

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
DB, CHENNAI.

Arguments heard on 24.01.2017

Order passed on 17.02.2017

CA No.55 of 2015

(Under Section 8 of the Arbitration and Conciliation Act, 1996)

In

C.P.No.31 of 2015

(Under sections 397, 398 402 & 403 of Companies Act, 1956)

Applicants Nos.1 to 7/Respondent Nos.3 to 10

- 1) M/s.Grass Lands Agro Private Ltd.
- 2) Mr.Muruga Bharti
- 3) Mr.R.Venkatesh
- 4) Mr.K.Pandiarajan
- 5) Mrs.Hemalatha Rajan
- 6) Mr.Chandu Nair
- 7) Mr.M.Anantharamakrishnan
- 8) Mr.Kalpathi S.Suresh

Represented by counsels M/s.K.Manoj Menon and P.Neelakantan

-Vs-

Respondents Nos. 1&2/Petitioners Nos. 1&2

- 1) Mr.R.S.Mohammed Saleem
- 2) Mr.S.Senthil Kumar

Represented by counsels M/s.Ramakrishnan Vijayaraghavan &
G.Sivashankaran

Respondents Nos.3&4/Respondents No.1&2

- 3) M/s.Sara Cotton Fibers Pvt. Ltd. rep by Advocate
Mr.A.Srinivasan
- 4) Mr.K.Sundhar Rajan, rep by counsels M/s.Mothilal & Goda

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ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ,
MEMBERS (JUDICIAL)

CH MOHD SHARIEF TARIQ, MEMBER (JUDICIAL) (Oral)

1. Under adjudication is an application numbered as C.A.1 of 2015 filed in C.P.No.31 of 2015 before the Company Law Board. The C.A. has been filed by the Applicant/Respondents No.3 to 10 against Respondents/Petitioner Nos.1 and 2 and Respondent No.3/Respondent No.1 and Respondent No.4/Respondent No.2. The C.A. has been filed under Section 8 of the Arbitration and Conciliation Act, 1996 stating therein that the entire dispute between the Applicant/Respondents and Respondent/Petitioners and Respondents/Respondents arose out of the Shareholders Agreement dated 12.07.2013. Clause 13 of shareholders agreement provides for resolution of all disputes relating to the share agreement by arbitration by 3-member arbitral tribunal. For the sake of convenience, the said clause is reproduced as under :-

“The parties will attempt to settle any dispute between them related to this Agreement in an amicable and expeditious manner as follows :-

13.1 The party raising the dispute must first provide a written description of the nature of the dispute, disagreement or claim in writing and provide this to the other Party. If the parties are unable to resolve the dispute within ten(10) days of receiving the written notice above, the disputing party may serve a written notice to the other party for a meeting to discuss the possibilities of resolving the dispute, disagreement, or claim without resort to arbitration.

If this meeting fails to reach an agreement, the disputing party may submit the dispute to arbitration in the manner detailed below :

13.2 Arbitration. All arbitral proceedings undertaken by the Parties under this Agreement shall be governed by the Arbitration and Conciliation Act, 1996. The Arbitral tribunal shall be composed of 3 arbitrators, one appointed by each Party and the third independent arbitrator appointed by the two appointed arbitrators. The arbitral proceedings will be held in Chennai in English language. The award of the arbitral tribunal shall be final and binding upon the parties."

2. Under para 5 of the C.A., the Applicants/Respondents stated that they have already referred their disputes pertaining to the Shareholders Agreement for arbitration by their notice dated 04.05.2015 and also appointed Mr. Justice (Retd) T.N.C.Rangarajan as their Arbitrator and in response, on 04.06.2015, The 1st to 3rd Respondents/Petitioners, 1st Respondent company have, without any reservation, appointed Mr. Justice (Retd) K.P.Sivasubramanian as their arbitrator. The said arbitrators agreed upon Mr. Justice (Retd) S.Venkatachalamoorthy as the Presiding Arbitrator. The Respondent-4/Respondent-2 has also agreed to the constitution of the Arbitral Tribunal vide notice dated 22.07.2015. Therefore, the arbitral tribunal has been fully constituted and is expected to hold its preliminary meeting shortly. In the light of this, it is averred that in order to avoid multiplicity of proceedings and the issue raised in the petition that have arisen out of the Shareholders Agreement, be referred to the Arbitral tribunal constituted by the parties themselves.

Besides this, it has been asked that the company petition is not maintainable either on law or facts as none of the ingredients of Section 397 and/or 398 of the Companies Act, 1956 are applicable to the alleged acts complained of by the petitioners. Therefore, the company petition is liable to be dismissed *in limine*.

3. The Respondent/Petitioners No.1 and 2 filed the counter in the C.A. and stated that the petition has been filed under section 397 and 398 of the Companies Act, 1956 wherein the matter complained of pertains to the alleged acts of oppression and mismanagement by Applicants No.1 to 8/Respondents and Respondent-4/Respondent-2. It is stated that the matter complained of is not arbitrable by the Arbitral tribunal. It has been stated that Applicants No.2 to 8/Respondents are not the parties to the Arbitration Agreement. It has further been stated that the subject matter of the Shareholders Agreement on the basis of which the Arbitral Tribunal has been constituted pertains to the repayment of money allegedly due by the Respondent/Petitioners and the company petition before this tribunal is for seeking equitable relief against oppression and mismanagement under the Companies Act, 1956. It is further averred that the reliefs are separate and distinct which could only be granted by this Tribunal and not by the Arbitral Tribunal and the matter complained of by the Respondent/Petitioners falls within the jurisdiction of the company law tribunal.

4. It is necessary to know the nature of the matter that has been complained of by the Respondent/Petitioners No.1 and 2 in C.P.No,31 of 2015. The allegation levelled by the Respondents/Petitioners against the Applicants/Respondents is that Respondent No.4/R2 started reporting to Applicant No.8/Respondent No.3, and Applicant No.7/Respondent No.10. They have substantially managed the affairs of the company and its subsidiaries in Ethiopia and Singapore. The Respondents/Petitioners referred to two e-mails that have been exchanged between the Respondent No.4/Respondent No.2, Applicant No.8/Respondent No.3 and Applicant No.7/Respondent No.10 which are stated to contain the contents to demonstrate the deep and invasive control of the company by them. It has been stated by the Respondents/Petitioners that the Respondent No.4/Respondent No.2, Applicant No.8/R3 and Applicant No.7/R10 were having the control on the finance and management of R1 company and the Respondents/Petitioners were the Directors of the company only on papers. The Respondent No.4//R2, Applicant No.8/R3 and Applicant No.7/R10 were *de facto* Directors of the company. The Respondents /Petitioners further alleged that R4/R2, Applicant No.8/R3, Applicant No.1/R4 appear to have diverted substantial portion of funds available for the project and they used these funds to repay the debts to the company and its subsidiaries which resulted in mounting losses and failure of yield in the Cotton Farm in Ethiopia.

5. The Respondents/Petitioners have also averred in the company petition that the Applicant No.8/R3, Applicant No.1/R4 and Applicant No.7/R10 have denied various suggestions given by the Respondents/Petitioners to take up the project forward, but due to their non-response to exercise the 'put option', the delay in time caused irreparable damage to Respondents/Petitioners.

6. It is worthwhile to mention that the Respondents/Petitioners have stated in the C.P. that they have made several attempts to negotiate an amicable settlement with the Respondent No.4/Respondents No.2, Applicant No.8/R3 and Applicant No.7/R.10, but they refused to admit any mismanagement and started sending letters and ultimately a legal notice alleging various wrong doings on the part of Respondents/Petitioners in order to threaten and prevent the Respondents/ petitioners from seeking redressal against oppression and mismanagement. Based on this, the respondents/Petitioners alleged that the management of R3/R1 and its affairs are being conducted by the Applicants/Respondents in a manner prejudicial to the public interest and in a manner oppressive to the members of the company. It has further been alleged by the Respondents/Petitioners that the acts of oppression and mismanagement are continuing on daily basis till filing of the company petition.

Having said so, the Respondents/Petitioners have sought reliefs as follows:-

“a) holding the Second, Third, Fourth and Tenth Respondents responsible for the oppression and mismanagement of the company and consequently directing surcharge proceedings against the Second, Third, Fourth and Tenth Respondents to determine the loss caused to the Company by their acts of oppression and mismanagement and direct them to pay to the Company the extent of the loss;

b) direct the Second, Fourth and Tenth Respondents to transfer to the Petitioners the equity shares of the Company held by them at a value to be determined by this Hon'ble Bench;

c) directing the Second, Third, Fourth and Tenth Respondents to pay the costs of this petition and

d) granting such reliefs as this Hon'ble Bench deems fit and proper and thus render justice.”

7. We have heard both of the counsels in relation to the C.A. and perused the pleadings carefully. The counsel for Applicants/Respondents has referred the case law as follows :-

- 1) 20th Century Finance Corporation Ltd Vs Union of India and Others reported in (2011)161 CompCas 247(Delhi).
- 2) Demerara Distilleries Private Ltd and another Vs Demerara Distillers Ltd reported in (2015) 13 Supreme Court Cases 610
- 3) P.Anand Gajapathi Raju and others Vs P.V.G.Raju (dead) and others reported in (2000) 4 Supreme Court Cases 539
- 4) Vijay Sekhri and Others Vs Tinna Agro Industries Ltd and another reported in (2010) 159 CompCas 336 (CLB).

The counsel for Respondents/Petitioners has referred the case law as follows :-

- 1) Punita Khatter Vs Explorers Travellers and Tours Private Limited
 - 2) Vimal Kishore Shah Vs Jayesh Dinesh Shar reported in (2016) 8 SCC 788
 - 3) Sukanya Holdings (P) Limited Vs Jayesh H.Pandya reported in (2003) 5 SCC 531
 - 4) Sporting Pastime India Ltd Vs Kasturi reported in (2006)3 LW 533.
 - 5) Dass Largerway Wind Turbines Limited Vs Cynosure Investments (P) Ltd. reported in (2007) 3 CTC524
 - 6) Avigo PE Investments Ltd Vs Techpro Engineers Ltd. reported in (2016) SCC online CLB 18
8. The subject matter contained in the Shareholders Agreement dated 12.07.2013 can well be demonstrated by quoting Para No.6 of its recitals which is as follows :-

“In view of the foregoing transfer and consequent rights, obligations and covenants cast upon Mr.Sundhar and the Guarantor being Promoters of the Company along with Mr.Saleem, the Parties have agreed to enter into this Agreement in order to determine the terms and conditions of each Party’s rights and obligations in relation to the Company, the Project and each other as shareholders of the Company”

9. If we look at the subject matter of the Agreement and the prayers made by the Respondents/Petitioners in the company petition, then it can safely be concluded that relief (b) of the Company petition is covered by the Shareholders Agreement. But relief (a) of the Company petition pertains to the allegations of oppression and mismanagement. Certainly, the reliefs cannot be bifurcated, and particularly relief (a) cannot be

referred to the Arbitral Tribunal as has been held in the cases viz. Punita Khatter Vs Explorers Travellers and Tours Private Limited, Sukanya Holdings (P) Limited Vs Jayesh H.Pandya, Sporting Pastime India Ltd Vs Karturi, Dass Largerway Wind Turbines Limited Vs Cynosure Investments (P) Ltd. and Avigo PE Investments Ltd Vs Techpro Engineers Ltd. (supra) However, there is an exception to the above stated legal position which has been carved out by the High Court of Bombay in M/s.Rakesh Malhotra Vs Rajendrakumar, reported in (2015)53 Texman.com.135 (Bombay). The relevant para is reproduced as under :

“24(a) As to whether the disputes in a petition properly brought under sections 397 and 398 r/w section 402 of the Companies Act, 1956 can be referred to arbitration, the answer is no, subject to the caveat that I have noted regarding a mala fide, vexatious or oppressive petition and one that is merely ‘dressed up’ to avoid an arbitration clause.”

10. In the light of the above, at the first instance, it is necessary to ascertain as to whether the company petition filed under Sections 397 and 398 r/w Sections 402 and 403 of the Companies Act, 1956 is a ‘dressed up’ petition or not?. It is admitted position as has been stated under para 8 herein above that the Shareholders’ Agreement dated 12.07.2013 provides that the parties have agreed to enter into the agreement in order to determine the terms and conditions of each party’s right and obligation in relation to the company, the project and each other as shareholders of the company. The Agreement dated 12.7.2013 provides

an arbitration clause based on which the arbitral tribunal has already been constituted and the claim has been filed against R3/R1 company, Respondents/Petitioner 1 and 2 and R4/R2 as reflects from the claim petition. The claimants are R4, R5, R7, R8, R9 and R10 as arrayed in the company petition. The Applicants/Respondents have referred their dispute to the arbitral tribunal under the shareholders agreement by their notice dated 4.5.2015. The parties to the shareholders agreement dated 12.7.2013 are Petitioners No.1, 2 and R2 as shown in the Agreement are the guarantors and promoters. Whereas R4 in the company petition is Grasslands Agro Private Ltd. (an investor), who is also signatory to the arbitration agreement being represented by R2. Petitioners No.1 and 2 are also the directors of R1 company. They are in day to day management along with R2 who also represents R4 company. The petitioner made allegations of oppression and mismanagement against R2, R3, R4 and R10 and not against other respondents as arrayed in the company petition.

11. From the facts and circumstances of the case mentioned in the pleadings and the prayers made in the company petition, it appears that the sole purpose of filing the petition is to obstruct the claim of the Applicants/ Respondents before the Arbitral Tribunal which has already been constituted in accordance with the Shareholders Agreement dated 12.07.2013. The Respondents/Petitioners have 'dressed up' the petition with allegations of oppression and mismanagement against the Applicants/Respondents on the basis of which relief (a) is claimed, then

relief (b) is prayed to seek direction against R4/R2, Applicant No.1/R4 and Applicant No.7/R10 to transfer the equity shares held by them in respect of R3/R1 company to the Respondent/Petitioner at a value to be determined by the CLB/NCLT, Thus relief (b) has no connection with relief (a) of the company petition. This is nothing but a 'dressed up' petition in order to obviate the claim that has been filed by the Applicants/ Respondents before the arbitral tribunal which has been constituted in accordance with the Shareholders Agreement dated 12.07.2013. This fact has further been strengthened from para 37 of the reply statement filed by the Respondents/Petitioners before the arbitral tribunal, wherein it has been stated that "the attempts made by the claimants in their legal notice are factually and legally untenable and having regard to the oppression and mismanagement of R1 company committed by the claimants. The Respondents/Petitioners filed a petition for relief against oppression and mismanagement before the CLB". This transpires that for the purpose of the counter claim, the allegations of oppression and mismanagement are levelled against Applicants/Respondents in the company petition. The action of filing the company petition has been done at the earlier point of time by envisaging that the applicants/respondents were likely to file the claim before the Arbitral Tribunal. The issue of transfer of shares is clearly the subject matter of the agreement dated 12.07.2013 and the allegations of oppression and mismanagement by the Respondents/ Petitioners who are the directors of R1 company seems to have levelled

against Applicants/Respondents in order to 'dress up' the petition filed under section 397 and 398 r/w 402 and 403 of the Companies Act, 1956. It is an admitted fact that the Applicants/R2, R3, R5, R6, R7, R8, R9 and R10 are the shareholders, then as to how the shareholders could be made responsible for the oppression and mismanagement, when the Respondents/Petitioners are the Directors of R1 company. However, it is admitted fact that all the Applicants/Respondents are not signatory to the shareholders Agreement. But that aspect may not be a bar to refer the matter to Arbitral Tribunal. In *Vijay Sekhri and Others Vs Tinna Agro Industries Ltd.* (supra), it was observed that Arbitration Agreements may also be enforced against non-signatories when the interest of such non-signatories are directly related to, if not congruent with, those of a signatory. It was further observed that when the facts and allegations presented by the petitioner both signatories and non-signatories are intertwined and therefore, cannot be separated. The same is true in relation to the case in hand.

12. The contractual obligation contained in the Shareholders Agreement can be determined only by the Arbitral Tribunal. In *20th Century Finance Corporation Ltd. Vs Union of India and Others* (supra), it was held that it flows from the contractual obligations contained in the sponsorship agreement and has to be necessarily determined through the means of arbitral agreement which is contained in Article 8(2) of the Sponsorship Agreement. In this matter, the CLB held that Application u/s 8 of the

Arbitration and Conciliation Act, 1996, was maintainable to the extent it related to the terms of Sponsorship Agreement and covered by the Arbitration clause contained therein. This view was upheld by the Delhi High Court and the Appeal filed against the CLB order was dismissed. In *Demerara Distilleries Private Ltd Vs Demerara Distillers Limited* (supra), the Apex court did not agree with the contentions that has been advanced by the Respondent company to resist the prayer for appointment of Arbitrators u/s 11(6) of the Arbitration and Conciliation Act, 1996 with regard to the application being premature, dispute not being arbitrable and the proceedings pending before the CLB would not merit any serious consideration. The court held that the proceedings before the Company Law Board at the instance of the present Respondent and the prayer of the petitioner therein for reference to Arbitration cannot be laudably and reasonably construed to be a bar for impediment of the application for referring the matter to the Arbitrator. In *P.Anand Gajapathi Raju and Others Vs PVG Raju (dead) & Others* (supra), the issue before the court was, that whether the court can refer the parties to Arbitration. It was held that the Arbitration Agreement covers all the disputes between the parties in the proceedings and the Arbitration Agreement satisfies the requirements of Section 7 of the new Act and the language of Section 8 is pre-emptory and held that it is obligatory for the Board to refer the parties to the arbitration in terms of their Arbitration Agreement.

13. In the light of the facts and circumstances of the case in hand and the case law discussed herein above, it can fairly be concluded that the company petition is a 'dressed up' petition and the relief (b) claimed in the petition falls within the purview of the Shareholders Agreement dated 12.07.2013, otherwise also in M/s.Everest Holding Ltd. Vs Shyam Kumar Shrivastava & Ors, reported in 2008 (12) JT 135, in Para 18 of the judgement, the Hon'ble Supreme Court held that in terms of the arbitration Agreements, Arbitrator can find out and adjudicate as to whether or not a company is functional and if it was not functional then he could always find out the nature and status of its assets and can also issue directions and pass orders regarding dues and liabilities and also for taking recourse to appropriate remedy. Therefore, C.A.No.55 of 2015 filed by Applicants/Respondents is allowed and the company petition No.31 of 2015 is dismissed. In the circumstances, that the Arbitral Tribunal is already constituted and the claim/counter-claim has already been filed by the parties before the Tribunal. Therefore, there is nothing to be referred to the Arbitral Tribunal. However, the Respondents/petitioners are given the liberty to file additional claim, if any, before the Arbitral Tribunal. In that case, the Tribunal shall give opportunity to the Applicants/Respondents to file counter, if any. There is no order as to costs.


ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)


CH. MOHD SHARIEF TARIQ
MEMBER (JUDICIAL)