

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 22.5.2009

Date of Order: 25.5.2009

OMP No. 292/2009

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25.5.2009

**K.K.Modi Investment and Financial
Services Pvt. Ltd.**

... Petitioner

Through: Mr. Rajiv Sawhney, Sr. Advocate with
Mr. Shanmuya Patro, Ms. Meghalee Barthakur
And Ms. Mallika Joshi, Advocates

Versus

Apollo International Inc. & Ors.

... Respondents

Through: Mr. Rajiv Nayyar, Sr. Advocate with
Mr. Dhruv Wahi, Advocates for R-2 & 3

JUSTICE SHIV NARAYAN DHINGRA

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the reporter or not? | Yes. |
| 3. Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

The petitioner has made this application/petition under Section 9 of the Arbitration & Conciliation Act, 1996 (for short "the Act") with a prayer that respondent no.1 and his affiliates viz. respondents no. 2, 3 & 4 be restrained from giving effect to a notice dated 22.4.2009 whereby a license agreement dated 6.9.2002 between respondents no. 1 & 3 was terminated. It is obvious that

the petitioner is not party to this license agreement which was revoked by notice dated 22.4.2009. The petitioner in his application has relied upon an arbitration clause contained in Article 11.14 of Shareholders' Agreement and has pleaded that the agreement between respondents no. 1 & 3 was part of the contract, entered into by the petitioner with respondents no. 1 to 4 by way of Shareholders' Agreement. The Shareholders' Agreement is placed on record and clause 11.14 reads as under:

11.14 Arbitration of Disputes: The parties shall attempt to settle disputes arising out of or relating to this Agreement or the breach thereof by a meeting of a designated representative of each of the parties within ten (10) days after a request by either of the parties to the other party asking for the same. If such dispute cannot be settled at this meeting, the parties shall designate a mediator, or if the parties are unable to agree upon a mediator, each party shall choose a mediator and the chosen mediators shall choose a single person to mediate the dispute. If the matter is not then settled in a manner satisfactory to the parties, either party may submit the dispute to binding arbitration by a sole arbitrator chosen by agreement of the parties, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Except as otherwise specifically provided for herein, each party shall bear its own costs and attorneys' fees. The procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement, provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damages. All applicable statutes of limitations shall be tolled while the procedures specified in this Section are pending. The parties will take such action, if any, required to effectuate such tolling.

2. The Shareholders' Agreement is dated 30.8.2001 and is between Apollo International Inc. i.e. respondent no.1 and petitioner. Other respondents are not parties to this Shareholders' Agreement and by this Shareholders' Agreement both – the petitioner and respondent no. 1 had decided to form a new company by the name of Modi-Apollo International Group Private Limited. The above arbitration clause as provided in the Shareholders' Agreement is in respect of resolution of disputes between petitioner and respondent no.1 concerning the Shareholders' Agreement which relates to formation, functioning and management etc. of the company Modi Apollo International Group Private Limited. It is submitted by Counsel for the petitioner that respondent no.1 and respondents no. 2 & 3 were all having same Directors and were having economic unity. He referred to the agreement entered into between respondent no. 3 and respondent no.1 on 6.9.2002 to press his point that the addresses of service given in this agreement of both the respondents are the same. He stated that since respondents no. 1, 2 & 3 were of the same group and respondent no.1 had entered into an agreement with petitioner on the basis of its having entered into a Master Agreement and Implementation Agreement with respondent no.3, the liability of respondents no. 2, 3 & 4 would automatically be towards the petitioner. The agreement entered into between petitioner and respondent no.1 would be equally binding on respondents no. 2, 3 & 4 and termination of Master Agreement and Implementation Agreement by respondent no.3 since affects petitioner substantially as respondent no.1 had made the petitioner invest

hundreds of crores of rupees on the basis of the above two agreements, the petitioner not only has a cause of action, but can invoke the arbitration clause stated above against all the respondents. He submitted that revocation of the agreements between respondent no. 1 and respondent no.3 could ruin the future of thousands of students who had taken admission or who were about to take admission. He also submitted the Shareholders' Agreement, clause 11.12, provided that all exhibits attached thereto would stand incorporated by reference and shall constitute a part of the agreement. The Master Agreement between respondents no. 1 & 3 and the Implementation Agreement between respondents no. 1 & 3 were part of the annexures to the Shareholders' Agreement and therefore they are to be read as part of the Shareholders' Agreement and petitioner could invoke arbitration clause against all the respondents when the agreement between respondents no. 1 & 3 was revoked by respondent no.3.

3. I consider that under Section 9 of the Act, the petitioner can seek relief against those respondents who have a contractual relationship with the petitioner and there should be a contract between petitioner and the respondents for referring the disputes between them to the Arbitrator. It is admitted case of petitioner that he has no direct contract with respondents no. 2, 3 & 4. It is also not his case that respondents no. 2, 3 & 4 entered into any kind of agreement with the petitioner in respect of the subject matter of the petition. The petitioner's contention is that the contract between petitioner and respondent no.1 gets

extended to respondents no. 2, 3 & 4 because of economic unity and because of the fact that respondent no.1, on the basis of its contract with other respondents, had entered into the Shareholders' Agreement with the petitioner. This argument does not hold good in absence of a contract between the petitioner and other respondents and in absence of a direct or indirect arbitration agreement as envisaged under Section 7 of Arbitration and Conciliation Act, 1996 between petitioner and respondents 2, 3 and 4.

4. Section 7 of the Act provides the circumstances under which an arbitration clause can be inferred between the parties. Section 7 reads as under:

7. Arbitration Agreement – (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties:

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the

agreement is alleged by one party and not denied by the other.

- (5) *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

5. The first requirement of Section 7 is that there should be a contract between petitioner and respondent, if there is no contract between petitioner and respondent the arbitration clause between them cannot be inferred. In the present case, the contract is there only between petitioner and respondent no.1 in the form of a Shareholders' Agreement. There is no contract between petitioner and respondents no. 2, 3 & 4. Can such a contract be inferred between petitioner and respondents no. 2, 3 & 4 merely on the ground of economic unity of respondents 1 to 4? Every company which is incorporated under relevant law of a country is a separate legal entity/person having right to enter into contracts with other legal entities or persons independent of the holding company or the parent company of which it is subsidiary. Unless the law provides that all companies having common management or subsidiary companies or holding Companies shall be considered one legal entity for the purpose of contracts, the Court cannot presume that all subsidiary companies and the holding or parent company shall be considered as one legal person and a contract with one company shall be considered as a contract with every other company of that group. If it is so, then the registration of separate companies as subsidiary companies or wholly owned companies would have no meaning and

the Court would be effectively merging all subsidiary companies wholly or partly owned companies into one company. That is not the position under company law or any other law that a subsidiary company practically has no legal existence and it is only the main company which has legal existence. A contract with respondent no.1 cannot be considered as a contract with respondents no.2, 3 & 4. If respondents no. 2, 3 & 4 were to be considered one and the same person then there was no reason for the petitioner to enter into contract with only a subsidiary company. The petitioner should have entered into a contract with main company. The very fact that the petitioner entered into a contract with subsidiary company on the basis of an agreement of respondent no.1 with respondent no.3, shows that the petitioner knew that respondents no. 1 & 3 were two different legal persons and he was entering into contract with respondent no. 1 or not with respondents no. 2, 3 or 4. The contract between respondent no. 1 & 3 cannot be considered as contract between petitioner and respondents no. 1 & 3 on the ground of economic unity of respondents no. 1 & 3. By the notice dated 22.4.2009 the respondent no.3 had terminated the license, which it granted to respondent no.1 under a separate contract which was entered into between respondents no. 1 & 3. The person aggrieved can only be respondent no.1 who could have invoked arbitration clause contained in the license agreement against respondent no.3.

6. I consider that there is no arbitration agreement between petitioner and respondents no. 2, 3 & 4 in respect of the License Agreement which is terminated by notice dated 22.4.2009. I, therefore find that this application/petition under Section 9 is not maintainable and is liable to be dismissed. This however, would not preclude petitioner from seeking remedies against respondents under appropriate law.

Dasti.

May 25, 2009
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SHIV NARAYAN DHINGRA, J.