method of valuation even though till date no exercise for determination of value has been started. This act is a clear-cut defiance of the Court's order. Therefore, I.A. No.305/KB/2017 deserves to be dismissed with special cost of Rs.50,000/-.

ORDER

I.A. No.305/KB/2017 is rejected with the special cost of Rs.50,000/-. The costs shall be paid within 15 days in the account of Prime Minister's Relief Fund. Both the parties have to comply with the terms of the preliminary decree and cooperate with the valuer, Ernst and Young LLP. The respondents are directed to pay the fees of the Valuer, in proportion to their share, failing which all bank accounts of the applicant shall be frozen w.e.f. 22.09.2017. Valuation report may be called within three months w.e.f. 22.12.2017 . List on 22.12.2017 for further orders.

Sd/-

(Vijai Pratap Singh
(Member (J)

Dated, this 7th day of Sept. 2017