IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	**03.09.2024**
Order pronounced on	**05.11.2024**

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

O.A.Nos. 525 to 527 of 2024

O.A.No.525 of 2024

Ashok Kumar ... Applicant in all OAs

Vs

1.M/s.Indian Public School Private Limited
Represented by its Managing Director,
70, Dr.Alagappa Road,
Tatabad, Coimbatore-641 012.

2.The Indian Public School,
[Not for Profit Company]
Represented by its Director,
70, Dr.Alagappa Road,
Tatabad, Coimbatore-641 012.

3.TIPS Edge Private Limited,
Represented by its Director,
70, Dr.Alagappa Road,
Tatabad, Coimbatore-641 012.

4.M/s.Nuevo Agora Centro de Estudios,
Represented by its Director Mr.Isidoro Diez Caveda,

Calle Foronda, 6,
28034 Madrid, Spain.

5.NACE France SAS,
Represented by its CEO Mr.Luca Eva,
117 Boulevard Malesherbes-75008 Paris.

6.Wendel
Represented by its CEO, Mr.Laurent Mignon,
4 Rue Paul-Cezanne-75008 Paris.

7.Providence Equity Partners,
represented by its Managing Director, Mr.Sofian Lignier,
72 Welbeck St., London W1G 0AY,
United Kingdom.

8.Mrs.Karunambika Kumar,
6/62, Veeriampalayam Road,
Kalpathi Post,
Coimbatore-641 035.

9.Mr.Jairam Balakrishnan
Flat 904, Building 14,
Heritage City, MG road, DLF Phase 2,
Gurgaon, 122002, India ... Respondents in all OAs

Prayer in O.A.No.525 of 2024: This original application has been filed under Order XIV Rule 8 of OS Rules r/w. Section 9(1)(ii)(b) & (c) of the Arbitration and Conciliation (Amendment) Act, 2015, praying to grant an order of interim injunction restraining Respondents 4 and 5, their men, agents, or anyone acting through or under them, from directly or indirectly interfering with the management of Respondents 1 to 3

Company by the Applicant herein, as Managing Director of Respondents 1 to 3 Company.

Prayer in O.A.No.526 of 2024: This original application has been filed under Order XIV Rule 8 of OS Rules r/w. Section 9(1)(ii)(b) &(c) of the Arbitration and Conciliation (Amendment) Act, 2015, praying to grant an order of interim injunction restraining Respondents 1 to 5, their men, agents, or anyone acting through or under them, from appointing Mr.Jairam Balakrishnan as the Additional Director or CEO of the 1st Respondent company.

Prayer in O.A.No.527 of 2024: This original application has been filed under Order XIV Rule 8 of OS Rules r/w. Section 9(1)(ii)(b) & (c) of the Arbitration and Conciliation (Amendment) Act, 2015, praying to grant an order of interim injunction restraining Respondents 1 to 5, their men, agents, or anyone acting through or under them, from in any manner acting in derogation of the Shareholders' Agreement dated 09.03.2017.

In all OAs:

For Applicant : Mr.R.Sankaranarayanan, Senior Advocate
Mr.Satish Parasaran, Senior Advocate
Mr.Srinath Sridevan, Senior Advocate for
M/s.K.M.D.Muhilan

For Respondents: Mr.Vijay Narayan, Senior Advocate
Mr.P.H.Arvindh Pandian, Senior Advocate
for M/s.Aparajitha Vishwanath for R4 & R5
Mr.R.Parthasarathy, Senior Advocate

for M/s.Seshadri Mandalam for R9
No appearance for R1 to R3 & R6 to R8

COMMON ORDER

Background

The first, second and third respondents are companies promoted by Mr.Ashok Kumar ('the applicant'). The fourth respondent, which is a company incorporated in Madrid, Spain, is currently the majority shareholder of the first respondent and holds about 80.25% of the paid-up share capital of the first respondent. The applicant holds the remaining 19.75% of the paid-up share capital of the first respondent. The first respondent, in turn, is the holding company of the second and third respondents. The fifth, sixth and seventh respondents are entities exercising control over or associated with the fourth respondent. The eighth respondent is the wife of the applicant and the ninth respondent is the proposed Chief Executive Officer (CEO) of the first respondent.

2. A shareholders' agreement dated 09.03.2017 (the SHA) was executed by and between the applicant, first respondent, fourth respondent, fifth respondent and eighth respondent. The said agreement

provides for dispute resolution by arbitration in clause 26 thereof. Relying on the arbitration clause in the SHA, the present applications were filed under section 9 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) before invoking the arbitration clause. By these applications, the applicant seeks three remedies: (i) to restrain the fourth and fifth respondents from directly or indirectly interfering with the management of the first to third respondents by the applicant as managing director; (ii) to restrain the first to fifth respondents from appointing Mr.Jairam Balakrishnan as the Additional Director or CEO of the first respondent; and (iii) to restrain the first to fifth respondents from, in any manner, acting in derogation of the SHA.

<u>Counsel and their contentions</u>

3. Oral arguments on behalf of the applicant were advanced by Mr.Sankaranarayanan, learned senior advocate, in O.A.No.525 of 2024; Mr.Srinath Sridevan, learned senior advocate, in O.A.No.526 of 2024; and Mr.Satish Parasaran, learned senior advocate, in O.A.No.527 of 2024.

4. The contentions of Mr.Sankaranarayan may be summarised as under:

(i) The applicant is the promoter of the first to third respondents and originally his family held the entire paid-up capital. Later, the fourth respondent acquired the stake of the applicant and that of his wife in the first respondent in phases. The last tranche was acquired from the applicant's wife in January, 2024.

(ii) As regards the acquisition of the remaining stake of 19.25%, an agreement was reached for the payment of fixed and variable components as consideration. Such agreement is contained in the email dated 24.06.2024 from Mr. Sofian Lignier, Managing Director of Providence Equity Partners, the seventh respondent. The email clearly captures the amount payable towards the fixed component and also sets out the transitional and post-transfer arrangements.

(iii) Both Article 32 of the amended Articles of Association and the SHA confer a right of first refusal on the fifth respondent with regard to the remaining stake of the applicant, and the above agreement was reached in that context.

(iv) The applicant's position as the Managing Director is recognized not only in the employment agreement but also in the SHA. The applicant continues to be the Managing Director as on date. As per Section 196 of the Companies Act, 2013 (CA 2013), read with Section 2(53) thereof, no company can have both a managing director and manager. Since a managing director is defined in CA 2013 as a person with substantial powers of management, the appointment of the ninth respondent as CEO would contravene Sections 196 and 203 of CA 2013.

5. Mr.Srinath Sridevan made the following submissions:

(i) The applicant's appointment as Managing Director was renewed on 15.03.2022.

(ii) As Managing Director, the applicant has provided a personal guarantee to lenders. The facilities agreements with the lenders contain change in control clauses requiring prior approval of the lenders in case of change in control. Although there was a change in control over the fourth respondent after the facilities agreements were executed with the lenders, prior approval was not obtained. Since breach of the change in control clause of the facilities agreements was committed, the applicant's personal guarantee is at risk of being invoked.

(iii) The fourth respondent undertook due diligence and reports were submitted by its legal and financial advisers pursuant to such due diligence in July 2023. The sale by the applicant's wife was subsequent to such due diligence.

(iv) When the emails in June 2024 between Mr.Sofian Lignier and Mr.Ashok Kumar are examined along with the email of 02.07.2024 from M/s.Khaitan & Co. (Legal Adviser) to the fourth respondent, it is clear that a concluded contract was arrived at for the purchase of the remaining stake.

(v) A further due diligence is being proposed by the contesting respondents to resile from the agreement of June 2024.

6. Mr.Satish Parasaran made the following submissions:

(i) The email of 24.06.2024 constitutes a binding arrangement.

(ii) All acquisitions and loan enhancements were undertaken by the applicant pursuant to board resolutions dated 16.06.2023.

7. In response to these arguments, Mr.Vijay Narayan submitted as follows:

(i) Although the fourth respondent originally intended to purchase the remaining 19.75% stake of the applicant in the first respondent, due to subsequent events, the fourth respondent does not intend to purchase the remaining stake at this juncture.

(ii) None of the applications are maintainable in view of the admitted 80.25% shareholding of the fourth respondent in the first respondent.

(iii) When the email of 24.06.2024 is seen in the context of the steps indicated by M/s.Khaitan & Co for the purchase of the remaining stake, it is clear that the purchase of the remaining stake was subject to negotiations and the execution of definitive agreements.

(iv) The right of first refusal under clause 10 of the SHA and Article 32 of the amended Articles of Association requires that the applicant obtain a firm offer from a third party buyer. In the absence thereof, the said provisions are not applicable.

(v) The reliefs claimed in the present applications are not in consonance with the notice issued under Section 21 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

8. Mr.Arvindh Pandian made the following submissions:

(i) No action has been taken as on date to remove the applicant from the post of Managing Director. If such action is initiated, it would be in accordance with the terms of the employment agreement.

(ii) As a consequence of the dispute between the minority and majority shareholders, public interest in the running of these schools should not be affected. In order to protect the larger public interest, an administrator may be appointed and made part of a committee for the interim management of the schools until the arbitral tribunal is formed.

9. By way of rejoinder, the following submissions were made on behalf of the applicant:

(i) The June 2024 emails envisage three different phases. The first phase between 01.07.2024 and 30.09.2024 is for the on-boarding of the ninth respondent. The second phase is for the execution of documents. At the time of execution of documents, the sale consideration agreed to in the email of 24.06.2024 was required to be paid. In the third phase, the applicant was required to be appointed as Chairman with effect from 01.10.2024.

(ii) In light of the above, the email dated 24.06.2024 constitutes a contract for the purchase of shares in terms of Sections 4 and 5 of the Sale of Goods Act, 1930 read with Section 2(e) and (h) and Section 7 of the Indian Contract Act, 1872.

(iii) Since a *prima facie* case has been made out that the email of 24.06.2024 qualifies as a contract, the balance of convenience and hardship are required to be considered. In view of the applicant being the promoter and Managing Director for a considerable period of time since inception, the balance of convenience is in favour of preserving the *status quo* and not permitting the disruption thereof by conferring substantial powers of management on the ninth respondent.

(iv) All rights under the SHA, such as call and put options, drag-along and tag-along rights are also subject to the execution of definitive agreements. On that account, it cannot be said that they do not qualify as contractual clauses which are binding on the parties.

(v) All acquisitions were approved by board resolution dated 23.12.2021.

Discussion, analysis and conclusions

10. The admitted position is that the fourth respondent currently holds 80.25% of the paid-up share capital of the first respondent and the applicant holds the remaining 19.75%. Ordinarily, in view of the above, the fourth respondent would be in a position to control the affairs of the first respondent. Whether this position has *prima facie* changed on account of the email exchanges in June, 2024 falls for consideration in these applications. The email of 24.06.2024 appears to have been sent by Mr.Sofian Lignier from his official email ID. It appears *prima facie* that such email was sent by him as a representative of the seventh respondent. Since the email of 24.06.2024 is central to the

adjudication of these applications, the said email is set out in its entirety:

> *"On 24 Jun 2024, at 6.40 PM, Lignier, Sofian <Sofian.Lignier@provequity.co.uk wrote:*
> *Hi Ashok,*
>
> *I hope you had a good weekend. Following our most recent discussions last week, I went to final investment committee on the final deal parameters discussed. Please find below a summary of our final proposal. The good news is that I convinced them to accept most of what we discussed, including the retention. As feared when we spoke though, our investment committee members were very disappointed about the downwards revision of financial forecasts and, as a result, have calibrated the earnout thresholds to incentivize you to overperform and not simply meet the current FY25 target.*
>
> *I trust this is all acceptable and you appreciate the substantial improvements since we first intiated those discussions. For information, I have no ammunition left with my IC.*
>
> *It would be good that you and the TIPS team now work on putting in place a great onboarding from Jairam starting next Monday. I will share a separate email with Luca, Cristina and you so this can be worked out on starting now.*
> *Thanks,*
>
> *Sofian*
>
> *-------*

1. Transitional arrangements/Timeline

a. Agreed Globeducate internal

communication on 24th June (today)

b. Jairam start date 1st of July 2024

c. 1st July to 30th September 2024:Ashok to work with Jairam to help him settle in his new role and familiarize himself with the operations and team

- *In parallel, Khaitan to draft and finalise all transaction documentation and changes of governance documentation to be implement, which includes*
  - *SPA, Board resolutions, Director and Managing Director resignations, transfer of executive powers etc.*

e. 30th September 2024: signing of all documentation, payment to Ashok, effective transfer of managerial powers and changes of governance across the TIPS group of companies (incl trust, LLP, society) to happen all at once

a. From 1st October 2024:

- *Chairman role for Ashok with role including business development, representation and brand ambassador role, relationsip management with local regulators and governments*

Same monthly salary as Jairam

Duration of contract - 2 years with customary termination/notice period clauses

b. Full India non-compete/non-solicitation clause for 2 years following end of Chairman role by Ashok.

? Additional focused non-compete/non-solicitation restrictions to apply for an additional 2 years beyond that in the following cities only: Coimbatore, Chennai Hyderabad, Bengaluru, Tiruppur, Madurai, Kochi, Karur within catchment areas of existing school campuses (defined as 1hr drive time radius around school campus locations)

*2. **Shares acquisition***

*a. **Globeducate to acquire remaining 19.75% stake held by Ashok Kumar (AK) in the Indian Public School Private Limited (which shall also include for the avoidance of doubt the 0.02% held by AK in TIPS Section 8 Co and the 0.5% held by AK and KK in Edsmart LLP and any other shares held by AK or KK (directly or indirectly) in the TIPS group of legal entities)***

b. Valuation

- *Upfront price of INR 2,080 M representing a FY Aug-24 EBITDA multiple of 17x(per latest EBITDA reforecast of INR 660m)*

- *Earnout of up to INR 625 M (the "earnout Cap") contingent on FY Aug-25 EBITDA performance* *ii. FY Aug-25 EBITDA target: INR 845M-If target achieved, then maximum earnout payment*

iii. No earnout payable if FY Aug-25 EBITDA is lower than INR 815M. Earnout amount grows linearly between 0 and the

Earnout Cap and the Earnout Cap if FY Aug-25 EBITDA is between INR 815M and INR 845M

iv. Earnout payable once EBITDA validated through FY Aug-25 accounts audit, to be concluded no later than 31 December 2025

v. Earnout to be structured as a consultancy payout, as our understanding is that the current Indian corporate law framework does not allow for contingent earn-out structures per European market practice

c. Drafting of the SPA to start as soon as agreement in principle with the help of Khaitan to draft the requisite agreement which shall include in particular:

i. Customary fundamental and business representations and warranties *ii. Customary indemnification for potential damages resulting from breaches of representations and warranties and potential underperformance in FY Aug-24 EBITDA vs. Target*

iii. Guarantee mechanism to include 15% price retention (i.e.INR 312M) and Earnout. INR 312M retention amount to be released (or balance thereof) on the latest of 31 December 2024 and approval of 31 August 2024 TIPS audited accounts

d. Closing & payment of the TIPS share acquisitions to occur at the same time as the transfer of managerial powers to Jairam, intended to be on or around 30th September 2024 (or earliest upon mutual agreement by the parties if all documentation is ready). This will include also relevant governance changes at the TIPS Sec 8 company. trustee board, Dhee Trust, Edsmart LLP, Edsmart Society, IPS and TIPS Edge

` *3. **C-shares at PN VII level***

a. AK to retain the value of C-share holdings in accordacne with the C-share plan terms and conditions."

11. Upon receipt of the above email, the applicant requested that the acquisition of the remaining 19.75% stake be concluded earlier instead of 30th September. In response, Mr.Sofian Lignier agreed subject

to legal documentation. As regards the compensation specified in Mr.Sofian Lignier's email, the applicant stated as under in the reply of 24.06.2024 and Mr.Sofian Lignier's responses thereto are also contained in the reply, albeit in parenthesis:

> "*Also with respect to my compensation we agreed for a similar compensation from the day Jairam is on board and hope that is the plan and not have a lower structure for me when he is on board from July 1st. [could this possibly be from 1st September 2024 in order not to impact the group's financial reforecast for FY24? Hopefully not so much of an issue for you. I would appreciate this considering the big effort we made on the upfront share price]*
> *The rest seeks ok, in line with our discussion and yes FY 25 needs to be a stellar year to beat the number threshold you have set, and certainly hope to get there with Jairam's help as well.*"

12. From the above emails, it appears that an in-principle agreement was arrived at both with regard to the transfer of the remaining 19.75% stake of the applicant in the fourth respondent and for the induction of the ninth respondent with effect from 01.07.2024. The

purchaser is labelled in the emails as "Globeducate". While the applicant asserts in the affidavit in support of these applications that Globeducate is the brand used by the fourth respondent, it is not possible to record any conclusions in such regard on the basis of materials on record. It also appears that the in-principle agreement was acted upon as regards the induction of the ninth respondent. From the perspective of the reliefs claimed in the applications, the transfer of the remaining stake is not directly relevant. Such relevance is limited to whether the induction of the ninth respondent was entirely contingent on and part of the package deal involving the acquisition of the remaining stake of the applicant.

13. After these applications were filed, the applicant issued notice under Section 21 of the Arbitration Act. The notice was addressed to the fourth respondent and the fourth respondent acknowledges receipt thereof. As such, arbitral proceedings have commenced as per the statute. As per the memo dated 29.10.2024 of the applicant, the parties have constituted the arbitral tribunal pursuant to such notice. The present applications should be adjudicated by keeping this position

in mind.

14. The question that, therefore, arises for consideration is whether the applicant is entitled to the reliefs claimed or part thereof pending adjudication of the dispute by the arbitral tribunal. The emails exchanged in June 2024 form the sheet anchor of the applicant's case. From the text of such emails, as stated earlier, it appears *prima facie* that an in-principle arrangement was entered into for the purchase of the applicant's remaining stake by Globeducate and that such arrangement also involved induction of Mr.Jairam Balakrishnan and the retention of the applicant as Managing Director and Chairman, respectively, at different stages of the process. For purposes of these applications, it is neither necessary nor appropriate to record definitive conclusions on whether the email exchanges qualify as a concluded contract. Such determination falls squarely within the province of the arbitral tribunal.

15. For present purposes, the question as to whether the applicant is entitled to the reliefs claimed and, if so, to what extent may be examined by assuming *arguendo* that the email exchanges in June

2024 qualify as a binding contract. Even so, there is ambiguity on the parties to such contract given that the email exchanges were between the applicant and a representative of the seventh respondent and it is recorded therein that Globeducate would buy the stake. In any event, proceeding on such assumption, if the contesting respondents refuse to purchase the applicant's stake, the applicant would arguably be in a position to sue for specific performance of the contract to purchase his remaining stake in the first respondent. As regards the other elements of such contract pertaining to the managerial roles of the applicant and the ninth respondent during the transition period and thereafter, it appears *prima facie* that an action for specific performance would not lie and only compensation claims could arguably be made.

16. Another way to approach the issue would be to assume for interlocutory purposes that the contesting respondents have committed breach of the composite contract and examine what relief should be granted at this stage to the applicant. By taking into account not only the SHA and the email exchanges, but also the fact that the applicant is the

promoter/founder of the first to third respondents, a *prima facie* case is made out to restrain the fourth and fifth respondents from taking any steps to remove the applicant as Managing Director of the first to third respondents until the arbitral tribunal has the opportunity to examine the matter. Although steps have not been taken for his removal, in view of the escalating conflict, there is a reasonable likelihood of such eventuality and the balance of convenience favours maintenance of *status quo* in this regard.

17. On 09.08.2024, the applicant requested for urgent relief in respect of agenda item Nos.5 and 6 of the Board Meeting held on the same date. In order to preserve the *status quo* so as to enable the parties to endeavour to resolve the dispute through mediation, the first respondent was permitted to proceed with the meeting and transact the business specified in the agenda subject to the condition that agenda item Nos.5 and 6 pertaining to the ratification of the employment agreement of the ninth respondent and his appointment as CEO, respectively, be not implemented. The parties reported subsequently

that the endeavour to resolve the dispute amicably failed. It was contended on behalf of the applicant that the induction of the ninth respondent as CEO would violate Sections 196 and 203 of CA 2013. Section 196, however, prohibits the appointment of both a managing director and manager for a company and not both a managing director and CEO. As regards Section 203, the said provision mandates that a company falling within the prescribed class should have the key managerial personnel specified therein and further provides that such company should have either a managing director or CEO or manager and, in their absence, a whole-time director. Put differently, it is not a provision intended to restrain the appointment of a CEO for a company with a managing director.

18. Even assuming that the email exchanges qualify as a contract and such contract was breached, the balance of convenience is not in favour of restraining an entity holding 80.25% of the paid-up share capital from inducting a person of its choice as additional director or CEO. As justification for such induction, the contesting respondents have asserted that the applicant is not providing any information to

them about the affairs of the first to third respondents. Especially in the context of interim protection being granted as regards the applicant's position as Managing Director, it certainly cannot be said that irreparable hardship would be caused to the applicant if interim relief as regards the ninth respondent is not extended. In my view, by way of interim relief, the shareholder with controlling interest cannot be prevented from taking such measure even assuming that the contesting respondents resiled from the alleged composite agreement to buy the applicant's remaining stake.

19. With regard to the relief in respect of alleged breach of the SHA, the applicant has not been able to establish even *prima facie* that there was a breach of the SHA and, as discussed above, the assertions of breach are in respect of the alleged contract for purchase of the remaining stake. While the dispute resolution clause in the SHA appears *prima facie* wide enough to embrace a dispute relating to an alleged ancillary contract, as contended by the contesting respondents, it does not appear that the right of first refusal or any other clause in the SHA

was contravened by the contesting respondents.

20. Accordingly, these applications are disposed of on the following terms:

(i) The fourth and fifth respondents are restrained from taking any steps for the removal of the applicant as Managing Director of the first to third respondents for a period of six weeks from the date of receipt of a copy of this order. Within this period, it is open to the applicant to re-apply for this or other interim relief from the arbitral tribunal.

(ii) The interim order granted earlier on 09.08.2024 is vacated.

(iii) For the avoidance of doubt, it is clarified that the arbitral tribunal may consider and decide applications, if any, for similar or other interim relief, including for the continuance of the interim protection granted herein, uninfluenced by the observations in this order.

05.11.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation: Yes/No
kal

SENTHILKUMAR RAMAMOORTHY, J.

kal

Pre-delivery order made in
O.A.Nos. 525 to 527 of 2024

05.11.2024