

COMPANY LAW BOARD
NEW DELHI BENCH
NEW DELHI

CP NO. 96(ND)/2014

CA NO.

PRESENT: CHIEF JUSTICE M. M. KUMAR
CHAIRMAN

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NEW DELHI BENCH OF THE
COMPANY LAW BOARD ON 04.02.2016

NAME OF THE COMPANY: **M/s. Avigo PE Investments Ltd.**

Vs.

M/s. Tecpro Engineers Ltd. & ors.

SECTION OF THE COMPANIES ACT: 397, 398, 399, 402 and 403 of the Companies Act 1956.

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1	AJAY K. TAIN ARSHAT KUMAR	ADVOCATE ADVOCATE	RESPONDENT NO. 3	[Signature]
2	ADITYA DWARS	ADVOCATE	PETITIONER	[Signature]
3	JOYDEEP MAZUMDAR		Resp. 1, 2 & 6.	[Signature]

ORDER

Avigo PE Investment Ltd filed the instant company petition namely C.P. 96(ND) of 2014 under section 397, 398 & 402 etc of the Companies Act, 1956. Respondents No.1,2 & 6 on the one hand and Respondent No. 3 on the other have filed two applications u/s 8 of the Arbitration and Conciliation Act 1996 alleging that the petition filed by the petitioner-non applicant is a dressed up petition and the matter squarely falls within the exclusive jurisdiction of an Arbitrator. In that regard reliance has been placed on an arbitration clause 19 of Share Subscription cum shareholder's Agreement dated 18.08.2010 (for brevity 'SSSA') entered between the parties. On the prayer made in the applications it has been emphasized that disputes raised in the company petition have already been brought before the Arbitral Tribunal at the instance of petitioner-non applicant and the arbitration is in progress. Therefore no adjudication of the same issues would be permissible in the company petition.

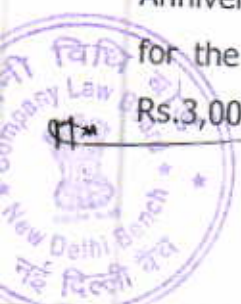
2. Notice of the application was issued. The non applicant – petitioner filed reply opposing the prayer for leaving the disputes to be decided by the Arbitral



Tribunal in terms of clause 19 of 'SSSA' suggesting that disputes concerning oppression and mismanagement under sections 397, 397, 402 & 403 of the Companies Act, 1956 cannot be referred to arbitration. Rejoinder has also been filed.

3. In order to find out the answer to the basic question whether the company petition is a ruse to harass the respondents and whether the petition is dressed up in such a manner as to seek similar relief which is available to the parties before the Arbitrator, it would be necessary to briefly notice the prayers made by the non applicant-petitioner. A declaration has been sought from this Board that actions of the Respondents are oppressive and amount to mismanagement u/s 397, 398 etc. of the Companies Act, 1956, A further prayer has also been made to issue directions and pass order declaring that all resolutions passed in the Board Meeting, General Meeting and AGM after 2013 are illegal and are liable to be set aside and that the Registrar of companies shall not take notice of the fabricated and forged account for financial year 2012-2013 which were to be approved at AGM dated 2.9.2013. The Petitioner also sought direction for declaring that the transfer of share from Respondents No.2 & 4 to Respondent No. 6 is null and void ab initio because it is against the Articles of Association of Respondent No.1-company.

4. The prayers have been made in the background facts stated in various paras of the petition asserting that non applicant- petitioner made an investment of Rs.40,00,00,000/- (Rs forty crores) by subscribing to the equity shares and compulsory convertible preference share of the Respondent No.1 company in accordance with the SSSA dated 18.08.2010 (Annexure P-3). The petitioner has subscribed to 6,25,000 fully paid up equity shares of Rs.10/- each of the Respondent No.1 company for cash at a premium of Rs.310/- per equity shares for an aggregate consideration of Rs.20,00,00,000/-. Thus the petitioner has invested a sum of Rs.40,00,00,000/- . The preference shares were thus convertible at the option of the non applicant-petitioner any time after December 31.12.2012. If he did not exercise option then the preference shares were further compulsorily convertible on the 5th Anniversary of the date of investment (Annexure P-4 & 5). As per the balance sheet for the financial year 2012-2013, the authorized share capital of the company is Rs.3,00,00,000 /- divided into 30,00,000 equity shares of Rs.10/- each. The issued,



subscribed and fully paid share capital of the Respondent No.1 company is Rs. 2,48,50,000/- divided into 24,85,000 equity shares. The shareholding pattern of the parties in the respondent No.1 company is as follows:-

Name of the shareholder	Equity Shares	Preference Shares (No.)	Percentage
Mr. Ajay Kumar Bishnoi	45000		1.81
Mr. Amul Gabrani	45000		1.81
Mr. Arvind Kumar Bishnoi	247000		9.93
Mr. Aditya Garbrani	247000		9.93
Mrs. Goldie Gabrani	545000		21.93
Mrs. Amita Bishnoi	545000		21.93
Atihana Infrastructure Pvt. Ltd.	186000		7.48
Avigo PE Investments Ltd.	625000	500000	25.18

There are at present seven directors namely Mr. Ajay Kumar Bishnoi, Mr. Amul Gabrani, Mr. Arvind Kumar Bishnoi, Mr. Aditya Garbrani, Mr. Suresh Kumar Goenka, Mr. C.V. Narsimhan and Mr. J.P. Singh (Nominee director of the petitioner). The non applicant -petitioner claims to have funded the business of the subsidiary of the Respondent No.1-company namely Tecpro Infra Projects Ltd, Edappally, Ernakulam. As per the terms of agreement dated 18.8.2010 the affairs of the subsidiary were also subjected to the supervision of the Board of the Respondent No.1-Company

5. It is alleged that after 31.03.2013 respondent No. 2 to Respondent No.5 stopped communicating with the non applicant-petitioner and also stopped reverting to the communications sent by him to respondent No.1-company. Respondent No.2 to Respondent No.5 have refrained from providing any information in respect of the financial and operational affairs of the respondent No.1 company to the non applicant- petitioner. It has also been alleged that AGM approving the accounts in respect of financial year 2012-2013 was to be called. However, no notice of any such meeting was given to the non applicant-petitioner. There are further allegations that the Respondent No.1-company fails to convene the meeting of the Board of Directors for the quarter ending June 2013 in accordance with the provisions of the Articles of Association of respondent No.1-company despite notice and reminders. Eventually the legal notice was issued on May 7, 2014 which enlisted the breach of the terms of the 'SSSA' committed by the Respondent No.1 company.

The non applicant-petitioner terminated the 'SSSA' in accordance with the terms of the Clause 15.3 thereof. Accordingly it further exercised the option contemplated under clause 16.1 of the 'SSSA' and sent a request to the respondent to purchase all its equity shares and preference shares of Respondent No.1-company. Likewise rights in accordance with clause 12.3 and 12.6 of the 'SSSA' and Articles 86 & 88 of Articles of Association of the company were exercised. On July 10, 2014 a notice was sent by the non applicant-petitioner for calling a meeting of Board of directors with a proposed agenda of twelve items.

6. The Petitioner has further disclosed the fact that it had filed an application u/s 9 of the Arbitration and Conciliation Act, 1996 for securing interim reliefs against the Respondents. Eventually they have also invoked arbitration clause in SSSA and the matter is now pending in arbitration. However, some crucial averments have been made in paras (a) to (m) of para xxiii of the petition disclosing various acts of mismanagement and oppression. A perusal of paras xxiv to xxvi would reveal suppression of information from non applicant-petitioner in respect of allotment of shares to Respondent No.6 alleging that it violates fiduciary principle. Apart from the violation of fiduciary principle the provision of Article 74 of the Article of Association of Respondent No.1-company has also been alleged to be violated as it casts an obligation on Respondent No.1-company to take written consent of the petitioner in the matter concerning transfer of shares of Respondent No.1-company. It is further alleged that the promoter-directors could not have transferred share to their relatives without approval and meeting of the Board or the shareholders of Respondent No.1-company. Likewise there are violations of the procedure as prescribed by Articles 23 to 35 for transfer of shares. It has also been alleged that quorum of the general meeting of Respondent No.1 company was to be considered complete only when representative of the petitioner was present as provided by Article 53 of Articles of Association and the meeting held on 2.9.2013 fails to fulfill the aforesaid obligation which thus ultra vires the Article of Association. The records concerning aforesaid subsidiary company are also not been showed.

7. There are allegations of related party transaction which according to Article 91 required prior consent and approval from the Board of Directors of Respondent No.1-company. No approval had ever been taken and a copy of the Annual return

concerning its subsidiary company namely Techpro Systems Ltd. has been placed on record (P-36)

8. On the basis of the aforesaid facts and circumstances the petitioner-non applicant has asserted that there is wholesome mismanagement and oppression.

Arguments: Applicant-Respondents

9. I have heard the learned counsel for the parties at a considerable length and have perused the paper book with their able assistance. Learned counsel for the applicant-respondents has vehemently argued that: -

(a) The company petition is nothing else but a ruse to enforce the contractual obligations emerging from the 'SSSA'. The non applicant-petitioner are not entrepreneur and are rank investors. In fact the non applicant-petitioner wants their investment back. In that regard a reference has been to the order dated 9.9.2014 where the petitioner has expressed his desire to leave the company after receiving an amount of Rs.100 Crores. Learned counsel has further argued that clause 19 of the 'SSSA' concerning arbitration has already been invoked by the non applicant – petitioner and the proceedings are in progress before the learned Arbitrator Former Chief Justice of India Hon'ble Dr. A. S. Anand. It has further been argued that on the ground that there is a breach of SSSA dated 18.8.2010 and violation of the provisions of Companies Act a notice was issued on 7.5.2010 (Annexure P-20) terminating the SSSA. Fundamentally it is a breach of agreement and claim of damages. There is no issue of mismanagement and oppression. Accordingly the matter needs to be left to the Arbitration.

(b) Another argument raised is that the Company Law Board is a creature of a statue which has limited power whereas the arbitrator has wider powers. It was then submitted that a perusal of Annexure-I appended with the 'SSSA' (annexure P-3) would show that Mr. Amul Gabrani, Mr. Ajay Kumar Bishnoi, Mr. Aditya Garbrani and Mr. Arvind Kumar Bishnoi were the promoter directors of the Respondent No.1-company whereas the non applicant-petitioner is merely an investor in the company. It has been submitted that the arbitration agreement is not part of the Articles and Respondent No.1-

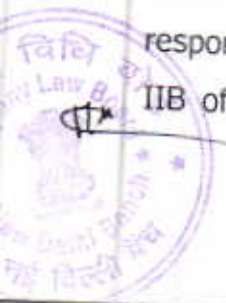


company is not bound as per the provisions of section 36 of the Companies Act, 1956.

(c) Learned counsel has then submitted that all disputes raised in the company petition emanate from 'SSSA' which contains clause 19 providing for arbitration, therefore non applicant –petitioner approached Hon'ble Delhi High court by filing an application u/s 9 of Arbitration Act for grant of interim protection being OMP No. 831 of 2014. However no interim protection was given as it is evident from order dated 1.8.2014 passed by Hon'ble Delhi High Court. On its failure to obtain interim protection the present company petition was filed with the allegations of mismanagement and oppression which in fact amounts to forum shopping. It is a malafide petition. It has further been submitted that non applicant – petitioners are not interested in running the affairs of the company which is evident from the interlocutory order dated 9.9.2014 passed by this Board regarding the statement of non applicant-petitioner demanding a sum of Rs. 100 Crores for leaving the company because they are basically investors.

Arguments: Non applicant Petitioner

10 Learned counsel for the non-applicant petitioner has argued that the relief claimed in the petition filed u/s 397, 398 read with sections 402 cannot be granted by an Arbitrator in the arbitration proceedings as the acts of oppression and mismanagement cannot be subject matter of proceeding before Arbitrator. Referring to a number of acts of mismanagement and oppression and ignoring the participation of the petitioner in the affairs of the company it has been urged that such a oppression can be dealt with by the Company Law Board alone in the present proceedings. As an illustration it has been pointed out that applicant-respondent in collusion with each other has transferred equity shares among themselves in contravention of the provisions of Articles of Association of Respondent No.1-company. Moreover no notice for approving the financial statement for the year 2012-2013 was issued to the petitioner who holds 25.15% shareholding in the respondent No.1-company. A number of similar averments have been given in para IIB of the preliminary submissions. It has been maintained that there are false



allegations of a dressed up petition to enforce SSSA which falls within the domain of the Arbitrator in accordance with the provision of arbitration clause 19 of the 'SSSA'.

Conclusion:

11 Having heard the learned counsel for the parties and after perusing the record it would be first necessary to find out the law concerning the issue raised before me. A short question of law which emerges for determination in this application filed under section 8 of the Arbitration Act is:

'Whether the dispute raised in a properly filed petition under sections 397, 398, 402 and 403 of the Companies Act can be referred to arbitration in accordance with the agreement between the parties'

12 The proposition of law raised in this case is no longer *res-integra*. It would however be profitable to peruse sections 397, 398, 402 and 403 of the Companies Act so as to understand the nature of power enjoyed by the Company Law Board and the same is as follows:-

397. Application to Company Law Board for relief in cases of oppression:-

(1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply by virtue of section 399.

(2) If, on any application under sub-section (1), the court is of opinion-

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would 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 Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

398. Application to Company Law Board for relief in cases of mismanagement:-

(1) Any members of a company who complain-

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its Board of directors, or of its managing agent or secretaries and treasurers or manager, or in the constitution or control of the firm or body corporate acting as its managing

