

In Re: Amrl International Tech

In Re: Amrl International Tech

SooperKanoon Citation : sooperkanoon.com/48220

Court : Company Law Board CLB

Decided On : Jan-30-2008

Judge : K Balu

Appellant : In Re: Amrl International Tech

Judgement :

1. This is an application filed under regulation 44 of the Company Law Board Regulations, 1991 ("the Regulations") read with Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") seeking directions against the respondent/petitioner to refer the action brought under Sections 397 & 398 of the Companies Act, 1956 ("the Act") before the Company Law Board, being the subject matter of the agreements entered into between the parties to arbitration, in support of which Shri R. Venkatavaradan, learned Counsel, submitted: o The first applicant-Company is one of the parties to (a) Memorandum of Understanding (MOU) entered on 09.10.2006 by the respondent/petitioner, the first applicant-Company and the Investor group; (b) Shareholders Agreement (SHA) dated 04.11.2006 and (c) Share Subscription Agreement (SSA) dated 04.11.2006 entered into by the respondent/petitioner, the applicant-Company, M/s. AMR Constructions, the eighth respondent, the respondent No. 13 in the company petition and TIDCO. The Investor group in all the three agreements is represented by the second applicant and accordingly, the second applicant has initiated the present proceedings on behalf of all the persons constituting the Investor group. These agreements which are suppressed by the respondent/petitioner set out various terms and conditions for running the business and management of the first

applicant-Company, including the shareholding pattern in the Company. The MOU deals with the modalities for future arrangements between the parties. The SHA provides for the management of the affairs of the Company and certain rights and obligations between the parties, as specified therein. The SSA facilitates the acquisition of 68% of the paid up equity share capital of the Company by the investors.

o All the allegations made in the company petition are matters fully covered by the MOU, SHA & SSA. Clause 11.2 of the MOU, Clause 15 of the SHA and Clause 12 of the SSA provide for arbitration, as the means of resolving disputes arising out of the MOU/SHA/SSA between the parties and, therefore, the disputes raised in the company petition can be resolved only by a properly constituted arbitral tribunal under these agreements. The respondent/petitioner is bound by the terms of the contract and cannot seek to agitate the disputed issues before the CLB. By virtue of Section 8 of the Act, 1996 the petitioner may be directed to go before the arbitral tribunal for resolving the subject disputes, without however, being adjudicated in the present proceedings. If the disputes raised in the main petition can be decided without reference to the agreements in question, the CLB is empowered to exercise its jurisdiction under Sections 397 and 398, whereas in the present case, the grievances have arisen out of the agreements and, therefore, the disputes are bound to be referred to arbitration. If the grievances raised in the affairs of the Company are on account of the agreements, the disputes cannot be adjudicated before the CLB, without any reference to the terms of the agreements and if the agreements are in force, the parties are to refer the disputes arising out of the agreements for arbitration, as held in *E. Logistics P. Ltd. v. Financial Technologies (India) Ltd.* *Airtouch International (Mauritius) Ltd. v. RPG Cellular Investments and Holdings P. Ltd.* (2004) Vol. 121 CC 647 that when the entire foundation of the petition is on the SHA and the matters agitated in the company petition are arising out of and in connection with the SHA, the parties must be referred to arbitration, in terms of the SHA and cannot invoke the jurisdiction of the CLB under Sections 397 & 398.

o The substantial rights of the parties under the SHA and other agreements can be enforced before the arbitral tribunal. It is only by virtue of the agreements, the

parties have acquired interest in the Company. All the rights and obligations flowing from the agreements are not to be raised in a Section 397/398 petition. The allegations of the petitioner with reference to tiling of statutory forms, convening of the extra ordinary general meeting, alteration of the articles of association and memorandum of association increase in authorised capital, change in the name of the Company, non-convening of board meeting, non-sending of notices of board meetings, share allotment, effecting changes in the composition of the board of directors of the Company by removing and appointing additional directors, utilisation of the Company's property for personal benefits, appointment of general manager and change of the registered office are squarely covered by the MOU/SHA/SSA, as the case may be. The respondent/petitioner intends to cancel the agreements and terminate the directorship. The grievances of the respondent/petitioner are not arising out of any statutory duties, but consequent upon the contractual obligations between the parties to the agreements. The alleged acts of mis-management are either obligations or rights of either of the applicants or the respondent/petitioner, as contemplated in the relevant Clauses of the agreements. These issues which are to be raised before the arbitral tribunal, can never be raised in a Section 397/398 proceeding. The provisions of the agreements are binding upon the parties and the breach of any of the terms of the agreements, will have to be resolved by referring it to arbitration in terms of the arbitration Clause(s). No remedies can be claimed in the shape of the purported acts of mismanagement and oppression.

o All the parties before the CLB need not necessarily be parties to the agreements, but only substantial parties need be parties to the agreements, to remedy the grievances in the affairs of the Company.

The respondents 2 to 4, 8 & 9, being nominees of the respondent No. 12, need not be parties to the agreements. The respondents 2 to 12 are investors and need not be parties, especially when the second respondent is representing others and hence other allottees need not be parties to the agreement. The parties cannot frustrate the SHA, by merely joining third parties, not being formal parties to the proceedings before the CLB. It would be sufficient, if the main parties to the company petition are parties to the SHA, as held in Airtouch International

(Mauritius) Ltd. v. RPG Cellular Investments and Holdings P. Ltd. (Supra).

o The arbitral tribunal cannot set aside the impugned allotments, yet it would adjudicate the dispute in relation to the allotments, since arising out of the agreement(s), upon which the petitioner is at liberty to approach the CLB. Resetting aside the allotments in terms of the prayer of the petitioner. Though the arbitrator cannot either declare the statutory forms filed with the Registrar of Companies as null and void or direct the Registrar of Companies to initiate appropriate action against one Shri R. Sivaram, a Practicing Company Secretary, yet the prayer for removing the respondents 2-4, 8 & 9 from directorship of the Company for playing fraud and fabrication of documents and for declaration that these respondents are unfit to be appointed as directors of the Company can be granted by the arbitral tribunal.

2. Shri T.K. Seshadri, learned Senior Counsel, while opposing the application to refer the parties for arbitration submitted: o The remedies under Sections 397 and 398 are alternate remedies for winding up and any action under Section 397/398 must be in a representative capacity, and moreover, power has been conferred on the CLB by the statute. The CLB must be satisfied to make an order under Section 397 that the company's affairs are being conducted in a manner oppressive to any member or members, that the facts would justify the making of a winding up order, on the ground that it was just and equitable that the company should be wound up and that a winding up order would be unfairly prejudice the applicant or applicants. The scheme of Sections 397 and 402 constitute a code by itself, granting relief to oppressed minority shareholders and granting appropriate relief. The grievances must be in relation to the rights of a member which must be harsh, burdensome, continuous and unfair, adversely affecting their interest. Section 398 contemplates acts of mismanagement in the affairs of the Company in a manner prejudicial to its interest or public interest, which are found lacking in the instant matter. Hence, private rights of the petitioner cannot be the subject of a Section 397/398 proceeding.

o The application is not maintainable in the light of the averments and pleadings made in the company petition. The respondent/petitioner. M/s. AMR Constructions

Limited and the first applicant are parties to the MOD dated 09.10.2005. AMR Constructions, a sole proprietary concern, the eighth respondent, the first applicant, Axes Technologies Inc., Tamilnadu Industrial Development Corporation Limited and the respondent/petitioner are parties to the SHA and SSA. These documents have not been signed by Axes Technologies Inc. and TIDCO. Furthermore, all the parties before the CLB are not parties to the agreements. While the respondents 2, 8 & 13 alone are parties to the SHA, there are several other respondents who have been arrayed as parties to the main petition. The second applicant is not a party to the MOU. In terms of the SHA, the respondents 2 & 8 are only investors, but the investor group has not been defined. Furthermore, the investor group is not a party to the company petition. Clause 15 applies to parties to the SHA, which speaks about what can be referred to arbitration.

The SSA as well as the SHA has not been signed by the respondent No. 13 and TIDCO, thereby the requirements of Section 7 of the Act, 1996 are not satisfied. Section 8(2) of the Act, 1996 stipulates that any application for referring the disputes must be accompanied by the original agreement or duly certified copy of the agreement, where the applicant has filed only a xerox copy, which is contrary to Section 8(2). The SHA and SSA are inchoate documents and cannot be enforced and are inconsistent with the provisions of Section 8 of the Act, 1996.

o All the allegations set out in the petition are in relation to the affairs of the Company. The statutory rights of the shareholders cannot be the subject matter of any arbitration. The question of oppression cannot be dealt with by the arbitrator and the reliefs claimed before the CLB cannot be granted by the Arbitrator. The company petition has been filed for the alleged acts of mismanagement; violation of provisions of the Companies Act in the affairs of the first applicant; fraud, falsification and forgery of company records; fabrication; filing of false forms with the Registrar of Companies and misappropriation of the funds of the Company as detailed therein, which fall within the ambit of Sections 397 and 398 of the Act. These acts of mismanagement and the reliefs sought for by the petitioner are issues outside the scope of agreement and within the exclusive jurisdiction of the CLB. The Arbitrator cannot set right these violations and frauds. The reliefs sought

for by the petitioner can neither be granted by the Arbitrator. The present application has been deliberately filed to cover up the falsity and fraud played by the applicants and others who have been appointed as additional directors of the Company and with a view to protract the proceedings. The powers conferred on the CLB under Sections 397 & 398 are exclusive in nature and cannot be delegated to an arbitral tribunal. The arbitral tribunal is only a contractual tribunal to settle disputes arising out of the understanding reached between the parties. Therefore, the question of referring the parties to the arbitral tribunal does not arise and the application is liable to be dismissed.

3. Shri T.K. Seshadri, learned Senior Counsel, in support of his legal submissions, relied on the following decisions: Sandeep Kumar and Ors. v. Master Ritesh and Ors. (2006) 8 SC 575 to show that if all the parties to the suit are not parties to the arbitration agreement, the question of invoking the arbitration Clause does not arise. Sporting Pastime India Ltd. and Anr., K.C. Palanisamy and Anr. & Cheran Holdings P. Ltd. and Anr. v. Kasturi and Sons Limited (2007) Vol. 137 CC 821 to show that any grievances arising directly out of the provisions of the Act cannot be referred to the arbitral tribunal. The jurisdiction of the CLB cannot be ousted even by consent of the parties. If the parties are not common, the prayer for arbitration cannot be entertained. If all parties to the petition have not signed the agreement, Section 8 cannot be invoked. Das Lagerway Wind Turbines Ltd. v. Cynosure Investments Private Limited (2007) 3 CTC 524 to show the scope of the petition filed under Sections 397 and 398 is quite distinct from the scope of the arbitration Clause contained in the agreement and the reliefs claimed in the company petition cannot be granted by the arbitrator and it can be granted by the CLB alone, by virtue of Sections 397 and 398 of the Act. The dispute over which the arbitrator has competency can alone be referred for arbitration. Binay Prakash and Ors. v. Domco P. Ltd. and Ors. (2007) Vol. 138 CC 619 to show that there is no provision for splitting the cause or parties and referring the subject matter of the suit to arbitration. Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr.

to show that the matter cannot be referred to arbitration under Section 8 of the Act 1996, if any such application is not accompanied by the original agreement or duly certified copy thereof The entire subject matter of the suit should be subject to

arbitration agreement and the bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

o Chennai Container Terminal Pvt. Ltd. and Anr. v. Union of India Rep. by Secretary, Ministry of Shipping, Road Transport and Highways and Ors. (2007) 4 MLJ 412 to show that by virtue of Section VI of the Act 1996, a party means a party to the arbitration proceedings and does not include a third person, who is not a party to the agreement.

o Smt. Sudershan Chopra v. CLB and Ors. (2004) Vol. 118 CC 341 to show that there must exist a valid arbitration agreement between the parties and that original arbitration agreement or a duly certified copy thereof should accompany the application.

o Sporting Pastime India Limited v. Kasturi & Sons Limited (Madras High Court) to show that the scope of Sections 397 and 398 in dealing with the statutory obligations is distinct and the CLB has every jurisdiction to deal with it, which is not coming under the purview of the agreement. The reliefs claimed in the company petition cannot be granted by an arbitrator, which are available under Sections 397 & 398 from the CLB alone and the statutory jurisdiction cannot be ousted even by the consent of the parties. If the purported charges arise independent of the agreement, they cannot be agitated before the arbitral tribunal.

Cosmosteels P. Ltd. and Ors. v. Jairam Das Gupta and Ors. (1978) Vol. 48 CC 312 to show that Sections 397 and 398 empower the minority shareholders to approach the court for relief against oppression by majority shareholders, a power of widest amplitude, conferred on the court.

4. I have considered the arguments of learned Counsel for the parties.

The short issue before me is whether the present action brought before the CLB under Sections 397 & 398 be referred to arbitration, in the facts of the present case and in the light of the relevant provisions of the Act, 1996 and the Regulations, 1991.

5. By virtue of Section 8 of the Act of 1996, it is mandatory for a judicial authority, before which an action has been brought in a matter, being the subject-matter of an arbitration agreement, to refer the parties for arbitration provided, (a) the application under this Section is made any time before submitting the "first statement on the substance of the dispute"; and (b) there is a valid arbitration agreement. Sub-section (3) provides that an arbitration may be commenced or continued and an arbitral award be made inspite of (a) application made under Sub-section (1), and (b) pendency of the issue, before a judicial authority. Section 7(3) and Clause (a) of Sub-section (4) of Section 7 of the Act, 1996 stipulate that an arbitration agreement shall be in writing and signed by the parties. Section 45 of the Act, 1996 specifies that a judicial authority must refer the parties to arbitration, if the following requirements are satisfied: (a) a judicial authority is seized of an action in the matter of which the parties have made an agreement for arbitration; (b) one of the parties to the agreement makes a request for referring the parties to arbitration; and (c) if it is not found that the arbitration agreement is null and void, inoperative or incapable of being performed.

In the light of the above provisions of the Act, 1996, the agreements on record must be borne in view. There are MOU dated 09.10.2006, SHA and SSA both dated 04.11.2006 setting out a series of terms and conditions in relation to the affairs and management of the Company which also provide for resolving the disputes arising from and out of those agreements through arbitration mechanism. Clause 11(2) of the MOU provides that any controversy, claim, dispute or claim arising out of it shall be finally settled by arbitration in accordance with the Act, 1996. Clause 15 of the SHA and Clause 12 of the SSA respectively contemplate that any dispute arising amongst the parties shall amicably be settled, failure of which the dispute shall be referred to a panel of three arbitrators with the petitioner-respondent, T1DCO not being a party before the CLB and the respondent No. 13, appointing one arbitrator, the Investor appointing one arbitrator and the arbitrators so appointed jointly nominating a third presiding arbitrator. The arbitration proceedings shall be governed by the Act, 1996. The MOU has been duly signed by the parties concerned namely, the petitioner-respondent, M/s. AMR Constructions Limited, not a party to the CLB proceedings and the Company herein, while the SHA and the SSA have not been admittedly signed by TIDCO,

and the respondent No. 13. It is well settled Ural a non-signatory to arbitration agreement, when willing to arbitrate is entitled to arbitration, but when unwilling he is not liable to submit to arbitration. It is, therefore, beyond doubt that in case TIDCO and the respondent No. 13 being non-signatory parties to the SHA and SSA are unwilling to submit to arbitration, the disputes arising out of SUA and SSA cannot be arbitrated and the arbitration Clauses contained therein are incapable of being performed.

It is relevant to point out as held in *Smt. Sudershan Chopra v. CLB and Ors.* (supra) that there must exist a valid arbitration agreement in order to invoke Section 8 of the Act, 1996.

According to the applicants, the grievances raised in the main petition on account of - (a) filing of fabricated forms before the Registrar of Companies without convening any board meetings of the Company, (b) carrying out amendments unauthorisedly in the articles of association of the Company; (c) increasing the authorised capital without the consent of the members (d) changing the name of the Company without prior approval of the members; (e) allotting 1.25 crores shares contrary to the provisions of the articles of association of the Company; (f) using the Company's property for personal benefits; (g) appointing a general manager without approval; (h) non-convening of any extra ordinary general meeting on 04.11.2006. (i) non-convening of the board meetings after 04.11.2006 and non sending of notices of the board meeting to Mr. Vernon R. Loucks or Charles Vernon Loucks; and (j) changing the constitution of the board of directors of the Company, by resignation and re-appointment of Mr. Vernon R. Loucks or Charles Vernon Loucks, are squarely covered by MOU/SHA/MOU, which are however seriously disputed by the respondent-petitioner. It is not under dispute that TIDCO and the respondent No. 13 have not signed the SHA as well as the SSA, in which case these two non-signatories are not liable to submit to arbitration, in the event of their unwillingness to settle the disputes arising out of the SHA and the SSA through arbitral tribunal. It is relevant to point out that the petitioner/respondent TIDCO and the respondent No. 13 are entitled to appoint one arbitrator and therefore, if there is no willingness on the part of TIDCO and the respondent No. (sic) for appointing an arbitrator, none of the disputes discussed

supra can be referred to a panel of three arbitrators, as contemplated in the SHA and the SSA. Furthermore, the respondents 3 to 7 and 9 to 12 are not parties to the SHA and the SSA. TIDCO though, a party to the SUA and the SSA is not a party to the CLB proceedings.

While the petitioner-respondent and the Company alone are parties to the MOU, the respondents 2 to 13 are not parties. M/s. AMR Constructions Limited, being party to the MOD is not before the CLB. The allotments made in favour of the respondents 2 to 13 are being challenged in the main petition and the relief of setting aside the allotments impugned in the main petition cannot be granted in the absence of and without hearing the allottees including the respondents 3 to 7 and 9 to 12, who are parties not to the SHA and the SSA, despite the stand of the applicants that the second respondent is representing them and accordingly, these parties are found to be main and not formal parties to the company petition. I, therefore, do not find commonality of the main parties to the present proceedings and the SHA and the SSA unlike in the case of Airtouch International (Mauritius) Ltd. v. RPG Cellular Investments and Holdings P. Ltd. (Supra). All the parties to the company petition, who are already found to be main parties not being parties to the MOU/SHA/SSA, the question of invoking the arbitration Clause(s) does not arise as held in Sandeep Kumar and Ors.

v. Master Ritesh and Ors. (Supra).

6. Apart from the above complaint made in the main petition, the petitioner is aggrieved on account of the following alleged acts of oppression and mismanagement in the affairs of the Company.

- o The resignation of Mr. Vernon R. Loucks has been filed with the Registrar of Companies, unauthorisedly using his digital signature.

- o Mr. Vernon R. Loucks has been re-appointed using a forged letter, attaching the photograph of some other person, who is unknown and making use of his digital signature without his knowledge.

o Mr. Charles Vernon Loucks was holding a Director Identification Number 00849470. but fraudulently and without any authority made another application in the name of 'Charles Vernon Locks' without Charles Vernon Louck's knowledge and consent by forging signature and misspelling the name and obtained another Director Identification Number. This has been used for filing other Forms, using the stolen digital signature of Mr. Charles Vernon Loucks.

o Form No. 32 filed showing resignation of Mr. Paul Pandian is accompanied by a forged letter of Mr. Paul Pandian.

o The affairs of the Company have been conducted in a manner prejudicial to the interest of the Company and its shareholders. The rights of the petitioner/respondent have been oppressed by fraudulent acts of the respondents 2 to 4, 8 & 9 to the company petition. The business of the Company is being conducted in a manner oppressive to the interest of the petitioner and public interest.

o The petitioner/respondent brought into the Company a sum of Rs. 70 lakhs to pay for a Chennai project office and construct a compound on the project site. These monies were utilised to pay a sum Rs. 20 lakhs to one Mr. Krishnamoorthy for services which are unknown and without the approval of the petitioner/respondent and further spent an amount of Rs. 10 lakhs for acquiring a car without any authorisation.

The MOU which contemplates that any dispute, controversy or claim arising out of it shall be settled by arbitration, does not encompass the matters enumerated her above. These are remediable by the scheme of Sections 397 and 402, constituting a code by itself, as held in *Cosmosteels P. Ltd. and Ors. v. Jairam Das Gupta and Ors.* (Supra). The arbitration Clauses forming part of the SHA and the SSA will be of no relevance, as they are already found to be incapable of being performed for the reasons elaborated elsewhere. In the light of the principles enunciated by the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr.* (Supra) that where the subject matter of the company petition either wholly or in part, lies outside the arbitration agreement and also between some of the parties who are not parties to the arbitration agreement, there is no question of application

of Section 8 of the Act, 1996. When the subject matter of the company petition includes subject matter of the arbitration agreement as well as other disputes, the action in question cannot be referred to arbitration. There is no provision for splitting the cause or parties and referring the subject matter of the company petition to the arbitrator, which has been followed in *Binay Prakash and Ors. v. Domco P. Ltd. and Ors.* (Supra). Section 8 can neither be pressed into service where some parties to the company petition are not parties to the arbitration agreement. Furthermore, the reliefs claimed in the company petition, namely, (a) setting aside the impugned allotment of shares; (b) declaring the statutory forms filed with the Registrar of Companies as null and void; and (c) directing the Registrar of Companies to initiate action against Mr. R. Sivaram, a Practising Company Secretary for his alleged fraudulent actions in the affairs of the Company, cannot be granted by an arbitrator, which are available under the provisions of Sections 397 and 398 of the Act from the CLB alone as reiterated in *Das Lagerway Wind Turbines Ltd. v. Cynosure Investments Private Limited* (supra). The statutory jurisdiction of the CLB cannot either be ousted by the parties as held in *Sporting Pastime India Limited v. Kasturi & Sons Limited* (Supra). The whole of the grievances of the petitioner are not flowing from the MOU/SHA/SSA and the subject disputes are remediable, without recourse to the agreements, and therefore, the decision in *E. Logistics P. Ltd. v. Financial Technologies (India) Ltd.* (Supra) will be of least assistance to the applicants.

The CLB in exercise of the inherent power conferred by Regulation 44 may make such orders as may be necessary for the ends of justice or prevent the abuse of the process of the Bench. Nevertheless, the exercise of the inherent power by the CLB, in the facts of the present case, would run parallel to the provisions of Section 8 and 45 of the Act 1996 and, therefore, I do not venture to act contrary to these provisions, by exercising the inherent power in terms of Regulation 44.

7. In view of my forgoing conclusions, the prayer of the applicants to refer the parties before the CLB to arbitration in terms of Section 8 of the Act, 1996, does not merit any consideration. Accordingly, the application stands rejected. The respondents are at liberty to file counter to the main petition by 21.02.2008 and rejoinder to be filed by 17.03.2008. The matter will be heard on 21.03.2008 at 2.30

PM. With these directions, the application is disposed of.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com