

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

MA No. 552/2018
in
C.P. No: 1151/241-244/NCLT/MB/MAH/2018

Dynatron Services Pvt. Ltd.
.... Petitioner

V/s.
Yeoman Marine Services Pvt Ltd
.... Respondent No. 1

Dhananjay Mishra
.... Respondent No. 2
Seema Dhananjay Mishra
.... Respondent No. 3

MA No. 552/2018
Dhananjay Mishra
.... Applicant

V/s.
Dynatron Services Pvt. Ltd.
.... Respondent

Order Delivered on: 31.08.2018

Coram:

Hon'ble Bhaskara Pantula Mohan, Member (J)

Hon'ble V. Nallasenapathy, Member (T)

For the Applicant: Adv. Saumya Brajmohan a/w Adv. Ankit
Kharote i/b M/s. Solomon & Co.

For the Respondents: Adv. Hitesh Mutha a/w Adv. Sumit
Raghani i/b Agrud Partners.

Per. Bhaskara Pantula Mohan, Member (J)

ORDER

1. On 11.04.2018 the Petitioner filed the Company petition u/s 241-244 r/w section 246 of Companies Act, 2013 (shortly the "Act") against the Respondents complaining oppression and mismanagement.
2. While the Company Petition is pending, Respondent 2 filed this instant Application u/s 8 of the Arbitration and Conciliation Act 1996. The answering Respondent without filing reply, chose to argue the matter and has filed written submissions.

3. This Bench heard and considered the arguments of both the sides.
4. The followings are the contentions of the Applicant for referring the disputes between the parties to Arbitration u/s 8 of the Arbitration and Conciliation Act, 1996.
 - a) The disputes raised by the Petitioner in company petition arises from first Memorandum of Understanding (shortly "MOU") dated 15.04.2015 and second MOU dated 21.08.2015.
 - b) The Petitioner alleged in the company petition that the Applicant has neither transferred the assets of M/s Yeoman Marine Services (shortly "YMS"), owned by the Applicant, to the newly formed R1 company as provided in the second MOU nor conducting the business of R1 as provided in the first MOU but has only allotted 51% of equity shares in R1 company to himself and his wife R3 and assumed complete management control to the exclusion and detriment of the Petitioner.
 - c) The disputes raised by the petitioner are connected with first MOU and second MOU and are to be finally settled under provisions of Arbitration and Conciliation Act 1996, by a sole arbitrator to be appointed under arbitration agreement as contained in clause 17.2 and 5.2 of first and second MOU's respectively.
 - d) The Petitioner filed petition u/s 9 of Arbitration and Conciliation Act 1996 before the Hon'ble High Court of Delhi in OMP (I) No. 4/2018 against R1 and the Applicant but withdrawn the same on 09.03.2018 with the liberty to file the same before the court of competent jurisdiction.
 - e) On 03.02.2018 the Applicant filed the Petition u/s 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Mumbai being Commercial Arbitration Application No. 138/2018 praying for appointment of sole arbitrator to decide all claims, disputes and differences between the Petitioner and the Applicant. The Hon'ble Bombay High Court has appointed Sole Arbitrator on the consent of both the parties.
 - f) On 07.06.2018 the Petitioner filed an Application u/s 17 of the Arbitration and Conciliation Act, 1996 before the sole Arbitrator inter alia praying

that the Applicant be directed to appoint two nominees of the Petitioners as directors on the board of R1, be restrained from selling, transferring or alienating any of the assets of YMS and grant inspection of the books and papers of R1.

- g) The applicant submits that the company petition is merely a dressed up petition, in the guise of oppression and mismanagement, which seeks to oust the arbitration clause contained in the MOU's. It is further submitted that the petition is an abuse of process of law, vexatious and not bona-fide and there are no reliefs that are not arbitrable or cannot be granted by the sole arbitrator.
5. Before going into the merits of the application u/s 8 of the Arbitration and Conciliation Act 1996, the petitioner's case under section 241-242 of the Companies Act, 2013 is detailed as below:
- a) The petitioner for the last 30 years engaged in the business of repairs, maintenance and after sales support for diesel engines, gear transmission, electronic control and monitoring systems and also supplies spare parts for MTU engines, ZF gear boxes etc. R2, the sole proprietor of M/s. Yeoman Marine Services (YMS) who used to do sub-contracting work for the petitioner proposed to join the petitioner by incorporating a new company under the name of Yeoman Marine Services Pvt. Ltd. which will take over R2's proprietorship business of YMS and will also contribute its assets as part of his contribution in return for retaining 51% shareholding in the newly formed company and the petitioner will have 49% shareholding for which the Petitioner required to invest Rs. 10 crores. Accordingly, a MOU dated 15.04.2015 (First MOU) was executed between the parties which was subsequently modified by the another Memorandum of Understanding dated 21.08.2015 (Second MOU). As per the Second MOU in order to run the newly formed R1 company the Board of Directors shall comprise of 4 members, 2 from each side, the accounting and the financial functions of R1 shall be jointly managed and controlled by both the parties and the petitioner shall have equal access to the accounts of R1.
- b) Since the respondents were yet to transfer the assets of YMS to R1, the officials of the petitioner had discussion with R2 for taking steps for implementing the MOU but in vein. The petitioners sought details of

various expenses and also regarding Rs.1.5 crores paid to R2 but the respondent failed to respond.

- c) When the petitioner recommended two nominees from their side namely Mr. Krishnamurthy and Mr. Awadesh Mishra during June, 2017, when two of their nominee directors resigned from R1 due to personal reasons, R2 refused to appoint them as nominee directors of the petitioner, thereby taken entire control of R1 with R2 and R3 (wife of R2) as directors of R1, which leads to not only oppression against the petitioner but also mismanagement of R1 company.
- d) When R2 denied access to the Petitioner to the Accounts of R1 and usurped the profitable 'MTU Germany' business which belong to the Petitioner into R2's owned proprietary concern thereby running the Petitioner's business and the Petitioner was constrained to issue notice to R2 on 17.05.2017 for breach of Memorandum of understanding dated 21.08.2015.
- e) R1 has not given any notice of board meeting to the erstwhile directors of the Petitioner except for the board meeting held on 28.09.2016 and 03.03.2017. Further, no notice of AGM and EGM were sent to the Petitioners. When EGM was held on 17.10.2015 for alteration of object clause and when the EGM was held on 02.11.2015 for increase in authorised share capital, no notice was issued to the Petitioner. Likewise, no notices were issued to the Petitioners for the AGMs held on 30.09.2016 and 20.09.2017.
- f) The Petitioner has not received any copy of the Annual Accounts, Director's Report or Financial Statements of R1 and the Financial Statements were approved by R2 and his wife R3 as Directors, without the participation or consent of the Petitioners who hold 49% of shares in R1 company and these acts of the Respondents are contrary and in complete breach of MOUs wherein the accounting and financial functions of R1 has to be jointly managed and controlled by both the parties.
- g) There is a phenomenal rise in the salary taken by R2 without any justification and no break up details were provided for administrative expenses to the tune of more than Rs.2 Crore. The Petitioner invested substantial amount to the extent of Rs.6 crores but R2 has diverted the funds invested by the Petitioner for formation of R1 company.

h) The Petitioner sought the following reliefs:

- i. Pass an appropriate order u/s. 241, 242, 243, 244 and 246 of the Companies Act, 2013, to bring an end to the acts of oppression and mismanagement perpetrated by the Respondent;
- ii. Direct that the R1 would be jointly managed and controlled by both the Petitioner and R2 and all major decisions relating to the Company, its operations, business plans, further financing, capital induction, bank operations, investments, disinvestments, expansion, budgets, senior level hiring had to be approved by the board in terms of the Companies Act, 2013;
- iii. Direct R1 would function with two nominee directors of the Petitioner on the board of directors at all times.
- iv. Direct the respondent 2 to transfer the assets and business of Yeoman Marine Services to R1 as agreed under the MOU dated 21.08.2015 and as mentioned in the Memorandum of Association of the company-
- v. to pass an order thereby framing a scheme for the proper management and administration of R1 Company on such terms and conditions as this Hon'ble Tribunal deems fit and proper;
- vi. Pass an order directing the Respondents to disclose all transactions carried out on behalf of R1 Company with entities relating to R2 and in case of any losses caused to R1 Company R2 and R3 be directed to make good such losses caused to R1 Company;
- vii. Pass an order to carry out an independent audit in respect of the dealings and transactions of R2 and R3 on behalf of R1 Company and an independent auditor be appointed by this Hon'ble Tribunal to carry out such investigation and thereafter appropriate orders be passed under section 242 and 246 and/or any other provisions of the Companies Act, 2013.

6. We have carefully perused pleadings and heard both the parties at length. In so far as this Application is concerned the following issues fall for the consideration:

- i. Whether the Petition is barred under law in view of the Application filed u/s 17 of Arbitration & Conciliation Act before the Sole Arbitrator and the Petitioner voluntarily submitting himself to the jurisdiction of Arbitral Tribunal?

- ii. Whether the acts complained of in the Petition can be adjudicated by the Sole Arbitrator while adjudicating issues before him?
 - iii. Whether the Petition is dressed up to suit the requirements u/s 241 and 242 of the Companies Act, 2013?
7. On a very plain reading of this Application and the related documents, it is clear that the grievance of the Petitioner in the main Petition and some of the prayers in the Application under Section 17 of the Arbitration and Conciliation Act, 1996 before the sole Arbitrator are one and same. However, the Petitioner, had voluntarily dropped four prayers i.e. (e), (f), (g) and (h) from agitating in the application under section 17. The rest of the prayers are purely a matter arising out of the MOU's entered into between the parties. But in so far as the pleadings in the petition, the prayers made therein deal with the acts of oppression and mismanagement undoubtedly. To say a few things, the Petitioner alleges non-service of notice of meetings, financial discrepancies, non-appointment of Directors even though the Petitioner holds 49% of the shares in the Company and the rights of Shareholders and their entitlement in the Company. These acts of non-service of notice of meetings, financial discrepancies and non-appointment of Directors etc. are the matters squarely covered under the Companies Act with an exclusive jurisdiction vested with National Company Law Tribunal (NCLT). Apart from that, the NCLT is vested with powers to pass order u/s. 242 to grant any kind of relief on the basis of equity and law and also vested with the power to enforce its orders which no other Tribunal or Court is entitled to. So, the Application filed u/s.17 of the Arbitration and Conciliation Act before the sole Arbitrator is with respect to an Arbitration proceeding wherein the Respondent No. 2 is the Claimant and the Petitioner herein is the Respondent. The contentions in the said proceedings before the sole Arbitrator are purely arising out of contractual obligations between the parties therein and the same can be adjudicated by the sole Arbitrator. Further, it is important to note that the Petitioner herein who is the Respondent in the said Arbitration proceedings had dropped certain prayers from the Application filed u/s. 17 of the Arbitration Act, which come under the purview of Section 241-242 of the Companies Act and the same are very much agitated in the main Company Petition. Also it doesn't amount to splitting of cause of action or forum shopping and furthermore the tribunal has expansive and plenary powers to order and issue directions with respect to the management and operations of the company that an arbitrator would not have. The applicant herein who is the respondent No. 2 in the company petition had relied upon the orders passed by the National Company Law Tribunal Principal Bench, in the case of

Sh. Ramnish Kumar Sharma Versus M/s. D. R. Johns Lab Pvt. Ltd. & Ors. and National Company Law Tribunal, Guwahati Bench in the case of *Binod Kr Bawri & Ors. Versus Calcom Cement Ltd. & Ors.* wherein it was held that the matters filed under section 397/398 of the Companies Act, be referred to arbitration in accordance with the agreement entered therein. The said orders deal with a situation where the pleading and the prayers made in the petition relate to a contractual obligation between the parties which are within the purview of Arbitration as per the agreement between the parties. The respondent No. 2 had also relied upon the judgement of the Hon'ble High Court, Bombay in *Rakesh Malhotra Versus Rajinder Kumar Malhotra & Ors.* (2015) 192 Comp Cas 516 to point out that when a malafide, vexatious, oppressive or dressed up petition is brought only to evade an arbitration clause, then in such circumstances the NCLT has the power to dismiss the petition and refer the parties to arbitration. The Applicant also relied on Company Law Board's decision in *Pinaki Das Gupta v. Maadhyam Advertising P. Ltd.*, [2003] 114 Comp Cas 346 (CLB) and *E- Logistics P. Ltd. v. Financial Technologies (India) Ltd.*, [2007] 139 Comp Cas 311 (CLB) to say that when all the issues were grievances raised in the Company Petition are covered by agreements, the disputes cannot be adjudicated by CLB and shall be referred to arbitration under section 8 of the Arbitration and Conciliation Act, 1996. Since the grievance in this case such as non- appointment of directors, non-service of notice of meeting, etc are not arising out of agreement, the cases cited does not apply to the facts of the case on hand.

So, from the above it can be established that the contentions with which the application Under section 17 of the Arbitration and Conciliation Act is filed and the contentions raised in the main company petition are separate. Hence the application filed under section 17 of the Arbitration and Conciliation Act does not preclude the petitioner herein to agitate their grievance of oppression and mismanagement in the petition. Apart from that the acts complained of, as said above, cannot be adjudicated by the sole arbitrator since the powers available to this Tribunal cannot be exercised by him and the reliefs as sought in the petition are not arising out of any contractual obligation. Therefore, we hold that the issue no 1 and 2 in favour of the petitioners.

8. In so far as the issue no. 3 is concerned, the facts stated in the petition relate to financial discrepancies, non-service of notice of EGM/AGM and appointment of directors etc. The said contentions are such that the NCLT alone can hear and decide the said issues. Hence, the contention of the applicant that the main company petition is dressed up to suit the requirements under section

240 and 241 of the Companies' Act is not acceptable. Therefore, we hold the issue no. 3 in favour of the petitioner in the main company petition.

9. Therefore, for all the aforesaid reasons we hold that the company petition no. 1151/18 on our file is absolutely maintainable. This Miscellaneous Application No. 552 of 2018 is dismissed. The respondent is directed to file a reply to the main company petition within 15 days and rejoinder, if any may be filed within 15 days thereafter. List the matter for final hearing on 4th October, 2018.

SD/-

V. Nallasenapthy
Member (T)

SD/-

Bhaskara Pantula Mohan
Member (J)