

IN THE NATIONAL COMPANY LAW TRIBUNAL,
CHANDIGARH BENCH.

CA NO. 50/C-1 of 2016

Date of order: 20.12.2016

In Re:

Anil Chopra vs. M/s Anant Tools Pvt. Ltd. & Ors.

CP NO. 127(ND)/2015

RT No.11/2016

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH, MEMBER(JUDICIAL)
HON'BLE MS. DEEPA KRISHAN, MEMBER(TECHNICAL)

Present:- Mr. Hemant Sharma and Mr. Ashish Chaudhary,
Advocates for applicant.
Mr. Rajinder Mahajan, Advocate for Petitioner– respondent.

R.P.NAGRATH, MEMBER(JUDICIAL)

This order will dispose of the CA No.50/C-1 of 2016 in CP No.127(ND) of 2015 / RT No.11/Chd/2016, filed by respondent No.2 in the Company Petition (referred to as the applicant) under Section 8 of Arbitration and Conciliation Act 1996 (in short to be referred hereinafter as the Act of 1996) read with Regulation No. 44 of the Company Law Board Regulation 1991 (for brevity the Regulations).

2. The parties in CP No.127 of 2015 / RT No.11/Chd/2016 (for short the petition) are Anil Chopra, petitioner, Swatantar Kumar Chopra, applicant as respondent No.2 the real brothers and M/s Anant Tools Private Limited, respondent No.1. The petition has been filed under Section 397/398 of the Companies Act 1956 (in short to be described as the Act of 1956). It was stated that the petitioner is lawful owner of 2500 equity shares of ₹1000/- each as shown in the Annual Return ending 28.09.2007 and thus holder of 50%

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equity shares out of total 5000 equity shares of the company. The prayers made by the petitioner are to claim dividend, bonus issue, rights issue on the basis of holding 50% of the paid up share capital of the company; to cancel all the allotments of equity shares made after 28.09.2007; to set aside/cancel all the resolutions passed in regard to reduction of equity share capital of the petitioner from 2500 equity shares to 1490 equity shares and also set aside/cancel the documents filed with the Registrar of Companies; to set aside/cancel all the resolutions passed in regard to increase of equity share capital of the respondent No.2 from 2500 equity shares in his own name and in the name of his family members whose names have been described in the petition. Certain other reliefs have also been sought challenging the appointment of Mr. Anuj Chopra as whole time Director of the company, Mrs. Sushma Chopra wife of respondent No.2 as Director etc. It was further stated that the illegal increase of the authorised share capital from ₹50,00,000/- to ₹75,00,000/- and paid up share capital to ₹71,00,000/- divided into 7100 shares came to the notice of petitioner on perusal of the Annual Return for the period ending 30.09.2014. The act of increasing share capital and the issuance of shares amongst family members of the applicant was absolutely illegal as the respondent company did not offer any right shares to the petitioner nor any notice of the General Body Meeting was given for appointment of the whole time Director and the Director. These are inter alia the grounds of mismanagement and oppression seeking remedy in terms of

Anuj Chopra


Sections 397/398 of the 1956 Act.

3. Before submitting his first statement on the substance of the defence, applicant has filed in the instant application. It is stated that petitioner and the applicant had been running business in the name of three companies M/s Anant Tools Private Ltd., Anant Tools (Unit No.II) Pvt. Ltd. and Kamal Tools Pvt. Ltd. as directors of these companies and they were also the share holders thereof. Disputes arose between both the brothers due to difference of opinion and mutual distrust and they separated their companies by preparing mutual agreement in writing on 19.07.2007. Thereafter, more disputes arose between these groups which they resolved with the aid and aegis of four named arbitrators and thereafter entered into a Memorandum of Understanding (MoU) dated 31.03.2008, original of which is attached with the application. Under the said MoU applicant and his family members got management and control of respondent No.1 company whereas petitioner and his family members took over the other two companies namely Anant Tools (Unit No.II) Pvt. Ltd. and Kamal Tools Pvt. Ltd.

4. The applicant has referred clauses 2,3,4 and 14 of the MoU which are reproduced as under:-

"2. That Memorandum and Articles of Association of all the Companies have a restriction that share holding in each company will be of 3 groups i.e. Sh. S P Chopra family group, Sh. Swatntar Chopra family group, Sh. Anil Chopra family group. It also contained a restriction that shares in these companies can only be owned by members of the family of each group which means only male members and their wives and no outsider other than male members and their wives can be shareholder of each company. Memorandum and AoA of each company will be amended to put a restriction that in Anant Tools Pvt. Ltd., shares will

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be owned by Sh.Swatantar Chopra, his wife and male legal heirs of Sh.Swatantar Chopra and their wives only. Similarly, Memorandum and AoA of Anant Tools (Unit No.II) Pvt. Ltd. and Kamal Tools Pvt. Ltd. will be amended to put a restriction that shares in these two companies will be owned by Sh. Anil Chopra, his wife and male legal heirs of Sh. Anil Chopra along with their wives.

3. That maximum care is taken to separate the market to avoid any possible clash in future & save market share. Nobody will manufacture items of any group except ANANT planes. Any group is free to do only Buyer's Branch if required.

4. That group 'A' cannot export "Anant Planes" and group 'B' cannot make sales of Anant Planes in Indian market as well as cannot make Indirect Export of Anant Planes.

14. That in case of dispute or difference which may arise between the parties with regards to the cost, meaning and effect of this Memorandum of Understanding or any part thereof or the rights and liabilities of the parties or any other matters relating to affairs of above said companies, shall always be referred to arbitrators as stated above and their decisions shall always be final and binding on both the parties."

5. It is, therefore, prayed that all the disputes referred to in the main petition are directly or indirectly relating to the affairs of respondent No.1 and therefore, fall within the ambit of arbitration clause provided in the MoU dated 31.03.2008. It was further stated that petitioner is guilty of concealment of vital and material facts and not entitled to any discretionary relief from the Tribunal. The petitioner concealed the factum of mutual agreement dated 19.07.2007, MoU dated 31.03.2008 and existence of arbitration clause contained therein. Moreover, two Civil Suits were filed by Shri Pawan Kumar Chopra (brother of the parties) in the Civil Court at Jalandhar, claiming succession certificate in respect of the shares held by Shri S P Chopra,(deceased) father of the parties on the basis of Will dated 11.12.2003 and claiming ownership of the house at

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Jalandhar on that basis. Pawan Kumar Chopra had withdrawn both the suits on 17.01.2015.

6. It is further contended that the applicant and Ors. Filed Civil Suit in the Hon'ble High Court of Delhi claiming infringement of the trademark. The petitioner representing Anant Tools (Unit-II) Pvt. Ltd. filed application IA No.15414/2009 before the Hon'ble High Court of Delhi invoking arbitration clause contained in the MoU dated 31.03.2008. Hon'ble High Court of Delhi allowed the application of the petitioner vide order dated 11.8.2010, Annexure 'C', holding that the suit was not maintainable and therefore, rejected the suit with liberty to the applicant and others to take recourse to such of the provision and avail the appropriate remedies for the purpose of referring the dispute to arbitration

7. Thereafter the applicant and Anr. filed Arbitration Petition No.295 of 2012 Annexure-D in Hon'ble High Court of Delhi under Section 11(6) of the 1996 Act. The aforesaid arbitration application is admittedly pending before the Hon'ble High Court of Delhi.

8. This application is vehemently opposed by the petitioner. It is stated that the respondent company never sent notice of either Annual General Meeting or the Extraordinary General Meeting to the petitioner in which resolution to increase the authorised share capital from 5000 shares to 7500 shares may have been passed. Even while making further allotment of 2100 shares of ₹1000/- each the applicant did not offer any right share to the petitioner thereby violating the statutory requirement of Section 81 of the Act 1956. The shareholding of the petitioner has thus been reduced from 50% to

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21.98% unauthorisedly. However, the factum of execution of the mutual agreement and MoU is not a disputed proposition.

9. We have heard the learned counsel for the parties and extensively considered the rival contentions raised by them. Learned counsel for applicant vehemently contended that when the petitioner himself opposed the Civil Suit filed, by respondent No.1 company and Arr. in the Hon'ble High Court of Delhi complaining infringement of the trademark, on the plea of existence of the arbitration clause for resolving the dispute. That plea having been accepted by the Hon'ble High Court of Delhi, it would not lie in the mouth of the petitioner to make a summersault. It is submitted that Clause 2 of the MoU refers in detail as to the division of the three companies giving control to Swatantar Kumar – applicant and his family, over respondent No.1 company, and the other two companies to the petitioner and his family. Shareholding pattern was to be made effective in each of the company before 30.06.2008. As per the terms of the MoU all the documents for this purpose were to be filed with the Registrar of Companies before 25.09.2008. It is further contended that in compliance with the settlement and MOU the corresponding changes were made in the shareholding of Anant Tools (Unit-II) Pvt. Ltd. which has gone under the control of petitioner and his family.

10. It is pertinent to mention that the aforesaid plea raised on behalf of the applicant was disputed on behalf of the petitioner. The petitioner was thus directed to file share pattern of Anant Tools (Unit-II) Pvt. Ltd. which he filed as Annexure-I along with affidavit dated 06.10.2016 showing the share

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pattern from 31.03.2006 to 31.03.2015. As per Annexure-I the shares of Swatantar Kumar Chopra, his wife Sushma Chopra, Anil Chopra the petitioner, that of Rita Chopra, Anuj Chopra and Aasheesh Chopra remained static throughout from 31.03.2006 to 31.03.2008. Thereafter the shares of Anil Chopra increased from 4937 to 7087 that of Rita Chopra increased from 2693 to 3693, and Aasheesh Chopra increased from 3045 to 3545 from the year ending 31.03.2009. Equity shares of Anant Tools (Unit-II) Pvt. Ltd. were 21350 from 31.03.2008 which increased to 25000 from the financial year ending 31.03.2009 as per annexure-I attached with the said affidavit.

11. It is thus contended that there was also a corresponding change in financial year ending 31.03.2009 in respect of respondent No.1 company. It is an admitted fact that petitioner and applicant held 2500 shares each in respondent No.1 company but the shares of S.P. Chopra who had already died were restored in the year 2009. The share pattern was also changed in this way. In the year 2009, the share capital of respondent No.1 company was increased from 5000 to 7100 shares reducing equity shares of the petitioner from 2500 to 1490 and increase in the shares of applicant and his family members. It was vehemently contended for the applicant that he never raised any objection to the changes made in the Anant Tools (Unit-II) Pvt. Ltd. because this was in furtherance of the mutual settlement and the MoU.

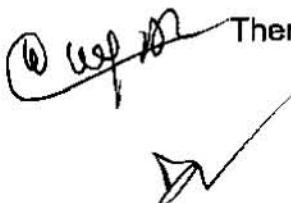
12. The contention on behalf of petitioner basically is that he never participated in the resolutions, if any, passed for change in share capital nor any notice was given with regard to the appointment of whole time director, director or even giving effect to changes in the equity shares through the same,

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may be based on clauses of MoU. It is further contended that a company makes decisions through its Board of Directors for which minimum quorum is at least two directors who at the time were the petitioner and the applicant only. It is, therefore, submitted that in the absence of the petitioner and not sending him notices of meeting especially his being not present in the meetings no such resolution could be passed. Section 174 of the 1956 Act prescribes for the quorum of the meeting for the Board of Directors and this is to be proceeded with the notice in terms of Section 171 thereof. Presently, however we are mainly concerned with the maintainability of the application under Section 8 of the Act of 1996.

13. Learned counsel for the petitioner has basically relied upon the judgement of Principal Bench of the Company Law Board **Pinaki Das Gupta Vs. Maadhyam Advertising (P) Ltd. Manu/CL/0040/2002 in CP No.47 of 2001 and CA No.21 of 2002 decided on 04.02.2002** in support of his contention that that the matter is required to be referred to arbitration where there is remedial clause for such a settlement between the parties. In the said case all the shareholders entered into an agreement for sale of shares to one Publicis(India) Communications (P) Ltd., by which all shares held by these shareholders constituting 100% in the company would be sold by them and purchased by Publicis. As per this agreement the purchase consideration was to be paid in four instalments and that three shareholders including the petitioner were to continue to be employed by the company up to 30.09.2002.

There were also other terms of the agreement. In terms of the said agreement

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the petitioner had handed over all the share certificates in respect of his shares together with share transfer forms. It was stated that the company violated the terms of the agreement and passed certain resolutions in violation of the provisions of law. The respondent company sought for referring the matter to arbitration in terms of Section 8 of the 1996 Act on the ground that the entire petition is based on the agreement dated 15.01.2001 in which there is arbitration clause providing for reference to the sole arbitrator. The Company Petition in the said case filed before the Principal Bench of Company Law Board was also under Section 397/398 of the 1956 Act.

14. A contention was raised before the Company Law Board that in view of the wide powers under Section 402 of the 1956 Act, those are not available to an arbitrator and that Section 8 of the 1996 Act is not applicable to a proceeding under Sections 397/398 of 1956 Act. It was observed by the Company Law Board in the said case that the petitioner himself served a notice dated 19.05.2011, invoking the Arbitration clause and that clause covers practically all the issues raised in the petition.

15. Examining the facts of the case the Company Law Board ultimately held as under:-

"12. The points/areas of dispute as raised in this notice are practically similar to those raised in the petition before us. Since the petitioner himself has raised these issues in the notice, he is aware that they are all covered by the arbitration agreement. As a matter of fact this notice has been issued on 19.05.2001, that is, just one day after filing of this petition on 18.05.2001. Even the reliefs that have been sought cannot be granted without examining the terms of the contract, as all the reliefs sought are based on the terms of the agreement. Further, the petitioner has not sought for any final relief in the petition. All the reliefs are in the nature of interim reliefs pending the implementation of/performance of

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the terms of the contract, which itself is a matter for the petitioner to decide. In other words, the main grievance of the petitioner in this petition is non-performance of the terms of the agreement and we find that the arbitration clause in the agreement specifically provides for arbitration in cases of non-performance of the terms of the agreement. The learned counsel for the petitioner argued that in view of breach of the terms of clause 21, the agreement has no binding effect. This argument is contrary to the pleadings and is an after-thought, as in the petition he has sought for implementation of the agreement. Even otherwise, this issue also as to whether the agreement is binding is covered by the arbitration agreement, therefore, we are fully convinced that all the issues raised in the petition are covered by the arbitration agreement and in terms of Section 8 we have to necessarily refer the matter to arbitration and, accordingly, we do so. The learned counsel referred to Needle Industries case to advance the argument that even if oppression is not established, the court is not powerless to do justice. This proposition would arise only when the petition is heard on merits. Now that we have held that the matter covered in the petition is the subject matter of the arbitration agreement, there is no scope to examine whether the petitioner has been oppressed or not.

13. This application CA 21/2002 is allowed and referring the parties to arbitration, accordingly, we close this petition."

16. We however, find ourselves bound by the decision of Hon'ble Punjab & Haryana High Court on the issue as reported in **Sudershan Chopra and Ors. vs. CLB and Ors. 2004 137 PLR 12 in the Letters Patent Appeal No.235 of 2003 decided on 10.02.2004** which is subsequent to the decision of Principal Bench of CLB in **Pinaki Dass Gupta's case (Supra)**. By referring to the provision of Sections 397/398, 402/403 of the Companies Act, 1956 the Hon'ble High Court held that reliefs that have been sought by Group 'B' could not be granted by an arbitrator and are available only under the provisions of Section 397 and 398 read with Sections 402 and 403 of the Act of 1956. It was further held that the statutory jurisdiction of the CLB and the right of appeal

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against its decision can not be ousted even by consent of the parties. Hon'ble High Court observed as under:-

"56. A bare reading of the *aforequoted* sections would reveal that interference by the Company Law Board is called for where the affairs of the Company are being conducted in a manner prejudicial to the interest of the general public or in a manner oppressive to any member(s) and Shareholders of the Company. The various Clauses of Section 402 also show that the orders envisaged thereunder cannot be given to a party/parties by an Arbitrator. It is true that as per the documents on record the shares of the two contesting groups come to 97.6% but the fact remains that the balance 2.4% is in the hands of other persons. As held by the Hon'ble Supreme Court in **Cosmosteels Pvt. Ltd. and Ors. V. Jairam Das Gupta and Ors., 48 company cases 312**, the scheme of Sections 397, 398 and 402 appear to constitute a Code by itself for granting relief to oppressed minority shareholders. It is also clear that the interest of 2.4% minority shareholders and the Company could be, prejudicially affected if the matters were put to Arbitration and finally decided by the arbitrator, whereas an order made by the Company Law Board under Sections 397,398, 402 and 403 would be appealable under Section 10F of the Companies Act. These aspects become relevant in the light of the observations in **Chiranjilal Shrilal Goenka(deceased) through LRs vs. Jasjit Singh and Ors. MANU/SC/04/1993**. In this matter, the question of the probate of a will was referred by the consent of the parties for arbitration to retired Chief Justice of the Bombay High Court. As some proceedings with regard to the probate were also pending in Court, the question arose as to whether the Arbitrator could decide on the validity of the Will. The Hon'ble Supreme Court observed that it was only the probate court, whose order was appealable, which could decide this question *moreso*, as the decision of the Arbitrator would deprive the losing party of the statutory right of appeal provided under Section 299 of the Indian Succession Act. The court also observed that the argument as the parties had consented to the reference of the dispute to arbitration, no interference by the Court was called for, could be of no avail as consent could not confer jurisdiction nor there was any estoppel against a statute. We find that the *aforesaid* observations would clearly apply in the present case as well for the reasons already set out above."

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17. It was further observed that there is unanimous opinion in the High Courts' dealing directly with the issue raised that no arbitration in case such as the present one is permissible. In **O.P.Gupta vs. Shiv General Finance (P) Ltd. and Ors. 1977)47 Company cases 279(Delhi Manu/DE/0093/1975)** that no arbitrator can possibly give relief to the petitioner under Section 397 & 398 and will be unable to pass any order under Section 402 and 403 of the Companies Act. It was held that an order of stay in the proceedings based on the arbitration clause will tantamount to dismissing the petition. The following paragraph from the aforesaid judgement was also quoted by the Hon'ble Punjab & Haryana High Court:-

"6. I must also refer to Section 9(b) of the Companies Act, 1956 which states that any provision in any memorandum, article or agreement to the extent that it is repugnant to the Act will be void. In view of the fact that the learned counsel for the applicant relies on article of the company which is in consistent with the provisions of Section 397 and 398. I would hold that the article regarding arbitration would be void. He also states that the subject matter of the present petition cannot be tried by this Court but has to be referred to arbitration before it can be proceeded with. I find an obvious repugnancy between Article 43 of the Articles and Section 397 and 398 of the Companies Act, 1956. The repugnancy can be resolved in one of two ways, either the article is wholly void by reason of Section 9(b) of the Act or the article does not apply when proceedings for winding up a company or a petition under Section 397 or 398 are moved in the court. In either case, the article cannot be called into play for the purpose of staying the present proceedings."

18. The other contention for the applicant was that the company petition is time barred as the same is filed after more than 6 years of the change in the shareholding pattern and increase in the share capital, on the principles latches and delay. That may also be a ground to contest the petition on merits

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but that would not debar the Tribunal in disposing of the instant application under Section 8 of the Act. The corresponding changes in the share capital and share pattern of the other two companies is also a subject of contest on merits of the main petition.

19. There was another plea raised by the petitioner that on the allegations of forgery of record of the company, a Criminal complaint No.849/1 of 2010 is pending before the Judicial Magistrate, Jalandhar. The learned Judicial Magistrate has found sufficient grounds based on preliminary evidence to issue process against the applicant No.2 and others for offences under Section 406, 420 and 471 read with Section 34 and 120-B of the Indian Penal Code vide order dated 03.07.2012. The said proceedings are not at all relevant to the controversy between the parties especially when it was admitted during arguments that a petition against that order of summoning is pending in the Hon'ble Punjab & Haryana High Court under Section 482 of the Code of Criminal Procedure.

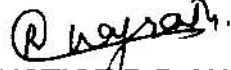
20. In view of the above, especially that the instant petition is filed under Sections 397 and 398 for which the powers can be exercised by the Tribunal alone the application under Section 8 would not lie. It is further pertinent to mention here that the exercise to refer the disputes to the named arbitrators, as per the terms of the agreement would be a futile exercise. As per the terms of MoU the named arbitrators are Surinder Mahajan, Ashwani Kumar, R.S. Bedi and S.J.P. Singh. The applicant has himself stated that after the decision of Hon'ble High Court of Delhi rejecting the Civil Suit for

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Infringement of the trademark based on the mutual settlement, the respondent has filed application for appointment of arbitrator(s) under Section 11(6) of the 1996 Act because four arbitrators named in the MoU dated 31.03.2008 have expressed their unwillingness to be appointed as arbitrators. This fact is reiterated even in the written arguments submitted by the learned counsel for the applicant in paragraph 14.

22. In view of the aforesaid reasons, we find that the petition which is filed under Section 397 and 398 of the Companies Act 1956 has to continue and proceed to the logical end irrespective of any agreement between the parties containing arbitration clause and therefore, the instant CA filed by applicant who is respondent No.2 in the Company Petition is dismissed.


(DEEPA KRISHAN)
Member(Technical)


(JUSTICE R.P. NAGRATH)
Member(Judicial)

December 20, 2016.