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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 05.01.2021

Date of Decision: 22.01.2021

+ OMP(I)(COMM) 374/2020 & I.A. 10845/2020 (stay)

AIRGATE HOLDINGS LIMITED

..... Petitioner

Through Mr. Sandeep Sethi, Sr. Adv. with
Mr. Saket Shukla, Mr. Vasanth Rajasekaran,
Mr. Saurabh Babulkar, Ms. Reshma Ravipati,
Ms. Maryam Quadri, Advs.

Versus

SUMIT MOHAN SINGH GANDHI & ORS. Respondents

Through Dr. A.M. Singhvi, Sr. Adv. with
Mr. Rishab Gupta, Ms. Meghna Rajadhyaksha,
Mr. Gauhar Mirza, Mr. Rishabh Jogani,
Mr. Manavendra Gupta, Ms. Madhavi Khanna, Advs
for R-1.

Mr. Rajiv Nayar, Sr. Adv with Mr. Rishab Gupta,
Ms. Meghna Rajadhyaksha, Mr. Gauhar Mirza,
Mr. Rishabh Jogani, Mr. Manavendra Gupta,
Mr. Saurabh Seth, Adv for R-2.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') preferred by Airgate Holdings Ltd., which is a majority shareholder in the respondent no. 3 company, seeking the following reliefs:

(a) *Suspension of the majority Put Option purportedly exercised by the Respondent No. 1 and Respondent No. 2 vide two notices dated 15 November 2020.*

(b) Stay of the Put Option notice(s) dated 15 November 2020 issued by the Respondent No. 1 and Respondent No. 2.

(c) For costs; and

(d) For such further and other reliefs as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the present case

2. Primarily, the petitioner is aggrieved by the two put option notices issued by respondent nos. 1 and 2 on 15.11.2020, which require the petitioner to purchase 19.98% shares of the respondent no. 3 company presently held by the said respondents, for a consideration of INR 67,67,85,037.

3. Even though no formal notice was issued in the petition, with the consent of the parties, the matter was taken up for final disposal on the basis of the petitioner's pleadings and the documents filed by both sides.

4. The petitioner company, incorporated under the laws of Cyprus, is a subsidiary of M/s Hyve Group PLC, a company incorporated in the United Kingdom. On 03.12.2012, the petitioner acquired a stake of 28.3% equity shares in one M/s Asian Business Exhibition & Conferences Limited (ABECL) in which respondent nos. 1 and 2 also held shares. Subsequently, the said respondents and the other shareholders of ABECL entered into a Share Holders Agreement (SHA) on 03.12.2012 which included, inter-alia, a provision for demerger of the business exhibition division of ABECL into a newly formed entity, *i.e.*, Respondent No. 3. Pursuant to an order passed by the High Court of Bombay, the demerger of the business took place and resulted in the incorporation of respondent no.3 on 22.03.2013. The petitioner, respondent nos. 1 and 2 and other shareholders of

ABECL were allotted proportionate shareholding in the respondent no.3 company. As per Article 26 of the Articles of Association of the newly incorporated respondent no.3 company, its day-to-day operation management and decision making was to be conducted through a Management Committee comprising of three representatives of the existing shareholders i.e respondent nos.1 & 2 and one representative of the petitioner.

5. On 31.03.2014, the petitioner, who was then holding 28.3% shares in the respondent no. 3 company, entered into a Share Holders Agreement (SHA) with the other shareholders of respondent no. 3 company, which included respondent nos. 1 and 2. This SHA, which referred to the petitioner as an Investor, recorded the rights and obligations of all the shareholders towards respondent no.3 according to their shareholding percentage. Clause 7 of the SHA created a 'call option' for the Investor, which granted the petitioner a right to purchase additional shares from the existing shareholders in the respondent no. 3 company, to the tune of 31.7% of the share capital on a fully diluted basis. Simultaneously, the SHA created a 'Put Option' for the existing shareholders which would give them the right to sell their shareholding to the Investor or an affiliate nominated by the Investor, to the tune of 31.7% of the share capital held by them on a fully diluted basis. The SHA then went on to create a *second* call/Put Option right for the investor and the remaining shareholders respectively, which would be available once either of them attained majority shareholding after the first exercise of call or Put Option. Thus, in case the petitioner became a 60% shareholder, Clause 11 of

the SHA created a 'second call option' in its favour which meant that it would have the right to purchase 50% of the equity securities held by the remaining shareholders, which would leave the existing shareholders only with 20% shareholding. Correspondingly, the 'second Put Option' provision granted existing shareholders the right to sell all or some of the securities held by them to the Investor/petitioner in one or more tranches.

6. This SHA was, with the mutual consent of all parties, amended on 05.01.2015 and can be regarded as the first instance of amendment. After this amendment, the petitioner, on 28.10.2015, exercised its call option right under clause 7 and acquired an additional 31.7% shareholding of respondent no. 3 company from respondent nos. 1 and 2 and other shareholders by way of a Share Purchase Agreement (SPA) dated 28.10.2015 for a total consideration of INR 137,36,25,646. This consideration was calculated on the basis of the EBIDTA (Earnings Before Interest Depreciation Tax Amortization) price, which in turn was derived on the basis of the figures reflected in the audited financial statements of respondent no.3 for the financial year (FY) 2014-15. As a result of this acquisition, the petitioner's shareholding in respondent no.3 increased to 60% which made it a majority shareholder while that of respondent nos. 1 and 2 fell to 23.94% and 16.01% respectively.

7. On the very same day of 28.10.2015, the SHA was amended a second time by the petitioner and respondent nos. 1 and 2 and though the Managing Committee in terms of Articles of Association remained responsible for day-to-day functioning and management of

respondent no.3 company, an additional provision by way of Clause 8A.1(c) was incorporated into the SHA thereby appointing the respondent nos.1 & 2 as the Chief Executive Officer and Chief Operating Officer respectively of the respondent no.3 company. Furthermore, by way of clause 11.1 of the second amendment agreement, the parties modified Clause 11.2 of the original SHA by providing that in case respondent nos. 1 and 2 exercised their post-majority put option to sell all or any part of their remaining shares, the petitioner would be obligated to purchase the same. The amended clause further entitled respondent nos. 1 and 2 to exercise their post majority put option right in tranches between 15th November and 15th December, 2017 or during the same period between 15th November and 15th December of any subsequent financial year as long as the existing shareholders held 5% or more of the share capital or until the expiry of 50 years from the effective date whichever was earlier

8. The SHA was once again amended with the consent of the parties on 14.11.2019, to be regarded as the third instance of amendment, whereby clause 3.14 was inserted to provide for appointment of a Board of Directors for respondent no. 3 by vesting the petitioner with the right to appoint 3 Directors and respondent nos. 1 and 2 with the right to appoint 2 Management Directors. This amendment further provided that if the shareholding of the respondent nos. 1 and 2 were to fall below 20% of the total share capital, they were to be held entitled to appoint only one management Director.

9. There were a few other note-worthy events which were taking place simultaneously. After acquiring majority shareholding of

respondent no.3 on 28.10.2015, the petitioner appears to have chosen to appoint an independent strategic advisory firm namely M/s GM Corporate Solutions, through its parent company M/s Hyve Group PLC, with an aim to undertake a financial review of respondent no. 3 company. For that purpose, all finance and accounting statements as also other records of respondent no. 3 were sought from respondent nos. 1 and 2. It is the case of the petitioner that the report furnished by M/s GM Corporate Solutions in February 2017 pointed out certain inconsistencies in the data shared by the respondents with the petitioner viz. the data shared with M/s GM Corporate Solutions. Instances of unexplained writing of bad-debts were also flagged, which resulted in the petitioner calling upon respondent nos. 1 and 2 to change the management and financial practices they followed. The petitioner also called upon these respondents to supply it with all requisite documents, especially those in terms of Clauses 3.1.7 and 15.5 of SHA which entitled each Director to access, inspect and examine financial records, books of accounts and titles of the respondent no. 3 company. It is the petitioner's stand that despite multiple requests, respondent nos.1 and 2 failed to comply with these requisitions and supply full records. The petitioner has contended that notwithstanding this, even the incomplete records supplied to the petitioner reflected unexplained writing-off of bad debts, overbooking of sales, fabricated TDS deductions and inter-ledger transfers with shell companies amounting to tax fraud. In fact, the petitioner has contended that one of these shell companies mentioned in the records, being High Ground Enterprises Limited, is presently under

investigation by Indian authorities for committing input tax credit fraud to the tune of INR 77 crore. The petitioner even claims to have conducted a third-party debtor verification exercise in May-December 2019 which uncovered large-scale writing off of amounts from the books of accounts of respondent no. 3 in the years 2015-17. As a result, respondent nos.1 and 2 were called upon to furnish explanation, but they neither provided an explanation nor rendered their cooperation. The petitioner has further contended that this halted the progress of the debtor verification exercise and prompted its refusal to sign off on the financial statements for FY 2018-19.

10. It is in response to these numerous apprehensions of the petitioner in respect of the affairs of respondent no.3 that respondent nos.1 and 2 executed a contract on 27.06.2020 undertaking, in their personal capacity, to indemnify the petitioner against all losses/damages /legal actions/liabilities in relation to the transactions undertaken by respondent no. 3 till FY 2018-19.

11. Thereafter, in the month of September 2020 at the instance of the petitioner, respondent no.3 issued debt recovery notices to 241 debtors, to which only 105 debtors replied. On receiving their responses, the petitioner convened an urgent board meeting on 24.09.2020 which was adjourned to 26.10.2020. However, on 26.10.2020, the petitioner's nominee Directors proposed conducting a forensic audit of respondent no. 3 company to fully comprehend the extent of the financial irregularities plaguing its affairs; which was duly accepted by a simple majority of the Board and recorded in a resolution. This resolution gave rise to a conflict when respondent

nos. 1 and 2 issued legal notices to the petitioner on the very next day, claiming that the same was passed in violation of the terms of the SHA and were null and void.

12. The petitioner's clash with respondent nos.1 and 2 on the grounds of fraudulent transactions and questionable accounts and finances brought on its decision to file a petition under Sections 213, 241, 242 and 244 read with Section 130(1) of the Companies Act before the learned National Company Law Tribunal, Mumbai on 10.11.2020 (hereinafter referred to as the 'oppression and mismanagement petition'). It is an admitted position that this petition is yet to be listed before the learned Tribunal.

13. Following this, respondent nos.1 and 2 issued the impugned post majority put option notices on 15.11.2020, by way of which they called upon the petitioner to purchase their respective shareholding of 13.93% and 6.05% in the respondent no.3 company for a total consideration of Rs. 67,67,85,037. Immediately upon receiving these notices, the petitioner sent separate replies to respondent nos.1 and 2 on 17.11.2020 whereunder it stated its refusal to honour the invocation on the ground that there were questions of financial impropriety existing against respondent no. 3 which needed to be resolved before any further action could be taken on these notices. Additionally, the petitioner called upon the respondents to cooperate with the conduct of a forensic audit. It is at this stage that the petitioner moved the instant petition under Section 9 of the Act seeking stay of the put option notices, under the apprehension that respondent nos. 1 and 2 may declare it as being in 'material default'

under the SHA for failing to comply with the impugned notices and cause them further losses.

14. Learned senior counsel for the petitioner, Mr. Sandeep Sethi, while not disputing that clause 11.2 of the SHA entitled respondent nos. 1 and 2 to exercise their put option right, contended that the issuance of the impugned notices was manifestly illegal as these respondents were the CEO and COO of respondent no.3 at a time when it was being grossly mismanaged. He submitted that over the years, many decisions taken in respect of respondent no. 3 indicated glaring mismanagement and financial impropriety in the conduct of its affairs. This is what had compelled the petitioner's parent company to hire M/s GM Corporate Solutions, an accounting firm, to investigate respondent no.3 company and the report released by the firm in February 2017 had confirmed the petitioner's suspicions; a large number of outstanding debts in the company's name had been uncovered, but the respondent nos. 1 and 2 had not been taking any steps to recover the same. This had constrained the petitioner to call upon respondent nos. 1 and 2 to implement appropriate changes in the financial practices and take corrective actions, as well as to requisition the necessary accounts and financial statements in terms of clause 3.1.7. of the SHA whereunder each Director was entitled to examine the books, accounts, titles of the respondent no. 3 company. However, the local management had failed to provide the necessary information, especially those pertaining to debtor details, in breach of Schedule 2 of the SHA as amended on 28.10.2015. The sheer non-cooperation of the company's management in providing complete debtor records as

also the unexplained writing off bad debts without any justification had not only invited suspicion but also constituted a blatant and continuing breach of its duty under clause 15.7 of the SHA whereunder the local management was obligated to exercise good financial practices. Thereafter, all steps proposed by the petitioner's nominee Directors, which included proposing a debt recovery exercise in the Board Meeting dated 26.10.2020 in order to undo the damage, had been heavily opposed by respondent nos. 1 and 2. Rather, they had attempted to circumvent these measures and compel the petitioner's nominee Directors, notwithstanding their reluctance, to approve the financial statements of respondent no. 3 for the year 2018-19 by assuring them through indemnification contracts in respect of transactions undertaken by the respondent no. 3 company till FY 2018-2019. He submitted that in any event, the put-option right of respondent nos.1 and 2, albeit contractually vested, was not an absolute right. By relying on Section 51 and 54 of the Act, he submitted that when the respondents were in breach of the SHA themselves, they could not compel the petitioner to honour select provisions therein to their advantage and receive monies for the put option exercise.

15. Mr. Sethi further contended that the exercise of the put option right by respondent nos.1 and 2 at a point when the petitioner had already approached the National Company Law Tribunal, was wholly *mala fide* and a blatant attempt by these respondents to shield their fraudulent activities from scrutiny in the forensic audit. He submitted that this was also an attempt on their part to unjustly enrich

themselves by not only basing the valuation of the shares put up on manipulated and exaggerated financial statements and records of respondent no. 3 company but also by applying the incorrect floor price formula set out in Clause 7.3 of the SHA. He further submitted that Clause 8.1 of the SHA envisaged only the following two methods for determining the consideration value of post-majority put option price after 2015 which involved calculating it (i) against the EBITDA price applicable for that year or (ii) as per fair market value of the shares computed by a chartered accountant. Yet, the respondents had wrongfully sought to rely on the floor price formula set out in clause 7.3 of the SHA by invoking Clause 7.6 to arrive upon an exorbitant consideration of INR 67,67,85,037 for the shares, despite being aware that Clause 7.6 was applicable only with respect to the FY 2014-2015. He submitted that since the invocation had been made in 2020 and the only two applicable methods, EBITDA and fair market value of shares determined by petitioner's Chartered Accountant, relied on the audited financial statements of respondent no.3 company which were disputed, the only resort for the parties was to determine the put option price after getting their disputes adjudicated in arbitration. He also submitted that Clause 11.2.2 of the SHA vested the post majority put option right upon respondent nos. 1 and 2 for as long as 50 years w.e.f. 27 March 2014, i.e., the date of the execution of the SHA; with 44 years left in the SHA, there was absolutely no hurry for respondent nos. 1 and 2 to exercise this option at this point when the accounting and financial statements of respondent no.3 are a subject of dispute between the parties.

16. Mr. Sethi then submitted that the petitioner apprehended that respondent nos. 1 and 2 were intending to wrongfully treat the petitioner as a defaulter under clause 12 of the SHA by misconstruing its bona fide refusal to honour the put option notices as a “material default”. Such a step would inevitably lead to a suspension of the petitioner’s rights as an investor under the SHA, including but not limited to voting rights, tendering of resignations of the nominee Directors of the petitioners. He submitted that for these reasons, it had become manifestly urgent for this Court to stay these put option notices and grant the prayers sought by the petitioner.

17. Finally, Mr. Sethi submitted that irrespective of the allegation of default raised by respondent nos.1 and 2, it remained a matter of fact that the petitioner’s parent company, i.e., M/s Hyve Group PLC, had assets which were more than sufficient to satisfy the amounts claimed in the put option notices. To substantiate this point, he placed reliance on the interim statement of accounts furnished by M/s Hyve Group PLC for FY 2019-20 on 07.05.2020 which placed its net value of assets on that date at GBP 198,587,000. He submitted that since this audit was conducted as per international standards of accounting, this statement also took into account Hyve’s indirect liabilities in equity of respondent no.3 through the petitioner, towards the put option rights exercisable by the remaining shareholders in respect of the 40% shares held by them, and that the same was catered for in the sum of GBP 8,455,000 set aside by it. Considering that the total equity liability of GBP 8,455,000 of Hyve PLC formed a small portion of its total net assets of GBP 198,587,000 owned by the

petitioner's parent company, the petitioner was financially competent in all respects. He, thus, submitted that there was absolutely no danger of the petitioner being unable to honour this liability at a later stage. He also submitted that no harm would be caused to respondent nos.1 and 2 in case they were made to await a final decision in arbitration on the aspect of financial irregularities before being permitted to exercise their put option rights. He, therefore, submitted that since the petitioner was financially secure and competent to satisfy the liabilities arising out of the put option invocation in respondent no.3 company, the impugned notices ought to be stayed without requiring the petitioner to make any deposit for the same.

18. On the other hand, Dr. Singhvi, learned senior counsel for the respondent no. 1 submitted that the terms of the put option provision contained in Clause 11.2 of the second amendment carried out on the SHA on 28.10.2015, whereunder the impugned notices had been issued, were clear, unequivocal and independent of any other clause in the SHA. This provision did not make the put option right of the company's shareholders dependent on the petitioner's consent and its invocation had to be honoured regardless of the surrounding circumstances. Therefore, the petitioner's claim that the notices could not be sent when the accounting and financial statements of the respondents were disputed, was completely baseless and unsupported by the terms of the SHA. He submitted that consequently, the petitioner's attempt to injunct the operation of such an unconditional clause was without ground. He further submitted that ironically, the petitioner had no qualms in invoking the call option right accruing to

it under the SHA, which corresponded to the respondents' put option right, numerous times in the past to obtain majority shareholding in the respondent no.3 company. Yet, when respondent nos. 1 and 2 began asserting their rights under the SHA, the petitioner was leaving no stone unturned to deny them of the same.

19. Dr. Singhvi further submitted that there was no question of there being any financial irregularities in the conduct of affairs of the respondent no.3 company, the petitioner's objections to the notices were *mala fide* and a blatant misuse of its majority shareholding rights under the SHA. Firstly, he submitted that ever since the petitioner acquired majority/additional shareholding in respondent no.3 company, the Board of Directors of the Company was controlled by a majority of 3:2 in favour of the petitioner. This implied that the petitioner had not only enjoyed majority voting rights but had also had the power to nominate the Finance Director who directly supervised the finance and accounting departments of the Company. He submitted that considering that the petitioner had indeed appointed a Finance Director of its own choosing, it meant that its own agents were in charge of the financial records. Thus, he submitted that the petitioner could not swerve around to plead ignorance of the accounting and financial decisions taken by the respondent no.3 company or hide behind any purported failure on the respondents' part to supply it with the relevant records. He further submitted that the arrangement between the parties entitled the petitioner to appoint a statutory auditor of its choice to audit the accounts and financial statements of the respondent no.3 company and, accordingly, all

balance sheets of the company for the last 7 years had been duly audited without any objection thereto from the petitioner or its nominee Directors. This showed that the records of respondent no. 3 company were not fabricated or falsified, even as per the petitioner and the auditors it had appointed. He submits that notwithstanding the aforesaid and its misplaced suspicion of the accounts and financial statements of the company, the petitioner had unquestioningly accepted the dividends for FY 2018-19 and 2019-20 which had been calculated on the basis of these very disputed statements. On the aspect of the outstanding debts owed to the company, he submitted that in the larger scheme of things the totality of these debts constituted less than 2% of the company's total turnover calculated over a period of over 8 years which was well below the industry average. These debts had only been extended to long standing clients of the company, who had positively contributed to its revenue growth in the past, as a goodwill gesture in order to foster and maintain their cordial relationships – a fact known and practiced by the petitioner himself. He submitted that this was why at the Board meeting held on 30.06.2020, the Company's Board had unanimously written off these non-recoverable bad debts for the financial years 2017-18 and 2018-19. Although this meeting was attended by the petitioner's nominee Directors, evident from a perusal of the Board resolution of that date, the petitioner had disregarded the actions which its nominee Directors had consented to and had begun arbitrarily issuing recovery notices to the parties whose debts were written off. He submitted that this act of unilaterally issuing recovery notices to numerous past

debtors of the Company, including several marquee clients of the Company and their Directors to recover monies from old, written off debts was not only time barred and illegal, but had also dented the brand value, goodwill and reputation of the respondent no. 3 company in the market and caused losses to the tune of INR 77 crores for the company. He submitted that this made it obvious that the petitioner's actions had been motivated by the *mala fide* intention to raise doubts about the financial health of the Company, bring down its valuation and adversely affect the respondents' decision to exercise its put option or exit rights. Lastly he submitted that the petitioner had been habitually misusing its powers as a majority shareholder in the past. For instance, it had tabled the resolution to appoint a forensic auditor in the adjourned Board Meeting held on 26.10.2020, when this never formed a part of the agenda of the original Board Meeting – in violation of clauses 3.2.4 and 3.2.6 of the SHA which prohibited the Board from passing any resolution in an adjourned board meeting on an aspect which was not on the agenda of the original board meeting, without obtaining the consent of the other shareholders. He submitted that in any event, on 27.06.2020, the petitioner had been personally indemnified by respondent nos. 1 and 2 in respect of all financial transactions of respondent no.3 company for every financial year till 31.03.2019 by way of an undertaking contract which had reciprocally required the petitioner to not conduct any forensic audit or investigation into the accounts of the Company for that period. He submitted that despite this arrangement, the petitioner was seeking to

rake up issues which stood settled in the past to deny the respondents their contractually vested put option right.

20. Dr. Singhvi finally submitted that there was a complete loss of trust between the petitioner and respondent nos.1 and 2 on account of the apparently *mala fide* decisions which had been taken by the former's nominee Directors in the days leading up to the institution of the present petition. They had hastily instituted debt recovery proceedings against long standing clients of respondent no.3 and had subsequently filed a wrongful and manipulated oppression and mismanagement petition against respondent nos.1 and 2 before the learned National Company Law Tribunal, Mumbai on 10th November 2020, all of which would have driven the share prices of respondent no.3 to the ground. He submitted that this was the final nail in the coffin and led to the issuance of the put option notices. He also submitted that there was no reason to exempt the petitioner from paying the amounts under the impugned notices since the same had been correctly calculated as per the floor price formula set out in Clause 7.3 of the SHA in adherence to Clause 7.6 as the audited financial statement for FY 2019-20 were admittedly not available. By drawing my attention to the impugned notices, he submitted that the petitioner had been duly provided a detailed explanation of how this value had been arrived at by setting out the requisite calculation in Annexure A. He further submitted that the petitioner's contention that the application of the floor price formula was restricted to invocations made in the year 2015 was without basis, not backed by the spirit of the SHA and completely contrary to general practice in such

transactions. By referring to the interim financial statement of Hyve PLC published on 07.05.2020, he submitted that in fact the petitioner's parent company had set aside the fair value of its current liability towards equity options in respondent no.3 company and, therefore, there was no reason to stay or suspend the impugned put option notices.

21. Mr. Rajiv Nayar, learned senior counsel for respondent no. 2 adopted the submissions of Dr.Singhvi and additionally submitted that the manner in which the put option right could be exercised had been set out comprehensively in the SHA. Once respondent nos. 1 and 2 had issued the impugned notice strictly in accordance with this procedure, the petitioner could not complain and/or seek an order restraining the respondents from exercising their rights. He submitted that rather, the petitioner's failure to pay the amount in accordance with the impugned notices was a 'material default' under the SHA and invited the consequences thereof set out in clause 12.3, which provides that failure to cure material default within 30 days leads to suspensions of all rights of the defaulter under the SHA. He submitted that as soon as respondent nos. 1 and 2 sent the impugned notices on 15.11.2020, the clock had begun running against the petitioner in respect of the put option payment. He concluded by praying that this petition, being an attempt on the petitioner's part to evade its obligations under the SHA and the penalty thereunder for being in material default, be dismissed.

22. I have heard the learned senior counsel for the parties and perused the record. I may note, at the outset, that as far as the

relationship between the parties is concerned, there is no dispute with respect to the circumstances leading up to the execution of the SHA, its amendments or the fact that both sides are governed by the terms thereof. Since the petitioner has assailed the put option notices, the heart of this dispute lies in the call/put option rights which have been created in favour of the petitioner and the respondents respectively under clauses 7, 8 and 11 of the SHA. It is, therefore, apposite to first note the relevant extracts of these clauses which read as under:

“7. CALL OPTION

7.1 The Investor or any Affiliate of Investor will be entitled (but not obliged) to acquire an additional 31.7% (thirty one decimal seven per cent) of the Share Capital on a Fully Diluted Bases (the “call shares”) from the Existing Shareholders (“call option”).

x x x

8. PUT OPTION

8.1. In the event the Investor chooses not to exercise its Call Option as set out in Clause 7 (Call Option) above, the Existing Shareholders shall jointly have the right but not an obligation to sell 31.7% (thirty one decimal seven per cent) of the Share Capital (the “Put Shares”) to the Investor or any Affiliate that may be nominated by the Investor during the Put Option Period at a price equal to the Relevant Year EBITDA Price determined in accordance with Clause 7.3 above or the fair market value computed by a chartered accountant appointed solely by the Investor, whichever is higher (“Put Price”) (“Put Option”). If the Company fails to deliver audited financial statements of the Company for the Relevant Year to the Investor on or prior to September 30, 2015 on account of any reason other than a mandatory requirement under applicable Laws, then the Put Price shall be deemed to be the Floor Price determined in accordance with Clause 7.3 above. Notwithstanding anything to the contrary contained in this Agreement, the Put Price payable by the Investor or any person nominated by Investor (other than a Competitor in India) to the Existing Shareholders shall not exceed INR 6,000,000,000. (Indian Rupees six billion).

x x x

11.1. Investor Second Call Option

11.1.1. At any time after the completion of the Call Option under Clause 7 (Call Option) or the Put Option (Put Option) under Clause 8, if neither Mr. Manish Gandhi nor Mr Sumit Gandhi remain in the employment of the Company, the Investor shall have the right, but not the obligation ("**Post Majority Call Option**") to purchase 50% (fifty percent) of the Equity Securities then held by the Existing Shareholders or such number of Equity Securities, the Transfer of which would result in the Existing Shareholders holding together with their affiliates, 20% (twenty percent) of the Share Capital ("**Post Majority Call Option Shares**")

11.1.2 The Post majority Call Option may be exercised by the Investor during the period commencing from the expiry of 255 (two hundred and fifty five) days from the last date of:

- (i) the Financial Year preceding the Financial Year on which Mr. Sumit Gandhi and Mr. Manish Gandhi Cease to be employed by the Company,
- (ii) the Financial Year, on which Mr. Sumit Gandhi and Mr. Manish Gandhi cease to be employed by the Company, or
- (iii) until the expiry of 50 (fifty) years from the Effective Date whichever is earlier ("**Post Majority Call Option Period**").

11.1.3 In the event that the Investor wishes to exercise the Post Majority Call Option, the Investor shall be required to give a notice in writing to the Existing Shareholders within the Post Majority Call Option Period ("**Post Majority Call Option Notice**") expressing its intention to exercise the Post Majority Call Option. A Post Majority Call Option Notice shall be irrevocable. The Existing Shareholders shall, simultaneously with the receipt of the Post Majority Exercise Price (net of statutorily required deductions, if any) from the Investor for the Post Majority Call Option Shares, Transfer the Post Majority Call Option Shares to Investor. The sale and purchase of the Post Majority Call Option Shares shall take place in accordance with Schedule 2, subject only to receipt of all necessary Government Approvals.

11.2. Existing Shareholders Second Put Option

11.2.1 At any time after the completion of the Call Option

under Clause 7 (Call Option) or the Put Option under Clause 8 (Put Option), the Existing Shareholders shall, at all times, have the right, but not the obligation (**"Post Majority Put Option"**) to sell all or some of the Equity Securities held by the Existing Shareholders in the Company to the Investor in one or more blocks of such number of Equity Securities as constituting 5% (five per cent) or more of the then Share Capital of the Company (**"Post Majority Put Option Shares"**). For the avoidance of doubt, it is clarified that the Existing Shareholders may exercise the Post Majority Put Option in one or more tranches. For so long as the Post Majority Put Option is exercised with respect to Equity Securities constituting up to 20% (twenty per cent) of the Share Capital (in one or more blocks of 5% (five per cent) or more of the Share Capital, as set out above), such Post Majority Put Option shall be referred to as the **"First Tranche Post Majority Put Option"**.

11.2.2 The Post Majority Put Option may be exercised by the Existing Shareholders during the period commencing from November 15 and ending on December 15 of any Financial Year, for so long as the Existing Shareholders hold 5% or more of the Share Capital or until the expiry of 50 (fifty) years from the Effective Date, whichever is earlier (**"Post Majority Put Option Period"**).

11.2.3 In the event that the Existing Shareholders wish to exercise the Post Majority Put Option, Existing Shareholders shall be required to give a notice in writing to the Investor within the Post Majority Put Option Period (**"Post Majority Put Option Notice"**) expressing irrevocably, their intention to exercise the Post Majority Put Option and specifying the number of Post Majority Put Option Shares with respect to which they intend to exercise the Post Majority Put Option. Investor shall, simultaneously with the transfer of the Post Majority Put Option Shares, make payment of the Post Majority Exercise Price (net of statutorily required deductions, if any) in relation thereto, within 15 (fifteen) days of the receipt of the Post Majority Put Option Notice. The sale and purchase of the Post Majority Put Option Shares shall take place in accordance with **Schedule 2**, subject only to receipt of all necessary Government Approvals (if any).

11.3. Post Majority Exercise Price

The Post Majority Call Option Shares and the Post Majority Put Option Shares shall be purchased by the Investor at a price

(“Post Majority Exercise Price”) equal to:

(i) for the Post Majority Call Option Shares, in accordance with Clause 7.3, calculated for the Relevant Year on which the Post Majority Call Option is exercised; and

(ii) for the post Majority Put Option Shares, in accordance with Clause 8.1, calculated for the Relevant Year on which the Post Majority Put Option is exercised.”

23. As noted above, the parties are *ad idem* that the SHA vested the petitioner with two opportunities to exercise the call option right and two corresponding opportunities to respondent nos.1 and 2 to exercise the put option right. The first call option right was exercisable in terms of Clause 7.1 whereas the first put option right was exercisable in terms of Clause 8.1. Once the first call/put option right was exercised and the petitioner attained the status of a majority shareholder in respondent no.3 company, Clause 11 kicked into effect and opened the doors for the petitioner to exercise the second call option right referred to as the “post majority call option” in terms of Clause 11.1. In like manner, it was open for respondent nos. 1 and 2 to exercise their corresponding post majority put option right as per Clause 11.2 of the SHA. In the present case the petitioner after becoming the majority shareholder in October, 2015 has admittedly not exercised its post majority call option and it is the respondent nos. 1 and 2 who have chosen to exercise their post majority put option today, the validity whereof forms the nexus of their dispute.

24. The petitioner while not denying that the respondent nos. 1 and 2 have the right to exercise the post majority put option, has vehemently urged that the respondents ought not to be permitted to

exercise the same at this stage since *inter alia* (i) there are pending allegations of serious financial impropriety, oppression and mismanagement of respondent no. 3 company which have been levelled by the petitioner against respondent nos. 1 and 2, and that (ii) the invocation of this right has come at a nascent stage of the SHA's life which subsists for a period of 50 years from the effective date of the SHA, i.e. 27 March 2014. Apart from this, there is an additional reason why the petitioner is aggrieved by the timing of the impugned notices; the petitioner has contended that the notices are a counterblast to the oppression and mismanagement petition it has preferred before the NCLT against these respondents for the manner in which they were conducting the affairs of respondent no.3 company.

25. From the submissions made at the bar, I find that two questions arise for my consideration in this petition being (i) whether the petitioner has made out a prima facie case in support of its allegations of financial impropriety and misconduct on the part of respondent nos.1 and 2 which precludes them from exercising their put option right exercise at this stage and, (ii) whether the valuation of the shares, as contained in the impugned notices, is in consonance with the SHA.

26. In respect of the first issue, the petitioner has relied on the correspondences and documents exchanged between the parties, especially the report furnished by M/s. G.M. Corporate Solutions in February, 2017 in support of its plea that the company was being mismanaged,. During the course of arguments, the petitioner claimed that it had an issue, from the very get go, with the manner in which

financial decisions were being made on behalf of the respondent no.3 company. The petitioner claimed that its apprehensions in this regard finally resulted in its request to respondent nos.1 and 2 to reveal all trading, financial and accounting statements of respondent no.3 company, but to no avail; initially the respondents did not reply and when they did, they supplied incomplete details and statements which it claims is in breach of Clause 15.5 of the SHA. The petitioner further claimed that the respondent nos.1 and 2 were also extending numerous debts and failing to recover the same which led to an unacceptable increase in the outstanding debts of the company and contributed to its flailing financial health. This was in breach of its obligation under Schedule 2 of the SHA to exercise good financial control of the company. The petitioner also claimed that when it sought answers from these respondents for these state of affairs, they failed to present sufficient explanations for the same, did not cooperate with the petitioner's proposal to undertake any audit and recovery exercise and showed complete unwillingness to take any corrective steps. In reply, respondent nos. 1 and 2 argued that there are several reasons as to why the allegations of financial misconduct levelled by the petitioner are completely baseless; (i) the petitioner holds majority voting rights in the company, (ii) the Finance Director who supervised the finance and accounting department of the respondent no.3 company was appointed by the petitioner and (iii) the statutory auditor for the company was also appointed by the petitioner, thus, the petitioner cannot attempt to distance itself from the financial decisions taken by the company. These respondents

further urged that, as a result, not only are the accounts of respondent no. 3 company duly audited by one of the big four companies selected by the petitioner and overseen by the financial Director it appointed, but also that the accounts have been duly approved every year by the petitioner and its directors. It was also claimed by respondent nos.1 and 2 that these accounts which the petitioner is casting doubt on, were used by it for the purpose of forcibly declaring and receiving dividends for F.Y. 2019-2020, which reflects its acceptance of the company's good financial health and estops it from challenging these statements.

27. I have carefully considered this issue. It is an undisputed position that the Finance Director was a person chosen and appointed by the petitioner and that this person oversaw all financial transactions of the company and reported to the petitioner's nominee Director. Not only that, even generally speaking it does appear that the petitioner was well represented and involved in the general functioning of the company considering clause 3.1.4 of the SHA, as amended on 14.11.2019, entitled it to appoint three out of the five Directors in the Board of Directors of the respondent no.3 company. This provision reads as under:

“3.1.4 From the date of execution of the Third Amendment Agreement, the Board shall consist of not more than 5 (five) Directors, of which:

- (i) the Investor shall be entitled to appoint 3 (three) Directors of the Board from the Panel; and*
- (ii) the Existing Shareholders shall be entitled to nominate 2 (two) Management Directors of the Board, provided however that if the Existing Shareholders hold less than 20% (twenty percent) of the Share Capital, the Existing*

Shareholders shall be entitled to nominate only 1 (one) Management Director to the Board.”

28. It is also undisputed that the petitioner was always represented in the company's Board through its nominee Directors and that once it attained majority shareholding status, crystallised in the third amendment of the SHA, the Board was composed of five Directors out of whom three were chosen and appointed by the petitioner. Another undisputed position is that ever since the petitioner joined the ranks of the shareholders of the respondent no.3 company, annual auditing of the company's accounts has been conducted by a statutory auditor of the petitioner's choice which was either E&Y or Deloitte. Other than that, the petitioner was also never denied adequate access to conduct statutory audits of the company through other external agencies over the years, confirmed by its own admission before this Court of having appointed GMC to investigate the financial actions of the company. In fact, the report which the petitioner has used to support its allegations of financial misconduct before this Court was furnished at the conclusion of the investigation by GMC in February 2017. There is an additional ground raised by the petitioner that respondent nos. 1 and 2 failed to extend basic cooperation during such investigation and inquiries; it has been urged that even if it was provided with copies of the audit report, the complete documents sought by them for the purpose of financial inquiries were never supplied. However, I am of the view that neither the 2017 report by GMC nor these allegations of non-cooperation can be regarded in isolation when it is also undisputed that the balance sheets of the

respondent no.3 company for every financial year since 2013 have been duly scrutinised and signed by the statutory auditors without any reservation or adverse comments.

29. Now, once the petitioner expanded its shareholding in respondent no.3 company in November 2015 to 60% and, as per its own claim, approved the financial statements of respondent no.3 company till 2016 there is an implied concession on its part in respect of all financial transactions till that year. However, notwithstanding the petitioner's claim that it did not sign financial statements for the FY after 2016 since it held several reservations with respect to the manner in which the company was conducting its business, there is the significant aspect of the dividend which was received by the petitioner from the respondent no.3 company throughout this period. The petitioner did not deny having received annual dividend to the tune of GBP 43 million over the last few years from the respondent no.3 company, including a sum of GBP 1.30 million for the F.Y. 2019-2020, all of which were released on the basis of the statement of accounts which it impugns today. Rather, it appears that the respondent nos.1 and 2 were opposed to releasing dividends for FY 2019-20, evident from the Board resolution dated 30.06.2020, as they wished to preserve the company's finances during the pandemic; yet, the dividends were released at the insistence of the petitioner's nominee Directors who were exercising majority voting rights on its behalf. Thus, the petitioner's conduct reveals that its grievances with the company on the ground of financial impropriety and misconduct clearly did not hamper the benefits it received or deter its participation

in the affairs of the company in the last few years as a majority shareholder. All things considered, when it is undisputed that the petitioner held majority voting rights, was granted such a wide berth when it came to conducting audits of the respondent no.3 company, wielded adequate say in the appointment of key management personnel and remained well represented in the Board by way of three nominee Directors out of the total quorum of five, any attempts on its part to distance itself from the financial and daily operations of the company at this stage do not *prima facie* hold water.

30. Another ground adopted by the petitioner on the aspect of finances was the mounting growth of debts in the books of account of respondent no.3, resulting from the allegedly questionable financial decisions taken under the leadership of respondent nos.1 and 2. The petitioner has claimed that these bad debts were numerous and that the respondent nos. 1 and 2 showed no inclination to recover the same or take any corrective actions to change its policy in this regard. In defence, respondent nos. 1 and 2 have claimed that the mounting debts which the petitioner is complaining of were (i) gestures of goodwill that it extended to its long standing clients who had contributed significantly to its revenue growth in the past, (ii) written off with the petitioner's knowledge, through its nominee Directors and (iii) small sums which formed less than 2% of the annual revenues of respondent no. 3 company calculated over a period of over 8 years.

31. On this aspect, the respondent nos. 1 and 2 had relied upon the Board Resolution dated 30.06.2020 to submit that the Company's

Board had unanimously written off these non-recoverable bad debts for the financial years 2017-18 and 2018-19. It was submitted that this decision was taken with the participation of the petitioner's nominee Directors. I have perused this document and find merit in the respondent's contention. The meeting in question, with a quorum comprising of Messrs. Gordon Payne, Thomas Whelan and Cheng Suet Ying, the petitioner's nominee Directors, did unanimously resolve to write off the bad debts of the respondent no.3 company for the financial years 2018-19 and 2019-20. The relevant extract of the Board Resolution dated 30.06.2020 reads as under:

"5 Approval WRITING OFF BAD DEBT OF THE FY 2017-18 AND 2018-19

The Chairman took item No 5 "Writing Off Bad Debt Of The FT 2017-18 And 2018-19"

DB explained to the board that certain debtors as at 31st March, 2018 and some in FY 2018-19 are not recoverable and hence need to be written off. DB then presented Annexure no. 2 (forming part of the Minutes) before the board and proposed board resolution for writing off of bad debt aggregating to Rs.41,70,5475 in the books of account of the Company for the FY 2018-19.

TW stated that SG and MG as CEO and COO of the Company are in charge of the local business and given that they are fully convinced that the debtors identified by them cannot be recovered based on this representation and in the letter provided to us and the information contained within the letter as to the recoverability of the debtors, the write-off could be approved.

After discussion the board passed the following resolutions unanimously:

***"RESOLVED THAT* the amounts noted against each of the items w.r.t. financial year 2017-18 and 2018-19 mentioned as per Annexure 2 be and are hereby written off in the books of account of the company for**

the financial year 2018-19.

<i>Sr. No.</i>	<i>Name of the Party</i>	<i>Amount (Dr./Cr.)</i>
	<i>As per Annexure 2</i>	<i>As per Annexure 2</i>

RESOLVED FURTHER THAT *Mr. Manish Mohan Singh Gandhi, Director of the Company be and is hereby authorized to do such other acts or deeds, as may be required to give effect to this resolution.”*

32. While considering the impact of this resolution, one has to be mindful to the undisputed position that the debts in question were advanced in the years 2018-19 and 2019-20, which was a period when the petitioner held majority voting rights in the company and had appointed key personnel to the company’s decision making units. In this regard, I have considered a short e-mail correspondence which took place in September 2018 between respondent no. 2 and the petitioner’s nominee director at the time, one Mr. Thomas Whelan, after Mr. Whelan was authorised to review and write off all uncollected debts of respondent no. 3 company up to 31.03.2017. For this purpose, I may begin by referring to the following extract from the Board Meeting dated 21.09.2018 which granted Mr. Whelan this power :

“The Chairman informed the board that the company has outstanding debts of INR 154,870.599 (£ 1,720,784) as on Year End 31st March 2017 relating to periods before April 2017. These debts remain uncollected for a long period of time; hence a detailed review of these debtors is required. The Chairman proposed name of Mr. Thomas Whelan, Director of the Company to write off all uncollectible debts up to 31st March 2017 after review and to ensure the balance sheet reflects a true and fair view on the Company’s financial position. After detailed discussion the following resolutions were passed:

“RESOLVED THAT *Mr. Thomas Whelan, Director of the*

Company be and is hereby authorized:

I. To review the debtor book and to write off all uncollectible debtors from years prior to April 2017 in full or is deemed required to be written off as on March 31, 2018.

II. To collect third party confirmation from debtors in cases he believes is necessary or he can commission the statutory auditors to obtain the same per the standard process.

III. To take a decision on behalf of the board to decide the number of parties and amounts to be written off in the books as on March, 2018."

33. Seven days later, the following conversation took place over e-mail:

- *"On 28 Sep 2018, at 10:00 AM, from Manish Gandhi:*

Dear Tom,

Since we are writing off debtors of prior period to an extent that we are not comfortable from the tax point of view I would want you to confirm that GBs would not be held accountable to any liabilities that might arise out of such a massive write off in one year. Our recommendation is different and of a lesser amount - a 1 GPBMn lesser. Please confirm the same or otherwise.

- *Friday, 28 September 2018, 10:18 AM +0530 from Thomas Whelan:*

Hi Manish,

Let's discuss shortly as in taxi now.

I do not expect any adverse impact from the tax authorities as the basis of the write is could commercial judgment that can be backed up by repeated attempts to recover this debt. We now are making a decision which is supported (in fact recommended by Deloitte – big 4 audit firm).

- *On 28 Sep 2018, at 10:21 AM, from Manish Gandhi:*

As long as it's understood that it doesn't become a personal liability for GBs. We will go with your recommendation.

- *On 28 Sep 2018, at 10:27 AM, from Thomas Whelan:*

There are no personal liability implications here as ABEC - the firm is making a decision to write off this debt."

34. While this exchange is quite telling insofar as it concerns the petitioner's allegations of financial impropriety and lack of transparency against respondent nos. 1 and 2, the overall position emerging from these documents is that the debts in question were written off in the presence of and with the consent of the petitioner's nominee Directors and, sometimes, upon their direction and insistence. Add to that the undisputed position that the respondent no.3 received a significant tax break on account of these write offs, it appears that the debts had benefitted the company in some respects and the issue of their non-payment had been put to rest. The record also shows that respondent nos. 1 & 2 had executed an undertaking contract, in their personal capacity, on 27.06.2020 which indemnified the petitioner and its nominee directors from all transactions that were undertaken by respondent no. 3 company till 31.03.2019 when respondent nos. 1 and 2 were serving in the capacity of CEO and COO of the company. This undertaking contract also recorded a reciprocal obligation on the part of the petitioner and its nominee Directors to abstain from requiring or conducting any forensic or internal audit or any other investigation of the financial records of the company up to FY 2018-19. This indemnification from any losses/damages/legal action/liabilities arising out of transactions conducted by respondent no.3 till 2018-19 adequately secures the petitioner and its parent concern in respect of the very transactions that it is wary of today.

35. Notwithstanding this indemnification contract, it appears that the petitioner's nominee Directors proceeded to initiate debt recovery

proceedings against the debtors of respondent no. 3 and, in doing so, dredged up some disputes between them and respondent nos. 1 and 2 causing their professional partnership to erode further. The respondent nos. 1 and 2 assailed this step as a breach of procedural stipulations under the SHA and in complete violation of the statutorily mandated procedure of consulting the company's Board before embarking on litigious routes against its debtors. Aside from the alleged illegality of the debt recovery exercise, these respondents further claimed that this unilateral issuance of demand notices to its long standing clients for relatively paltry sums has significantly dented the business of respondent no. 3 company, resulting in loss of goodwill and causing irreversible loss, prejudice and damage to its reputation. As per respondent nos. 1 and 2, when considering that the sums sought to be recovered are not noteworthy by any measure, the act of the petitioner's nominee Directors is transparently *mala fide* and intended to inflict damage to the company. It may also have an adverse impacting on the business and the share prices of the respondent no.3 company. They contended that that the petitioner's grievance with these small debts today and aggressive insistence on a forensic audit for the years after 2016 is a mere after-thought, a cleverly timed strategy to shut out all opposition from the company's minority shareholders and to deprive them from exercising their put option right under the SHA.

36. At this stage, it may be useful to take note of the settled legal position that though Section 9 confers wide ranging powers on the Courts to pass interim measures of protection, these measures are

solely driven to preserve and protect the assets which form the subject of dispute. The purpose of the Court being, at the stage when arbitration is yet to be invoked, to effect protective directions which act as placeholders until appropriate directions are passed by the Arbitral Tribunal. Essentially, all interim measures granted at the pre arbitration stage under Section 9 are aimed to ensure that arbitration proceedings are not frustrated. In this regard, reference may be made to the decision in ***Channel Tunnel Group Ltd. Vs. Balfour Beatty Constructions Ltd.*** (1993) 1 All ER 664, 688 (HL).

“...the purpose of interim measure of protection is not to encroach on the powers of the arbitrators, but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided, that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration. It is a powerful weapon since it is buttressed by the coercive powers of the Court. In the area of arbitration law an interlocutory injunction is to balance the position of the parties pending arbitration, whilst avoiding a decision on issues which could only be resolved by the Arbitrators.”

37. Thus, the mandate of Section 9 necessitates issuance of directions which will preserve and protect the assets of the parties until they finally proceed to arbitration. This has to be done equitably by balancing the rival contentions and apprehensions of both the parties and taking a decision on a prima facie basis, from the evidence placed on record.

38. In the light of this legal position and the polar opposite stances adopted by them, it is apparent that the parties’ dispute with respect to the allegations of financial irregularities requires a much more comprehensive examination, of a kind that this Court certainly cannot

undertake while exercising its powers under Section 9 of the Act. However, for the purpose of meting out justice in the present petition, I have carefully considered the extent of influence wielded by the petitioner in the financial dealings of respondent no.3. The petitioner chose and appointed several key personnel in the company and the finance team thereof was not only directly under the supervision of a Finance Director appointed by the petitioner but the entire department itself reported to the petitioner's nominee Director. It appears that the petitioner was never denied an audit into the accounts and finances of the respondent no.3 company through external auditors and that even the statutory auditor of the company was appointed under the recommendation of the petitioner. In fact, as noted above, the Board resolution dated 21.09.2018 shows that Mr. Thomas Whelan, a nominee director of the petitioner, was authorised to review and write off all uncollected debts of respondent no. 3 company up to 31.03.2017; who then proceeded to authorise writing off of significant sums of debts, despite the hesitation of respondent nos.1 and 2. Thus, the petitioner's nominee Directors wrote off and, in some cases, insisted upon the writing off of the debts that it complains of today. The record shows a tacit acceptance on the petitioner's part of the financial dealings of respondent no.3 company. Throughout the period of its shareholding in the company, the petitioner has accumulated an enormous margin of dividends which it has received from respondent no.3 company over the years, which includes the period that it seeks to cast suspicion on. Not to mention, no annual statements of the company for any financial year have been flagged by its statutory

auditors, rather each has been approved by the petitioner's own nominee Directors which signifies their acceptance of the financial dealings of the company for those years. Even the allegations of default under the Clauses 15.5 and Schedule 2 of the SHA amended on 28.10.2015, by the respondent nos. 1 and 2 cannot be determined without leading evidence. Therefore, prima facie, I find no merit in the petitioner's submission that the respondent nos.1 and 2 orchestrated financial transactions which would bring harm to the company, without the knowledge of the petitioner. At the cost of repetition, I emphasise that this is a purely interim finding since drawing any sort of final conclusion on this aspect, at this stage, would be premature and invariably cause prejudice to the arbitration proceedings and those pending before the learned National Company Law Tribunal.

39. Now coming to the second grievance of the petitioner which concerns the valuation made by respondent nos.1 and 2, in the impugned notices, of the shares they seek to sell today. The respondent nos. 1 and 2 appear to have relied upon Clause 7.6 of the SHA to invoke the floor price formula set down in Clause 7.3 for the purpose of calculating the amount payable to them on the premise that the other two methods of calculating share price in Clause 7.3 could not be applied since the audited financial statements for the relevant year, FY 2019-20, are not available. On the other hand, the petitioner contended that Clause 7.6 was meant to apply only for FY 2014-15 as it makes a specific reference to a situation where the audited financial statements were not delivered to the petitioner/Investor on or before

30.09.2015. Thus, according to the petitioner, the use of the floor price formula through Clause 7.6 was only intended to calculate the value of shares in the event of exercise of call/put option by any shareholder in the year 2015 and no other year. It was submitted that Clause 7.6 of the SHA automatically stopped operating after 2015. The petitioner, therefore, contended that the SHA provided only two methods for determining share values for the purpose of a call/put option right exercise after 2015 which was contained in Clause 8.1; (i) by taking the EBITDA price of the shares for the relevant year and calculating the value based on that, or (ii) on the basis of the fair market value of the shares determined by a chartered accountant. However, since these methods depend entirely on the audited financial statements of respondent no.3 company for the relevant year and the petitioner is in staunch opposition of the statements released thus far, the petitioner contended that no valuation could be made as on date without arbitrating the issue of financial irregularities. Here, it may be apposite to extract the clauses which form the crux of this issue, namely Clause 7.3 of the SHA:

“7.3. Subject to Clause 7.6 and applicable Law, the Call Price shall be the higher of: (I) the Floor Price; (II) the Relevant Year EBITDA Price; or (III) the fair market value computed by a chartered accountant (eligible to practice in India as per applicable Law) appointed solely by the Investor. For the purposes of this Agreement:

“Floor Price” means the amount in INR equal to the value of “FP” determined in accordance with the formulae set out below:

$$FP = \frac{CS}{ESC} \times \text{Closing Date Enterprise Value-Net Debt on Relevant Year}$$

For the purpose of the abovementioned formulae:

- (i) **“CS”** means the number of Call Shares proposed to be specified in the Call Option Notice,
- (ii) **“ESC”** means aggregate number of Equity Securities comprising the Share Capital; and
- (iii) **“Closing Date Enterprise Value”** means INR 3000 million.
- (iv) **“Net Debt on Relevant Year Closing Date”** = Long term and short term borrowings of the Company – Cash & cash equivalents – Non-core real estate assets. Net Debt should be estimated as of year of completion date of the Call Option.

xxx

7.6 If the company fails to deliver audited financial statements of the Company for the Relevant Year to investor on or prior to the expiry of September 30, 2015 on account of any reason other than a mandatory requirement under applicable Laws, then the Call Price shall be deemed to be the Floor Price.”

40. Reading these extracted provisions along with Clause 8.1 already noticed hereinabove, it is not difficult to gauge as to why the petitioner urged that this formula was applicable only for FY 2015. Undoubtedly, the plain language of Clauses 7.6 as also 8.1 makes a specific reference to the year 2015 for application of the floor price formula. However, that being said, it is undisputed that the SHA underwent an amendment in 2019, i.e., much after September, 2015, yet the clause for determining the value of the shares on the basis of the floor price formula was never removed and continued to remain intact in the contract. If the intention of the parties was to truly limit the applicability of Clause 7.6 to a single year of 2015, nothing prevented them from removing the clause entirely. The fact that they did not, has to be read along with the settled principles governing construction of a contract in that, contents of the SHA have to be read

in a manner which does not render the terms thereof absurd. Prima facie, I am of the opinion that the interpretation sought to be advanced by the petitioner would lead to a preposterous situation wherein the put option right of respondent nos.1 and 2, a contractually vested right under the SHA, can never be exercised after FY 2015 in case the audited financial statements of the company are not available. That would mean that once the petitioner achieved majority shareholding of respondent no.3 company in 2015 and FY 2015 ended, respondent nos.1 and 2 could never exercise their put option rights in case any of the shareholders raised a dispute on the finances of the company preventing the finalisation of the audited financial statements for the relevant year. Certainly, the agreement did not intend to bear such a complicated operation of the call/put option rights or make these rights inaccessible to its shareholders. Thus, I am of the prima facie view that at this stage, when the audited financial statements for the FY 2019-20 are not available, the only legitimate method to determine the price of the shares under the SHA is as per the floor price formula set out in Clauses 7.3 and 7.6. Therefore, at this stage, it cannot be prima facie stated that the valuation of the shares, as carried out in the impugned notices, is excessive in any manner.

41. The petitioner contended before me that if the impugned notices were not stayed, it had to perforce pay the amounts of INR 47,18,27,107/- to respondent no.1 and INR 20,49,57,930/- to respondent no. 2, aggregating a sum of INR 67,67,85,037/- as consideration for the 19.98% shares put up by them, failing which it would be held in 'material default' under Clause 12.3 of the SHA. A

necessary corollary thereof would be that the petitioner's rights as a majority shareholder would be suspended under Clause 12.3 of the SHA leading to it being deprived of its right to take part in the management of respondent no. 3 company. Relevant extracts of Clause 12 of the SHA which defines material default and its consequences read as under:

"12. MATERIAL DEFAULT

12.1. For the purpose of this Clause 12 (Material Default), the following events shall constitute a "Material Default" of this Agreement:

(i) x x x

(ii) failure by either the Investor or any Affiliate of the Investor or any Person to whom Equity Securities have been Transferred by the Investor pursuant to this Agreement (each, a "Put Obligor") to perform such Put Obligor's obligations In relation to the Put Option or the First Tranche Post Majority Put Option on account of any reason other than on account of any mandatory requirement under applicable law which prohibits the Put Obligor from performing Its obligations in relation to the Put Option or the First Tranche Post Majority Put Option; and

(iii) x x x

Any Person who commits a Material Default under this Clause 12.1 shall be referred to as the "Material Defaulter".

12.2. In the event of a Material Default by either the Investor or the Existing Shareholders, the Existing Shareholders or the Investor (as the case may be) {the "Non-Defaulting Party"}, shall, within a period of 30 [thirty] Business Days from the date of such Material Default give a notice in writing to the Material Defaulter, intimating the Material Defaulter of such Material Default ("Material Default Notice").

12.3. Notwithstanding anything to the contrary set out In this Agreement or any other provision of the Transaction Documents, If any Material Default is not cured by the Material Defaulter within a

period of 30 (thirty) Business Days from the date of the Material Default Notice("Material Default Cure Period")], the rights of such Material Defaulter under Clauses 2(Share Capital), 3 (Management), 4 (Deadlock), 5 (Restrictions on Transfer of Equity Securities), 6 (Right of First Refusal) and 10 (Tag Along Right) shall be suspended with immediate effect from the date of expiry of the Material Default Cure Period until such Material Default is cured by the Material Defaulter. In the event that a Material Default is not cured within the expiry of the Material Default Cure Period by the Material Defaulter:

12.3.1 a Material Defaulter shall, Immediately upon the expiry of the Material Default Cure Period, procure the Immediate resignation and removal of Its Director(s) nominated by such Material Defaulter and shall, subject to applicable Law, indemnify and hold harmless the Non-Defaulting Party on demand against all losses which the Non-Defaulting Party may suffer as a result of, or In connection with any claim made by such resigning or removed Director, as the case may be, including but not limited to, for unfair or wrongful dismissal, and any reasonable costs and expenses Incurred in defending such proceedings including, but without prejudice to the generality of the foregoing, legal costs actually Incurred, or other compensation arising out of such Director's removal or loss of office; and

12.3.2. Subject to applicable law, all voting rights of the Material Defaulter as a Shareholder shall be suspended until such Material Default Is cured."

42. The apprehensions of the petitioner appear to be correct, if the party which needs to honour the put option invocation does not do so within the stipulated period, it shall be in 'material default' under the SHA. However, before me, the case of the petitioner is that the very issuance of the impugned notices under Clause 7.6 was illegal and unsustainable and, therefore, merely because the petitioner refuses to honour these notices and pay the exorbitant amounts arbitrarily demanded by the respondents, it cannot be deemed to be in 'material

default’ or subject to the consequences thereof under Clause 12.3 of the SHA.

43. At the same time, the petitioner did not deny its liability for paying monies to respondent nos.1 and 2 if their exercise of put option right is green lit in arbitration. In other words, were it to be held in arbitration that there is no proof of the respondent no.3 company having indulged in questionable financial practices under the sole directions of respondent nos. 1 and 2, the petitioner claimed to have no qualms in honouring the payments required to be made towards the put option exercise. Thus, notwithstanding the petitioner’s acknowledgement of the fact that it has a contractual obligation to buy out these shares from respondent nos. 1 and 2 as and when directed, its only reservation is with respect to honouring the put option notices at this premature stage and paying any amount for these shares without resolving its disputes pertaining to the financial irregularities in the affairs of respondent no 3 and, in that process, end up paying them a greater sum than payable. Therefore, the liability to pay for these shares is not denied, what is denied is the existence of the liability and the requirement to pay for these shares today and that too at the price demanded by the respondent nos. 1 and 2.

44. While opposing the hasty manner in which respondent nos. 1 and 2 have demanded satisfaction of this liability, the petitioner claimed that there is absolutely no justification on their part to insist that this exorbitant demand of theirs must be met at this stage itself. For this purpose, the petitioner did not only take great pains to establish its financial solvency as on date but also urged that in line

with the international standards of accounting, its parent company had already catered for the amounts payable towards purchase of these additional shares under the put option clause of the SHA. To the petitioner, this proved that in case the demanded amount was found to be justifiably payable in arbitration, the petitioner would undoubtedly be in a position to discharge this liability. In fact, both parties drew my attention to the Condensed Consolidated Statement of Financial Position contained in the interim finance report of the petitioner's parent company Hyve Group PLC, published on 07.05.2020 for FY ending on 31.03.2020 which estimated its net assets to be GBP 198,587,000. This financial statement was also used by the petitioner to contend that it had more than enough assets to satisfy the amounts claimed by respondent nos. 1 and 2 in their impugned notices as and when it is found to be valid and payable by a Court of law. The petitioner, thus, contended that there was no reason to compel it to pay any amounts to respondent nos.1 and 2 at this premature stage or to deposit the same before this Court considering that the financial health of the petitioner's parent company was intact which eliminated any need for securing the amount. On the other hand, respondent nos. 1 and 2 relied on this financial statement as well to claim that these figures proved that there was no reason for the petitioner to refuse making payment under the impugned notices.

45. I have carefully considered this aspect and remain of the view that in these proceedings, the primary duty of this Court is to pass equitable reliefs in order to ensure that the interests of both parties are duly secured until such time their grievances with respect to each

other are resolved in arbitration. Thus, even though the allegations of financial impropriety and misconduct in the affairs of respondent no. 3 company are serious in nature, they still need to be thoroughly examined by a competent forum before respondent nos. 1 and 2 are held guilty on this charge. At the same time, at this stage, when these allegations are yet to be conclusively established, it would not be appropriate to simply ignore the entitlement of respondent nos. 1 and 2 under the SHA to exercise their put option rights.

46. Significantly, the petitioner is a company incorporated in Cyprus and has, admittedly, negligible assets within the territory of India. In addition to that, notwithstanding the interim finance report of Hyve Group PLC which has been relied on by the petitioner and respondent nos.1 and 2, even the preliminary results for the year 2020 published on 01.12.2020 and placed on record by the petitioner show that the value of its net assets in September 2020 is GBP 176,946,000, lower than the valuation of GBP 198,587,000 in its interim report published in May 2020. I can see that the net assets of the petitioner's parent company have fallen by GBP 21,641,000 in a span of four months, which may be typical during a pandemic, but the fact of the reduction in the net assets of the petitioner's parent company remains. Thus, there appears to be merit in the plea of respondent nos.1 and 2 that the petitioner ought not to be permitted to be relieved of its obligation to honour the put option right under the SHA unless adequate directions are passed in order to secure their interest.

47. For these reasons, as also my prima facie findings which have been recorded hereinabove, I am of the view that were these put

option notices to be stayed, in order to balance equities the petitioner ought to be made to deposit before the Court the amount which is required to be paid as consideration for the 19.98% shares put up by respondent nos. 1 and 2. On that note, as already discussed above, I have not been persuaded by the petitioner's contention that there is any infirmity in the formula used by these respondents to calculate the consideration, rather the valuation set out by them in the impugned notices deserves to be prima facie accepted for the purpose of securing the amounts in the interregnum.

48. Accordingly, it is directed that the operation of the impugned put option notices dated 15.11.2020 issued by respondent nos.1 and 2 in respect of the 19.98% shares of the respondent no.3 company held by them, are stayed, subject to the petitioner depositing an amount of INR 67,67,85,037/- before this Court within a period of two weeks. Thereupon, the respondent nos. 1 and 2 shall maintain status quo as regards the 19.98% of the shares of respondent no.3 company which the impugned notices relate to. The deposit of the amount by the petitioner before the Court would be subject to any orders that may be passed regarding the validity of these notices, either in arbitration, which may be invoked by either of the parties, or by the learned National Company Law Tribunal, as the case may be. It is made clear that in case the said amount is not deposited within 2 weeks, this order shall stand vacated and the respondents will be at liberty to take appropriate steps in accordance with the SHA.

49. Before concluding, I would like to deal with the plea of respondent nos. 1 and 2 that since the petitioner had already

approached the NCLT, institution of this petition amounted to forum shopping. In my view, there is no merit in this objection; though this petition impugning notices dated 15.11.2020 was filed on 18.11.2020, the fact remains that these notices were issued only after the petitioner had already preferred the oppression and mismanagement petition before the learned NCLT on 10.11.2020. Even otherwise, it is a matter of record that the NCLT petition had not been listed for hearing at the Tribunal all the way till 04.01.2021 when this judgment was reserved. Further, unlike the proceedings before the learned NCLT, the petitioner has specifically sought suspension of these notices before this Court as an interim measure till its challenge to these notices is decided by the appropriate forum. In these circumstances, there is no question of there being any forum shopping or duplicity of proceedings arising out of the presentation of this Section 9 petition.

50. The petition is disposed of in the aforesaid terms.

JANUARY 22, 2021

REKHA PALLI, J