BEFORE THE COMPANY LAW BOARD, NEW DELHI BENCH, NEW DELHI;
CA 128/C-II/2014 in CP 64(ND) 2014

Present: B.S.V. Prakash Kumar, Member (Judicial)

In the matter of:

Companies Act, 1956 Section 397, 398 and Regulation 44 of the Companies Act, 2013 and the CLB Regulations, 1991

And

In the matter of:

SIDHARTH GUPTA & ORS. ..... PETITIONERS

v.

M/s. GETIT INFOSERVICES PRIVATE LIMITED & ORS. .....RESPONDENTS

Present:

The counsel for the Petitioners: Mr. Rajeev Virmani, Senior Advocate, Mr. Ananya Kumar and Ms. Pragya Chauhan, Advocates.

The counsel for the Respondents: Mr. Arun Kathpalia, Mr. Samaksh Goyal, Mr. Gaurav Duggal, Mr. Samaksh Goyal, Advocates for R1 and R3.

Ms. Ritu Bhalla, Ms. Misha and Mr. Yajur Mittal, Advocates for R2

Order
(Pronounced on 23.02.2016)

R1 filed this CA u/s 45 of Arbitration & Conciliation Act, 1996 for referring the dispute raised in the Company Petition to Arbitration in terms of clause 23 of the Subscription and Shareholding Agreement (SSHA) dated 28.08.2010 as well as subsequent amendments to the same dated 4.7.2011, 28.09.2011 and the Memorandum of Agreement dated 18.05.2012 seeking dismissal of this CP as not maintainable for want of jurisdiction and refer the disputes to Arbitration in accordance with the Rules of Singapore International Arbitration Centre in pursuance of the Arbitration Clause as mentioned above.

2. Before going into this Application, I must say what the Company Petition is. The petitioners 1 to 5 entered into a Shareholders' Agreement (SSHA) with R2, allowing R2 to purchase 50.1% shareholding of the company for consideration of ₹95,99,37,230 (subscription considerable amount) by paying it in seven tranches in accordance with SSHA. The terms of this agreement were made part of Article of Association. Again on 18.05.2012, the shareholding of the respondents was increased from 50.1% to 76% on execution of Memorandum of Agreement dated 18.05.2012. On 30.09.2013, R2 again brought in an amount of ₹187.6crores as share application money, to clear the loan liability of the company and to cater the working capital requirement as per business plan. Since this money had come into the company as share application money, R1 Company, first increased the authorised capital from ₹125crores to ₹300crores, in furtherance of it, rights issue was given for allotment of ₹4,63,72,645 equity shares with a rate of ₹53.22 (issue price) per share on pro rata basis. Before giving this rights issue notice, the share price was set out on valuation report given by M/s. Sanjeev Sapra & Associates. Total investment by R2 in R1 company till this petition was filed is ₹680crores as against ₹4.84crores investment by the entire promoters group.

3. The grievance of this petitioner in this Company Petition is that the respondents dealt with the affairs of the company prejudicial to the interest of the petitioners' group by not disclosing to their nominee director with respect to the money brought in by R2, in valuing the shares of the company without any proper valuation and accepting such unfair and improper valuation as the basis for rights issue as to use the money unauthorizedly brought in by R2 to allot a substantial higher number of shares to it at such undervalued price by unfairly diluting the petitioners shareholding in the company. To perpetrate fraud upon the petitioners, the management in R1 held an EOGM on a short notice for increase of authorised share capital though at least 21 days notice is required to hold EOGM in the company. The company also violated Article 77.5.2 by calling Board Meeting dated 13.03.2014 on short notice as against the mandate of 14 days notice. In the Board Meeting dated 13.03.2014, the valuation report given by M/s. Sanjeev Sapra was unquestionably accepted by the members of Board on 13.03.2014, on the same day a resolution was passed approving the rights issue contrary to Article 77.5.3, the petitioners further say that they later came to know that shares were allotted to R2 on 20.05.2014 pursuant to the rights issue dated 13.03.2014. The petitioners submit that there was no board approval for future funding, the report of M/s Sanjeev Sapra was not authorised by the board to conduct such valuation, and he was not an investment banker to

determine fair market value of the company in as much as that it did not satisfy the qualification criteria set out in Article 49.1.103 r/w Article 54.2.4 of AOA and M/s. Sanjeev Sapra did not follow the parameters/methodology set out in Article 95.2 r.w Article 49.1.79 of the AOA. The petitioners submit that when they got this company valued by American Appraisal India Pvt. Ltd. as on 26th December, 2014 share value as on 31.01.2014 has come around ₹230 which is far higher than the value of ₹53.22 assessed by M/s Sanjeev Sapra. By this, the shareholding of the petitioners has fallen below 5% resulting in P1 to P3 are unfairly deprived of their stake in the company and their position in the Board of Directors.

4. On seeing the petitioners filed this CP, R1 filed this CA saying that despite there being a dispute resolution mechanism provided for under Clause 23 of SSHA mandating to resolve disputes arising out of SSHA through negotiations, failing which, to resolve through arbitration at Singapore International Arbitration Centre (in short "SIAC"), and despite this arbitration clause was reiterated in the amendments dated 4.7.2011 & 28.9.2011 to the SSHA as well as in the Memorandum of Agreement dated 18.5.2012, the petitioners have approached this Bench by filing this CP under sections 397/398, 399, 402 & 403 of the Companies Act, 1956.

5. In definition part of SSHA, dispute is defined as ***"any and all claims, causes of actions, disputes or proceedings arising out of or in connection with this agreement"***. It is also said that R1 Company, the promoters group i.e., petitioners, R2 and its nominee directors are parties to SSHA covered with Arbitration Clause, it can't be therefore said that R1 Company is not a party to Arbitration Clause 23. In the definition ***'party'*** in SSHA, R1 Company is also referred as a party. It is further said in clause 11 of SSHA that ***"in the event of any of the provisions of the SSHA and Memorandum and Article of Association, the parties agree that the provisions of SSHA shall prevail"***. In clause 11.3 of SSHA, R1 has undertaken that SSHA is binding and R1 shall not aid or abet any violation of SSHA. That this amendment was carried out in clause 50 of Article of Association of R1. In the event of failure of resolution, for there being a mechanism under arbitration clause to proceed before SIAC for arbitration, any shareholder in dispute may commence the arbitral process through SIAC under the Arbitration Rules of SIAC.

6. For having the petitioners filed this CP on the premise that R1 company issued shares in violation of the terms and conditions of the shareholders agreement (SSHA) in as much as the Article of Association, these issues are

opened to be raised before Arbitral Tribunal as envisaged under Section 45 of the Arbitration and Conciliation Act, 1996. The terms and conditions of Shareholders Agreement have been incorporated in the Article of Association adding that in the event of any conflict between any of the provisions of SSHA and Memorandum of Article of Association, SSHA shall prevail over Articles of Association. In view of the same, R1 company prays this Bench for having the petitioners raised contractual disputes before Company Law Board u/s 397/398, this CP shall be dismissed as not maintainable for want of jurisdiction and direct the disputes to be referred to Arbitration in accordance with Rules of SIAC.

7. The petitioners filed reply to the application stating that this application is not maintainable and the parties to the present petition cannot be referred to arbitration for the reasons stated below:

8. This SSHA has been executed between the petitioners and R1 to R3 only. Respondents 4 to 8 and Performa respondents 9 to 13 are admittedly not parties to SSHA. For all the respondents in this CP not being parties to SSHA, the arbitration clause in that agreement is not binding upon Respondents 4 to 13; hence this case cannot be referred to arbitration. Though Arbitration Clause is covered in the SSHA, for the company not being referred in the dispute resolution procedure contemplated in clause 23.5.1, the Arbitration Clause shall be limited to the shareholders of the company but not to the company. The petitioners submit that Article of Association does not contain the Arbitration Clause, since the arbitration clause in the agreement, not being part of the AoA, it shall not be binding upon the company. Though as many clauses as present in the SSHA are brought into the AOA, Arbitration Clause is not consciously mentioned or incorporated in the Articles of Association, for this Arbitration Clause is out of the ambit of AOA, the disputes emanating out of violation of Articles cannot be referred on the premise arbitration clause is present in the SSHA. It is further stated that clause 23.5.2 of SSHA makes it clear that the disputes in between R2 (investor) and the promoters (petitioners) would be capable of reference to arbitration. If the disputes are solely between R1 Company and the shareholders or inter se between the persons referred as promoters, they would not fall within the ambit of arbitration clause, this arbitration clause is applicable only when the dispute arose between R2 on one hand and the petitioners on the other hand. The petitioners submit that the reliefs sought in the petition are of such nature that they cannot be granted by an Arbitral Tribunal in such cases it shall not be referred to arbitration. The

petitioners have *inter alia* sought reliefs in relation to allotment of shares of the company, composition of the Board of Directors of the company, regulation of the affairs of the company. Since these reliefs can only be granted u/s 402 & 403 alone, such reliefs cannot be referred to the Arbitral Tribunal. As to regulation of the affairs of the company, if any dispute arose, it has to be dealt with under sections 397/398 for those rights are statutory rights given to the shareholders such as proper notice of rights issue of shares, violation of Articles of the company, allotment of shares detrimental to the interest of the members of the company. In view of the same, the petitioners pray this Bench to dismiss this CA.

9. On hearing the submissions of either side counsel, the point for consideration is

Whether the subject matter in this CP falls within the ambit of jurisdiction u/s 397, 398 r/w 402 & 403 or within the ambit of arbitration clause constituted in the SSHA arrived at between the parties.

10. The undisputed facts of the case are that the petitioners are promoters and R2 is an investor joined into the company through a shareholders' agreement (SSHA) dated 28.08.2010 by investing around ₹100crores. The understanding in between these two groups to work jointly is the shareholders agreement entered between them. The understanding in between the petitioners and R1-3 did not remain there, they have further entered into amendments on 04.07.2011, 28.9.2011 and Memorandum of Agreement on 18.5.2012, and it was incorporated in Clause 50 of Articles of Association saying in the event of conflict in between the clauses of SSHA and Articles of Association, the clauses of SSHA shall prevail over AoA. If we see the series of agreements entered between the petitioners and respondents 1-3, it is clear that the functioning of the company has gone into the fold of terms and conditions agreed between the parties, rather by the articles of association. Whenever any third party comes into the company with huge investment crossing 50% stake in the company, they usually take the management into their hands, so is the case here. Initially it is an agreement that R2 could invest up to a cap of 95%, in the process of it, this investor pumped in huge funds, 100 times to the fund initially put in by the petitioners. It is also not the case of the petitioners that this company is running on the expertise of the petitioners. It is also not in dispute that the company has been in need of funds ever since the investor joined in this company. It is also not the case of the petitioners that the company does not require any money. It is a fact that R2 entered into the company by investing huge money with an

understanding that R2 would get more than 50% shareholding and management of the company. According to this agreement, R2 initially acquired 50.45 shareholding and management in the company with its nominee directors. In the second phase when funds were required, R2 again put in money, by which his shareholding went up to more than 75%. As necessity for the funds rising from time to time, R2 has kept on investing money in the company, in the process of it, R2 invested ₹189crores as share application money in the month of September, 2013 to meet the loan liability and working capital requirements. It is not the case of the petitioners that allotments made to Respondent No.2 were made without funds coming from R2. It is also not the case of the petitioners that the money brought in by R2 was not utilised for the requirements of the company. These petitioners who have filed this CP only invested ₹4.84crores as against ₹680crores invested by R2. The petitioners have not stated that authorised capital was increased or allotment was made without issuing notice to the petitioners. Their only case is that EOGM and Board Meetings were held with short notice and valuation made by M/s Sanjeev Sapra is not proportionate to the real value of the company and not reflecting fair market value, moreover, M/s Sanjeev Sapra is not a competent person to value the shares of the company because he is not a qualified valuer with qualification criteria set out in Article 49.1.103.

11. The contention of the petitioners is, when violation of statutory rights is found, such dispute will then fall within the jurisdiction of CLB u/s 397 & 398, not before arbitral tribunal. It is pertinent to say that it is settled proposition of law that mere violation of law or any terms in between the parties will not automatically fall within the ambit of jurisdiction under section 397, 398. It has to be shown that the conduct of the persons in the management is either prejudicial to the interest of the company or interest of the members of the company. Unless the conduct of the management amounts to oppression or mismanagement, the jurisdiction under section 397/398 cannot be invoked. Here in the present case, if the allegations of the petitioners, such as holding meetings on short notice, valuation of the company is not on fair market value and not in accordance with provisions of law, are closely looked into, I don't believe any of the actions of the respondents fall within the jurisdiction of 397/398, if any pleading is there saying the conduct of the Respondent amounts to oppression or mismanagement, it is a statement dressed up to mould it as a petition u/s 394 & 398..

12. As to holding meetings on short notice, it is not said anywhere how holding meetings on short notice has become oppression against the petitioners or mismanagement of the company. As I already said that mere violation of Articles of Association or provision of law cannot become oppression unless laced with malfeasance. It is known to the petitioners that company had a need of funds, for that, R2 already invested ₹189crores as share application money towards loan liability and working capital; having put in huge money, it is legitimate expectation of R2 to get allotment to the money invested by R2. May be, meetings were held on short notice but not without any notice. Yes, it could be understood that the action of R2 was oppressive, had R2 failed to make an offer of rights issue to the petitioners on pro rata basis. R2 indeed made an offer of rights issue to the petitioners, and even offered to allot shares to the petitioners on loan basis provided the petitioners accept the offer to pay the consideration along with interest. But the petitioners, instead of accepting such a generous offer come from R2, the petitioners ignored the same, started evincing other ways to stall the functioning of the company by pointing out some technical short falls in conducting the affairs of the company. Though meeting was held on short notice, but rights issue was left open for acceptance of the shareholders for a period of 30 days. Therefore, it cannot be said that R2 tried to appropriate the entire allotment to itself ignoring the entitlement of the petitioners. It is not for the first time the petitioners failed to accept the offer of rights issue, in past also when the petitioners failed to put the funds to meet the necessity of the company, R2 alone invested money by allotment. That allotment was made on the valuation report given by the same Mr. Sanjeev Sapra, now when the same M/s Sanjeev Sapra gave valuation report; the petitioners have taken it as grievance to file this CP. When the petitioners raised that M/s. Sanjeev Sapra valuation report is not in compliance with the Articles of Association, R1 Company has taken another valuation from Deloitte, which is one of the renowned valuers in the world. The valuation per share given by M/s Sanjeev Sapra is around ₹52, whereas the valuation report given by Deloitte is within the range of ₹42 to ₹54 per shares. So, the valuation given by Sapra can't be said weird or undervalued in the light of the valuation given by Deloitte.

13. On seeing the conduct of the petitioners ever since R2 has come into the company, it is evident that they have never made any attempt to invest any money in the company except the money had already invested before R2 has come in. To make an attempt that the valuation given by M/s Sanjeev Sapra is incorrect, the petitioners procured another valuation report purported to have