

Pinaki Das Gupta vs Maadhyam Advertising (P.) Ltd. on 4 February, 2002

JUDGMENT

Balasubramanian, Vice Chairman, J.

1. In this order, we are considering the application filed by the respondents in terms of Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act'). The facts of the case are that the petitioner has filed a petition under Section 397/398 of the Companies Act, 1956 ('the Act') alleging acts of oppression and mismanagement in the affairs of Maadhyam Advertising (P.) Ltd. ('the Company'). According to the petitioner, he is one of the promoters of the company holding 2625 shares of Rs. 100 each out of the total paid up shares of 10,000 equity shares. In addition to the petitioner, there were six other shareholders. All the shareholders entered into an agreement for sale of shares to one Publicis (India) Communications (P.) Ltd. by which all the shares held by these shareholders constituting 100 per cent shares in the company would be sold by them and purchased by Publicis. As per this agreement, the purchase consideration is to be paid in four instalments and that 3 shareholders including the petitioner were to continue to be employed by the company up to 30-9-2002 for which they were to enter into employment/consultant contract with the company on or before the date of acquisition. This term of the agreement is relevant since payment of 2nd to 4th instalments depended upon generation of revenue and earn-out. In terms of this agreement, the petitioner had handed over all the shares certificates in respect of his shares together with share transfer forms. While the first instalment has been paid, the company has committed breach of the term of the agreement relating to the employment/consultant contract. Since the consideration for the shares would depend upon the revenue of the company in respect of payment of 2nd to 4th instalments, the association of the petitioner with the company was very essential to ensure that the company earns better revenue. Further, even though the petitioner was a director, without any letter of resignation from the petitioner, the company has passed a resolution accepting his resignation with effect from 29-12-2000. Thus, the 1st and 2nd respondents have completely excluded the petitioner from the management of the company, even though he was one of the original promoters of the company. Further, the respondents 2 and 3 have also been denying the payment of further instalments after having paid the 1st instalment of Rs. 1.13 crores. Accordingly, he has prayed for various reliefs.

2. While this petition was filed on 18-5-2001, the petitioner filed an amendment application on 6-11-2001 seeking to amend the original petition. In this amendment application, he has submitted that his resignation letter was subject to acceptance and confirmation by the Board in a Board meeting to be held on 15-1-2001. However, no such meeting was held on that date and as such his resignation letter could not have been accepted on that date. He has also averred in the amendment application that without the knowledge and consent of the petitioner, the 3rd respondent, who was one of the promoters of the company, had entered into an MOU on 23-2-2000 claiming himself to

represent the shareholders and the company with Publicis for sale of the entire 100 per cent shares of the company. This MOU was never disclosed to the petitioner. As such, in the amendment application, he has sought for an additional relief to declare the MOU dated 23-2-2000 as null and void.

3. In the application, the respondents have sought for referring the matter to arbitration in terms of Section 8 of the Arbitration Act on the ground that the entire petition is based on the agreement dated 15-1-2001 in which there is an arbitration clause providing for reference to a sole arbitrator all the disputes arising out of the said agreement.

4. Ms. Anuradha Dutt, the counsel appearing for the respondents submitted: A perusal of the allegations in the petition would reveal that all the allegations made in the petition arise out of the agreement dated 15-1-2001. It is as per this agreement that the petitioner was to be employed and the allegation is that he has not been so employed. In terms of this agreement, the petitioner has already received the first instalment towards consideration for his shares and in terms of the agreement, all his shares have already been transferred and as such he is not even a shareholder to move this petition. Even his resignation about which he has made complaints now arose out of the terms of the agreement. Further, a perusal of the reliefs sought would indicate that what he is seeking in the petition is specific performance of the agreement. Even in the amendment application, which is yet to be admitted, his prayer relates to declaration of the MOU dated 23-2-2000 as null and void on the ground that he had no knowledge of the same earlier. This statement is wrong inasmuch as this MOU has been specifically referred to in the agreement dated 15-1-2001 in Clause 28. That being the case this could be subject to arbitration. Therefore, without recourse to the terms of the agreement, none of the allegations could be looked into and that being the case, since arbitration has been provided in the agreement, the CLB should refer the dispute to arbitration in terms of Section 8.

5. She further submitted: The petitioner has already filed an application before the Delhi High Court in terms of Section 9 of the Arbitration Act seeking certain interim reliefs relating to the restoration of the Board as it existed before 15-1-2001 and cancellation of the transfer of shares. This application is pending before the High Court. He has also invoked the arbitration clause by issue of a notice dated 19-5-2001 to the 2nd and 3rd respondents in which, according to him, the disputes and differences had arisen in respect of specific performance of the agreement dated 15-1-2001, signing of employment contract payment of instalments and any other issue relevant to sale of shares as per the agreement. This notice itself would indicate that the disputes that have been raised in the petition have all been covered by the said notice. Therefore, this is a fit case wherein the provisions of Section 8 are squarely applicable. On the proposition that if the disputes in a petition under Section 397/398 relate to contractual agreements having arbitration clause, the dispute should be referred to arbitration in terms of Section 8 she referred to *P. Anand Gajapathi Raju v. P.V.G. Raju* [2000] 4 SCC 539, *Naveen Kedia v. Chennai Power Corporation Ltd.* [1995] CC 640 (CLB) and *Escorts Finance Ltd. v. G.R. Solvent & Allied Industries Ltd.* [1996] CC 323 (CLB).

6. Shri Bhattacharyya, advocate appearing for the petitioner submitted: Even though references have been made in the petition regarding the agreement dated 15-1-2001, the grievances of the

petitioner relate to oppression. Even though the 3rd respondent was a co-promoter of the company along with the petitioner, yet, the former has joined hands with Publicis by which the petitioner has been completely excluded from the management of the company. Even though the respondents have heavily relied on the arbitration clause in the agreement, this agreement is not binding inasmuch as, in terms of Clause 21 of the Agreement, the company should have entered into employment/consultant contract with the petitioner on or before 15-1-2001. However, as is evident from Annexure A-7, even the draft copy of the agreement was given to the petitioner only on 16-2-2001. The transfer of shares, resignation of the petitioner were allegedly approved in a Board meeting on 15-1-2001, that is before complying with Clause 21. If the meeting had really taken place, then these decisions would have no validity without compliance with Clause 21.

7. The learned counsel further submitted: The very fact that the MOU dated 23-2-2000 was entered into by the 3rd respondent without the knowledge and consent of the petitioner, would show that clandestine attempts to acquire 100 per cent shares by Publicis was going on for a long time in connivance with the 3rd respondent, which itself is oppressive to the petitioner. The powers under Section 402 of the Act are so wide that the CLB can mould proper relief with a view to put an end to the disputes. The company has filed a false criminal case against the petitioner which has been dismissed by the Court, in other words, inspite of the fact that the petitioner is a co-promoter director, he is being bounded. In Needle Industries case, which has been followed by the CLB in many other cases, it has been held that the Court is not powerless to render justice even if allegations of oppression are not established. However, in the present case, the sequence of events and also the manner in which the petitioner has been treated would establish that the petitioner is being oppressed. Therefore, the arbitration clause in the agreement cannot bar the petitioner from prosecuting the present petition before the CLB. In *Manavendra Chitnis v. Leela Chitnis Studios (P.) Ltd.* [1985] 58 Comp. Cas. 113 the Bombay High Court has held that subject-matter of a petition under Section 397/398 cannot be the subject-matter of an arbitration, for an arbitrator can have no powers such as are conferred on the Court by Section 402. Accordingly, he prayed for dismissal of this application.

8. We have considered the pleadings and arguments of the counsel. The admitted position is that there is an agreement for sale and purchase of shares dated 15-1-2001 and it contains an arbitration clause. The petitioner and the 1st respondent are also parties to the agreement. Clause 27(iii) of the agreement dated 15-1-2001 provides 'Any and all disputes and/or claims arising under this agreement and/or out of or in connection with the execution, interpretation, performance, and/or non performance of this agreement shall be referred to arbitration in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996 or any enactment or modification thereof then enforce. The reference shall be to a sole arbitrator jointly appointed by the parties. If the parties are unable to agree to a sole arbitrator, then the reference shall be to three arbitrators appointed as follows: One arbitrator appointed by the vendors, one arbitrator appointed by the purchaser and the third arbitrator to be appointed by the two aforesaid two arbitrators. The arbitration shall be held in Mumbai, India'. Section 8 reads "A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance the dispute, refer the parties to arbitration". In the present case, there is an arbitration agreement, and the first respondent, which is a signatory of the

agreement has filed this application in terms of Section 8 before filing first statement on the substance of the dispute. Therefore, the only examination that is required to be made is whether the matter before us is the subject of the arbitration agreement. Before we consider this aspect, we may advert to the contention of the learned counsel for the petitioner, that in view of the wide powers under Section 402, which powers are not available to an arbitrator, Section 8 is not applicable to a proceeding under Section 397/ 398. This Board has examined similar contention in a number of cases, including in the cases cited by Ms Dutt. In *Bhadresh Kantilal Shah v. AIA Magotteaux International* [2000] 24 SCL 270 (CLB) this Board observed "Another point raised by Shri Chagla has been that, an arbitrator is incapable of granting the reliefs as provided for in Section 402 of the Act. In regard to this argument, no doubt Company Law Board has vast powers under Section 402 of the Act, yet, granting of relief depends on facts of a particular case and if for granting the relief, determination of bona fide disputes is required and the same is covered by an arbitration agreement, then, it is for the arbitrator to decide these issues and not the Company Law Board. In this connection we may also refer to the Delhi High Court judgment in *Gurnir Singh Gill* case (supra). In this case, the Court itself, as pointed out by Shri Chagla, in exercise of the powers under Section 402, referred the parties to arbitration. It did so because, in facts of that case, it felt that the reliefs justified in that case could be granted by the arbitrator notwithstanding the fact that the powers under Section 402 are very wide. This case settles the claim of Shri Chagla that since an arbitrator cannot grant the relief provided for under Section 402, the matter cannot be referred to an arbitration. Granting of relief in a proceedings under Section 397/398 is discretionary depending on the facts of a case. If the CLB comes to a conclusion that appropriate relief justified in a particular case can be granted by an arbitrator, then, there is no reason why the matter cannot be referred to arbitration. In other words, even in a 397/398 petition, if the party applying for referring the matter to arbitration is in a position to establish that there are bona fide disputes arising out of and in connection with an arbitration agreement, and that the arbitrator could settle the disputes by appropriate reliefs, then, the Company Law Board will have to refer the parties to arbitration in terms of Section 8 or Section 45, as the case may be, of the Arbitration Act. Perhaps, that is the reason why Section 34 of the Arbitration Act of 1940 provided for staying of the proceedings but presently in terms of Section 8 and Section 45 of the Arbitration Act, such a stay of proceedings is not possible other than referring the parties to arbitration". Therefore, if it is established that the matter before the CLB is covered by an arbitration agreement, then, the same has to be referred to arbitration. This Board has done so in *Chennai Power Corpn. Ltd. and Escorts Finance Ltd.* cases as cited by the learned counsel for the respondents. In some petitions under Section 397/398, this Board found that of the issues raised therein, while some were covered under arbitration agreements others were not. In such cases, this Board referred the parties to arbitration on those issues retaining others for its examination. *Khandwala Securities Ltd. v. Kowa Spg. Mill Ltd.* [1999] 21 SCL 269 (CLB - N. Delhi) and *20th Century Finance Corpn. Ltd. v. RFB Latex Ltd.* [1997] CC 636. In other words, matters covered in a proceeding under Section 397/398 are not outside the purview of the provisions of Section 8 if the requirements of that section are satisfied.

9. Coming to the matters covered in the petition, we are in full agreement with the learned counsel for the respondents that de hors the agreement dated 15-1-2001, none of the allegations in the petition could be examined. A perusal of the petition indicates that the foundation of the petition itself is the said agreement and the reliefs sought as indicated below all arise out of the said

agreement. The reliefs sought in the petition are:

(a) Pass appropriate orders and directions to the respondent nos. 1 and 2 companies to specifically and faithfully perform and implement all the terms and conditions agreed in the agreement for sale of shares dated 15-1-2001 entered into amongst the respondents and the petitioner, in favour of the petitioner.

(b) Pass appropriate orders directing the defendants, their agents and other authorized persons not to indulge in violation and or breach of the any of the terms and conditions of the agreement for sale of shares dated 15-1-2001 and not to do any acts to the prejudice of the petitioner in ousting and excluding him from the affairs of the company.

(c) Pass appropriate orders directing the respondent Nos. 1 and 2 companies not to give effect to the transfer and registration of the shares of respondent No. 1 company owned by the petitioner either in the name of the respondent No. 2 or anybody else till the specific performance of all the terms and conditions of the said agreement for sale of shares dated 15-1-2001 entered into amongst the petitioner and the respondents and in the meanwhile to return to the petitioner the shares owned by the petitioner along with the shared transfer forms duly signed by the petitioner and in the possession of the respondent.

(d) Pass appropriate orders restraining the respondent No. 1 company from making any change in the composition of the Board of directors of the company as existing as on and prior to October, 2000 and ousting and excluding the petitioner from being a director of the Board of directors of respondent No. 1 company till the specific performance of all the terms and conditions of the above said agreement dated 15-1-2001 and the duly signed resignation voluntarily given by the petitioner.

(e) Pass appropriate orders declaring null and void any resolution passed by the Board of directors of respondent No. 1 company removing or indicating the resignation of the petitioner from the post of director of respondent No. 1 company.

(f) The respondent No. 1 company be also restrained from filing Form No. 32 conveying the resignation of the petitioner from the post of director of respondent No. 1 company and any other forms/reports regarding any changes in the composition of the Board of directors and/or functioning of the company before the Registrar of Companies without complete and specific performance of the above said agreement dated 15-1-2001 and directed to withdraw the Form No. 32 filed by them on 24-4-2001 before the Registrar of Companies in this regard.

(g) Pass appropriate orders directing the respondent No. 1 company as also defendant No. 2 to faithfully and specifically perform all the terms and conditions of the agreement for sale of shares dated 15-1-2001 including the signing and execution

of the employment/consultant contract between the petitioner and the defendant No. 1 company and restraining the respondents, their agents, etc., from creating any hindrance, obstruction, inference, pressure tactics, dishonesty, fraud and/or forgery, etc., against the petitioner and in the control and powers of the petitioner over the functioning and management of the company to be able to make his optimum contribution to the growth of business of respondent No. 1 company and ensure maximum generation of revenue and earn-out in order to be able to recover the maximum amount towards instalments of the shares and per the terms of the agreement dated 15-1-2001.

10. In the amendment application, the petitioner has sought for substitution of the prayer (a) above as follows:

(a) Pass appropriate orders declaring as null and void and terminating or setting aside the MOU entered into on 23-2-2001 between Publicis Zen Communications (P.) Ltd. And Mr. Michael Menezes, acting as such and on behalf of the other shareholders and as representative of Maadhyam (P.) Ltd. on the ground that Mr. Michael Menezes was acting as such without proper authority from the petitioner herein, Shri Pinaki Dasgupta and without proper authority and or resolution approved by the Board of directors of the company, Maadhyam Advertising (P.) Ltd.

11. A perusal of the reliefs sought for as indicated in (b) to (g) would show that all the reliefs sought arise out of the agreement dated 15-1-2001. As a matter of fact the notice dated 19-5-2001 issued by the petitioner himself invoking the arbitration clause covers practically all the issues raised in the petition. That notice reads :

"I do hereby give you the following notice--

(1) That the following disputes/differences have arisen between us with regard to the agreement dated 15-1-2001:

(a) specific performance of the agreement dated 15-1-2001

(b) signing of the employment contract as per Clause 21 of the Agreement dated 15-1-2001 and vide letter dated 16-2-2001 from Publicis (India) Communication Pvt. Ltd.

(c) Payment of instalments as per Clause 3 of the Agreement dated 15-1-2001

(d) any other issue relevant to sale of shares as per the agreement dated 15-1-2001 (2) That as per the terms of Agreement dated 15-1-2001 and Clause 27 (iii) the disputes/difference are referable to the sole arbitrator to be appointed by us, i.e., the parties in the agreement dated 15-1-2001. (3) Please indicate your choice of the sole arbitrator, if any, at the earliest".

12. The points/areas of disputes as raised in this notice are practically similar to those raised in the petition before us. Since the petitioner himself has raised these issues in the notice, he is aware that they are all covered by the arbitration agreement. As a matter of fact, this notice has been issued on 19-5-2001, that is, just a day after filing of this petition on 18-5-2001. Even the reliefs that have been sought cannot be granted without examining the terms of the contract, as all the reliefs sought are based on the terms of the agreement. Further, the petitioner has not sought for any final relief in the petition. All the reliefs are in the nature of interim reliefs pending the implementation of/performance of the terms of the contract, which itself is a matter for the arbitrator to decide. In other words, the main grievance of the petitioner in this petition is non-performance of the terms of the agreement and we find that the arbitration clause in the agreement specifically provides for arbitration in cases of non-performance of the terms of the agreement. The learned counsel for the petitioner argued that in view of breach of the terms of Clause 21, the agreement has no binding effect. This argument is contrary to the pleadings and is an after-thought, as in the petition he has sought for implementation of the agreement. Even otherwise, this issue also as to whether the agreement is binding is covered by the arbitration agreement. Therefore, we are fully convinced that all the issues raised in the petition are covered by the arbitration agreement and in terms of Section 8 we have to necessarily refer the matter to arbitration and, accordingly, we do so. The learned counsel referred to Needle Industries case to advance the argument that even if oppression is not established, the Court is not powerless to do justice. This proposition would arise only when the petition is heard on merits. Now that we have held that the matter covered in the petition is the subject-matter of the arbitration agreement, there is no scope to examine whether the petitioner has been oppressed or not.

13. This application CA 21 of 2002 is allowed and referring the parties to arbitration, accordingly, we close this petition.