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

COMPANY PETITION NO. 718 OF 2014

IFCI Limited ....Petitioner
Vs.
ABG Energy Limited ....Respondent

ALONG WITH
COMPANY PETITION NO. 719 OF 2014

IFCI Limited ....Petitioner
Vs.
Vadraj Cement Limited ....Respondent

Mr.Zal Andhyarujina a/w. Mr.Hemant Prabhulkar and Mr. Yogesh Bhoge I/b Jurisperitus Mumbai for petitioner (in both petitions).

Mr.Gaurav Joshi, senior advocate a/w. Mr.Peshwan Jehangir, Ms.Priyanka Desai, Mr.Devangshu Nath and Mr.Varun Mansinghka I/b Khaitan and Co. for respondent in CP/718/2014 and in CP/719/2014.

CORAM : K.R.SHRIRAM, J.
DATE : 31ST JULY 2018

P.C.

1 The above two petitions are to wind up both the companies, viz., ABG Energy Limited and Vadraj Cement Ltd. (the companies) on the ground that there are debts and the companies are unable to discharge its debts and require to be wound up.

2 One ABG Energy (Gujarat) Ltd. (ABGEGL), the two companies, a the third company ABG International Private Limited (in liquidation) and petitioner entered into an Agreement, dated 4th February 2010 called Share Subscription Agreement (said Agreement) whereby petitioner agreed to

subscribe to fresh equity capital to be issued by ABGEGL. Petitioner purchased/subscribed to 3.60 crores fully paid up equity shares of face value Rs.10/- each of ABGEGL. Those shares were issued to petitioner. Under the Agreement, if, at any time after the expiry of three years and before five years from the initial subscription petitioner proposed to sell, directly or indirectly, any Equity shares held by petitioner in ABGEGL, petitioner has a right to offer to the two companies and the 3rd company (in liquidation) to buy all or such shares that petitioner may wish to sell/dispose. What is the price at which the shares have to be purchased by the two companies and the 3rd company (in liquidation) is mentioned in clause 8(a) of the said Agreement. The consequence of the two companies and the 3rd company (in liquidation) failing to honour its obligation to buy those shares are provided for in clause 8(b) of the said Agreement. The consequence was, if within 45 days of petitioner making such offer, if the two companies and the 3rd (in liquidation) fail to honour its commitment to buy the shares, petitioner had a right to sell those shares to third party and the two companies and the 3rd company (in liquidation) was to be liable to pay differential amount to give higher of the price determined by the manner indicated in Clause 8(a). Clause 8 of the said Agreement reads as under :-

"8. PUT OPTION TO INVESTOR

(a) If at any time after the expiry of three (3) years and before five

(5) years from the Initial Subscription the Financial Investor proposes to sell, directly or indirectly, any Equity Shares held by it (whether in whole or in part) in the Company ("Offered Shares"), the Financial Investor shall have the right to offer to Promoters to buy all or any part of its shareholding in the Company and the Promoters shall be under an obligation to buy all or any part of such shares that the Investor may wish to sell/dispose at the higher of the following :-

> *(i) Price per share giving yield of 21% p.a. with quarterly compounding.*
>
> *(ii) Third party valuation of the Company on enterprise valuation/business valuation basis.*
>
> *(iii) Buy offer as received from any willing buyer of Investor's stake in the Company.*

b) In case the Promoters fail to honour the option exercised by the Investor as stated in Clause 8(a) herein above, within 45 days from date of such offer, then the Investor shall have right to sell its share holding to third party and the Promoters shall be liable to pay the differential amount to give higher of the price determined by the manner indicated in clause 8(a) above."

3 On 7th March 2013, petitioner addressed a communication to the two companies and the 3rd company (in liquidation) and called it Put Option Notice. Clauses 4, 5 and 6 of the said Put Option Notice read as under :-

"(4) IFCI hereby exercise the Put Option in terms of aforementioned Clause (8) of the SSA for sale of 3,60,00,000 equity shares held by it in ABGCL as on 06/03.2013.

(5) In view of the exercise of Put Option by IFCI, in order to determine the value of the shares in terms of clause 8(1) to 8(3) of the SSA, you are requested to call upon us on 12/03/2013 at our office for deciding the appointment of a third party valuer/advisor on mutually agreeable terms.

(6) In case you fail to call on us within the time stipulated in para 5 above, IFCI would be constrained to proceed further to determine price of the aforesaid shares in terms of the applicable provisions of the SSA, which shall binding on you."

4 It is petitioner's case that the two companies and the 3rd company (in liquidation) did not initiate any steps to appoint a valuer as required in the letter dated 7th March 2013 or take any steps to honour its commitment under the said Agreement, there is a liability of the two companies to petitioner and that constitutes debt requiring to be discharged. Petitioner, therefore, issued a statutory notice, dated 3rd April 2014 under Section 434 (1)(a) of the Companies Act, 1956 and called upon the company to pay a sum of Rs.73,29,70,026.37 which included Rs.36 crores invested, though the letter is silent as to how petitioner arrived at this figure of Rs.73,269,70,026.37. Shri Andhyarujina stated that the difference will be interest chargeable at 21% p.a. with quarterly compounding, as provided under Clause 8(a)(i) of the said Agreement. According to petitioner, there was no reply also to this statutory notice and therefore, the Court must draw a presumption that the two companies are commercially insolvent, with third company already being wound up.

5 The defence of the two companies are as under :-

(a) The Put Option to purchase shares of a company at a particular value on a future date is in the nature of a 'forward contract' and impermissible under the Securities Contracts (Regulation) Act, 1956 and as such unenforceable;

(b) The Securities Exchange Board of India (SEBI) had issued a Notification dated 3rd October 2013, by way of which SEBI gave an exemption to options [which were otherwise barred Securities Contract (Regulation) Act, 1956 (SCRA)] subject to terms and conditions set out therein and one of the notable condition was that nothing in the notification shall affect or validate and contract which has been entered into prior to the date of the notification, the im-permissibility/bar would continue.

Therefore, the Put Option contained in the said Agreement is null and void.

(c) Under Clause (8)(b) of the said Agreement, petitioner had an obligation to mitigate and petitioner has failed to mitigate. Therefore, the companies cannot be asked to pay losses which arises due to failure to take a reasonable step and whether petitioner exercised its right to mitigate or what if it had mitigated would be the loss suffered, will require evidence to be led and cannot be called a 'debt'.

(d) In the rejoinder, petitioner has made a statement that it is unable to mitigate but how far that is correct, can be only proved by evidence.

(e) Petitioner is not a creditor of the two companies and the 3rd company (in liquidation) and without petitioner being a creditor or contributory, petition is not maintainable.

(f) Companies are going concerns.

6 I would start with the defence of the two companies that there is no debt proved and in any event, as petitioner failed to mitigate its losses, petition is not maintainable.

It was also submitted by Shri Joshi that petitioner also did not exercise the Put Option correctly and therefore, the obligation of the two companies to buy all or any part of the shares did not get triggered. Shri Joshi also submitted that petitioner had to make up its mind as to what was the price it wanted the three companies to purchase the shares and unless that price was indicated, the companies would not have decided whether they want to buy. Shri Joshi stated that clause 8(b) also provided the consequence of the companies not fulfilling their obligations, inasmuch as within 45 days from date of such offer, petitioner had the right to sell its share holding to third party and all the three companies shall be liable to pay the differential amount to give higher of the price determined.

7 Shri Joshi submitted that in effect, the claim is for breach of contract against the three companies and what petitioner will be entitled to is only

damages and the Court, in the first place, will have to decide that the three companies are liable in damages to petitioner and then proceed to asses what that liability is. Until that is determined, there is no liability at all for damages.

8 Shri Joshi also submitted that what in effect petitioner is claiming is specific performance and as provided under Section 10 of the Specific Relief Act, 1963, petitioner is not entitled to seek specific performance but can claim damages. Shri Joshi made these preliminary submissions without prejudice to the company's stand that the Put Option was illegal and not permissible under SCRA.

9 Shri Andhyarujina submitted that the claim is in the nature of debt because the fact that petitioner has paid Rs.36 crores for shares cannot be disputed and 21% interest compounded quarterly is only a question of calculation. Therefore, at least to the extent of Rs.36 crores, there is an ascertained debt. Shri Andhyarujina also relied on a judgment of a learned Single Judge of this Court in ***Indiabulls Properties Pvt. Ltd. Vs. Treasure World Developers Pvt. Ltd.***[1] and submitted that the law requires debt must be an ascertained or definitely ascertainable amount, not one that requires adjudication. Shri Andhyarujina submitted that the claim in this petition is not in the nature of damages as it is quite clear that an amount of Rs.36

1 Company Petition no.496/2013 dt.28th Feb.2014.

crores has to be paid with interest at 21% P.A. compoundable quarterly, it is ascertained and is definitely ascertainable and does not require adjudication. Shri Andhyarujina also submitted that as the claim is not in the nature of damages, there is no duty to mitigate.

10 In a winding up petition, it is settled law that a Court has to see whether the defence raised by respondent company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. When a company has a bona-fide dispute, petitioner cannot be regarded as a creditor of the company for the purposes of winding up. "Bona-fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona-fide dispute in which the dispute can only be adjudicated by a trial in a civil court.

11 The issue as to whether petitioner correctly exercised the Put Option, based on which it has filed the petition, is a disputed question. The statutory notice, dated 3rd April 2014 proceeds on the basis of clause 8(a)

(i). But to make a notice of demand and issue a statutory notice for winding up, petitioner should have called upon the 3 companies to pay an amount ascertained when it was exercising the Put Option. The notice based on which petitioner is claiming that it exercised its Put Option is the one dated 7th March 2013. First of all, in that notice, no price was indicated at which it called upon the 3 companies to buy the shares. As per the said notice dated 7th March 2013, petitioner is only calling upon the companies to meet petitioner/s at petitioner's office for deciding the appointment of a third party valuer/advisor on mutually agreeable terms. By no stretch of imagination can this Put Option Notice/letter be called, the exercise of petitioner's rights for Put Option. Therefore, the defence of the companies that no price was even ascertained to call it a 'debt' cannot be dismissed as moonshine or not bona-fide.

12 Under clause 8(b), the consequence of the 3 companies' failure to honour the option exercised by petitioner is provided for. It says within 45 days from the date of such offer, petitioner shall have the right to sell the shares to a third party and the companies shall be liable to pay the differential amount, if any. First of all, whether petitioner exercised the Option under Section 8(a) correctly is a disputed question. Even assuming petitioner has exercised it correctly, still whether petitioner had an obligation to mitigate its losses as provided contractually under Clause (a)

and (b) is again a disputed question and the defence raised by the companies on these grounds, cannot dismissed as moonshine or lacking bona-fide.

13 Whether petitioner made attempts to mitigate or could not have mitigated, or they made enough efforts to mitigate and if mitigated, what would be amounts of damages are all questions which cannot be gone into in a winding up petition.

14 Therefore, as there exist substantial grounds for the dispute raised, on these points itself, I do not see any reason why I should go into other grounds raised by the two companies. Petition dismissed.

(K.R. SHRIRAM, J.)