IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.892 OF 2014

Life Insurance Corporation of India)....Petitioner
V/s.
Varun Global Limited)....Respondent

Mr.Prakash Shinde a/w Mr.Chirag Bhavsar i/by MDP & Partners for petitioner.
Mr.Gaurav Joshi, Senior Advocate a/w Mr.Sharique Nachan, Ms.Armin Pardiwalla and Mr.Jahangir Panday i/by M/s.Crawford Bayley and Co. for respondent.
Ms.Siddhi Vora i/by Nityoah Suneel & Associates for applicant in C.A.No.559 of 2016.

CORAM : K.R.SHRIRAM,J
DATE : 1.2.2018

P.C.:-

1 This petition is filed under Section 433(e) and 434 of the Companies Act, 1956 seeking winding up of respondent company Varun Global Limited (the company) on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 The petitioner is the Life Insurance Corporation of India. The respondent is a company registered under the Companies Act engaged in the business of Shipping. The main objects of the company

are to purchase, charter, hire or otherwise sell and exchange and deal with steam ships and other ships. It also is empowered by its objects clause to establish and maintain shipping lines between various ports. It was incorporated as a private limited company on or about 3rd November, 2009. The company requested a Rupee Term Loan of Rs.50 crores from the petitioner for general corporate purposes. A sum of Rs.50 crores was sanctioned by the petitioner on or about 24th November, 2009. In order to secure the repayment of the said loan, the company proposed to pledge 21,182 equity shares of Rs.100/- each held by the company in Khatau Industries Pvt. Ltd. along with right to occupy the use, possess and enjoy in certain premises situated at Laxmi Building, 6, Shoorji Vallabhdas Marg, Ballard Estate, Mumbai-1, which was leased to the said Khatau Industries Pvt. Ltd by the Bombay Port Trust on or about 2nd March, 1920 ("Leasehold premises").

3 At the material time the leasehold premises was proposed to be mortgaged to secure the loan and it was valued at Rs.62.24 crores. The loan sanctioned was reduced to Rs.45 crores as recorded in the letter dated 2nd February, 2010. The term loan was to be repaid in 17 equal quarterly installments of Rs.2.25 crores each followed by a bullet repayment by Rs.6.75 crores due and payable as the 18th

quarterly installment. In order to secure the aforesaid loan the company executed the following security documents in favour of the petitioner:-

> *"(i) Loan agreement dated 12th April, 2010 for the Rupee Term Loan for an amount of Rs.45 crores;*
>
> *(ii) Undertaking for creation of the permanent security dated 12th April, 2010;*
>
> *(iii) Undertaking for non-receipt of Commission dated 12th April, 2010; and*
>
> *(iv) Undertaking for Non-disposal of Shareholding dated 12th April, 2010.*

4 An amount of Rs.45 crores was disbursed on 13th April, 2010 at 12% interest payable on a monthly basis as set out in the terms of Loan Agreement. The company created an exclusive charge and mortgage in respect of the aforesaid leased premises and complied with the provisions of the Companies Act. In this respect a copy of the certificate of registration of mortgage has been relied upon by the petitioner as evidence in creation of the charge in favour of the petitioner, as the company had also pledged 21182 equity shares of Khatau Industries Pvt. Ltd.

5 The company defaulted in payment of the very first installment which was due on 15th June, 2011. Interest was paid till

July 2010 and the Company failed to pay the interest from August 2012. Since no payments were forthcoming, the petitioner vide an email dated 21st July, 2011 called upon the company to make payments of the amounts due. Meanwhile, it appears that the performance of the company was spiraling downward. As a result, the term loan was classified as a Non Performing Asset (NPA). Vide letter dated 25th November, 2011 the company admitted its liability to repay the term loan but failed and neglected to repay the same or any part thereof. Further demands dated 28/29th March, 2012 were made calling upon the company to pay their outstanding debt. The respondent company scheduled an Annual General Meeting on 4th February, 2013 whereby the respondent declared dividend for the 18 months period ended 30th September, 2012 at 5%. The petitioner vide their letter dated 29th January, 2013 objected to the declaration of the dividend considering the deteriorating financial condition and also the fact that declaration of said dividend was in contravention of Article 6.17(B)(4) of the Loan Agreement dated 12th April, 2010 whereby the company agreed not declare or pay any dividend to its shareholders unless it had first paid all the dues to the petitioner. The petitioner then called upon the company to clear their outstanding dues failing which the petitioner would be constrained to declare the company as a "Willful defaulter" in accordance with the RBI

Guidelines. The company meanwhile had issued cheques amounting to Rs.20,67,73,464/-. to the petitioner which were delivered to the petitioner's custodian (Stock Holding Corporation of India Ltd.) These cheques were dishonored resulting in criminal complaints being filed under the provisions of Negotiable Instruments Act, 1883.

6 On or about 30th April, 2014 the petitioner served on the company a statutory notice under Section 433 and 434 of the Companies Act calling upon to pay the amount of Rs.54,57,08,778/-. Although the notice was received, the company failed to reply. The petition therefore came to be presented on or about 15th July, 2014.

7 According to the petitioner as on 31st May, 2014 a total sum of Rs.55,78,77,508 was payable to the petitioner along with further interest thereon at 12% p.a. The petitioner also claims costs and charges set out in the particulars of claim as follows:-

Principal	Bank/ Legal charges	Simple Interest	Interest on Delayed Principal	Compound Interest	Liquidated Damages	Total
43,68,32,924	1,56.130	5,56,03,031	4,38,73,761	1,16,46,523	97,65,139	55,78,77,508

8 The petition was taken up for admission on 26.10.2016 and the judgment was pronounced on 23.12.2016. Various

contentions were raised and the court delivered an exhaustive and detailed judgment running into 53 pages. It will be useful to reproduce paragraph nos.51 to 59 of the said judgment.

> *"51. Applying these very principles, I am of the view that in the present case there is no dispute that the debt is owed from the respondent to the petitioner. There is indeed relatively small portion of the debt which is sought to be disputed. The dispute is restricted to whether the petitioner is entitled to claim interest at the rate claimed and as to liquidated damages. There is however no doubt that the principal sum and the admitted portion of interest is overdue. Moreover interest of Rs.16.80 crores on the overdue payment was already offered to be paid if the "willful defaulter" tag was deleted. In fact this amount was also paid over to the SBI to be kept in deposit with them. This course adopted by the respondent not only indicates an attempt to avoid payment of an admitted debt but in my view it amounts to refusal to pay an admitted debt. When the petitioner offered to deposit the amount with SBI to be retained with them in deposit, SBI addressed a letter to the petitioner from which it became obvious that the amount was part of the debt due over and above the principal sum. The principal sum and the overdue interest not being dispute at the material time, the respondent chose not to pay overdue amounts to the petitioner. Instead the respondent along with the assistance of SBI utilised the said amount of Rs.16.80 crores for purposes of VRL. This was clearly not a bonafide act on the part of the respondent and certainly does not support the respondent case for rejection of the petition.*
>
> *52. As to maintainability of the petition, the main fact that security was created by way of lease which had already expired. The security is now jeopardized. In my view unless lease is renewed and status quo ante restored, which facilitates the petitioner corporation to seek foreclosure in the likely event of the respondent failing to redeem the mortgage debts, it cannot be said that the petition is not maintainable. The application made by the*

workers for intervention in my view need not be gone into at this stage. The workers' interest would have to be considered when an order of winding up is to be passed or once the petition is admitted. In view of the respondent's conduct it is not open to the respondent to contend that the future of several employees would be at stake if the petition were to be admitted. If they are so concerned about the employees, the Varun Group and the respondent would not have ensured revenue neutrality.

53. The amount owing in principal to the JLF may be large but sum owing to the petitioner cannot and should not be judged on the basis of sums owing to the other creditors. When one views the debt due to the petitioner Corporation, uninfluenced by the sums claimed by members of the JLF, it is a large sum of money. The question therefore is whether the respondent company can be reasonably expected to pay the amount due to the petitioner and in the usual course of business. The answer to this question must be an emphatic 'No'.

54. From what has been placed before me, it is evident that the petitioner cannot expect to receive their original dues even the principal sum within a reasonable time. The business of the group companies all of whom are engaged in the shipping industry is admittedly passing through a difficult phase. The petitioner corporation has a duty to its stake holders including numerous policy holders and public funds are involved. The losses caused by non-payment of the sums due by the respondent Corporation will affect the public interest at large as compared to the interest of workers some of whom may be petitioner's policyholders. In the facts at hand the interests of the public at large must be given precedence over workers fears.

55. In any event, the amount of principal sum and overdue interest payable is not disputed. This however does not mean that the demerger of the shipping business to Varun Resources Limited and the retaining of the shipping management business alone with the respondent Corporation by itself resulted in the respondent being *revenue neutral. Being revenue neutral in the facts and circumstances, the respondent company will have just enough funds to maintain its operation of managing the assets of Varun Resources Limited. No doubt the petitioner Corporation did not object to the proposed scheme of amalgamation and demerger. Notwithstanding such inaction on the part of the petitioner the respondent cannot now contend that the petitioner ought to have been more diligent and ought to have objected to the same. Yet again, merely objecting to the scheme may not have resolved the issue. The petitioner cannot be left in the lurch and made to face the vagaries and the uncertainties of the shipping business. The petitioner is owed a debt by the respondent company. The restructuring package is not restricted to the respondent company. Under the restructured packaged monies payable to the JLF and proposed to be paid to the petitioner will be received only or mainly from Varun Resources Limited against whom the petitioner has no claim as on date.*

56. As stated earlier the principal sum of Rs.43,68,32,924/- is not in dispute. So also the sum of overdue interest in a sum of Rs.16.80. Therefore, it cannot be disputed that the total sum of Rs.60,48,32,924/-. Varun Shipping Company Ltd. has admitted that their proposed payment of Rs.12.85 crores will be towards outstanding loan of Rs.43,68,32,924/- towards principal and then they offered a revised payment schedule restructured over ten years which was clearly not acceptable to the petitioners. The petitioners cannot be forced to accept these terms even assuming the JLF is supporting the restructuring. The JLF consists of banks which may be providing more funds to support the operations of VSCL. However, it is clear that respondent Company Varun Global Limited is revenue neutral and in the additional affidavit dated 30th August, 2016 the CEO of the respondent has admitted in para 6 as follows :

"The Respondent has repeatedly approached the Petitioner to avail of a similar adjustment in line with the restructured credit of the joint lenders. To leave no room for doubt, the broad outline of what the Respondent is

willing to make in terms of payment whether to the Petitioner (should the Petitioner accept the restructuring) or deposit in a No. Lieu Account to be opened in a bank designated by this Court (should it not) is as follows:

** The outstanding amount to the Petitioner would stand capitalized as on 1st September, 2016. As per the scheme this works out to Rs.67.85 crores.*
** This amount would earn interest @ 12% and would be repaid as per the repayment schedule applicable to all other lenders, by 30th June, 2023. A copy of the schedule of repayment of the Petitioners' debt is annexed hereto and marked as Exhibit "C". The first installment of approximately Rs. 2 crores would be paid to the Petitioner on 1st October, 2016.*
** The last installment to clear all outstandings to the Petitioner would be paid by 30th June, 2023.*
** Interest would be continued to be paid to the Petitioner at the contractual rate of 12% per annum.*
· The Respondent would continue to enjoy the same security which it currently holds. The Joint Lenders Forum has refused to cede their security in favour of the Petitioner"

57. The petitioner may file a suit to recover its dues based on its security. However, the petitioner has made it clear that they are unable to accept the offers to receive the principal amount due to them and would pay upto June, 2023 as proposed. In the circumstances I do not find that there is sufficient material to hold that petition is not maintainable. In my view the petition is maintainable given the facts and circumstances of the case, notwithstanding the claims of the workers that is being agitated to be considered at the appropriate time. The other defences taken up by the respondents dealt with above have no merit.

58. Having considered the fact that the respondent is revenue neutral it appears that respondent company is unable to pay the debt owing to the petitioner. As seen from the Company's response and the submission made in the Company Application filed on behalf of the workers the *respondent's business of shipping management is wholly dependent upon the fortunes of its group companies VRL and VSCL. It is VSCL that is funding operation of the respondent Company and it is this fact that is being sought to be leveraged by the respondent and its group Company in order to seek the petitioners consent to agree to the terms proposed by VSCL. Given the factual contours of the dispute, the ambit of a winding up petition and the discretion vesting in this Court cannot be influenced by the decisions of VSCL and the JLF. The respondents have contended that they have enough assets to cover all liabilities. It is also a matter of record that the promoters were required to bring their own contribution and deposit the same with the State Bank of India to enable payment to the petitioner. The outstanding dues were to be paid subject to restructuring and the promoters contribution. In my view, the respondents have miserably failed in keeping up the promises held out and the same does not appear to be unintentional. The revenues are deliberately kept on a leash, being controlled by its group companies. The respondent will be unable to sustain itself on its own steam. Prima facie, it would have to be shown that Company is plainly commercially insolvent and its existing and probable assets would be insufficient to meet the existing liability. This I believe has been established by the Petitioner in this case ably assisted by the Respondent's admission of being revenue neutral. The respondent company is clearly unable to pay its debts as and when they arise. They have willfully omitted to even service this debt. In my view this is a fit case for admission. Considering the fact that it is a group company presently operating the respondent must be put to terms.*

59. In the circumstances I pass the following order :

(a) The Respondent Company shall deposit in this Court a sum of Rs.60,48,32,924/- within a period of six months from today i.e. on or before 23rd June 2017.

(b) If the amount is so deposited and if the petitioner files a suit or other proceeding as may be advised, the amount shall be transferred to the suit account.

(c) If the amount is so deposited and no suit or other proceeding is filed, liberty to the respondent to apply.

(d) If the respondent fails to deposit the said amount of Rs.60,48,32,924/- as per clause (a) above the Company petition to stand admitted and to be returnable after six weeks.

(e) The petition shall be advertised by the petitioner in the daily edition of two local newspapers namely 'Free Press Journal' (in English), 'Na-Shakti' (in Marathi) and in the Maharashtra Government Gazette.

(f) The Petitioner shall, within a period of two weeks from admission of the petition as above, deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master of this Court towards publication charges with intimation to the Company Registrar, failing which the Company Petition shall stand dismissed for non-prosecution.
(g) The Advocates for the petitioner shall forthwith forward a copy of this order to the Company at its registered address.

9 No further affidavit has been filed after the judgment was delivered. Of course, Shri Gaurav Joshi, Senior Advocate appearing for respondent stated that appeal was preferred which is still pending but the company never moved for even obtaining a stay of the order of admission. Admittedly, the amount as directed by this court in paragraph 59(a) of the judgment dated 23.12.2016 has not been deposited and the same has been recorded in the order dated 27.6.2017 passed by this court. The petition was thereafter listed on 22.8.2017, 11.1.2018 and 18.1.2018 and is finally taken up for

hearing today.

10 On record is an affidavit of service of one Dnyaneshwar D.Nimbalkar affirmed on 11.8.2017 confirming advertisement of the petition in `Free Press Journal' in English and in `Navshakti' in Marathi, both Mumbai edition on 24.7.2017 and in Maharashtra Government Gazette for the period 3.8.2017 to 9.8.2017 at serial No.17136. Notice under Rule 28 of the Companies (Court) Rules, 1959, has also been served as per the report dated 24.1.2018 filed by the company department.

11 Shri Gaurav Joshi, senior Advocate for the company simply stated that all the submissions made at the time of admission are reiterated. Since all those submissions have been considered and dealt with by this court at the time of admission, I do not wish to deal with the same again. In any event, paragraph-51 onwards of the order of admission has been reproduced above.

12 Shri Gaurav Joshi, stated that the company has applied for public listing to the Stock Exchanges and is hopeful of getting a clearance within a month or so and probably company will be listed in BSE and NSE and promoters' shares will be placed in the market for

sale. Of course, Shri Joshi could not confirm, and naturally so, but Shri Joshi states that the promoters' shares are expected to fetch about Rs.50 crores. It is neither here nor there and is purely speculative. At the same time, Shri Joshi on instructions states that the promoters are ready to pay over the entire sale proceeds to petitioner. The promoters were not in court. There is no affidavit on record making this offer and giving an undertaking. Mr.Joshi could not say whether any other party also has been made the same offer. The whole thing, in my view, was nothing but an attempt to delay the inevitable. From what has been stated in the order admitting the petition by this court, it does not give me any confidence that the company and its directors are sincere and can be believed. Nobody can have any faith or confidence in them. In the circumstances, as no new case has been made out after the petition was admitted, I see no reason why any further time has to be given.

13 From December-2016, when the petition was admitted and ordered to be advertised, the company had more than 12 months. Not a penny has been paid by the company to petitioner. It is to be noted that the company was also labeled as a NPA and later wilful defaulter. It is only confirms the observation made by this court while admitting the petition that respondents have miserably failed in

keeping up its promises and the same does not appear to be unintentional.

14 Having considered the petition and the documents annexed thereto and having heard the counsel, I am satisfied that the company is plainly commercially insolvent and is unable to discharge its debts.

15 In the circumstances, petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

> *"(a) that the Respondent Company, namely Varun Global Limited be wound up by and under the order and directions of this Hon'ble Court under the provisions of the Companies Act, 1956 ;*
>
> *(b) that the Official Liquidator attached to the High Court, Bombay be appointed as the Liquidator of the Company, namely Varun Global Limited, with all powers under the provisions of the Companies Act, 1956 including powers to take charge of the assets, affairs, books of accounts, records, documents, papers, vouchers, bills, etc. of the Respondent Company, namely Varun Global Limited."*

16 The Advocate for petitioner shall furnish a copy of this order, duly authenticated by the Associate of this court to the office of Official Liquidator. The Official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as

liquidator.

17 Shri Gaurav Joshi senior Advocate for respondent-company stated that there are petitions pending in the NCLT and if the company is ordered to be wound up, those proceedings will be delayed and resolution process would not take place. Certainly, that cannot be a ground for not going ahead with this petition. This court has held that proceedings before NCLT and this court can proceed simultaneously.

18 Shri Joshi seeks stay of the order. Mr.Shinde appearing for petitioner is opposing the prayer for stay.

There is no benefit that is going to come up by granting stay because if the intention of the company and its promoters were genuine, between December- 2016 and today, company would have atleast paid some money of the admitted liability to petitioner. Therefore, stay refused.

19 No submissions have been made in the interim applications by the applicant. All interim intervention applications disposed.

(K.R.SHRIRAM,J)

KJ