Dhananjay Mishra vs Dynatron Services Pvt. Ltd. & Ors on 10 April, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 389 of 2018

[Arising out of Order dated 31st August, 2018 passed by the National Company Law Tribunal, Mumbai Bench in M.A. No. 552/2018 in CP No. 1151/241-244/NCLT/MB/MAH/2018]

IN THE MATTER OF:

Dhananjay Mishra,
S/o Sh. Gulabchand Mishra,
R/o Sandy Flama, Dosti Flamingos,
807B, T. J. Road, Sewri, Parel,
Mumbai - 400 015.

...Appellants

Vs

1. Dynatron Services Private Limited,
Having its registered office at
104, Mittal Chamber,
Nariman Point,
Mumbai - 400 021.

2. Yeoman Marine Services Private Limited,
Having its registered office at
Unit No.31, Nilgiri Industrial Estate,
T. J. Road, Sewri, Parel,
Mumbai - 400 015.

3. Seema Dhananjay Mishra,
W/o Sh. Dhananjay Minhra.
R/o Sandy Flama, Dosti Flamingos,
807B, T. J. Road, Sewri, Parel,
Mumbai - 400 0 15.

....Respondents

Present:

For Appellant: Mr. Rahul Chitnis, Mr. Aman Vachher and Mr. Ashutosh Dubey, Advocates.
For Respondents: Mr. Vikas Mehta and Mr. Vasanth Bharani, Advocates.

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J U D G M E N T

BANSI LAL BHAT, J.

This appeal is directed against an order dated 31st August, 2018 passed by National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the 'Tribunal') in M. A. No. 552/2018 filed by the Appellant - 'Dhananjay Mishra' figuring as Respondent No.2 in CP No. 1151/241-244/NCLT/MB/MAH/2018 by virtue whereof the Appellant's application under Section 8 of the Arbitration and Conciliation Act, 1996 came to be dismissed. Aggrieved thereof the Appellant has filed the instant appeal assailing legality and correctness of the impugned order on the grounds set out in the memo of appeal.

2. For better understanding of the gamut of controversy involved at the bottom of instant case it would be appropriate to give a flashback of the events leading to passing of impugned order. Respondent No.1 'Dynatron Services Private Limited', who is petitioner in the Company Petition pending determination before the Tribunal, filed CP No. 1151/241- 244/NCLT/MB/MAH/2018 being company petition under Section 241-244 r/w Section 246 of Companies Act, 2013 against Respondents (1)'Yeoman Marine Services Pvt. Ltd.', (2)'Dhananjay Mishra' and (3)'Seema Company Appeal (AT) No. 389 of 2018 Dhananjay Mishra' complaining of oppression and mismanagement with allegations in the petition that the Appellant - 'Dhananjay Mishra' refused to appoint Mr. Krishnamurthy and Mr. Avadesh Mishra as nominee directors of the Petitioner in terms of Second Memorandum of Understanding (MOU) dated 21st August, 2015 thereby taking entire control of 'Yeoman Marine Services Pvt. Ltd', denied it access to accounts of the aforesaid company and indulged in many more acts of oppression and mismanagement including diversion of funds invested by Petitioner for formation of 'Yeoman Marine Services Pvt. Ltd'. While the Company Petition was pending determination, the Appellant herein filed petition under Section 11 of the Arbitration and Conciliation Act, 1996 before Bombay High Court praying for appointment of Sole Arbitrator to decide all claims, disputes and differences between the parties. Bombay High Court appointed Sole Arbitrator with the consent of both the parties. Respondent No.1 - 'Dynatron Services Private Limited' is stated to have approached the Sole Arbitrator with application under Section 17 of the Arbitration and Conciliation Act, 1996 praying for a direction to the Appellant to appoint two nominees of Respondent No.1 as Directors on the board of 'Yeoman Marine Services Pvt. Ltd' and restrain the Appellant from alienating, selling or transferring any of its assets.

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3. The case set up by Appellant before the Tribunal for referring the disputes between the parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 was that the disputes raised by Respondent 'Dynatron Services Private Limited' in Company Petition arose out of the First MOU dated 15.04.2015 and Second MOU dated 21.08.2015 and in terms of Arbitration Agreement as contained in clauses 17.2 and 5.2 of the first and second MOUs respectively, such disputes are to be finally settled by a Sole Arbitrator. Respondent No.1 herein who is the Petitioner in the Company

Petition did not file reply before the Tribunal but relied upon written submissions to oppose the motion. On consideration of the stands taken by the respective sides, the Tribunal crystallized the controversy involved in the application into the following issues:-

> (i) Whether the Petition is barred under law in view of the Application filed u/s 17 of Arbitration and Conciliation Act before the Sole Arbitrator and the Petitioner voluntarily submitting himself to the jurisdiction of Arbitral Tribunal?
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> (ii) Whether the acts complained of in the Petition can be adjudicated by the Sole Arbitrator while adjudicating issues before him?
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> (iii) Whether the Petition is dressed up to suit the requirements u/s 241 and 242 of the Companies Act, 2013?

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4. On consideration of the pleadings and submissions of the parties, the Tribunal found that the grounds urged in application u/s 17 of the Arbitration and Conciliation Act and the issues raised in the Company Petition are separate. Therefore application under Section 17 of Arbitration and Conciliation Act, 1996 does not preclude Petitioner - 'Dynatron Services Private Limited' to agitate its grievance of oppression and mismanagement in the petition. The Tribunal was further of the opinion that the reliefs sought in the Company Petition did not arise out of any contractual obligation and the acts complained of could not be adjudicated upon by the Sole Arbitrator. It further held that the powers available to National Company Law Tribunal to adjudicate upon issues of oppression and mismanagement, financial irregularities, appointment of Directors, etc. could not be exercised by the Sole Arbitrator. Thus all contentions raised by the Appellant were repelled resulting in dismissal of the application. The Company Petition No. 1151/2018 was held to be maintainable.

5. The sole issue arising for consideration in this appeal is whether the issues raised in the Company Petition qua allegations of oppression and mismanagement are arbitrable?

6. Learned counsel for Appellant contends that the grievances of the Respondent No.1 - 'Dynatron Services Private Limited' in the Company Petition essentially relate to allegations of business of the Respondent No.2 - 'Yeoman Marine Services Pvt. Ltd' not being carried out in terms of the Company Appeal (AT) No. 389 of 2018 MOUs that constitute disputes which can be finally settled under provisions of Arbitration and Conciliation Act, 1996 by a Sole Arbitrator appointed in terms of the Arbitration Agreement contained in clause 17.2 of the First MOU and Clause 5.2 of the Second MOU and there is only a passing reference to oppression and mismanagement in the Company Petition. It is further contended that if appointment of independent Auditor within competence of Arbitrator is allowed, other prayers would not survive for consideration. It is submitted that issues framed by the learned Arbitrator cover the issues raised in the Company Petition, thus the Company Petition was only a 'dressed up petition' to steer clear of the arbitration clause contained in the two MOUs. Per contra it is submitted on behalf of Respondent No. 1 that Respondent No.1 being 49 per cent

shareholder of Respondent No. 2 has been illegally ousted from functioning and management of the Company and none of its Directors are on board, no notices of AGM or EOGM have been given to Respondent No. 1 and details of management of funds have not been shared with it. The Company Petition seeks to enforce the statutory rights of Respondent No. 1 as a shareholder and the reliefs claimed in the Company Petition seek an appropriate order to bring to an end acts of oppression and mismanagement apart from jointly controlling and managing Respondent No. 2 and allied reliefs which can be granted only by Company Appeal (AT) No. 389 of 2018 NCLT exercising exclusive jurisdiction under the Companies Act, 2013 and not by the Arbitrator. Learned counsel for Respondent No.1 vehemently refuted the allegation of the Company Petition being a 'dressed up petition'. It is further contended that four reliefs have been voluntarily dropped by Respondent No. 1 in its application u/s 17 of the Arbitration and Conciliation Act, 1996 as the Company Petition was pending. Learned counsel for Respondent No.1 has pointed out that the Appellant has suppressed the factum of having challenged the consent order dated 4th April, 2018 of Bombay High Court appointing the Arbitrator before the Hon'ble Apex Court in SLP (C) No.18470 of 2018 which stands dismissed vide order dated 30 th July, 2018.

7. The distinction in law between disputes that are capable of arbitral resolution and those that are not constitutes the question of arbitrability. Same fell for consideration of the Hon'ble Apex Court in 'Booz Allen & Hamilton Inc.' Vs. 'SBI Home Finance Ltd.' reported in (2011) 5 SCC 532. It held:-

> "34. The term "arbitrability" has different meanings in different contexts. The three facets of Company Appeal (AT) No. 389 of 2018 arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:
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> (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).
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> (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.
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> (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 Company Appeal (AT) No. 389 of 2018 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.

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication Company Appeal (AT) No. 389 of 2018 stand excluded from the purview of private fora.

Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

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37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject- matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem Company Appeal (AT) No. 389 of 2018 are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under

the law for the time being in force".

40. Russell on Arbitration (22nd Edn.) observed thus (p. 28, Para 2.007):

> "Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type Company Appeal (AT) No. 389 of 2018 of remedy required is not one which an Arbitral Tribunal is empowered to give."

The subsequent edition of Russell (23rd Edn., p. 470, Para 8.043) merely observes that English law does recognise that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England (2nd Edn., 1989), have observed thus:

> "In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. ...
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> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy Company Appeal (AT) No. 389 of 2018 and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order...."

(emphasis supplied) Mustill and Boyd in their 2001 Companion Volume to the 2nd Edn. of Commercial Arbitration, observe thus (p. 73):

> "Many commentaries treat it as axiomatic that 'real' rights, that is, rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the Company Appeal (AT) No. 389 of 2018 validity of the underlying patent may not ... An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless."

(emphasis supplied)

42. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688] this Court held: (SCC pp. 689-90, paras 4-5) "4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or Company Appeal (AT) No. 389 of 2018 matter which the arbitrator is competent or empowered to decide.

5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application."

(emphasis supplied)"

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> 8. The dictum of Hon'ble Apex Court is loud and clear. The judicial authority which includes the National Company Law Tribunal which is ceased of the Company Petition under Section 241-244 r/w 246 of the Companies Act, 2013 would be bound to refer the parties to arbitration of the matter brought before it in accordance with the arbitration agreement provided that the arbitrator is competent or empowered to decide such dispute. Be it seen that the claim in the Company Petition pending adjudication before the Tribunal relates to matters arising out of the two Memorandums of Understanding. Disputes raised by the Respondent No. 1 in the Company Petition are in regard to alleged acts of oppression and mismanagement. It is alleged by Respondent No. 1 in the Company Petition that the Appellant has neither transferred the assets of 'Yeoman Marine Services Pvt. Ltd' to the newly formed company as provided in Second MOU nor conducted the business in accordance with the First MOU but has also allotted 51 per cent equity shares in the Company to himself and his wife thereby assuming complete management control to the exclusion of Respondent No. 1 seriously prejudicing its interests. From the relief clause in the Company Petition, it emerges that Respondent No. 1 seeks relief under Section 241 to 244 r/w 246 of the Companies Act, 2013 to bring an end to the acts of oppression and mismanagement perpetrated by the Appellant besides directing Company Appeal (AT) No. 389 of 2018 joint management and control of the company by Respondent No.1 and the Appellant. Petitioner (Respondent No. 1) also

sought the relief of induction of two Nominee Directors on the Board of Directors besides other allied and connected reliefs in addition to carrying out of independent audit through an independent Auditor. The allegations in the Company Petition and the nature of relief claimed therein leaves no room for doubt that the Company Petition raises vital issues pertaining to exclusive jurisdiction of the Tribunal. Relief claimed in the backdrop of allegations of oppression and mismanagement would depend on the finding that the affairs of the Company have been conducted in a manner prejudicial or oppressive to the Petitioner (Respondent No. 1 herein) and that to windup the Company would unfairly prejudice Petitioner though otherwise the facts justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. The Tribunal, empowered under Section 242 (2) of Companies Act, 2013 may, with a view to bring to an end the matters complained of, make such order as it thinks fit. On a plain reading of Section 242, it is manifestly clear that the facts should justify the making of a winding up order on just and equitable grounds. Admittedly, Arbitrator would have no jurisdiction to pass a winding up order on the ground that it is just and equitable which falls within the exclusive domain of the Tribunal Company Appeal (AT) No. 389 of 2018 under Section 271(e). That apart acts of non-service of notice of meetings, financial discrepancies and non-appointment of Directors being matters specifically dealt with under Companies Act and falling within the domain of the Tribunal to consider grant of relief under Section 242 of Companies Act render the dispute non-arbitrable though it cannot be disputed as a broad proposition that the dispute arising out of breach of contractual obligations referable to the MOUs or otherwise would be arbitrable. It is also indisputable that the statutory powers and plenary jurisdiction vested in the Tribunal renders it the appropriate forum to deliver result oriented justice. Admittedly, the statutory jurisdiction vested in the Tribunal cannot be exercised by the Arbitrator. Given the nature of allegations in the Company Petition in the context of reliefs that survive for consideration there is no escape from the conclusion that the dispute raised in the Company Petition and sought to be referred for arbitration is non-arbitrable. No exception in this regard can be taken to the view adopted by the Tribunal.

9. The impugned order, viewed in the light of foregoing discussion, does not suffer from any legal infirmity and does not call for interference. We are of the considered opinion that the Tribunal has Company Appeal (AT) No. 389 of 2018 correctly dealt with the issue and the finding is legally justified and sustainable. The appeal is accordingly dismissed. There shall be no orders as to costs.

[Justice Bansi Lal Bhat] Member (Judicial) [Balvinder Singh] Member (Technical) NEW DELHI 10th April, 2019 AM Company Appeal (AT) No. 389 of 2018