

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, CHENNAI**

**IA No. 193 of 2018**

*(U/s 8 of the Arbitration and Conciliation Act, 1996)*

**in CP No. 14/2018**

*(U/s 241 & 242 of Companies Act, 2013)*

*In the matter between*

M/s KIMS Bellrose Institute  
of Medical Sciences Private Limited  
... Applicant/Respondent No.1

*and*

1. Jubey M. Devasia
2. Bevis Thomas ... Respondents/Petitioners
3. Najeeb Ellias Mohammed
4. Govindan Vijayaraghavan
5. Zuhara Padiyath Mohiddin
6. Muhammad Sali Kunju
7. Jose Thomas ... Respondents/Respondents

**Order delivered on: 05.09.2018**

**Coram: K. Anantha Padmanabha Swamy, Member (Judicial)  
S. Vijayaraghavan, Member (Technical)**

*For applicants : Dr. K.S. Ravichandran, PCS, Ms. S. Manjula Devi, Advocate  
& Ms. M.K. Preetha, Advocate for M/s KSR & Co.*

*For respondents : Mr.S. Mahesh Kumar, Advocate*

**ORDER**

The application under consideration is filed under section 8 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) by M/s. KIMS Bellrose Institute of Medical Sciences Private

Limited, the 1<sup>st</sup> Respondent Company in the main petition, to refer the dispute between the parties to the arbitration.

2. The petitioners, the R1 and R2 in the present application, have filed a petition under section 241 and 242 of the Companies Act, 2013 (the Act) alleging various acts of oppression and mismanagement in the affairs of the applicant Company and sought for the following reliefs:

- a. To appoint an independent auditor to audit the accounts of the Company from the date of incorporation till date;
- b. To direct the Respondent No. 1 to convene and hold a board meeting to consider the passing of the accounts so audited.
- c. To grant injunction restraining the Respondent No. 2 from making transfer of funds except with the consent of the Petitioners and other board members;
- d. To restore the rightful position and the authority of the Petitioners to direct and control the operations of the Respondent No. 1 company;
- e. To investigate and assess the sums of money of Respondent No. 1 Company misappropriated by any person and direct person guilty of such

misappropriation to restore the funds to the Respondent No. 1 company

- f. To direct the 1<sup>st</sup> Respondent Company to pay the salary of the petitioners promptly each month.

3. Immediately after filing the petition, the Applicant/1<sup>st</sup> Respondent Company has filed this present application under section 8 of the Arbitration Act and prayed to refer the matter to Arbitration on the following grounds:

- The subject matter of the Company petition is covered by the Arbitration clause contained in the Share Purchase Agreement (SPA) and Share Subscription and Shareholder's Agreement (SSSA) dated 20.04.2013 and the allegations in the company petition derives from the said agreement.
- The SSSA is duly incorporated in the Articles of Association (AOA).
- The clause 6 of the SPA and clause 26 of SSSA contain a dispute resolution clause.
- The entire company petition is based on the rights and obligations arising under SPA and SSSA dated 20.04.2013. Merely by adding a few directors as respondents who are obviously bound by an agreement to which the R1 and R2, the petitioners in the main petition, are parties when

they constitute the board of the applicant Company, it cannot be said that the scope of the case falls outside the arbitration. The R1 and R2 herein are directors and they are parties to the Arbitration Agreement.

- The Respondent No. 2 and other Respondents in main petition are none other than the directors nominated by the Investor as per clause 10.2 of the SSSA. What binds the Company will bind its board of directors and shareholders.
- Even according to the petition, the applicant Company has issued notices for the meetings and all other aspects have been duly complied with as required by the provisions of the Act and the designation of the 1<sup>st</sup> Respondent herein has been changed with his consent and presence.
- Clause 9 of SSSA and Clause 7.1 of amended AOA deal with use of money, borrowings and funding and clause 10.17 and clause 8.18 of the amended AOA deal with decision of the board. Besides the 1<sup>st</sup> and 2<sup>nd</sup> respondent herein, the petitioners in the main CP, also have some right under the agreement.
- The R1 and R2, (the petitioners in main CP) made allegations that the R2 in the main petition had purchased some machinery and they were not utilized for the applicant company. As per clause

10.20 of the SSSA the R1 and R2 herein have given an undertaking to support and assist the investor.

- The R1 and R2, the main petitioners, are continuing as directors of the company and they are party to all the board meetings and general meetings and being party to all the decisions taken in the said meetings they cannot make wild allegations.
- Every year the board approves the accounts and the same are adopted in the general meetings. The R1 and R2, the petitioners in the main petition, are parties to all the decision taken in the board or general meetings and now they cannot make wild allegations.
- The R1 and R2 made allegations that their shareholding is reducing every year as the R3 herein invested more in the company and it is to be noted that the R1 and R2 herein are the promoters and they are continuing as directors of the company. Further Clause 19.4 and 19.5 of SSSA and Clause 17.4 and 17.5 of the amended AOA deal with the provisions of infusing funds and it also bars the R1 and R2 to obstruct or create any impediment to such further subscription by the investor. ✓

- All the allotments are made as per relevant clauses of SSSA and AOA and complying with the provisions and also in the paramount interest of the Company.
- The R1 and R2 have made bald allegations without producing even a shred of paper to prove their allegations and not made any prima facie case of oppression and mismanagement and filed this dressed up petition.
- The prayers sought in the petition would establish that there is nothing in the prayers that can be granted exclusively only by this Tribunal and there are no such prayers made in respect of reduction of capital or winding up and any other special matter that falls within the exclusive domain of this Tribunal to deal.
- As per section 5 of the Arbitration Act the extent of judicial intervention is limited.

4. The learned PCS for the applicant Company while reiterating the above submitted that the subject matter of the petition is covered by the arbitration clause of SSSA which has already been incorporated in the AOA of the Company. The learned PCS, therefore, prayed to dismiss the petition and refer the matter to arbitration and in

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support of his submissions he relied on the following case laws:

- (i) AIR 2000 SC 1886 – P. Anand Gajapathi Raju Vs. PVG Raju – *wherein held that section 5 brings out clearly the object of the new Act, namely that of encouraging resolution of disputes expeditiously and less expensively when there is an arbitration agreement, the Court's intervention should be minimal.*
- (ii) 156 (2009) DL T406 Manu/DE/0010/2009 – Ministry of sound International Limited Vs Indus Renaissance partners Entertainment Private Limited – *wherein held that subject matter of arbitration is the entire agreement dated 07.12.2006 and all disputes arising out of or in connection with the said Agreement have to be adjudicated and decided by arbitration.*
- (iii) (2017) 136 CLA227 (manu/NC/0125/2017) – Binod Kr Bawri and others Vs. Calcom Cement Limited and others – *wherein held .... The discussions made herein before unequivocally show that the company petition is nothing but a dressed up petition which is designed only to hide the actual colour of the disputes before the CLB and tried to paint such disputes as management disputes. Where the company petition is malafide, vexatious or oppressive and one that is merely dressed up to avoid an arbitration clause, the matter can be referred to arbitration.*

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5. The Respondent 1 and 2, the petitioners in the main petition, filed their counter. In brief the submissions made in the counter are as follows:

- (i) The application filed under section 8 of the Arbitration Act is not maintainable in the facts and the circumstances of the case.
- (ii) Though the SPA and SSSA have the arbitration clause, both clauses have very limited scope.
- (iii) The Company petition is filed for the alleged actions of the Respondents in the main petition and the same are not contained in the SPA and SSSA. The petition is filed for oppression and mismanagement in the affairs of the Company. The legal position and arbitrability of oppression and mismanagement is well settled principle of law, therefore, the application is not maintainable.
- (iv) The arbitration clause cannot give power to an arbitrator to decide the issues with respect to oppression and mismanagement.

6. The learned Counsel for the R1 and R2, the petitioners in the main petition, while reiterating the averments made in the counter prayed for the dismissal of the Application filed under section 8 of the Arbitration Act and relied on the following case laws in support of his submissions:

Rakesh Malhotra Vs Rajinder Malhotra – where in the Bombay High Court *held that where a petition under Chapter VI of the Companies Act, 1956 seeks reliefs some of which are in the nature of reliefs in rem and others that are in personam, then it is not possible or permissible to sever one from other and disassemble such a petition....no arbitration agreement can vest an arbitral tribunal with the powers to grant the kind of reliefs against oppression and mismanagement that the CLB might.*

7. Heard both the parties and perused the pleadings. Now the point for consideration is whether the present application filed under section 8 of the Arbitration Act is maintainable or not?

8. It is fact that the SPA and SSSA have clauses for referring the dispute to Arbitration and it is admitted by both the parties. The main allegations of the petitioners in the main petition are that the R2 has completely ignored the petitioners and taking independent decisions; purchasing equipments to be utilized in the other company and the R2 in the main petition is increasing his shareholding in the Company thereby making the petitioners as minority shareholders. It is a fact that the petitioners

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wanted funds for the development of the company for which purpose roped the R2 into the company and while doing so both the parties have entered into the SPA and SSSA. Further the SSSA is also incorporated in the AOA.

9. It is also a fact that the R1 and R2 herein are the promoter directors and they are still continuing as directors of the Company. They are very much aware that SPA and SSSA contains clause with regard to appointment of other directors by the investor and it is also a fact that what binds on the Company would also binds its board of directors and shareholders. Clause 9 of SSSA and Clause 7.1 of amended AOA deal with use of money, borrowings and funding and clause 10.17 and clause 8.18 of the amended AOA deal with decision of the board. The clause 10.20 of the SSSA deals with the undertaking given by the petitioners. It is also a fact that the company convened all the board meetings and general meetings and the petitioners are party to the decisions taken in such meetings. The petitioners have not made any allegations that the Company has not convened any meetings. It is also an admitted fact that the Clause 19.4 and 19.5 of

SSSA and Clause 17.4 and 17.5 of the amended AOA deal with the provisions of infusing funds and it also bars the R1 and R2 (the main petitioners in CP) to obstruct or create any impediment to such further subscription by the investor.

10. While considering this application, the prayers made in the petition are to be looked into. The petitioners in the main petition sought for appointment of an auditor to audit the accounts of the Company from its incorporation, direct the respondents to convene the board meeting to consider the passing of the accounts so audited, grant injunction restraining the R2 from making transfer of funds except with the consent of the petitioners and other board members and restore the rightful position and authority of the petitioner to the direct control of the operations of the applicant company. It is a fact that the board meetings and general meetings have been convened by the Company as per the provisions of the Act and the petitioners are party to all such decisions taken in the said meetings. The infusing of funds and allotment of shares are also covered in the SSSA. The other directors who are

not party to the agreement are not third parties and they are the directors appointed by the investor (R2 in the main petition) as per the clause of SSSA. Being aware about the consequences of the SPA and SSSA and, the petitioners having entered into such SPA and SSSA, it is not proper for them to make allegations against R2 in the main petition. The case laws cited by the applicant company support the claim of the applicant and the case law cited by the R1 and R2 is not in support of their claim as the facts and circumstances are otherwise.


11. The importance of arbitration agreement, for seeking a reference under Section 8, was emphasized by the Hon'ble Supreme Court in Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums [Order dated 23.07.2003 in Appeal (Civil) No. 5156/2003] has held that *if the existence of the arbitration clause is admitted, in view of the mandatory language of Section 8 of the Act, the courts ought to refer the dispute to arbitration.*


Further, the Hon'ble Supreme Court, while raising a presumption for the validity of an arbitration clause in an agreement, in India Household and Healthcare Ltd. v. LG Household

and Healthcare Ltd. [Order dated 08.03.2007 in Arbitration Petition No. 18/2005], said that *the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement.*

12. Considering the above, it is clear that the dispute between the parties arises only out of SPA and SSSA and, therefore, in the circumstances we feel that the issues raised have to be referred to Arbitration in terms of the Arbitration Clause contained in the said agreements. Regarding the managerial decisions which can be raised in a Petition under Section 241/242 of the Act, it is held that the Petitioners were a party to all the decisions and cannot raise the issues by way of a Petition under Section 241/242 of the Companies Act, 2013.

In view of the above, this **IA No. 193 of 2018** is allowed. Consequently, the **Company Petition No. 14 of 2018** stands dismissed. No orders to costs.

  
[S. Vijayaraghavan]  
Member (Technical)  
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[K. Anantha Padmanabha Swamy]  
Member (Judicial)