

**In the National Company Law tribunal
Single Bench, Chennai**

CA. No. 159 of 2012

In

CP No. 71/2012

M/s. Balaji Rubber Industries Private Limited

AND

CA. No. 190 of 2012

In

CP No. 80/2012

Bidar Rubber and Reclaims Private Limited

AND

CA. No. 1 of 2013

In

CP NO. 45/2013

Eswar Rubber Products Private Limited

Under Sections 397/398 of the Companies Act, 1956

CA. No. 159 of 2012

K. Vaidyalingam Applicant/Respondent No.2

Vs

S.K. Ganesan & 6 Others Respondents/Petitioners

M/s. Balaji Rubber Industries

Private Limited & 6 Others Respondents/Respondents

CA. No. 190 of 2012

k. Vaidyalingam Applicant/Respondent No. 2

S.K. Ganesan & 4 Others Respondents/Petitioners

M/s. Bidar Rubber and Reclaims

Private Limited & 7 Other Respondents/ Respondents

CA. No. 1 of 2013

K. Vaidyalingam Applicant/Respondent No.2

Vs

S.K. Ganesan & 5 Others Respondents/Petitioners

M/s. Eswar Rubber Products

Private Limited & 7 others Respondents/ Respondents

Order delivered on: 31.08.2017

For the Applicants in all CAs: Shri P.H. Arvinth Pandian, Sr. Advocate

For the Respondents in all CAs: Dr. K.S. Ravichandran, PCS

Per: K. Anantha Padmanabha Swamy, Member (J)

ORDER

1. Under consideration are 3 applications filed under section 8 of the Arbitration and Conciliation Act, 1996 (In short, 'Act, 1996') by the same applicant who is the 2nd Respondent in all the Company Petitions. The above applications have been filed based on the Memorandum of Understanding dated 20.07.2011 entered between the applicant group and respondents group, I feel it is appropriate to dispose of the above CAs by this common order.

2. The 1st Respondent all the CAs along with other shareholders has filed petitions under section 397, 398, 402 and 403 of the Companies Act, 1956 (the Act, 1956) before this Tribunal alleging various acts of oppression and mismanagement in the affairs of the respective 1st Respondent Companies and sought for the prayers mentioned infra:

CP No. 71/2012:

- I. That a fair value of shares of the company may be directed to carried out through a reputed firm of chartered accountants or the statutory auditors of the company.
- II. That the Respondents 2 to 8 may be directed sell all their shares to the petitioners at a fair price.
- III. To declare the shifting of registered office on 29th September 2011 as null and void and illegal.
- IV. To declare that AGM 2011 was not held though called and the resolutions which have been recorded as though passed at the AGM are liable to be set aside with necessary consequential reversing of actions taken in relation thereto.

- V. To appoint an independent and reputed firm of Chartered Accountants as the auditors of the Company and to carry out audit of accounts of the company.
- VI. To restore the managing directorship of petitioner No.1 for protecting the interests of the shareholders of the Company and to cancel the Form 32 filed with the Ministry of Corporate Affairs.

CP No. 80/2012

- I. That a fair value of shares of the company may be directed to be carried out through a reputed firm of chartered accountants or the statutory auditors of the company.
- II. That the Respondents 2 to 9 may be directed to sell all their shares to the petitioners at a fair price, if this company were to be allotted to Petitioner' group ultimately.
- III. To declare the shifting of registered office on 13th February, 2012 as null and void and illegal.
- IV. To declare that AGM 2011 was not held though called and the resolutions which have been recorded as though passed at the AGM are liable to be set aside with necessary consequential reversing of actions taken in relation thereto.
- V. To declare that the appointment of Respondent No.2 as chairman of the Company on 29.09.2011 is illegal and void and to set aside the same.
- VI. To declare the notice calling the AGM 2012 as insufficient and contrary to the mandatory provisions of the Companies Act, 1956 as well as the

Articles of Association of the Company and consequently declare all proceedings thereat if the AGM 2012 is held under the said invalid noticed as null and void and to set aside resolutions that may be passed therein.

- VII. To appoint an independent and reputed firm of Chartered Accountants as the auditors of the Company and to carry out audit of accounts of the Company for the financial years commencing 2011-12
- VIII. To surcharge Respondents No. 2, 4, and 7 for the money siphoned out by them on the basis of the finding of independent audit as aforesaid.

CP No. 45/2013

- I. To declare that the proceedings of the Annual General Meetings allegedly held on 29th September 2011 and 29th September 2012 are illegal and null and void and to direct the holding of the Annual General Meetings once again under an independent chairman.
- II. To declare the allotment of 8160 shares allegedly made on 31st January 2013 as oppressive and to issue an order setting aside the same.
- III. To declare the appointment of Respondent No.4 as an additional director of the Company in the board meeting allegedly held on 31st January 2013 as oppressive and set aside the same.

- IV. To declare the shifting of registered office w.e.f. 29th September 2011 as invalid, illegal and oppressive and to issue an order to set aside the same.
- V. To restore the directorship of the Petitioner No.2 for protecting the interests of the shareholders of the Company and to cancel the form 32 filed with the ministry of Corporate Affairs.
- VI. To surcharge Respondent No.2 for the amounts diverted by him on the basis of the independent audit and also to set aside the allotment of 8160 shares on the additional ground that the consideration was not received by the Company.
- VII. To grant proportional representation to the two groups in the board such that the composition of board of directors reflects directors representing the Petitioners and Respondents in proportion to the shareholding pattern.
- VIII. To direct the Respondents to sell all their shares to the petitioners at a fair price to be determined by an independent chartered accountant.
- IX. To appoint an independent and reputed firm of Chartered Accountants as the auditors of the Company and to carry out audit of accounts of the Company for the financial years commencing 2011-

12

The 2nd Respondent in all the main petitions has filed these applications under Section 8 of the Arbitration Act, 1996 with a prayer to refer the

matters to the Arbitral Tribunal which has already been constituted by the parties as per terms agreed between them.

3. Shri P.H. Arvinth Pandian, the learned Senior Counsel appearing for the Applicants in the instant CAs contended that the companies involved in the dispute are closely held & family companies and the shareholders are from Shri. K. Vaithyalingam Group and Shri. S. K. Ganesan Group. It is submitted that some disputes arose between the two groups and due to the efforts put forth by the friends and other family members to settle the disputes amicably, a Memorandum of Understanding (MoU) was entered into on 20.7.2011 between Shri. K. Vaithyalingam (Respondent 2) and Shri S.K. Ganesan. (1st Petitioner). As per the MoU restructure/reorganize of the ownerships, rights and obligations vis-a-vis have taken place in all the commercial entities and there by a quietus has been brought to the various disputes/differences.

4. The clause 19 of the said MoU refers, provision for resolution of disputes inter-alia by Arbitration, and the said MoU is in force till now. Further there were correspondences exchanged between the parties on 10.11.2011, 19.12.2001, 30.12.2011, 06.01.2012 and 20.01.2012 subsequent to the MoU.

5. It is submitted that in compliance with the above said MoU, an amount of Rs.6 Crore was paid by Shri. K. Vaithiyalingam Group to Shri. S.K. Ganesan Group and in proof of it receipt dated 29.09.2011 is placed. Shri. S.K. Ganesan Group has also incorporated another company under the name

and style of M/s. Eskegie Reclaims Private limited which also a manufacturing unit of reclaimed rubber products.

6. The Respondents herein have filed the main petitions under sections 397/398 of the Act, 1956 and said petitions are based on the rights and obligations as mentioned in the above MoU. Further neither the allegations alleged in the petitions nor the prayers sought for are outside the purview of the said MoU. The Arbitral Tribunal is already seized of the matters and the disputes could only be resolved by the Arbitral Tribunal alone constituted under the MoU dated 20.07.2011.

7. The learned Senior Counsel has submitted that the original MoU could not be filed as per the provision under section 8 of the Arbitration Act and sought permission of this Tribunal to file a duly certified copy under section 8 (2) of the Arbitration Act, 1996. By submitting the above facts, he prayed that the matters may be referred to the Arbitral Tribunal.

8. The learned PCS appearing for the Respondents in all the applications has contended that the said MoU dated 20.07.2011 has already been cancelled on 10.11.2011 and as on date it is not in existence. Since the applicant group has failed to perform the obligations as per MoU the same was cancelled. Further the clause 19 of the said MoU does not constitute an Arbitration Agreement entitling the applicant to invoke the provisions of section 8 of the Arbitration Act. The said clause 19 of the said MoU is also very narrow and it is no way connected to the matters complained of in the

main petitions pending before this Tribunal. The present applications are filed only to drag on the matter.

9. The learned Practicing Company Secretary for the Respondents has also contended that the parties to the present petitions are not parties to the MoU dated 20.07.2011, the Companies are not parties to the MoU, the subject matter of the MoU and the acts complained off in the main petitions are totally different and that the reliefs claimed in the petitions could not be granted by the Arbitrator and further there is no any Arbitration agreement between the parties is in existence. Therefore, he prayed to dismiss the applications.

10. In support of the contentions made on behalf of the applicants, the learned Senior Counsel for the applicant has relied upon the following citations.

(1) Shakti Bhog Foods Limited Vs Kola Shipping Limited **AIR 2009 SC12** where in it is held that the provisions made under section 7 of the Act that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.

(2) Great offshore Limited Vs Iranian Offshore Engineering and Construction Company **2008 14 SCC 240** – the court has to translate the legislative intention especially when viewed in light of one of the Act's main objective to minimize the supervisory role of courts in the arbitral process.

- (3) Trimex International Fze Limited, Dubai Vs Vedanta aluminium Limited, India **2010 3 SCC 1** – it is essential that the intention of the parties be considered in order to conclude whether parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned.
- (4) Smita Conductors Limited Vs Euro Alloys Limited **2001 7 SCC 728** – the arbitration clause in the agreement that was exchanged between the parties was binding on the parties.
- (5) Kotak Mahindra Bank Limited Vs M. S. Subramaniam and G. Manikandan **MANU/TN/0938/2008** – in an application under section 8, the Judicial Authority cannot go into the question as to whether the agreement is null and void, inoperative or incapable of being performed, the plaintiff should only raise these issue before the Arbitrator.
- (6) Hindustan Petroleum Corporation Limited Vs Pink City Midway Petroleum's **MANU/SC/0482/2003** – refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the applicant.
- (7) E-Logistics Private Limited and V Sanjeevi Vs Financial Technologies (India) Limited **MANU/CL/0079/2006** – When a complaint is made as regards violation of statutory or contractual right, the shareholder may initiate a proceeding in a civil court but a proceeding under section 397 of the Act would be maintainable only when an extraordinary situation is brought to the notice of the court keeping in view of the wide and far reaching power of the court in relation to the affairs of the company.
- (8) Spray Engineering Devices Limited Vs Shree Saibaba Sugars Limited **MANU/CL/0004/2008** – the reliefs sought in this CP are nothing but the seeking of compliance of the Arbitration agreement and no way that these reliefs can be granted without reference to the arbitration agreement. A few more alleged irregularities or alleged illegalities are

not adequate enough to withhold this petition from referring the matter to arbitration which alone has jurisdiction in this matter.

- (9) **Bialetti Industries SPA Vs Rachit Suresh Gangar and others** **MANU/CL/0039/2012** – section 8 of the Arbitration and Conciliation Act provides that a judicial authority before which an action is brought in a matter which is a subject matter of arbitration agreement shall, if a party so applies not later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration.

11. On the other hand, in support of his contentions, the learned PCS for the Respondents has relied on the following case laws:

- (1) **Atul Singh and others, sunil Kumar and others and the Madras High Court, MANU/SC/0313/2008**
- (2) **M. Venugopal Vs The Deputy Salt commissioner Salt Department** **MANU/TN/4879/2011** – to show that non-compliance of sub-section (2) of Section 8 of 1996 Act is a mandatory provision is fatal to these applications.
- (3) **Ujwala Raje Shah Vs Veer Corporation, MANU/MH/0204/2013** – it was not arbitration agreement but the provision which would enable the arbitration, only if the parties mutually decided after due consideration as to whether the disputes will be referred to arbitration or not.
- (4) **Jagdish Chander Vs Ramesh Chander 2007(5) SCC 719** – Mere use of the word arbitration or arbitrator in a clause will not make it an arbitration agreement, if it required or contemplates a further or fresh consent of the parties for reference to arbitration.
- (5) **ITC Classic Finance Limited Vs Grapco Mining and Co Limited and another AIR 1997 Cal 397** to show that if the arbitration clause is vague and uncertain, section 8 of the Act cannot be invoked.
- (6) **Kensoft infotech Limited Vs Sundaram BNP Paribas Home Finance Limited and Sundaram Infotech Solutions Limited**

MANU/TN/0328/2010 – the court is required to refer the parties to arbitration only in a manner which is the subject matter of an arbitration agreement. Section 8 does not envisage or answer a situation when some of the parties to the suit were not parties to the arbitration agreement.

(7) **Das Lagerway Wind Turbines Limited Vs Cynosure Investments Private Limited MANU/TN/9894/2007** – the scope of the petition filed under section 397 and 398 is quite distinct from the scope of the arbitration clause contained in the agreement and reliefs claimed in the company petition cannot be granted by the arbitrator and it can be granted by Tribunal by virtue of section 397, 398, 402, and 403 of the Companies Act, 1956.

12. The other Respondents have filed a memo simply stating that the dispute be referred to the Arbitral Tribunal.

13. Heard both sides, Perused the records and the written submissions filed by both sides.

14. Now the point for consideration is whether the applications are maintainable for referring the matters for the Arbitration as prayed.

15. The main contention of the applicant is that there is MoU dated 20.7.2011 entered into between the parties wherein the clause 19 specifies that the disputes can be referred to arbitration whereas the Respondents contended that the so called MoU has already been cancelled and as on date of filing of the applications it is not in existence.

16. In fact the above referred MoU dated 20.07.2011 entered into between K. Vaithyalingam Group and S.K. Ganesan Group but later on in view of

the letter dated 10.11.2011 the MoU has been cancelled. Having knowledge about the cancellation of the said MoU, the applicant is silent in this regard.

17. Section 8 of the Arbitration Act envisages a court to refer the matter to the Arbitration. However, it is the well settled principle of law that the Arbitral Tribunal has no Jurisdiction to pass an award affecting or in favour of a third party who is not a party to the arbitration agreement and it is also necessary for the applicability of Section 8 of the Act 1996 that not only the subject matter of the suit but subject matter of the arbitration agreement should be one but same and also the parties of the suit and the arbitration agreement should be one and the same.

18. In the present case, it is on record that the parties to the MoU dated 20.07.2011 are the parties in the main petitions are different. The cause of action shown in the main petitions are different from the cause of action of the MoU dated 20.07.2011. Further the applicant has not filed either the original MoU dated 20.7.2011 or a duly certified copy as per section 8(2) of the Arbitration Act, Whereas it is stated that he is withholding the MoU for purpose of prosecuting the matters before this Tribunal. Evidently not filing of the original MoU or its certified copy is fatal to the case of applicants. Further, the Respondents have made their submissions that the MoU dated 20.07.2011 has been cancelled by the Respondents by way of a letter dated 10.11.2011 sent by them. Therefore, it is clear that there is no MoU or agreement inforce on date of filing of the applications for considering the prayers for referring the matters to the Arbitral Tribunal.

The case laws referred by the learned Practicing Company Secretary for the Respondents herein are in support of contentions of the Respondents. I am not inclined to accept the case laws referred by the applicant for the reason the facts and circumstances in this case are otherwise.

19. In view of the above discussions, the prayers made in the instant applications are rejected.

20. Accordingly the instant applications are dismissed. However, no order as to costs.

21. The Respondents in all the main petitions are directed to file their counters. Put up on 21.09.2017.



K. Anantha Padmanabha Swamy, Member (J)

RLS