

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPELLATE JURISDICTION

Company Appeal (AT) 79 of 2017

(Arising out of order dated 17th January, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in CP No. 39/Mah/2016)

IN THE MATTER OF:

Mr. Vyomesh M. Shah & Anr. ...Appellants

v.

Vinca Developer Pvt. Limited & Anr. ...Respondents

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the Appellants against order dated 17th January 2017 passed by National Company Law Tribunal (hereinafter referred to as Tribunal) Mumbai Bench, Mumbai in Company Petition No. 39/Mah/2016 whereby and whereunder the application preferred by Appellants under Section 241, 242, 244 and 246 of the Companies Act, 2013 has been dismissed with observation that the petition is vexatious and frivolous and a cost of Rs.50,000 has been imposed.

2. The relevant facts for determination of case is that the Respondents filed the application under Section 241 and 242 of the Companies Act, 2013 alleging 'oppression and mismanagement' by the Appellants:-

3. Ld. Tribunal noticed the case of the Appellants, as referred to in para 2 of the impugned order and quoted below:-

" The entire case of the Petitioners is rest on an argument that the investment structure conceived by FMO (foreign investor invested Rs.418 crores in the year 2009) for bringing foreign investment into 'Amazia' and Rubix (both are 100% subsidiaries of Vinca) routing through Vinca is in breach of FEMA, therefore the rights accrued to FMO on Rs.418 crores invested by Vinca by it shall not be exercised and all the rights vested with FMO shall be set aside by this Bench holding FMO exercising its rights for realisation of its money as oppressive conduct against the petitioners so that these petitioners need not comply with the Hon'ble Supreme Court Order dated 15th November, 2016."

4. Keeping into consideration all facts as alleged, including the subscription dated 20th November 2009 with FMO (a foreign company), which invested Rs.418 crores by allotment of fully paid up transferable, non-marketable, unsecured, fully and mandatorily convertible INR denominated debentures of 'Vinca' to 2nd Respondent into two tranches and by allotment of 1244 class 'A' equity shares of 'Vinca' to 2nd Respondent with 10% of the voting

rights of the entire share capital of the company as submitted by 'Vinca' came to a conclusion that the Appellants cannot impose obligation upon nominee directors of FMO to exercise their affirmative vote for conversion Optionally Partially Convertible Debentures (hereinafter referred to as OPCDs) into shareholding. The Tribunal held that no case is made out under Section 241 of the Companies Act, 2013.

5. The brief facts of the case as highlighted by Appellant is as follows:

The 2nd Respondent (FMO) on the basis of a Subscription Agreement invested Rs.418 crores in Vinca partly by way of Compulsorily Convertible Debentures ("CCDs") and partly in equity. The equity comprised 10% of the voting rights. The CCDs were to be converted into equity after 60 months, giving FMO 99% voting rights in Vinca.

6. The entire amount of Rs.418 crores was required to be and was immediately invested by 'Vinca' in Optionally and Partially Convertible Debentures ("OPCDs") in "Amazia" and Rubix which

are both 100% subsidiaries of "Vinca" on the basis of Clause 2.3 and Clause 6.31 of the Subscription Agreement.

7. The Articles of Association ("AoA") of 'Vinca' have been amended and 3rd and 4th Respondents are the nominee directors of FMO in 'Vinca'. Article 2(uu) of AoA provides for "Reserved Matters" which includes all matters pertaining to investment by FMO in 'Vinca' and investments of 'Vinca' in "Amazia" and 'Rubix' and all matters pertaining to the "two permitted projects" of the business of 'Vinca'.

8. Article 2(qq) of AoA of 'Vinca' defines the "permitted projects" to be the development of "Ackruti Trade Centre" by "Amazia" and the slum development project by 'Rubix'. Article 12 of AoA of Vinca defines the business of 'Vinca' to be only these "permitted projects". Article 60 of AoA of 'Vinca' stipulates that in case of "Reserved Matters" the nominee directors of FMO can only vote in Board Meetings and Articles 62 and 63 of AoA of 'Vinca' require all decisions in respect of "Reserved Matters" to be taken in Board's Meeting and decision on a "Reserved Matter" not taken in accordance with the procedure set out therein.

9. 3rd Respondent is also a nominee director of "Amazia" and 'Rubix'. The 10th Respondent is the Debenture Trustee in respect

of OPCDs issued by "Amazia" and 'Rubix'. Under the OPCDs the coupon rate is 14.5% per annum and in the event of default of payment of the same, an option is provided to 'Vinca' to either convert the debentures into further shares in "Amazia" and 'Rubix' or to call back the entire investment and in default of the entire investment being returned 'Vinca' could invoke the corporate guarantee for the entire amount against 5th Respondent. The OPCDs have also been secured by mortgage of all assets of "Amazia" and 'Rubix' which are real estate companies.

10. Ld. Counsel for the Appellants submitted that the 3rd and 4th Respondents have acted in a manner oppressive to Appellants and in a manner prejudicial to the interest of 'Vinca'. They are directors of 'Vinca' and 3rd Respondent as a director of 'Amazia' and 'Rubix' have a fiduciary duty to 'Vinca' whose only business carried on through its two 100% subsidiaries is not prejudiced. They were aware that 'Amazia' and 'Rubix' at present are not in a position to serve the debenture on 'Amazia' and 'Rubix' failing to serve the debentures, 3rd and 4th Respondents could call up the monies that are due under the same and thereafter proceed against its securities for recovery or invoke the corporate

guarantee against 5th Respondent or in the alternative convert the OPCDs of 'Amazia' and 'Rubix' into equity.

11. It was contended that 3rd and 4th Respondents by not converting the OPCDs into equity or granting extension of time to 'Amazia' and 'Rubix' to serve the debentures and instead seeking to enforce the security and invoke the guarantee have in effect acted against the interest of 'Vinca' as this step will result in closing of the business of 'Amazia' and 'Rubix' and thereby destroy the only business of 'Vinca'.

12. This conduct on the part of 'Vinca' at the instance of 3rd and 4th Respondents is further compounded by the fact that at the instance of 3rd and 4th Respondents permission has been withheld by the debenture trustees for sale/lease/license of premises belonging to 'Amazia'.

13. According to the Ld. Counsel, on the one hand, at the instance of 3rd and 4th Respondents, 'Amazia' has not been permitted to sell/lease/license assets and thereby have access to funds, and on the other hand at the instance of 3rd 4th and 10th Respondents have called up the entire amount due under the debentures from 'Amazia' and 'Rubix' and sought to invoke the

Corporate Guarantee against 5th Respondent which on payment would result in the guarantor i.e. 5th Respondent to proceed against both 'Amazia' and 'Rubix' and thereby kill the only two businesses of 'Vinca'.

14. It was further submitted that preventing 'Vinca' carrying on its "real estate" business through 'Amazia' and 'Rubix' on the one hand by refusing permission to deal with their assets and at the same time insisting on the coupon rate of the OPCDs to be paid and insisting on recovery of entire investment of Rs.418 crores shows that FMO wanted to stop the business of 'Vinca'. In doing so 2nd, 3rd, 4th and 10th Respondents have acted prejudicially to the interest of 'Vinca'.

15. In fact, the specific grievance of the appellants is that though AoA of 'Vinca' required all decisions pertaining to "Reserved Matters" to be taken at Board's Meeting, such decisions were not being taken at the Board's Meeting and instead taken through unilateral directions issued by 3rd and 4th Respondents to the Debenture Trustee viz. 10th Respondent. In doing so, the appellants have been denied the role to participate through discussions in the decision making and decisions which are void

under Article 63 of AoA of 'Vinca' are being implemented. These decisions being contrary to the AoA of 'Vinca' are oppressive.

16. According to Appellants, the dismissal of the Company Petition on the ground that the same was vexatious and frivolous or in abuse of process could not have been done at the threshold and could have only been done after a trial, the basis of such findings are non-existent.

17. Further according to Appellants, the findings of Tribunal that if a party acts in accordance with Articles the same cannot be oppressive is also incorrect in law, as if such action is not for the best interest of the company or is oppressive the same can be challenged. Ld. Tribunal failed to appreciate the specific case of the Appellants is that Articles were being abused to kill the business of 'Vinca' carried on through its two 100% subsidiaries 'Amazia' and 'Rubix' and that too by taking decisions which were not in compliance with Articles 60 and 62 of the AoA of 'Vinca' and thereby null and void.

18. It was also submitted that the finding of Ld. Tribunal that the investment structure was not violative of FEMA is perverse and contrary to records as the Hon'ble Apex Court in its order has

directed the suit filed by 10th Respondent against 5th Respondent to be decided expeditiously without being influenced by observations of the Hon'ble Supreme Court.

19. Further according to Appellants, as funds have been used for real estate, there is clear violation of Regulations 3 to 6 of FEMA (Borrowing or Lending in Foreign Exchange) Regulations, 2000, particularly and Clause 4 of Schedule to the same and Circular 60 dated 21.05.2007 of RBI which expressly prohibits borrowings in Real Estate. The fact that the Appellants were party to the Subscription Agreement and to the amendments made to the AoA of 'Vinca' is of no consequence as there can be no estoppel against statute. Reliance was placed on decisions of Hon'ble Supreme Court and other Courts but it is not required to be referred, in view of finding as recorded below.

20. The stand of the Respondents, as highlighted are as follows.

According to the Respondents, overview of the broad transaction structure agreed to between the parties and recorded Binding Agreement have not been correctly reflected by the Appellants.

21. It was submitted that by way of a Share Subscription Agreement dated 20th November 2009, FMO invested Rs. 418

crores into 'Vinca' thus holding 10% equity shareholding in 'Vinca' along with 3 CCDs. Hubtown Ltd. - 5th Respondent, was a party to the said Agreement (signed by Appellant No. 1 on behalf of Hubtown) which records several representations, warranties, indemnities and covenants of Hubtown Ltd., given to the Respondents in relation to this Respondent's investment into 'Vinca'. Hubtown is a company promoted and controlled by the Appellants and the Appellants are directors of Hubtown. In fact, Appellant No. 1 is the Managing Director of Hubtown.

The Articles of Association of 'Vinca' were accordingly amended in view of the said investment.

22. Out of the said invested amount of Rs. 418 crores, the following amounts were advanced by 'Vinca' to its wholly owned subsidiaries 'Amazia' and 'Rubix'.

(i) Rs. 150,00,00,000/- to 'Amazia' and

(ii) Rs. 128,50,00,000/- to 'Rubix'.

Pursuant to the same, Optionally Partially Convertible Debentures (OPCDs) were issued by 'Amazia' and 'Rubix' to 'Vinca'. The said transactions are recorded in the respective Debenture Trust Deeds both dated 1st December 2009 ITSL was

appointed as debenture trustee of 'Vinca' under the said Debenture Trust Deeds. Under the said agreements, 'Amazia' and 'Rubix' were *inter alia* required to make regular payments to 'Vinca' including interest payments at regular intervals as more particularly recorded therein. In order to ensure due and punctual payment by 'Amazia' and 'Rubix' to 'Vinca' of all dues under the aforementioned Debenture Trust Deeds, certain security documents were executed including the following :-

- (a) Deed of Corporate Guarantee dated 9th December 2009 executed by Hubtown Ltd., as guarantor in favour of ITSL (as debenture trustee for the benefit of 'Vinca') and
- (b) Indenture of Mortgage executed by 'Amazia' in respect of 11 (eleven) ATC Units in the building Akcruti Trade Center and also in respect of the Trust and Retention Account which would hold all the proceeds of lease rents received by 'Amazia' from the ATC Units.

23. According to Respondents, the Appellants, by this proceeding, are seeking to overturn the promises made by way of a solemn contract at the time that this Respondent was induced into investing a sum of Rs. 418 crores in companies owned and

controlled by the Appellants (including 'Vinca', 'Amazia' and 'Rubix') and guaranteed by Hubtown Ltd., whose control also lies in the hands of the Appellants. It is patently dishonest and too late for the Appellants to contend now that the contractual terms should be held to be oppressive when companies controlled by them (i.e. Hubtown Ltd.) have been called upon to deposit/repay the said sums which were received by them.

24. It was also submitted that the Appellants have suppressed several material documents which alone is sufficient to deny grant of any reliefs. The conduct of the Appellants displays a complete lack of probity, an observation made even by the Hon'ble Supreme Court of India in its judgment dated 15th November 2016.

25. It was also submitted that the direction issued by debenture trustees (ITSL -10th Respondent) without convening the Board's meeting cannot be termed as an act of 'oppression'. Under the aforesaid Debenture Trust Deeds, it has been clearly and unequivocally recorded that ITSL (debenture trustee) is to act on the sole instructions of the Nominee Directors.

Referring to the impugned judgement, Ld. Counsel submitted all related matters have been noticed and decided by the Tribunal.

26. We have noticed the rival contentions and perused the record.

27. The Appellants have referred to Article 60(d) and 63 of the AoA of 'Vinca' to contend that the said provisions require the Nominee Directors to obtain consent of the Board of Directors before taking any decision on matters contemplated in the said provisions of the AoA. Pertinently, as is clearly evident from the Appellants' pleadings in the Company Petition, the acts of the Nominee Directors which the Appellants are aggrieved by are those by which the Nominee Directors have instructed ITSL to take actions to recall amounts from 'Amazia' and 'Rubix' on account of their defaults towards payment obligations under the terms of the Debenture Trust Deeds as well as actions taken towards enforcement of securities given to 'Vinca' under the transaction including by initiation of legal proceedings in respect thereof against Hubtown, 'Amazia', etc. The said actions complained of are clearly matters relating to OPCD Documents.

28. In this background, it is pertinent to examine the wordings used in Article 60(d) of the AoA which are clear and unequivocal in stating that the ACL Directors (which includes the Appellants herein) are deemed to have a conflict of interest *inter alia* on all matters relating to OPCD Documents and that the Nominee Directors shall on such matters constitute a quorum and shall have the sole right make any decision, take any action, etc. in respect of the said matters.

29. The Tribunal has correctly dealt with the said contentions in paragraph 23 of the Impugned Order in which paragraph it has been held that it is clear and unambiguous that the Nominee Directors have been given full liberty to give instructions to ITSL directly and therefore the Appellants' contention that the instructions should be routed through the Board of Directors is untenable on the fulcrum of oppression and mismanagement.

30. The Appellants have attempted to cause confusion between 'Reserved Matters' as per Article 63 of the AoA and 'matters wherein the Appellants have a conflict of interest' as per Article 60(d). The contentions raised by the Appellants which pertain to alleged unauthorized instructions given by the Nominee Directors

to ITSL relate to matters concerning OPCD documents and thus fall within the ambit of Article 60(d) and not under Article 63.

31. In fact, money is recoverable by 'Vinca' pursuant to legal proceeding initiated by ITSL on behalf of 'Vinca'. It was pointed out by the Ld. Counsel for the Respondents that the present proceedings are fundamentally premised on the contention that the subject transaction is illegal and/or a colorable device to circumvent FEMA in order that FMO can secure for itself an assured return which it can repatriate out of the country. On this basis, the Appellants have contended that the actions of ITSL including of taking out legal proceedings for the enforcement of security given by or on behalf of 'Amazia' and 'Rubix' under the subject transaction are actually for the benefit of FMO.

32. In this context, it is pertinent to note that in Summons for Judgment proceedings in the Summary Suit filed by ITSL against Hubtown before the Hon'ble Bombay High Court to enforce its rights under the Corporate Guarantee, the defence raised by Hubtown Ltd., i.e. Hubtown's contentions in relation to the subject transaction are identical to the Appellants' contentions in the present proceedings as set out above on which contentions the present proceedings are premised.

33. By a Judgment dated 15th November 2016 passed in the aforementioned Summons for Judgment proceedings, the Hon'ble Supreme Court *inter alia* held that (a) *Prima facie*, the subject transaction is not in violation of FEMA Regulations; (b) Since FMO becomes a 99% shareholder of 'Vinca' after the requisite time period has elapsed, FMO may at that stage utilize the funds received pursuant to the overall structure agreements in India and therefore, *prima facie*, there is no breach of FEMA Regulations; (c) At the stage that FMO wants to repatriate funds, RBI permission would be necessary. If RBI permission is not granted, then again there would be no infraction of FEMA Regulations; (d) The transaction of the purchase of shares and CCDs of 'Vinca' by this Respondent is not alleged to be violative of FEMA Regulations; (e) As regards the defences raised by Hubtown Ltd., there is a real doubt about Hubtown's good faith and the genuineness of such a triable issue. Thus the defences raised by Hubtown Ltd. are plausible but improbable.

34. From the aforementioned findings of the Hon'ble Supreme Court, it is clear that the Hon'ble Supreme Court recognizes that the transaction is not violative of FEMA and that the funds realized by 'Vinca' upon enforcement of the security offered by

and on behalf of 'Amazia' and 'Rubix' would remain with 'Vinca' and is thus for the benefit of 'Vinca' and not FMO. Therefore, by way of the aforementioned relief sought in the Company Petition, it appears that the Appellants are attempting to obstruct receipt of funds by 'Vinca' upon enforcement and realization of its securities under the subject transaction and acting in a manner prejudicial to the interests of 'Vinca'.

35. Ld. Counsel for the Respondents pointed out that in so far as affairs of 'Vinca' is concerned, the allegation of Appellants they are being conducted in a manner prejudicial to the public interest were not highlighted by the Appellants before the Tribunal. No pleading was made in the Company petition preferred before the Tribunal. Once the Hon'ble Supreme Court held that such transaction is not illegal and causes no infraction of FEMA laws and if and when FMO seeks to repatriate the amounts outside the country, RBI permission would be required without which the repatriation would not be possible. The question of any infraction of FEMA laws in such circumstances does not arise and no public interest being prejudiced.

36. We find no merit in this appeal. It is accordingly dismissed.

However, in the facts and circumstances there shall be no cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

27th July, 2017

RC

Not