

**IN THE HIGH COURT AT CALCUTTA
ADMIRALTY JURISDICTION
ORIGINAL SIDE
[COMMERCIAL DIVISION]**

BEFORE:

The Hon'ble Justice Ravi Krishan Kapur

AP 809 of 2022

UPHEALTH HOLDINGS INC.

Vs.

GLOCAL HEALTHCARE SYSTEMS PVT. LTD. & ORS.

For the petitioner	: Mr. S.N. Mookerjee, Senior Advocate Mr. Ratnanko Banerjee, Senior Advocate Mr. Suddhasatva Banerjee, Advocate Mr. Anand S. Pathak, Advocate Mr. Amit K. Mishra, Advocate Mr. Vijay Purohit, Advocate Mr. Shivam Pandey, Advocate Mr. Anujit Mookherji, Advocate Mr. Anirudhya Dutta, Advocate Ms. Didon Misri, Advocate Ms. Shyra Hoon, Advocate Mr. Naman Choudhury, Adv. Mr. Nav Dhawan, Advocate
For the respondent no.1	: Mr. Jishnu Saha, Senior Advocate Mr. Jishnu Chowdhury, Advocate Ms. Sonali Ghosh Panda, Advocate Mr. Dipendra Nath Chunder, Advocate
For the respondent nos. 2 to 4	: Mr. Joy Saha, Senior. Advocate Mr. Siddhartha Banerjee, Advocate Mr. Debashri Karmakar, Advocate Mr. Ishan Saha, Advocate Mr. Arya Nandi, Advocate Mr. Satyam Ojha, Advocate
Reserved on	: 25.04.2023
Judgment on	: 23.08.2023

Ravi Krishan Kapur, J.

1. This is an application under Section 9 of the Arbitration and Conciliation Act, 1996. The disputes between the parties arise out of a Share Purchase Agreement dated 30 October 2020 as amended on 20 November, 2020 and 4 March, 2021 respectively (SPA).
2. Briefly, the petitioner is a company incorporated under the laws of Delaware, USA and is a wholly owned direct subsidiary of Uphealth Inc. Uphealth Inc is a public company listed on the New York Stock Exchange. The petitioner is carrying on business *inter alia* of providing health care treatment. The respondent is incorporated under the provisions of the Companies Act, 1956 and provides technology enabled healthcare services.
3. By the SPA, the petitioner undertook to become the single largest shareholder of the respondent no.1 company. It is alleged that pursuant to the SPA and in terms thereof, the petitioner has paid the respondent, a sum of approximately USD 174.5 million (equivalent to Rs.2100 crores) which comprises of a substantial portion in cash and the balance by way of shares in the petitioner's parent company Uphealth Inc. It is also alleged that portion of the aforesaid amount had been paid by the petitioner to repay the debts of the respondents.
4. The SPA contains reciprocal obligations on both parties whereby the petitioner was to eventually become the single largest shareholder and ultimately have 100% ownership of the respondent no.1 company and the

respondent no.1 would become an indirect subsidiary of the UPH. In this connection, Clause 10.2 of the SPA provides as follows:

“All Parties agree that the commercial intent is through the transactions contemplated by the SPA the Acquirer shall eventually own 100% of the Target Share Capital. To that end, the Promoter and Option Sellers shall cooperate with the Acquirer to increase the Acquirer’s ownership in the Target after the IR Cash Closing Date in a form and manner acceptable to the Acquirer.”

5. The SPA also contemplated that the financial statements of the respondent no.1 would ultimately have to be consolidated and reflected in the financial statements of Uphealth Inc. It is contended that the respondents have in breach of their obligations under the SPA, failed to provide the petitioner with any access to the financial statements of the respondent no.1 which has caused delay in UPH filing their consolidated financial statements.
6. It is also contended that after transfer of the last tranche of monies to the respondents, the respondents have sought to renege from their obligations under the SPA and have filed diverse proceedings against the petitioner with the oblique and ulterior aim of defeating the rights of the petitioner under the SPA. In particular, the respondents have filed a criminal complaint dated 14 September, 2022 with the Commissioner of Bidhannagar Police, a separate complaint registered with the Technocity Police Station dated 15 October, 2022, an application being CP No.298 of 2022 before the National Company Law Tribunal, Kolkata Bench and a

Title Suit before the Learned Commercial Court at Rajarhat being Suit No.19 of 2022.

7. Pursuant to the aforesaid, the petitioner had been compelled to invoke the arbitration clause contained in the SPA and also file an application dated 25 October, 2022 before the Emergency Arbitrator. By an order dated 16 November, 2022 the Emergency Arbitrator held as follows:

- a. Declares that the Emergency Arbitrator has jurisdiction to rule on Application.*
- b. Declares that the requests made in the Application are admissible.*
- c. Directs the Respondents, both individually and jointly, to immediately provide to Applicant, and to any PCAOB-registered accounting firm identified by Applicant, access to all unaudited financial statement(s), data, documents, books and records necessary to be consolidated into UPH's 10-Q for 2022, in the form and manner requested (the Financial Statements request);*
- d. Orders the Applicant to refrain from causing the unaudited financial statements to enter the public domain;*
- e. Directs the Respondents, both jointly and individually, to cooperate with any PCAOB-registered accounting firm identified by Applicant in their review of the information provided pursuant to paragraph (a) above, including responding to any questions, making any company employees or officers available to respond to questions, and complying with any requests for further information or clarifications (the Cooperation request);*
- f. Orders the Respondents jointly and individually to refrain from taking any steps to access the funds in the Share Account whether on the basis of the 15 August, 2022 board resolution or otherwise;*
- g. Orders the Applicant to refrain from taking any steps to access the funds in the Share Account;*
- h. Dismisses the Remaining requests for relief;*
- i. Reserves to the Tribunal once constituted all issues of costs.*

8. The respondents have deliberately chosen not to comply with any of the aforesaid directions passed by the Emergency Arbitrator. In this background, the petitioner has filed this application seeking interim reliefs in aid of the arbitration proceedings.
9. On behalf of the respondent nos. 2 to 4 it is contended that, the order of the Emergency Arbitrator dated 16 November, 2022 is not an award and cannot be enforced under the Act. It is alleged that the disputes between the parties are the subject matter of a petition pending before the National Company Law Tribunal and are not arbitrable. It is alleged that the demand for the access to financial records of the respondent no.1 ought to have been made before the National Company Law Tribunal. It is alleged that the petitioner has failed to comply with the mandatory condition for resolution by way of mediation before initiating of arbitration proceedings as stipulated in Clause 14.2.2 of the SPA. It is alleged that the Arbitral Tribunal has been rendered *functus officio* and cannot continue with the reference. In support of their contentions, the respondents rely on the decisions in *Raffles Design International India Private Limited & Anr. Vs. Educomp Professional Education Limited & Ors.* 2016 SCC OnLine Del 5521, *Rakesh Malhotra Vs. Rajinder Kumar Malhotra and Others* 2014 SCC OnLine Bombay 1146, *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. & Ors.* (2022)1 SCC 209, *Fource Infrastructure Equipments Pvt. Ltd. & Ors. vs. General Atlanta Singapore Fund Pte. Ltd.* *Manu/CL/0068/2014* and *Dhananjay Mishra vs. Dynatron Services Pvt.*

Ltd. 2019 SCC OnLine NCLAT 163. The respondent no. 1 company had for all purposes adopted the submissions made by the respondent nos. 2 to 4.

10. Clause 14 of SPA is as follows:

14. GOVERNING LAW, JURISDICTION AND DISPUTE RESOLUTION

14.1 Notwithstanding any conflicts of laws doctrines or provisions to the contrary, the Agreement will be governed by and construed and enforced in accordance with the laws of the Republic of India. Nothing contained in Clause 14 shall prejudice a party's right to approach and seek remedies from any court having jurisdiction for the purpose of interim or interlocutory orders. The Parties hereby expressly agree and confirm that, subject to the provisions of the (Indian) Arbitration and Conciliation Act, 1996, Section 9, 27, 37(1)(a) and 37(3) of the (Indian) Arbitration and Conciliation Act, 1996, shall be applicable in relation to any Arbitrable Disputes under this Agreement and the enforcement of any awards provided for under Clause 14.2 (Arbitration).

14.2 Arbitration

14.2.1 Except as expressly provided elsewhere in this Agreement, any dispute, controversy, or claim arising under or relating to this Agreement or any breach or threatened breach hereof ("Arbitrable dispute") shall be resolved by final and binding arbitration administered by the International Court of Arbitration of the International Chamber of Commerce (the "ICA"); provided that nothing in this Clause 14.2.1 shall prohibit a party from instituting litigation to enforce any Final Determination.

14.2.2 In the event that any party asserts that there exists an Arbitrable Dispute, such party shall deliver a written notice to each other party involved therein specifying the nature of the asserted Arbitrable Dispute and requesting a meeting to attempt to resolve the same. If no such resolution is reached within thirty (30) days after such delivery of such notice, the party delivering such notice of Arbitrable Dispute (the "Disputing Person") may, within forty-five (45) days after delivery of such notice, commence arbitration hereunder by delivering to each other party involved therein a notice of arbitration ("Notice of Arbitration") and by filing a copy of such Notice of Arbitration with the ICA. Such Notice of Arbitration shall specify the matters as to which arbitration is should, the nature of any Arbitrable Dispute and the claims of each party to the arbitration and any other matters required by the rules and procedures of ICA as in effect from time to time to be included therein, if any.

14.2.3 Within twenty (20) days after receipt of the Notice of Arbitration, each of the two Disputing Persons shall appoint/nominate

one arbitrator, and the two arbitrators so appointed, shall appoint/nominate the third arbitrator (together, the “Arbitral Tribunal”).

14.2.4 The arbitration shall be conducted under the rules and procedures of ICA as in effect from time to time, except as otherwise set forth herein or as modified by the agreement of all of the parties. The venue and seat of the arbitration shall be Chicago, Illinois. The Arbitral Tribunal shall conduct the arbitration so that a final result, determination, finding judgment and/or award (the “Final Determination”) is made or rendered as soon as practicable, but in no event later than sixty (60) days after the delivery of the Notice of Arbitration nor later than ten (10) days following completion of the arbitration. The final Determination must be agreed upon and signed by the Arbitral Tribunal. The Final Determination shall be final and binding on all parties hereto and there shall be no appeal from or reexamination of the Final Determination, except as permissible under Applicable law.

11. The petitioner had also invoked the emergency powers under the Rules and Regulations of the International Chambers of Commerce (ICC). The petitioner in terms of the SPA has also invested a substantial sum of money both by way of cash and in the form of equity shares. The petitioner as the single largest shareholder of the respondent no.1 holding approximately 94.5% shares in the respondent no.1 is now being prevented from exercising their rights under the SPA. The respondent nos. 2 to 4 being the erstwhile promoters of the respondent no. 1 hold a miniscule shareholding in the company and are refusing to perform their remaining obligations under the SPA.
12. The proceedings before the Emergency Arbitrator had concluded on 16 November, 2022. The Emergency Arbitrator published two orders dated 10 November, 2022 and 16 November, 2022 respectively. The respondents have chosen not to comply with any of the directions of the Emergency

Arbitrator. *Prima facie*, having received the entire funds under the SPA, the respondents are now entangling the petitioners before every possible Police Station, Tribunal and Court while refusing to discharge their obligations under the SPA.

13. There is also no merit in the argument of the respondent that the proceeding before the National Company Law Tribunal is a bar to the arbitration proceedings. The arbitration clause is the bedrock of any arbitration. The words “any dispute, controversy or claim arising under or relating to this agreement” are of wide import and embrace the disputes raised in the present proceedings. Any arbitration agreement is a matter of contract and the sanctity of the same must be given its full effect. To decide whether a claim falls within the arbitration clause, it is the substance of the claim which has to be seen. One cannot get into technicalities or conduct a hair splitting exercise. A holistic and commonsense approach is required to be adopted on the basis of the text of the arbitration clause. On a combined reading of *inter alia* clauses 4.1.8 and 4.2.15 and 5.2.1 of the SPA, the disputes raised in these proceedings fall within the scope and ambit of the arbitral clause. For the sake of convenience, the aforesaid clauses are set out hereinbelow:

“4.1.8 The Sellers and the Acquirer will mutually agree upon a methodology that will enable the Acquirer to hold up to 90% (Ninety per cent) of the Target’s Share Capital immediately after the NR Closing. To give effect to this, the Sellers, the Target and the Acquirer shall take all necessary actions, including corporate actions.

4.2.15 The Sellers and the Acquirer will mutually agree upon a methodology that will enable the Acquirer to hold up to 90% (Ninety per cent) of the Target's Share Capital immediately after the NR Closing. To give effect to this, the Sellers, the Target and the Acquirer shall take all necessary actions, including corporate actions.

5.2.1 IR Cash Closing Actions by the Target and the Cash Sellers

- (a) Each of the Cash Sellers shall deliver to the Acquirer, duly executed and stamped statutory share transfer forms for transfer of such Respective Cash Sale Shares;*
- (b) The Target shall convene and hold a meeting of the Board at which resolutions shall be passed approving and authorizing: (i) the transfer of the Cash Sale Shares from the respective Cash Sellers to the Acquirer; (ii) updating of its register of members to record the transfer of the Cash Sale Shares, and to record the name of the Acquirer as the owner of the Cash Sale Shares; (iii) appointing Acquirer's designee(s) as director(s) to the Board of the Target (iv) providing certified true copies of items in (i) and (ii) above to the Cash Sellers and the Acquirer;*
- (c) The Target shall file Form DIR-12 with the jurisdiction registrar of companies in relation to appointment of the Acquirer's designee(s) to the Board of the Target;*
- (d) The Target shall provide to the Acquirer true extracts, duly certified by its Director, of the updated register of members and the register of directors and key managed personnel.*

14. In this background, there is no question of non-arbitrability of any of the disputes raised in this proceeding. All the disputes raised in this proceeding are covered under the SPA and are ex facie contractual disputes. There is also no merit in the contention that the SPA is confined only to the purchase and sale of shares. This argument is misconceived and ignores the entire scope, purport and ambit of the SPA. It is true that a

pernicious practice has been prevalent to file dressed up petitions before the NCLT with the ulterior object of defeating the arbitral proceedings. (See *Rakesh Malhotra v. Rajinder Kumar Malhotra*, 2014 SCC OnLine Bom 1146 and *Rishima SA Investments LLC v. Shristi Infrastructure Development Corporation Ltd.*, 2017 SCC OnLine NCLT 12082 para 62). However, since the question of maintainability of the proceedings is pending in an application under section 45 of the Act before the NCLT, the same is to be decided by the Tribunal.

15. Insofar as the orders of the Emergency Arbitrator are concerned, the Act does not provide for enforcement of orders passed by an Emergency Arbitrator in cases of a foreign seated arbitration by way of filing an application under section 9 of the Act. There is no *pari materia* provision under Part II of the Act similar to section 17(2) of the Act [*Raffles Design International India Private Limited & Anr. Vs Educomp Professional Education Limited & Ors.* (2016) 6 ArbLR 426]. Nevertheless, it cannot be ignored that both parties had participated in the proceeding before the Emergency Arbitrator. The order of the Emergency Arbitrator is reasoned. The parties agreed to be bound by the orders. The orders of the Emergency Arbitrator have not been interfered with nor challenged. There appears to be no illegality nor perversity nor contravention of any law shown in the order of the Emergency Arbitrator. Accordingly, the orders of the Emergency Arbitrator are a supplemental factor which may be taken into consideration at this stage of the proceedings.

16. There is also no substance in the argument that there are no pleadings to grant the reliefs prayed for. The prayers made before the Emergency Arbitrator can always be the subject matter of an application under section 9 of the Act meant for protection and preservation of the rights of the parties pending the arbitral proceedings. In this context, the decision of *Bachhaj Nahar vs. Nilima Mandal (2008) 17 SCC 491* cited on behalf of the respondents is distinguishable and inapposite.
17. The contention that pre-arbitral steps being mandatory have not been complied with is also without basis and an empty formality. [See *Demerara Distilleries (P) Ltd. vs. Demerara Distillers Ltd. (2015) 13 SCC 610 paras 4-5* and *IMZ Corporate Pvt. Ltd. vs. MSD Telematics Pvt. Ltd. 2021 SCC OnLine Del 3016 para 9*].
18. In respect of the prayer (b) of the Notice of Motion, it is alleged that in view of the prevalent laws of the USA and the mandatory filing requirements which the parent company of the petitioner has to comply with, the financial information sought for from the respondents is necessary. There are severe consequences which follow from the delay in filing of the aforesaid documents insofar as the petitioner and its parent company are concerned. In any event, the petitioner being the single largest shareholder of the respondent no.1 is lawfully entitled to such information, books on accounts and financial records of the respondent no.1. Such obligations and information must also be provided in terms of the SPA.

19. Insofar as prayer (d) is concerned, it is submitted that a nominee and authorized signatory of the petitioner is already having access to the ICICI bank of the respondent no.1. In view of the aforesaid, there can be no prejudice which would be caused to the respondents if prayer (d) is allowed.
20. All the reliefs sought for are in aid of and to protect the subject matter of the arbitration and to preserve the rights of the parties under the SHA.
21. The Arbitral Tribunal is fully competent to consider and decide all other issues including the jurisdictional challenge of the proceedings having terminated or not and the time period for publishing of the award within the extendable time limits or the interplay of laws, if any. The autonomy of the arbitral process must be preserved. [See *Vidya Drolia & Ors. vs. Durga Trading Corporation* (2021) 2 SCC 1 para 129 and *Sanjiv Prakash vs. Seema Kukreja* (2021) 9 SCC 732]
22. For the foregoing reasons, the petitioner has been able to demonstrate a strong prima facie case on merits. The balance of convenience and irreparable injury are also in favour of orders being passed as prayed for herein.
23. In such circumstances, the ad interim order dated 23 December, 2022 stands confirmed. There shall be an order in terms of prayers (b) and (d) of the Notice of Motion. With the aforesaid directions, AP 809 of 2022 stands disposed of.

(RAVI KRISHAN KAPUR, J.)

Later:

After pronouncement of the judgment Mr. Saha, Senior Advocate appearing on behalf of the respondent nos.2 to 4 prays for stay of operation of this order. The prayer for stay is considered and rejected.

(RAVI KRISHAN KAPUR, J.)