

THE HON'BLE SRI JUSTICE SANJAY KUMAR

COMPANY PETITION NO.171 OF 2009

DATED 19th MARCH, 2013

Between

Mr.M.Chandra Sekhar Rao,
s/o late Sri M.P.Rao, aged 57 years,
r/o D.No.1-10-208, Ashoknagar,
Hyderabad and another.

...Petitioners

and

M/s.Agri Gold Projects Limited,
40-1-21/3, Surya Towers, 1st Floor,
M.G.Road, Vijayawada-10,
rep. by its Managing Director,
Mr.A.Uday Bhaskar Rao and others.

...Respondents

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ORDER:

The petitioners were shareholders of M/s.Sai Renewable Power Private Limited (SRPPL). The first petitioner was formerly its Managing Director. By way of this company petition filed under Sections 433(e), 434(1)(a) and 439 of the Companies Act, 1956 (for brevity, 'the Act of 1956'), they seek the winding up of M/s.Agro Gold Projects Limited, Vijayawada, the respondent company.

SRPPL is a private limited company engaged in the business of generating power from industrial waste. It was incorporated under the provisions of the Act of 1956 and has its Registered Office at Hyderabad. The respondent company is a public limited company engaged in the business of generating power, amongst other things. The petitioners were the promoters of SRPPL and were instrumental in establishing a 4.5 MW 'industrial waste to non-conventional energy' power plant at West Godavari District. While so, the shareholders of SRPPL entered into a Memorandum of Understanding (MoU) on 12.06.2008 with the respondent company, in terms of which, they agreed to sell their shareholding in SRPPL to the respondent company. The agreed sale consideration was a sum of Rs.5,00,00,000/-, which was to be paid upfront, along with the sale value of the Certified Emission Reductions (CERs) from the date of commissioning (31.03.2004) to 22.09.2007, being the monitoring period under verification, and the sale value of the CERs from 23.09.2007 till the date of handing over of the plant (05.11.2008). In

addition thereto, the respondent company was to pay the value of the arrears due from the APTRANSCO/DISCOM from the date of commissioning till the date of handing over of the plant.

The respondent company paid a sum of Rs.2,50,00,000/- but the balance amount of Rs.2,50,00,000/- remained unpaid. Further, the sale value of the CERs was also not paid. The shareholders of SRPPL and the respondent company entered into the 'Amendment dated 29.11.2008 to the MoU dated 12.06.2008'. In terms of this Amendment, the respondent company was to pay the balance payment of Rs.2,50,00,000/-, which it accordingly did. In so far as the CERs were concerned, their sale value was to be determined keeping in mind two factors. Firstly, the market value of the CERs as on 29.11.2008 was fixed as the price payable for 100% of the CERs accrued to the company and the respondent company was required to pay the sale consideration equivalent to 50% of the CERs in cash within one week from the date of issuance of the first CERs by the United Nations Framework Convention on Climate Change (UNFCCC). It was further agreed that the respondent company would not reduce the value of the CERs from the price fixed even if there was a fall in the price of CERs as on the date of issuance of the CERs. Similarly, the shareholders of SRPPL were not to claim any price more than the price per CER fixed as per the Amendment even if there was an increase in the value of the CERs as on the date of issuance. A separate agreement was required to be executed simultaneously along with the amended MoU, fixing the price per CER. However, no such separate agreement was executed.

Sri A.Rammohan Rao, the Vice President of the respondent company, was stated to have made a computation by hand of the total consideration payable towards the sale value of the CERs in terms of the Amendment dated 29.11.2008. As per this statement, which was filed along with the company petition, the total number of CERs was quantified at 63,911, and after adjusting 2% adaptation fees payable to

UNFCCC, the CERS due to SRPPL were stated to be 62,632.78. The published rate of CERs as on 28.11.2008 was stated to be 13.9 Euros per CER which put the value of the CERs at 8,70,595.642 Euros. As per the exchange rate for Euros obtaining as on 28.11.2008, the value in Indian currency was quantified at Rs.5,49,86,820.75 ps. Initial payment of 50% of this sum was to be Rs.2,74,93,410.40 ps. This document bears the signature of Sri A.Rammohan Rao, along with the date '28/01'. According to the petitioners, the total number of CERs issued by the UNFCCC was 51,107 on the basis of the electricity generated by SRPPL between 31.03.2004 and 22.09.2007. Further, 10,500 CERs were to be issued for the period 23.09.2007 till the date of handing over of the plant to the respondent company (05.11.2008). The petitioners further stated that at the Extraordinary General Meeting (EGM) of SRPPL held on 31.12.2008, the petitioners transferred their shareholding in SRPPL (52.2%) to the respondent company. The resolution passed on the said date was stated to have recorded the mode and manner of payment of the consideration accruing on account of the CERs.

The complaint of the petitioners is that the respondent company which was to pay Rs.2,74,93,410.40 ps. upfront and the balance amount within seven days of the issuance of the CERs by UNFCCC, committed default in making the payment. The petitioners further stated that believing the assurances given by the respondent company, they had transferred the remaining 47.8% of their shareholding in SRPPL to the respondent company and to Uday Bhaskar Rao, its Managing Director. On the said date, the first petitioner tendered his resignation from the post of Managing Director of SRPPL but continued as a Director on its Board as agreed upon by the parties. On 12.05.2009, the petitioners and the respondent company again entered into a Memorandum of Settlement (MoS). As per this settlement out of the total 63,607 CERs, 53,107 CERs had already been issued and hosted. The petitioners were entitled and authorized to encash the

amounts so realized and to receive the proceeds of the sale of the CERs. For the balance CERs (10,500) the respondent company deposited a cheque with one G.V.Pratap Reddy, a mediator. However, the petitioners complain that they did not receive the cheque thereafter.

Relations between the parties having soured, the petitioners alleged that the respondent company was aiming to remove them from the Board of Directors of SRPPL. They thereupon approached the City Civil Court, Hyderabad, in O.S.No.486 of 2009, seeking a permanent injunction against the respondent company from removing them as Directors of SRPPL until and unless the MoU dated 12.06.2008, the Amendment dated 29.11.2008 and the MoS dated 12.05.2009 were implemented. *Status quo* orders were granted by the Civil Court in the said suit on 12.08.2009.

The petitioners claimed that the respondent company was due and liable to pay them Rs.5,49,86,820.75 ps. towards the ascertained value of the CERs and was also liable to pay interest thereon. They issued the statutory notice dated 19.08.2009 under Section 434(1)(a) of the Act of 1956 calling upon the respondent company to make the payment due along with the interest within 21 days from the date of receipt thereof. As per the averment in the company petition, the respondent company despite service of the said notice failed to pay the amount and did not reply thereto. They therefore alleged, by way of this company petition, that the respondent company was unable to pay its debts and was commercially insolvent and sought the winding up of the respondent company under the provisions of the Act of 1956.

Notice before Admission was ordered in the matter on 26.10.2009. Thereupon, the respondent company entered appearance through counsel and filed its counter dated 07.12.2009. Therein, the respondent company stated to the following effect:

The petitioners ceased to be Directors of SRPPL with effect from 12.08.2009. Reference in this regard was made to the amendment sought to be effected by the petitioners themselves in the

suit pending before the City Civil Court, Hyderabad. The respondent company pointed out that the MoU dated 12.06.2008 was entered into by it with all the shareholders of SRPPL, i.e., M/s.MPR Refractories Limited, M/s.EMVES Finance and Investment Limited, M/s.Polygon Refractories Private Limited, Mrs.M.Mrinalini, Mrs.M.Lalitha and the petitioners. The respondent company stated that as per the said MoU and the subsequent Amendment dated 29.11.2008, the consideration of Rs.5,00,00,000/- had already been paid by it. As regards the consideration to be paid towards the sale value of the CERs, the respondent company denied the claims of the petitioners. The respondent company pointed out that no separate agreement fixing the price per CER had been executed as required by the Amendment dated 29.11.2009. The respondent company stated that the petitioners and the other shareholders of SRPPL had committed a fraud upon it constraining it to file a criminal complaint before the learned IX Additional Chief Metropolitan Magistrate, Hyderabad, under Sections 120-B, 418, 420, 467, 468 and 471 IPC. The said complaint was stated to have been referred to the Chikkadapally Police Station for investigation and was registered as Crime No.188 of 2009. The EGM dated 31.12.2008 was denied on the ground that the minutes thereof contained several blanks and gaps. The respondent company further stated that G.V.Pratap Reddy was brought in by the petitioners themselves to act as a security trustee to collect blank cheques from the respondent company and to hold them in safe custody till such time all documents and records pertaining to SRPPL and more specifically, the CERs record, were handed over by the petitioners for ascertaining the genuineness, correctness and validity of the sale and for arriving at their sale value. As per clauses (a) to (f) of the MoS dated 12.05.2009, once the sale value of the CERs was ascertained, G.V.Pratap Reddy was to fill in the amounts in the cheques and jointly deliver them to the petitioners and others. As the petitioners failed to submit the documents pertaining to the CERs, their sale value could not be

ascertained.

The respondent company further stated that the claim of the petitioners and the other shareholders of SRPPL would be subject to the outcome of Crime No.188 of 2009 and, therefore, it could not constitute a legally enforceable debt forming the basis for winding up proceedings. The respondent company reiterated that the sale value of the CERs had not been ascertained till date and therefore, the claim for Rs.5,49,86,820.75 ps. along with interest was stated to be without justification. The respondent company also stated that it had replied to the statutory notice under letter dated 10.09.2009 which was sent by Speed Post to the first petitioner, calling upon him to fulfill the conditions of the MoS dated 12.05.2009 and to collect the cheques deposited with G.V.Pratap Reddy thereafter, upon ascertainment of the value of the CERs. The respondent company was stated to be a reputed company operating 5 bio-mass power plants through its subsidiary companies with a total strength of about 400 employees. The assets of the respondent company were stated to be about Rs.120 crores. The respondent company stated that there was a *bonafide* dispute between the petitioners and the respondent company and that the winding up proceedings were only an attempt to enforce payment of money. The respondent company therefore prayed for dismissal of the company petition.

In their reply dated 22.12.2009, the petitioners sought to raise the issue of their removal from the Board of Directors. However as this is not relevant for the purposes of this case, the same is eschewed from consideration. The petitioners stated that they held 13,69,889 and 4,59,350 shares respectively in SRPPL. The petitioners further stated that they were the Managing Director and Director on the Board of M/s.MPR Refractories Limited which held 10,50,000 shares in SRPPL, while M/s.EMVES Finance and Investment Limited held 6,60,000 shares and M/s.Polygon Refractories Private Limited held 1,00,000 shares. The first petitioner's wife is Mrs.M.Lalita, who held 4,51,500

shares in SRPPL, while the second petitioner's wife is Mrs.M.Mrinalini, who held 2,50,500 shares in SRPPL. The petitioners stated that they represent the collective interest of all the shareholders of SRPPL and had obtained their consent to represent them in the MoU. The consent letters dated 10.06.2008 were also filed. The petitioners again drew the attention of the Court to the terms of the MoU and the MoS with regard to payment of the sale value of the CERs in support of their claim that the respondent company was due and liable to pay them the said ascertained sum.

As regards the EGM held on 31.12.2008, the petitioners referred to the letter dated 15.12.2008 issued by the respondent company consenting to the said meeting to be held on 31.12.2008. This meeting was stated to have been attended by the Managing Director and all the Directors of the respondent company along with their Advocate. The Minutes of the said meeting were said to have been signed by all the said persons. Notice of the meeting dated 24.12.2008 sent by SRPPL to all the shareholders was also filed. The criminal case was stated to have been filed by the respondent company with an intention to avoid payment of the balance consideration to the petitioners and was castigated as a false and fictitious case. The information pertaining to the EGM dated 31.12.2008 was stated to have been uploaded by the Registrar of Companies, Andhra Pradesh, and was available on its website. Reference was made to the Minutes of the meeting dated 31.12.2008 in the context of the mode of payment towards the sale value of the CERs, which was stated to be binding on the respondent company. The petitioners denied that they had not handed over all the documents and records pertaining to SRPPL and the CERs record. They stated that all the information pertaining to hosting and ascertainment of the CERs was available on the website of UNFCCC and that, in order to sell the same, no further documentation was required. They further stated that in the meeting held on 25.01.2009 at the Registered Office of SRPPL, they had handed over certain

documents in addition to those already handed over on 04.01.2009, which was duly recorded in the Minutes. The respondent company was stated to be carrying on the operations of SRPPL despite not paying the sale consideration due and liable to be paid to the petitioners. As regard the statutory notice dated 19.08.2009, the petitioners stated that they had not received any reply dated 10.09.2009. They pointed out that no copy of the said reply had been filed along with the counter and reiterated their prayer for winding up of the respondent company.

Though the petitioners filed consent letters dated 10.06.2008 from the other shareholders of SRPPL, they also filed C.A.No.266 of 2010 to implead them in the company petition. By order dated 16.04.2010, this Court allowed the application and Mrs.M.Lalitha; Mrs.M.Mrinalini; M/s.MPR Refractories Limited, Hyderabad; M/s.EMVES Finance and Investment Limited, Hyderabad; and M/s.Polygon Refractories Private Limited, Hyderabad, were impleaded as Respondents 2 to 6 in the company petition.

Taking note of the objections raised by the petitioners in their reply, the respondent company filed Memo dated 10.06.2010 seeking to place on record the reply dated 10.09.2009 addressed to the first petitioner in response to the statutory notice dated 19.08.2009. The respondent company also filed some correspondence from M/s.Thermax Limited in support of its contention that SRPPL was due and liable to pay various amounts to the said concern. The respondent company also filed letter dated 11.03.2010 received from UNFCCC in the context of the letter dated 31.12.2009 addressed by A.Uday Bhaskar Rao, Managing Director of the respondent company, and the letter dated 29.11.2009 of the first petitioner. Therein, the UNFCCC referred to the controversy as to whether the signature of the first petitioner in the Form dated 11.05.2009 received by it was legitimate or forged. Adverting to the litigation pending between the parties, the UNFCCC stated that pending resolution of the matter between them

and/or a judicial decision, no further action would be taken at its end at that time. The UNFCCC called upon the parties to inform it as soon as they reached a mutually acceptable resolution.

In view of the Memo filed by the respondent company along with the reply notice dated 10.09.2009 said to have been posted on 10.09.2009, the petitioners filed reply dated 03.07.2010 to the said Memo stating that they had searched their old correspondence and had discovered an envelope addressed to the first petitioner by the respondent company under Receipt No.EN502238936IN dated 10.09.2009, which only contained the invoices and letters from M/s.Thermax Limited. The reply notice dated 10.09.2009 was not found in the said envelope. They therefore reiterated that no reply had been sent to them in response to the statutory notice.

The respondent company thereafter filed written arguments on 13.07.2010. However, as no leave was obtained from this Court to do so, the same are not taken into consideration.

While so, the petitioners filed Company Application No.985 of 2012 stating that the respondent company was at the final stage of negotiating with third parties to divest itself of the equity shareholding and assets of SRPPL which it had acquired from the petitioners and respondents 2 to 6. The petitioners therefore sought a direction from this Court to restrain the respondent company from alienating, encumbering or creating any third party interest in the shareholding and assets of SRPPL. However, as Sri C.V.Mohan Reddy, learned senior counsel for the respondent company, on instructions, informed this Court that it would not transfer the shares held by it in SRPPL, the said undertaking was recorded and extended thereafter from time to time.

By affidavit dated 07.11.2012, the respondent company sought to raise an additional ground in support of its defence. It stated therein that forward contracts were regulated by the Forward Contracts (Regulation) Act, 1952 (for brevity, 'the Act of 1952') and Section 15(1)

thereof empowered the Central Government to notify the goods or class of goods in respect of which forward contracts for sale or purchase would be illegal. Carbon credits or CERs were said to have been notified on 04.01.2008 by the Central Government under the said provision and therefore, the arrangement between the petitioners and Respondents 2 to 6, on the one hand, and the respondent company on the other, was stated to be illegal as it was hit by Section 15 of the Act of 1952.

The respondent company also filed affidavit dated 06.12.2012 detailing the procedure for issuance of CERs, the crux thereof being that the Clean Development Mechanism Executive Board would send an e-mail containing the password and block number identifying the CERs and the company would be able to obtain the CERs identified by the block number in the client account by using the password provided by the Board. The respondent company stated that the Board had sent an e-mail containing the password and block number to the petitioners and that the petitioners had failed to provide the details thereof to it. The respondent company further stated that the petitioners had written complaints to the Board, thereby stalling the process of the sale of the CERs by it. Copies of the correspondence, including the letter dated 12.03.2010, between the first petitioner and the UNFCCC were filed in support of this averment.

By their reply dated 20.02.2013, the petitioners stated that the procedure for issuance and sale of CERs had nothing to do with the issue raised in the company petition. They pointed out that as per the MoU dated 12.06.2008, Amendment dated 12.01.2008 and the MoS dated 12.05.2009, the value of the CERs was to be determined in the given format and as the said exercise had already been completed whereby the value of the CERs was calculated at Rs.5,49,86,820.75 ps., the same was due and payable to them by the respondent company. They further pointed out that they had done more than what was expected of them as they had already handed over the plant and

transferred 100% of their shareholding in SRPPL though they had not received the sale consideration in terms of the sale value of 63,607 CERs. They further pointed out that payment of the sale value of the CERs was not pegged to the actual sale of the CERs by the respondent company. They alleged that the Managing Director of the respondent company had forged the signature of the first petitioner in his communication to the UNFCCC and therefore, the first petitioner had addressed letter dated 04.08.2009 pointing out that his signature had been forged and that his name should not be changed as the focal point of communication without his consent.

By a separate reply affidavit of the same date, the petitioners stated that Section 15(1) of the Act of 1952 had no relevance as the CERs continued to stand in the name of SRPPL even after the transfer of its management. Only the sale value of such CERs was to be part of the sale consideration for the said transfer under the MoU dated 12.06.2008, Amendment dated 29.11.2008 and the MoS dated 12.05.2009. They therefore stated that the contract was not illegal as alleged by the respondent company and therefore, the debt due and liable to them was a legally recoverable debt.

Sri S.Ravi, learned senior counsel appearing for the petitioners, while reiterating the contents of the pleadings filed by his clients, pointed out that the sale consideration for the transfer of the equity shareholding of the petitioners and respondents 2 to 6 in SRPPL was subject to payment of the three components of the sale consideration – (i) cash component of Rs.5,00,00,000/-, (ii) sale value of the CERs and (iii) the arrears from the APTRANSCO/ DISCOM. He stated that the cash component of the transaction had been paid by the respondent company and the value of arrears due from the APTRANSCO/DISCOM was still *sub judice* and was yet to crystallize. The only issue was with regard to payment of the sale value of the CERs in terms of the MoU, the Amendment and the MoS. He pointed out that the MoU dated 12.06.2008 provided for payment of the sale

value of the CERs only on the date of their issuance. However, under the Amendment dated 29.11.2008, the parties agreed to a change in this modality to this effect:

“[Note: The value of sale consideration of CERs as mentioned in item No.s 2.1(ii) and 2.1(iii) will be arrived as per market value of CERs as on the date of signing this amendment and such price per CER shall be the price fixed towards the price payable for 100% of the CERs accrued to the Company by the First Party. The First Party will pay the balance sale consideration equivalent to 50% of the CERs as per the price fixed in cash within one week from the date of issuance of the 1st CERs by UNFCCC. The First Party shall not reduce the value of CERs from the price fixed even in case of a fall in the price of CER as on the date of issuance of the CERs. Similarly, the Second Party shall not claim a price more than the price per CER fixed hereinabove, if there is any increase in the value of CERs as on the date of issuance of the CERs. A separate agreement fixing the price per CER shall be executed simultaneously with this amended MOU].”

Learned senior counsel pointed out that as per the Minutes of the EGM held on 31.12.2008, the respondent company undertook as follows with regard to payment for the CERs:

“Payment of CERs

7. According to clause 2.1(ii) and 2.1(iii) of the MOU dated June 12, 2008 and amendment dated November 29, 2008 a sum equivalent to 50% of the value of the CER's accumulated upto the date of handing over of the company i.e., November 5, 2008 was to be paid by AGPL to the shareholders of this Company. However, Mr.A.Uday Bhaskara Rao stated that AGPL would not be in a position to pay this amount unless AGPL receives the loan amount from its bank. After discussion it was decided that AGPL will deposit a cheque drawn in favor of the shareholders of this company for the said amount equivalent to 50% of the CER's value in money. For the purpose of clarity and convenience the quanta of CER's, the value of a CER in euros and the value of the same in Indian rupees is calculated as shown hereunder:
No. of CER's accumulated x value per CER in euros x conversion rate of euro in rupees as per the prevailing rate on November 29, 2008.
8. The rate of the CER's shall be downloaded from the internet and arrived at accordingly and cheque for 50% of the value shall be deposited by AGPL.
9. It was noted that a supplemental agreement recording the revised understanding shall be executed at the earliest

between the parties.”

Learned senior counsel further pointed out that the exercise contemplated by paragraph 7 aforestated had been undertaken by Sri A.Rammohan Rao, the Vice President of the respondent company, on 28.01.2009 duly quantifying the total amount due to the petitioners and respondents 2 to 6 towards the sale value of the CERs at Rs.5,49,86,820.75 ps. He also pointed out that 53,107 CERs had been issued by the UNFCCC on 18.03.2009 and despite the same, the respondent company failed to discharge this component of the sale consideration.

On the other hand, Sri C.V.Mohan Reddy, learned senior counsel appearing for the respondent company, contended that there was a *bonafide* dispute as to the entitlement of the petitioners to the sale value of the CERs. In addition thereto, he contended that the status of the debt itself was in question in view of the legal bar to forward contracts in respect of carbon credits (CERs) under the Act of 1952. He pointed out that no separate agreement had been executed by and between the parties as contemplated under the Amendment dated 29.11.2008 and therefore, there was no agreed value for the CERs as contended by the petitioners. He stated that the denial of the petitioners as to receipt of the reply notice dated 10.09.2009 indicated their lack of *bonafides*. He denied the EGM dated 31.12.2008 altogether. He also relied upon the letter dated 11.03.2010 addressed by the UNFCCC to support his contention that there was a stalemate between the parties which required resolution through a regular legal process and that the same could not be the basis for summary winding up proceedings under the Act of 1956. He contended that the respondent company was not liable to pay any amount to the petitioners till the resolution of the dispute. He further argued that the respondent company was willing to allow the petitioners to sell the CERs or encash them, as they so chose. He relied on the definition of a ‘forward contract’ under Section 2(1)(c) of the Act of 1952 and

asserted that as the subject contract was barred by law, the parties had not chosen to enter into an agreement as contemplated by the Amendment dated 29.11.2008. He concluded by stating that there was no ascertained sum due and liable to be paid by the respondent company to the petitioners as the contingency with regard to the sale of CERs had not arisen, owing to their failure and acts of omission, and as such no debt was due from the respondent company to them. He accordingly prayed for dismissal of the company petition.

Sri S.Ravi, learned senior counsel, in his reply, contended that the MoU dated 12.06.2008 did not contemplate the sale of the CERs to the petitioners or to a third party. It was only the sale of shareholdings of the petitioners and respondents 2 to 6 that was the subject matter of the said MoU. No transfer of the CERs was contemplated thereunder and only the 'sale value' of the CERs formed part of the consideration for the transfer of the shareholdings by the petitioners and others. He therefore stated that the Act of 1952 had no application. In so far as the EGM dated 31.12.2008 is concerned, he stated that it was not open to the respondent company to approbate and reprobate. He pointed out that no suit had been filed by the respondent company about any liabilities which were attributable to the petitioners till date. He therefore asserted that the so-called dispute sought to be raised by the respondent company was mere moonshine.

The MoU dated 12.06.2008 reflects that what was contemplated thereunder was the sale of the 100% paid-up share capital of SRPPL by its shareholders to the respondent company. The sale consideration therefor was detailed as under:

"2.0 SALE CONSIDERATION

2.1 The Sale Consideration, as agreed by and between the Parties, for the transfer of all the fully paid equity shares in the share capital of the Company aggregating to 100% of the total paid up share capital in the Company by the Second Party to the First Party is as follows:

- (i) Upfront Payment of Rs. Five Crores (Rupees Five Crores only).

(+) PLUS

- (ii) Sale Value of CERs from the date of commissioning to 22nd Sept. 2007 (Covered by the present monitoring period under verification).

(+) PLUS

- (iii) Sale Value of CERs from 23rd September 2007 to the date of handing over of the Plant (To be covered by the second monitoring period from 23rd September 2007 to till the date of handing over of the Plant)

(+) PLUS

- (iv) Value of arrears due from Aptransco/Concerned Discom from the date of commissioning till the date of handing over of the Plant to be paid as per the Order of Appellate Tribunal For Electricity, New Delhi in Appeal No.1 of 2005, [Which is subject to outcome of/in pursuance of Pending Appeal before the Hon'ble Supreme Court, filed by Aptransco/Discoms/Aperc against the Order of Appellate Tribunal for Electricity, New Delhi in Appeal No.1 of 2005]."

Clause 3.3 of the MoU dated 12.06.2008 detailed the methodology for the transfer of the shares:

"3.3. The Share transfers will be carried out as follows:

- (i) 60% of the Shares amounting to 25,92,000 number of shares held by the Second Party will be transferred to the Purchaser i.e., First Party on the date of handing over of the Plant as per para 3.2 hereinabove.
- (ii) Balance 40% of the Shares amounting to 17,28,000 number of shares held by the Second Party will be transferred:
 - (a) Upon issuing Cheque(s) by the First Party in favour of the shareholders of the Company for the value of consideration as mentioned in Para 2(iii) above. The quantum and value of said CERs will be calculated as on the date of handing over of the plant. However, this cheque shall become payable only on actual issuance of CERs by the EB of UNFCCC; and
 - (b) Upon issuing Cheque(s) by the First Party in favour of the shareholders of the Company for the value of consideration as mentioned in Para 2(iv) above. The value of arrears due from Aptransco/ Concerned Discom will be worked out up to and as on the date of handing over of the plant. However, this cheque shall become payable only after final disposal of pending appeal before the Hon'ble Supreme Court of India as stated in Para 2(iv) above and after release of the said arrears by Aptransco and/or concerned Discom as the case may be.; and
 - (c) Upon Pledge/hypothecation of 40% of shares amounting to

17,28,000 number of shares by the First Party from the 60% shares transferred under item No.(i) above in favour of a person or persons as informed by the representative of the Second Party as an additional security in respect of the value of considerations mentioned in Para 3.3. (ii) and (iii) above. The standard format of a nationalized bank with suitable modifications shall be used for this purpose. The Pledge shall be for a period of three years and upon the lapse of three years and on furnishing of valid Corporate Guarantee and upon giving an undertaking by way of executing agreement to confirm the payment of the amounts detailed in Para 3.3(ii) and (iii) by the First Party to replace the said pledge of shares, the pledge shall stand cancelled.”

Clause 3.4 thereof clarified as under:

“3.4 For removal of doubts, it is clarified that it is mutually agreed by and between the parties that;

(a) in case of actual realization of values mentioned in item No.s 3.3(ii) and (iii) above is more than the value of the Cheques issued, then the said Cheques shall be treated as issued against discharge of existing and legally enforceable debt “in part” and the First Party shall pay the balance amount to the Second Party or to the person or persons as directed by the representative of the Second Party.

(b) In case of actual realization of values mentioned in item No.s 3.3 (ii) and (iii) above is less than the value of the Cheques issued, then the said Cheques issued shall be treated as issued against discharge of existing and legally enforceable debt “in full” and after realization of the said cheques, the excess payment shall be refunded to the First Party by the Second Party or by the persons who encashed the said cheques.

.....”

However, under the Amendment dated 29.11.2008, certain changes were made. The ‘note’ referred to *supra* makes it clear that the sale value of the CERs was to be arrived at as on that date and was to remain fixed irrespective of the actual price fetched by the CERs thereafter. The MoS dated 12.05.2009 mentioned the fact that the parties had entered into the MoU dated 12.06.2008 for sale of the equity in SRPPL held by the shareholders thereof to the respondent company and that the said MoU was subsequently modified on 29.11.2008 as regards certain conditions. It was further stated that

subsequent to the MoU dated 29.11.2008, a lot of correspondence ensued between the parties and on account of the misunderstandings, the MoU could not be concluded in the manner agreed upon in the two MoUs. The settlement further recorded that with the intervention of well-wishers, both the parties had decided to complete the balance transaction on the terms and conditions thereunder. In so far as it is relevant for the purposes of this case, this settlement stated as follows:

“It is mutually agreed by both the parties as under:

a. Out of the total CER's aggregating to 63607 no.s, 53107 numbers of CER's have already been issued and hosted. In this connection it is mutually agreed between both the parties that in respect of CER's issued and hosted, the Second Party is entitled and authorized to encash the amounts so realized and has the right to receive the proceeds of sale of CER's. For the amount to be realized, the First Party has issued an undated blank cheque which will be kept in the custody of Mr.G.V.Pratap Reddy. Once the sale value of these CER's is ascertained, the exact amount for the value of 53107 CER's would be filled up and then only Mr.G.V.Pratap Reddy shall release the cheque in favour of the Second Party.

For the balance of CER's i.e 10500 nos, a cheque for value already agreed upon by the parties in the MOU's referred above, the First Party has issued a cheque in favour of the Second Party and handed over the same to Mr.G.V.Pratap Reddy.

.....

e. The First Party hereby agrees and also undertakes to meet all legal requirements, procedures etc to withdraw all court cases and other litigation against the Second Party and its related companies/parties, as this settlement is full and final.”

In the context of the above stated facts, this Court is of the opinion that the provisions of the Act of 1952 have no application to the present contract. Section 2(1)(c) of the Act of 1952 defines a 'forward contract' to mean a contract for delivery of goods which is not a ready delivery contract. In the present case, the delivery of the CERs by and between the parties was never contemplated at all. All that was agreed to by and between the parties was that part of the sale consideration for transfer of the shareholdings of the petitioners and respondents 2 to 6 to the respondent company would be determined by pegging the same to the 'sale value' of the CERs. This methodology only pertained

to quantification of the sale consideration by adopting the 'sale value' of the CERs and actual sale of the CERs between the parties or to a third party was never intended. Further, the Amendment dated 29.11.2008 adopted a crystallized sale value of the CERs by pegging the same to the date of execution thereof. The actual realizable sale value of the CERs was held to be irrelevant thereafter.

Though the Amendment dated 29.11.2008 required the parties to enter into an agreement simultaneously and no such agreement was ever executed, this Court finds it of no consequence as the Amendment dated 29.11.2008 is admitted by the respondent company and was duly signed by its authorized representative. Further, the MoS dated 12.05.2009 specifically mentioned that for the balance 10,500 CERs, a cheque for the value already agreed upon by the parties had been issued by the respondent company in favour of the petitioners and was handed over to the mediator, G.V.Pratap Reddy. This MoS is also admitted by the respondent company. The reference to the value 'already agreed upon' was obviously in the context of the method of valuation referred to in the Amendment dated 29.11.2008. The respondent company therefore cannot contend at this stage that there was no settled value or mode of valuation for quantifying the sale consideration which was pegged to the sale value of the CERs. The Minutes of the disputed EGM dated 31.12.2008 read to the effect that the respondent company was not in a position to pay the amounts equivalent to 50% of the value of the CERs owing to the fact that it was yet to receive a loan from its bank. The mode of arriving at the value of the CERs in Indian rupees is mentioned therein and was put to use by Sri A.Rammohan Rao, the Vice President of the respondent company, in the statement dated 28.01.2009, which is in his own handwriting. Though this meeting is hotly denied by the respondent company, this Court finds it difficult to accept the same. The only ground urged by the respondent company to discredit the Minutes of this meeting is that the same contains gaps and blanks. However, perusal of the original

Minutes of this meeting, produced by Sri S.Ravi, learned senior counsel, reflects that dates of the two cheques mentioned in para 2 and the clause number of the MoU dated 12.06.2008 in para 11 are the only gaps/blanks therein. Pertinent to note, even in the MoS dated 12.05.2009, which is an admitted document, the cheque number, the date thereof and the date of handing over of the said cheque were left blank in one clause while the name of the bank on which another cheque was drawn was left blank in another clause. Therefore, this Court is not persuaded to accept that the mere presence of such inconsequential blanks in the document discredit its validity and genuineness. All the more so, as the EGM dated 31.12.2008 was attended by the learned counsel on record for the respondent company. He does not deny his signature in the Minutes of the said meeting but states that the understanding was that a General Body Meeting would be held thereafter. However, the nomenclature of the document is that it is the Minutes of the EGM held on 31.12.2008 at 11.00 A.M. at the Registered Office of SRPPL. The Minutes also record that the decision taken at the said meeting by the shareholders present in person or through proxy or representative letters, is irrevocably binding upon all the shareholders and in token thereof, the said Minutes of the EGM were signed by all present. It is therefore not believable at this stage that the signatories to this document were unaware of what they were signing. Further, the notice dated 24.12.2008 of the said EGM is also placed on record.

Once the Minutes are taken to be a true and faithful record of what had transpired at the meeting attended by both the parties with their counsel, the admission of the respondent company therein that it was unable to pay 50% of the amount due towards sale value of the CERs owing to its failure to get a bank loan assumes significance. The irrefutable fact also remains that the petitioners not only handed over the plant, assets and undertaking of SRPPL to the respondent company but also transferred their 100% equity shareholding. In return,

they are yet to be paid the current realizable sale consideration. In the meanwhile, the respondent company is continuing with the operations of SRPPL. In this context, it would be irrelevant whether the respondent company is otherwise commercially solvent. The observations of the Supreme Court in this regard in ***IBA HEALTH (INDIA) PRIVATE LIMITED v. INFO-DRIVE SYSTEMS SDN. BHD.***^[1]

are relevant:

“24. The appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company’s insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company’s liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1) (a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

25. An examination of the company’s solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company’s liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterized as a stand alone ground.”

Therefore, unless the respondent company is able to establish that there is a *bonafide* dispute with regard to the petitioners’ claim, its failure to pay its dues to the petitioners would have to be viewed

seriously by this Court and its commercial solvency would not be a stand alone ground to be taken into consideration. The certificate date 30.11.2009 issued by LNP & Co., Chartered Accountants, certifying the worth of the respondent company is therefore of no consequence. Though the respondent company also endeavoured to raise the issue of liabilities which are allegedly due and payable by SRPPL to M/s.Thermax Limited, the MoU dated 12.06.2008 records the statement of the petitioners and respondents 2 to 6 that there were no liabilities except those of IREDA & Union Bank of India, and that any other liabilities would be borne by them alone. Further, there is no linking up of this clause with the clause relating to payment of the sale consideration by the respondent company. The respondent company therefore cannot attempt to build up a case that there were other liabilities payable by SRPPL which constrained it to withhold the sale consideration to the petitioners. Such was not the agreement between the parties.

On the above analysis, this Court finds that the respondent company failed to demonstrate a *bonafide* dispute and its defence in this regard is mere moonshine.

The Company Petition is accordingly admitted.

The advertisement of the petition shall be carried out in the Vijayawada Editions of New Indian Express (English daily) and Andhra Bhoomi (Telugu daily) as required by Rule 99 of the Companies (Court) Rules, 1959 in Form-48.

For proof of publication, post on 19.04.2013.

SANJAY KUMAR, J.

19th MARCH, 2013.
VGSR/PGS

[\[1\]](#) (2010) 10 SCC 553