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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY THE 05TH DAY OF AUGUST 2021

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P.NO.304 of 2019

1. VGP Marine Kingdom Private Limited,  
VGP Square,  
No.6, Dharmaraja Koil Street,  
Saidapet, Chennai – 600 015.

2. VGP Housing Private Limited,  
VGP Square,  
No.6, Dharmaraja Koil Street,  
Saidapet, Chennai – 600 015.

...Petitioners

Vs

Kay Ellen Arnold,  
W/o. Ian Mellsop,  
200 School Road, Waimaku RDI,  
0881, PO Box.202, Kumeu,  
New Zealand.

...Respondent

Original Petition praying that this Hon'ble Court be pleased to appoint an Arbitrator representing the respondent so that the Arbitral Tribunal can be constituted in terms of Clause 17.1.2 of the Share Subscription and Share Holders Agreement entered into between the petitioners and the respondent at Chennai on 27/04/2016 directing the Arbitrators to enter into reference, complete the proceedings and give an



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This Original petition coming on this day before this court for hearing in the presence of Mr V.Selvaraj for M/s.D.Jayasingh, advocates for the petitioners herein and Mr.P.S.Raman, Senior Counsel for M/s.S.K.Srinivasan, advocates for the respondent herein and upon reading the petition and the counter statement of Kay Ellen Arnold filed herein and this court having observed that the matter is now pending before N.C.L.T. In company Petition No.431 of 2019 U/S.213,241,242,241(4) and 243 of the company's Act, 2013 and now referring the matter to the Arbitration is a futile exercise and the petitioners can very well raise their grievance before the company court and nothing will prevent them from raising their grounds before the company court and this court does not find any merit in this petition and **it is ordered as follows:-**

That the O.P.No.304 of 2019 be and is hereby dismissed.

2. That there shall be no costs of this petition.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,  
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS  
THE 05TH DAY OF AUGUST 2021.

Sd./-

ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//

Dated at Madras this the      day of      2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments.



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16/09/2021

3

O.P.No.304 of 2019

ORDER

DATED :05.08.2021

THE HON'BLE MR.JUSTICE  
N.SATHISH KUMAR

FOR APPROVAL: 11.10.2021

APPROVED ON: 11.10.2021



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4

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2021

CORAM

THE HONOURABLE **Mr.JUSTICE N.SATHISH KUMAR**

O.P.No.304 of 2019

1.VGP Marine Kingdom Private Limited  
VGP Square  
No.6, Dharmaraja Koil Street  
Saidapet  
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2.VGP Housing Private Limited  
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Saidapet, Chennai 600 015.

... Petitioners

Vs

Kay Ellen Arnold  
W/o.Ian Mellsop  
200, School Road, Waimaku RDI  
0881, PO Box 202, Kumeu  
New Zealand.

... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, r/w. Order 14 Rule 8 of the Original Side Rules, to appoint an Arbitrator representing the respondent so that the Arbitral Tribunal can be constituted in terms of Clause 17.1.2 of the Share Subscription and Share Holders Agreement entered into between the petitioners and the respondent at Chennai on 27.04.2016 directing the



Arbitrators to enter into reference, complete the proceedings and give an award within the time fixed by this Court.

For Petitioner : Mr.V.Selvaraj  
for M/s.D.Jayasingh

For respondent : Mr.P.S.Raman, Senior Counsel  
for M/s.S.K.Srinivasan

### **ORDER**

Original Petition has been filed by the petitioners to appoint an Arbitrator representing the respondent so that the Arbitral Tribunal can be constituted in terms of Clause 17.1.2 of the Share Subscription and Share Holders Agreement entered into between the petitioners and the respondent at Chennai on 27.04.2016 directing the Arbitrators to enter into reference, complete the proceedings and give an award within the time fixed by this Court.

2.It is the contention of the petitioners that the Agreement dated 27.04.2016 has been entered into between the 1<sup>st</sup> petitioner and a company called Marinescape Construction Chennai Limited (now Aqess Limited) in respect to share subscription and shareholders and Clause 17.1.1 and 17.1.2 of the Agreement provides for settlement of disputes



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3. It is the further contention of the petitioners that the said agreement was terminated in view of the dispute arose between the parties and thereby the termination notice was issued to the respondent and to her husband on 04.01.2019 intimating them about the termination of the agreement dated 27.04.2016 as amended on 06.12.2017. In view of the specific Clauses provided in 17.1.1 and 17.1.2 of the agreement, which stipulates for settlement of disputes through Arbitration, the present petition has been preferred by the petitioners.

4. The main contention of the respondent is that the Original Petition No.304 of 2019 has been filed in the year 2019 when the matter was already before the Arbitral Tribunal in respect of the dispute arose between the parties in Agreement dated 27.04.2016, subsequent amendment made on 06.12.2017 and Addendum Agreement dated 28.05.2018. It is the further contention of the respondent that right from the Agreement dated 27.04.2016 to 28.05.2018, the disputes were dealt with by the learned Arbitrators. The project design, construction and management contract was given to M/s. Marinescape PM Ltd and Aquest Ltd. with the condition that they should find out an investor, the said



Respondent, who could not identify an investor to invest in VGP, requested the respondent to invest and introduced the second petitioner to the respondent and all the contracts constituted the construction, superstructure, maintenance and operations of the underwater Eco Aquarium on the East Coast Road, Chennai, which is the subject matter of the Arbitral proceedings between the petitioners and the other side and other parties. The respondent is none other than the wife of the 1<sup>st</sup> respondent in the Arbitral proceedings. As per the Agreement, the respondent is only a minority shareholder and there was no dispute till the matter is referred to the Arbitrators.

5.The further contention of the respondent is that the only grievance of the petitioner is that the agreement was entered in the year 2019 to the effect that the respondent shall not sell any of the company's share. The respondent has given an undertaking not to sell the company's share, she also filed a Company petition No.431 of 2019 before the N.C.L.T. against the oppression and mismanagement against the majority shareholders. Hence, the present petition for appointment of arbitrator which is not maintainable and it is only an abuse of process of law.



6.Mr.V.Selvaraj, the learned counsel for the petitioner submitted that the Arbitral Tribunal held that all the contracts constituting construction, superstructure, maintenance and operation of the aquarium project are controlled by the husband of the respondent. The respondent has also entered into a contract and assured to invest some amount in purchasing the shares and the agreement was entered in this aspect and that the agreement stipulates that the dispute will be resolved only by way of arbitration. Therefore, when there is an existence of Agreement, the dispute arose between the parties should be referred to the Arbitration.

7.It is the further contention of the petitioner that though there are Arbitral proceedings, the present dispute relating to the share purchase was not raised before the Arbitrators. Though the respondent had given an undertaking not to sell the shares, but violating the same, the respondent and her husband have made an attempt to sell the company's shares and hence the matter has to be referred to the Arbitration.

8.Mr.P.S.Raman, the learned Senior Counsel appearing for the respondent submitted that the petition is nothing but mere an abuse of process of law. Originally the agreement has been entered into between



27.04.2016, simultaneously other agreement has also been entered between them on the same day. The agreement between the petitioners and the respondent was entered on 27.04.2016, wherein, the respondent has become minority shareholder and Addendum agreement was also entered between the parties on 28.05.2018.

9. It is the further contention of the learned Senior counsel that in respect of all the contracts entered into between the parties, the dispute was already referred to the three members Arbitral Tribunal consisting of Justice Mr. Duraiswamy Raju, Former Judge of Supreme Court of India as a Presiding Arbitrator, Justice R.P. Jyothimani, Former Judge of Madras High Court and Justice Mr. K. Chandru, Former Judge, Madras High Court as Member Arbitrators. It is his further contention that subject matter of Agreement also referred to arbitration. Such being the position, the notice invoking Arbitration dated 04.01.2019 was sent to the respondent when the matter was already before the Arbitrators. The only grievance raised in the notice is that since the respondent is trying to create encumbrance over the shares of V.G.P Marine Kingdom, they are terminating the agreement. Wherein the respondent has given an undertaking to not to sell the shares. When all other connected



petitioners have not filed any claim in this regard, particularly with regard to the Agreement dated 27.04.2016 entered into between the petitioners and the respondent to the Arbitrators. He would further contend that the dispute with regard to share subscription and shareholder is already pending before the N.C.L.T. and the respondent has already preferred a petition in Company petition No.431 of 201 before the N.C.L.T for oppression and mismanagement, the Original Petition filed by the petitioners for appointment of arbitrator is not maintainable at this stage. Accordingly prays for dismissal of the same.

10. Heard the counsels on either side. Perused the materials placed on record.

11. It is to be noted that while dealing with the application u/s.11 of the Act, the Court will not embark much on factual dispute, except finding whether there is existence of Agreement or not. At the same time, taking into consideration the facts and circumstances of the peculiar nature of the given case that there were several contracts entered into between the petitioners on one side and M/s. Marinescape Construction Chennai Limited on the other side on 27.04.2016 for construction of aquarium and such contracts continued and resulted in



entering into further contracts on 27.04.2016 and amendment leading to further amendments and Memorandum of Addendum etc., In the meanwhile on 27.04.2016, the respondent has also entered into a contract with the petitioners, wherein, she has invested certain amounts to purchase the shares. Though the above contract dated 27.04.2016 contains clause of reference to arbitration, the clauses 17.1.1 and 17.1.2 indicate that the disputes would be referred to Arbitration. The fact remains that all the contracts including the Agreement which is the subject matter of the present petition and other contracts entered into between the parties were before the Arbitral Tribunal as documents C1 to C11 final award came to be passed by the three members Arbitral Tribunal. The learned Arbitral Tribunal had answered all the disputes raised in respect to contract of maintenance and operation for underwater aquarium project. It is curious to note that in the earlier Arbitral Proceedings, the 1<sup>st</sup> petitioner herein is the claimant and the 1<sup>st</sup> respondent is none other than the husband of the present respondent and the 2<sup>nd</sup> petitioner herein is none other than the Managing Director of the 1<sup>st</sup> petitioner. The dispute referred to the arbitration on the earlier occasion in respect of the all the contracts entered into between the parties, affiliate including the wife of the 1<sup>st</sup> respondent in the above



passed an award in respect of issues relating to the contracts including the Agreement dated 27.04.2016. Now the petitioners cannot take advantage of the mere fact that the respondent was not made as a party in the earlier proceedings on her individual capacity, whereas, her husband was very much made as a party as the 1<sup>st</sup> respondent. Entire discussion in the award passed by Three Member Tribunal not only results other contracts entered between the parties but also the Agreement dated 27.04.2016. The huge claim made by the 1<sup>st</sup> petitioner was negated. Wherein the counter claim has been allowed. It is to be noted that notice of invocation was issued on 04.01.2019 during earlier Arbitral proceedings. Having raised such a dispute as early as on 04.01.2019, the petitioners have not attempted to include the present claim before the Arbitral Tribunal by making amendment to include the additional claim, however, filed the present petition against the respondent not to deal with the shares and the respondent was forced to give an undertaking not to sell the shares.

12. Be that as it may, now the shares are still with the respondent and the respondent has filed a Company Petition No.431 of 2019 for oppression and mismanagement and the same is pending before N.C.L.T.

Therefore referring the matter once again to the Arbitration is nothing but



futile exercise. Further, though there is a specific contract governing clauses in the agreement viz. Clause 17.1.1. and 17.1.2, the agreement indicates that the respondent as KEA which term as indicated in the counter affidavit and the term affiliate indicates any party as specified in the very same agreement itself. The husband of the respondent had entered into a major contract from the year 2012 and he has been made as a party in the earlier proceedings. In fact all the contracts were interlinked and awards were already passed. Having raised the dispute in the year 2019 and when the main dispute is already pending before the Arbitral Tribunal, the petitioners now cannot take advantage of the clauses in the contract agreement alone to undo the Award already passed.

13. At any event, the very nature of the contract entered into between the parties herein with regard to the purchase of shares and investment in the company. The respondent had purchased shares and invested some amount in purchasing the shares as per the contract. Now the respondent has also filed an application before the N.C.L.T for oppression and mismanagement as a minority shareholder. When that being the position merely on the basis of contract, the matter could not be resolved even in the event of the Arbitrator being appointed and they



have no power to grant relief sought before the Company Court in the Company petition for removal of Director of the petitioner company and the relief sought u/s.242 of Company's Act, 2013 cannot be granted by the Arbitrator.

14.The various acts of oppression and mismanagement that has been raised before the N.C.L.T are as follows:

- a.Failure to allot shares to the respondent in time.*
- b.Failure to not intimate her the date of allotment of shares.*
- c.Failure to appoint her or her nominee as a director*
- d.Failure to handover certified copies of minutes of shareholders meeting held in May 2017.*
- e.Failure to hold board meeting of the first petitioner company*
- f.Cooking up of the minute book of the first petitioner company without conducting any board meeting*
- g.Failure to intimate or give notice about any board meeting, if at all held by the first petitioner company.*
- h.Failure to furnish her certified copies of minute book of board meetings if at all held till date.*
- i.Failure to hold annual general meeting of the first petitioner company.*
- j.Cooking up audited accounts and annual reports of the first petitioner company without conducting any Annual General Meeting.*
- k.Failure to intimate or give notice about any annual general meeting, if at all held*
- l.Failure to furnish her certified copies of resolutions passed annual general meetings if at all held till date.*



*m. Failure to hold Extraordinary general meeting of the first petitioner company, if required.*

*n. Cooking up resolution alleged to be passed at Extraordinary General meeting of the first petitioner company without conducting any Extraordinary General meeting.*

*o. Failure to intimate or give notice about any Extraordinary General meeting, if at all held.*

*p. Failure to furnish her certified copies of resolutions passed Extraordinary General Meeting if at all held till date*

*q. Failure to prove all audited statement of accounts to her till date.*

*r. Harsh, burdensome and onerous conduct.*

*s. Failure to adhere to the stipulation relating to affirmative ought to item given in schedule of the SSHA.*

*t. Failure to act upon the SSHA and total failure to perform even a single obligation under the SSHA, while enjoying the fruits and rights under the SSHA.*

*u. Siphoning off funds from the first petitioner company, taking undue advantage of their position and authority to operate company's bank account as sole signatory.*

*v. Failure to communicate the revised price of aquarium project to the lender bank.*

*w. Diversion of business of first petitioner company and siphoning off funds from the first petitioner company.*

*x. Non payment to suppliers.*

15. The matter is now pending before N.C.L.T. in Company

Petition No 431 of 2019 u/s. 213, 241, 242, 242(4) and 243 of the

Company's Act, 2013 and now referring the matter to the Arbitration is a



futile exercise and the petitioners can very well raise their grievance before the Company Court and nothing will prevent them from raising their grounds before the Company Court.

16. In view of the above, this Court does not find any merit in this petition. This Original Petition stands dismissed accordingly. No costs.

Sd./-N.S.K.J  
05.08.2021

//Certified to be true copy//

Dated at Madras this the      day of      2021.

COURT OFFICER(O.S.)

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