

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 72 OF 2013**

1. Emgee Housing Private Limited, a Company registered under the Companies Act, 1956, having its registered office at 608, City Center, Patto Plaza, Panaji, Goa – 403 001.
2. Mr. Mudhit Madanlal Gupta, adult, Indian Inhabitant, Hari Bhavan No. 2, 64, Peddar Road, Mumbai 400 026.
3. Emgee Corporation Private Limited, a Company registered under the Companies Act, 1956, having its registered office a 1st floor, Bahubali Building, Caswasji Patel Street, Fort, Mumbai, Petitioners/ Original Respondents

Versus

ELS Developers Private Limited, a Company registered under the Companies Act, 1956, having its registered office at 401, Dhun Building, 23/25, Janbhoomi Marg, Fort, Mumbai 400 001. Respondent/ Original Petitioner

Mr. Rahul Chitnis with Mr. Purushottam Karpe and Mr. Jairam Chandnani, Advocates for the Petitioners.

Mr. John Abreu Lobo, Advocate for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 30th MARCH, 2016

PRONOUNCED ON:- 26th APRIL, 2016

JUDGMENT:

By this petition, the petitioners (respondents before the Arbitrator) are challenging order dated 09.08.2012, passed by the Company Law Board, Mumbai Bench (CLB) in Company Application No. 27/2012 in Company Petition No. 8/397-398/CLB/MB/2012. By the impugned order, the CLB has dismissed the Company Application No. 27/2012, thereby refusing to refer the dispute to arbitration.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That, the respondent herein (petitioner before the CLB) had filed the aforesaid company application alleging mismanagement by the petitioners, as majority shareholders of the petitioner no. 1-Company.

That, company petition is filed for seeking action in respect of oppression and mismanagement. It appears that the

petitioners filed Company Application No. 27/2012 therein, under Section 8 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act, for short), seeking reference of the dispute to the Arbitrator. That application is based on Clause 53 of the Memorandum of Association of the Company, which reads thus:

"53. Whenever any differences or disputes arise between the Company on one hand and any of the members or either, heirs, executors, administrators or assigns on the other hand or between the members interest or their executors, administrators or assigns inter se touching the true intent or construction or the incidence or consequences of these presents or the statutes or touching anything when or thereafter done, executed, omitted or suffered in pursuance of these presents or of these presents, or to any of officers of the Company every such differences or disputes shall be referred to the decision of any arbitrator to be appointed by the parties to dispute or in differences or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties to dispute or in difference such arbitration will be governed

by the laws for the time being in force.”

3. It is contended on behalf of the petitioners that Clause 53 of the Memorandum of Association would amount to an agreement between the parties to refer the disputes and differences between the Company on one hand and any of the members or between the members inter se etc. to arbitration. It was contended that the company petition is filed with a view to frustrate the arbitration agreement as contained in Articles of Association. It is contended that in view of the binding agreement, the dispute has to be referred to an Arbitrator, to be appointed by the parties.

4. The respondent herein opposed the application. It was contended that the action for oppression and mismanagement under Sections 397 and 398 read with Section 402 of the Companies Act, 1956 (the Companies Act, for short), is required to be adjudicated by the CLB and the dispute cannot be said to be arbitrable in nature.

5. The CLB found that although the language employed under Section 8 of the Arbitration Act is peremptory, this presupposes that, what can be referred to the Arbitrator is "that dispute or matter, which the Arbitrator is competent or empowered to decide". It was further found that the Arbitrator cannot "possibly give relief" under Sections 397 and 398 or pass any order under Section 402 or 403 of the Companies Act. The CLB noticed that the scheme of Section 397/398 and Section 402 of the Companies Act constitutes a code in itself, for granting relief to the oppressed minority shareholders and the right of the shareholders under Sections 397 or 398 is a statutory right, which cannot be ousted by a provision contained in the Articles of Association, by taking recourse to Section 8 of the Arbitration Act, on the basis of a clause contained in the Articles of Association. The CLB relied upon the decision of the Hon'ble Supreme Court in the case of **Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., AIR 1999 SC 2354**. In the face of such a finding, the Company Application No. 27/2012 was dismissed. Feeling aggrieved, the petitioners are before this Court.

6. I have heard the learned Counsel for the petitioners and the learned Counsel for the respondent.

7. It is submitted by the learned Counsel for the petitioners that the CLB was not justified in refusing to refer the dispute to the Arbitrator, in view of a binding agreement between the parties, as contained in Clause 53 of the Articles of Association. It is submitted that once the CLB had noticed that the provisions of Section 8 of the Arbitration Act are peremptory in nature, the application could not have been rejected on the ground that the dispute is not arbitrable and, on the ground that the reliefs as claimed in the company petition could not be granted by the Arbitrator.

The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of, **Smt. Claude-Lila Parulekar Vs. Sakal Papers (P) Ltd. and Others, (2005) 11 SCC 73**, and in particular paragraph 25 thereof in order to submit that the Articles of Association constitute that a contract, not merely between the shareholders and the Company, but between the individual shareholders also.

Reliance is then placed on the decision of this Court in **Rakesh Malhotra Vs. Rajinder Kumar Malhotra and Others, (2015) 192**. The learned Counsel points out that although this Court in the aforesaid case came to the conclusion that the dispute in a petition "properly brought" under Section 397 and 398 read with Section 402 of the Companies Act, cannot be referred to the Arbitrator, there is a caveat attached thereto. It is submitted that where it is shown that the company petition is malafide, vexatious or oppressive and/or the petition is "dressed up" to avoid an arbitration clause, the dispute can be referred for determination by the Arbitrator. The learned Counsel would submit that the present company petition would fall into the exception culled out, as the same is malafide and vexatious and is an attempt to "dress up the dispute", to avoid the arbitral clause.

8. The learned Counsel was at pains to point out that the petitioner-Company is a closely held company. The learned Counsel would submit that the reliefs claimed are against the petitioner herein and as such, the CLB was not right in holding that the dispute was not arbitrable in nature. In this regard, the

learned Counsel has referred to the reliefs claimed in the petition, in order to demonstrate that the dispute would indeed be arbitrable in nature.

9. On the contrary, it is submitted by the learned Counsel for the respondent that the CLB has rightly come to the conclusion that the dispute was not arbitrable in nature and the reliefs claimed in the company petition could not be claimed before or granted by the Arbitrator. It is submitted that the reference of the dispute to the Arbitrator, would presuppose that the dispute is of an arbitrable nature and merely because there is an arbitration clause contained in the Articles of Association, which may be binding on the parties, cannot preclude the CLB from examining whether the dispute is arbitrable in nature and whether the reliefs as claimed, can be granted by the Arbitrator. The learned Counsel submits that the CLB, has rightly come to the conclusion that the dispute cannot be referred to the Arbitrator and the matter would not be governed by the exception as carved out in Rakesh Malhotra's case.

10. The learned Counsel for the respondent has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others**, reported in **(2011) 5 SCC 532**, and in particular paragraphs 35 to 37 thereof. Reliance is also placed on the judgment dated 21.03.2007 passed in C.R.P. No. 1050/2003 and C.M.P. No. 6892/2003 of the Madras High Court in the case of **Das Lagerway Wind Turbines Vs. Cynosure Investments Private Ltd.**, in order to submit that the scope of the petition filed under Section 397/398 of the Companies Act, is quite distinct from the scope of the arbitration and the reliefs claimed, cannot be granted by an Arbitrator. Reliance is also placed on the decision, in the case of **Haryana Telecom Ltd.** (supra), to submit that what can be referred to an Arbitrator is only the dispute or matter, which the Arbitrator is competent to decide.

11. I have considered the rival circumstances and the submissions made. The question whether the clause in Articles of Association (Clause 53 in this case), would tantamount to an

arbitration clause, may not detain us long. The Hon'ble Apex Court in the case of **Smt. Claude-Lila Parulekar** (supra) has held in paragraph 25 of the judgment that the Articles of Association constitute a contract not merely between the shareholders and the Company, but between the individual shareholders also. Thus, the existence of an arbitration agreement as contained in Clause 53 of the Articles of Association cannot be disputed. The only question is whether in the face of Clause 53 and the provisions of Section 8 of the Arbitration Act, the CLB was required to refer the dispute for determination by an Arbitrator (a private forum).

In the case of **Rakesh Malhotra** (supra), this Court after taking a survey of several decisions holding the field has concluded in paragraph 124 of the judgment that the disputes in a petition "properly brought" under Sections 397 and 398 read with Section 402 of the Companies Act, 1956, cannot be referred to arbitration, subject to the caveat i.e. where the company petition is malafide, vexatious or oppressive, and one that is merely "dressed up" to avoid an arbitration clause, the matter can be referred to arbitration. The contention on behalf of the petitioner is that the company petition is indeed a "dressed up" petition in

order to avoid the arbitration clause. The contention raised is that the reliefs claimed are personally against the petitioner no. 2 and thus, can be adjudicated by an Arbitrator.

12. In order to examine the said contention, it would be necessary to notice the case made out in the company petition and the reliefs claimed therein.

13. The petitioner no. 1-Company is incorporated with the object of carrying on business in real estate, as builders and contractors. The petitioner no. 2 is the Managing Director of the petitioner no. 1-Company. The petitioner no. 2 alongwith his family members and Company holds 65.45% shares of the petitioner no. 1-Company. The respondent no. 3 is a Company owned and controlled by the petitioner no. 2, which also holds a certain percentage of the equity capital of the petitioner no. 1-Company.

14. It is contended by the respondent that the petitioner no. 2 had approached the shareholders of the respondent-Company

somewhere in March, 2006 for investing in petitioner no. 1-Company, by way of equity for purpose of funding a realty project in Goa assuring good returns in the long term. The respondent-Company had accordingly invested a sum of Rs.1,42,50,000/- (Rupees One Crore Forty-Two Lakhs Fifty Thousand only), towards the share capital of the petitioner no. 1-Company, which aggregates to 12.5% of the paid up capital of the petitioner no. 1-Company. The respondent on 24.09.2008 entered into a MOU with the petitioner no. 2, Emgee Corporation Private Limited, Mrs. Geetanjali Gupta and Mr. Manoj Khalatkar, wherein it was agreed that the shareholding of the above shareholders would not be diluted by the Board and once the Company had surplus profits after repayments of all loans, the profits would be distributed in the same financial year and the Company would not undertake any new project besides the Goa (Odxel) project.

15. Disputes and differences cropped up between the parties in which the respondent approached the CLB with the petition under Section 397/398 of the Companies Act. It was *inter-alia* contended that the petitioner no. 2 has not stood by the

assurance made at the time of investments by the respondent. The petitioner no. 2 has also not called for Annual General Meeting from the year 2008 onwards and the petitioner no. 2 is ignoring the respondent and not willing to disclose the affairs of the petitioner no. 1-Company. There are other allegations made against the petitioner no. 2 of indulging in financial irregularities like acceptance of cash, upon sale of the ready flats which has not been accounted for, and funds being siphoned for his personal use. It is also alleged that the petitioner no. 2 has not filed any IT or ROC Annual Returns until recently when he has availed of the amnesty scheme. There are some instances of mismanagement set out in paragraph 19 of the petition. It is alleged that the *modus operandi* of the petitioner no. 2 has been to create loan liabilities and then give the money back to group Companies. It is thus contended that the affairs of the Company are being conducted in a manner prejudicial to the interest of the minority share holders. The respondent has claimed the following reliefs:

"a. To remove the 2nd respondent as Director of the 1st respondent Company.

b. To direct the 1st respondent Company to furnish all relevant details pertaining to the Goa project like total apartments sold, amount received from the sale of flats etc.

c. To appoint a receiver for looking after the state of affairs of the 1st respondent Company and to manage the funds of the Company till the petition is disposed off.

d. Direct the 2nd respondent to purchase the shares of the petitioner Company at a price to be determined by an Independent Chartered Accountant firm.

e. Pass such further and other orders as this Hon'ble Company Law Board may deem fit and necessary in the circumstances of the case."

16. As noticed earlier, the normal rule is that a dispute in a petition which is "properly brought" under Section 397/398 read with Section 402 of the Companies Act cannot be referred to arbitration, except a small window where the petition is shown to be malafide and "dressed up" to avoid the arbitration clause.

17. Considering the case made out in the petition and the reliefs claimed therein, it is not possible to accept that the petition is an attempt to "dressed up" the claim so as to avoid the arbitration clause. Only because the allegations are against the petitioner no. 2 and the petition *inter-alia* seeks removal of the petitioner no. 2, it cannot be said that the dispute can be resolved by reference of the same to an Arbitrator. As noticed earlier, there are other reliefs incorporated for appointment of a receiver and a direction to the petitioner no. 2 to purchase the shares of the respondent-Company at a price to be determined by the independent Chartered Accountant firm. The CLB has noticed and to my mind rightly so, that the Judicial Authority before whom the action is brought in the matter can justifiably refer the parties to arbitration, provided that the Arbitrator is competent or empowered to decide the said dispute between the parties. Considering the provisions of Section 402 of the Companies Act, the CLB has wide powers to give various reliefs in the wake of allegations of oppression and mismanagement made against the majority shareholders.

18. A useful reference, at this stage may be made to the decision of the Hon'ble Supreme Court in the case of **Booz Allen and Hamilton Inc.** (supra). One of the questions framed in that case was whether the subject matter of the suit was arbitrable i.e. capable of being adjudicated by a private forum. The Hon'ble Apex Court considered the scope and the ambit of the term "arbitrability" and has *inter-alia* held that the said term has different meaning in different contexts. Paragraphs 32 to 34 may be extracted with profit as under:

"32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision

of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section 2(b)(i) of that section.

33. But where the issue of "arbitrability" arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

34. The term "arbitrability" has different meanings in different contexts. The three

facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under :

- (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).*
- (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.*
- (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of*

disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

19. It can thus be seen that unlike Section 11 of the Arbitration Act, the "Judicial Authority" considering the application under Section 8 of the Arbitration Act will have to decide "all aspects of arbitrability" as held by the Hon'ble Apex Court and even if, there is an arbitration agreement between the parties and even if, the dispute is covered by the arbitration agreement, the Court/Judicial Authority will refuse the application under Section 8 of the Arbitration Act, if the subject matter of the dispute is capable of adjudication only by a public forum.

20. In my considered view, having regard to the allegations made in the company petition and the reliefs claimed, they would fall within the domain of public forum as that of the CLB. The impugned order passed by the CLB does not demonstrate any infirmity, so as to warrant interference under Article 227 of the Constitution of India.

In the result, the Writ Petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

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JUDGMENT CONTINUED:

At this stage the learned counsel for the petitioners prays for extension of the interim stay which was already operating for a period of six weeks, in order to enable the petitioners to approach the Hon'ble Supreme Court.

2. I have heard the learned counsel for the respondent.
3. The stay for the proceedings was operating from the year 2013. Considering the overall circumstances, the interim stay of the proceedings before the CLB shall continue for a period of six weeks from today.
4. Certified copy expedited.

C. V. BHADANG, J.

Ap/-