IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : COURT-IV

CA-67/2022 IN CP.09(MB)2022

Under Section 8 of the Arbitration and Conciliation Act, 1996

Application moved by:
Nityanand Sharma
… Applicant/
Respondent No.5

In the matter of
Chaitra Gowdar Chidanand
…Petitioner

Vs.
Get Simpl Technologies Private Limited & Ors.
...Respondents

Order Pronounced on **: 06.10.2023**

***Coram**:*

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Petitioner(s): Mr. Nausher Kohli a/w Ms. Sushmita Gandhi and Ms. Sanaya Patel, Adv.

For the Applicant/Respondent No.5: Mr. Shyam Kapadia a/w Mr. Alok Vajpeyi & Mr. Amol Jhunjunwala, Adv.

For the Respondent No.7: Mr. Rashmin Khandekar, Adv.

O R D E R

Per: Prabhat Kumar, Member (Technical)

1. The Applicant has filed this Miscellaneous Application under Section 8 of the Arbitration and Conciliation Act, 1996 "Section 8 Application"). The Applicant is Respondent No. 5 in Company Petition No. 9 (MB) of 2022 ("Company Petition"). For the sake of clarity, the Applicant is referred as 'Applicant' as opposed to as "Respondent No. 5", and the Petitioner in the Petition is referred to as 'Petitioner' hereinafter. All the parties are referred as the nomenclature assigned to them in the Company Petition.

   1.1. The Petitioner filed the Company Petition before the Hon'ble National Company Law Tribunal, Mumbai Bench-IV, *Inter alia, under Section* 241 and 242 of the Companies Act, 2013 ("Companies Act") alleging oppression and mismanagement in respect of the affairs of Get Simple Technologies Private Limited, i.e. Respondent No.1.

   1.2. The Petitioner's grievance relates to the restructuring of Respondent No. 1. The restructuring of Respondent No. 1 was done pursuant to a clause in the Shareholders' Agreement dated 14 July 2017 ("SHA"), to which the Petitioner is a party. Therefore, this is contractual dispute arising out of/in relation to the SHA.

   1.3. The SHA contains a widely-worded arbitration clause. The subject matter of the disputes raised in the Company Petition fall squarely within the purview of the arbitration clause. The Company Petition is 'dressed up', mala fide, oppressive and vexatious, to evade the arbitration clause.

   1.4. Therefore, the Applicant has filed this Section 8 Application seeking a reference of the disputes in the Company Petition to arbitration; and consequently, the dismissal of the Company Petition No. 9 of 2022.

2. Respondent No. 1 is a 'Buy now Pay Later' payments platform, among the first of its Kind in the Indian market. It was founded by the Applicant and the Petitioner. It was incorporated as a company under the Companies Act on 2 February 2015.

2.1. Being a start-up company, Respondent No. 1 was in need of funding at regular intervals since its incorporation. Respondent No. 1 received seed funding in May- June 2015, Pre-series Round A financing in November 2016, and Round A financing in July 2017. The funding was received from Respondent Nos. 8 to 32. At this stage, on 14 July 2017, the founders and the investors entered into the SHA to govern their inter-se rights and obligations.

2.2. Clause 2(g) of the SHA contemplated the restructuring of Respondent No. 1 into a Delaware Corporation. Pursuant to this clause, Respondent No. 1 took steps to give effect to the restructuring. The Petitioner, who was an employee and director of Respondent No. 1, led the discussions for the purposes of the restructuring. Various emails were exchanged between the Petitioner and the legal as well as tax advisors of Respondent No. 1, reflecting the involvement of the Petitioner in discussions and planning of the restructuring, since the year 2016.

2.3. In furtherance of the proposed restructuring, Respondent No. 4 was incorporated in Delaware on 27 June 2018, with the objective of transferring the operations of' Respondent No. 1 such that they would ultimately be controlled and Respondent No. 4, the restructuring was delayed by some time due to the financial difficulties which were being faced by Requirement of significant financial resources for effective conclusion of entire restructuring process.

2.4. Shortly after this period, in early 2019. the Petitioner started having disagreements with various fellow employees, including professional management that had been hired by Respondent No. 1. These disagreements even caused the resignation of the Chief Product Officer. By October November 2019, the extent of the disagreements and the Petitioner's obstructionist behavior meant that she was effectively acting against the best interests of Respondent No. 1. The Petitioner stopped coming into the office. A separation was imminent.

2.5. On 21 February 2020, after months had passed where the Petitioner had not come to the office. she emailed the Applicant suggesting mediation to discuss outstanding issues. On 23 February 2020, her employment with Respondent No. 1 was terminated. On 23 February 2020, the Applicant replied to the Petitioner stating that her termination did not require mediation. Various emails were exchanged on 21 February 2020, 23 February 2020 and 25 February 2020. On 8 June 2020, the Petitioner resigned as a director of Respondent No. 1, but remained as a shareholder.

2.6. In or around November 2020, Respondent No. 1 had finally managed to gather the required resources to implement the proposal for restructuring. The Applicant sent out an email dated 11 December 2020 to all the shareholders, including the Petitioner, providing all the details of the restructuring. The restructuring proposal clarified that the shareholding structure of Respondent No. 1 would be mirrored in Respondent No. 4 and that the assets of Respondent No. 1 would be transferred/sold to Respondent No. 2 (a wholly-owned subsidiary of Respondent No. 4). The restructuring proposal also specified that Respondent No. 1 intended to complete the asset transfer and file the election before 31 December 2020. Further. the restated Certificate of Incorporation of the Respondent No. 4 provided all relevant details

regarding the Class A Common Stock and Class B Common Stock, along with the rights and obligations associated with the said stock.

2.7. On 13 December 2020, the Applicant addressed an email to the Petitioner seeking consent for calling an extraordinary general meeting ('EGM') to be conducted 21 December 2020 to approve the transfer/sale or assets of Respondent no. 1 to Respondent No. 2, along with the Notice for the EGM. The Petitioner replied stating that her proxy would represent her for all matters related to Respondent No. 1's "Externalization" during the time she is unavailable, upon being informed by the Applicant that Respondent No. I was running on tight deadlines since the convertible notes expired on 6 December 2020.

2.8. On 19 December 2020, the Petitioner's proxy responded to such repeated reminders, once again failing to provide his consent for the EGM, but stated that "In principle we ore supportive...", pursuant to repeated follow-up of Respondent No. 7.

2.9. On 19 December 2020, the Board of Directors of Respondent No. I held a meeting where a resolution was passed approving the sale, assignment, and transfer of assets of Respondent No. 1 to Respondent No. 2.

2.10. Thereafter, on 20 December 2020, Respondent No. 7 addressed an email to the Petitioner's proxy and informed him of the poor financial situation of Respondent no. 1, and that the EGM which was originally scheduled to be held on 21 December 2020 would have to be postponed, owing to the proxy's failure to accord his consent in time. Thus, Respondent No. 7 requested that all the pending issues be resolved expeditiously in order to achieve the restructuring of Respondent No. 1.

2.11. On 27 December 2020, the Applicant addressed another email to the

Petitioner stating that the EGM previously scheduled on 21 December 2020 had to be Cancelled due to her failure to respond to and/or provide her consent, and the Applicant sought her consent for an EGM which was now Scheduled to be conducted on 29 December 2020. The Petitioner's legal Counsel, vide email dated 28 December 2020, granted her approval stating, that the Petitioner had consented to the restructuring of Respondent No. 1. In the said email the Petitioner-'s legal counsel raised certain queries in relation to the restructuring, which was clarified by Respondent No. 7 on the same date. Respondent No. 7 also expressly informed that the Petitioner was required to transfer USD 250 for subscription to the shares of Respondent No. 4.

2.12. On 29 December 2020, during the EGM, the shareholders of Respondent No. 1 approved the transfer/sale of assets of Respondent No. I to Respondent No. 2, which was a part of the restructuring. The Petitioner attended the EGM, but abstained from voting on this resolution. However, the Petitioner didn't remit the subscription money, so the restructuring had to be completed without the Petitioner having subscribed to the shares of Respondent No. 4.

2.13. On 26 March 2021, the Petitioner finally transferred the sum of USD 250 to subscribe to the shares of Respondent No. 4. However, the value of Respondent No. 4's shares had increased significantly in the interregnum period, and the Petitioner could no longer have subscribed to the shares at the original price of USD 250. As a counterblast to being informed that the Petitioner could not subscribe to the of Respondent No.4 at the price of USD 250, the Petitioner filed present Company Petition alleging oppression arid mismanagement, after the restructuring process was complete. No case of Oppression or Mismanagement is made out in the Company Petition. Further,

despite being filed as far back as on 12 October 2021, the Company Petition has not been moved as yet. Therefore, the Applicant has filed the present application under Section 8 of tile Arbitration and Conciliation Act, 1996, to refer the dispute to arbitration for the following reasons –

a. There exists a valid arbitration agreement covering all disputes raised in the Company Petition. The reliefs sought in the Company Petition are such as can be resolved by a private arbitral tribunal. There is no violation of any shareholder rights. What is being challenged is the restructuring under the SHA, which is a contractual challenge.

b. The Company Petition is ostensibly filed for asserting shareholder rights and minority protection rights. However, it is clear from facts, in the Company Petition, the undisputed facts and communications set out in this Section 8 Application, the contractual agreements entered into between the parties, and the reliefs sought, that the Company Petition is 'dressed up,' mala fide, oppressive and vexatious.

c. The purported shareholder rights in this ease are nothing but contractual rights emanating from the SHA especially as the restructuring of Respondent No 1 is an event contemplated by the SHA and the rights of the contracting parties to the SHA in relation to such restructuring are also provided for directly or indirectly by the terms for the SHA

d. Restructuring of Respondent No. 1 is pursuant to the SHA, and therefore entirely contractual in nature.

e. The primary reliefs that have been sought in the Company Petition are in relation to, and stem from, the resolutions passed at the

Board Meeting held on 19 December. These resolutions give effect to the restructuring of Respondent No. 1, which is contemplated by the SHA.

f. the Company Petition, read as a whole, makes it clear that the issues sought to be raised in the Company Petition arise out of and are in relation to the rights and liabilities created under the SHA, specifically the restructuring of Respondent No. 1 and allotment of' shares in Respondent No.4.

g. The final relief in the prayer clauses at paragraph 66 and 69 of the Company Petition seek to assail the resolutions which allow the transfer of assets from Respondent no. 1 to Respondent No. 2, all of which form a part of the restructuring.

h. The courts should lean in favor of referring parties to arbitration, in order to give effect to the contractual bargain entered into.

i. The reliefs sought in the Company Petition have all been sought against parties that are also parties to the arbitration agreement. While Respondent Nos. 2, 3 and 4 are not parties to the arbitration agreement, no relief has been sought against them.

j. Even the Petitioner' s case, that an arbitration agreement does not exist is contrary to her letter dated February 2020, shows that she is aware of the arbitration clause in the SHA,

3. The Petitioner filed her reply dated 29.03.2022 stating that the instant Petition has been filed by the Petitioner owing to certain oppressive acts by the Respondents, more particularly the Applicant and Respondent Nos. 6 and 7, whereby the said Applicant/ Respondents have left no stone unturned to oust the Petitioner from the Respondent No. I and to deny the Petitioner the fruits of her hard work. The Petitioner has been denied a seat at the table in Respondent No. 2 - 4 and despite numerous clarifications

being sought by the Petitioner, the said Respondents have failed to provide the clarifications as sought by the Petitioner to enable her to proceed with the issuance of shares in Respondent No. 4.

3.1. Pursuant to the restructuring, the Petitioner was sought to be allotted Class 'A' shares with one vote per share as opposed to the Applicant who was allotted Class 'B' shares with 15 votes per share. It is apparent that the shareholding of the Petitioner was therefore sought to be diluted by 15 times in Respondent No. 4 Company, as opposed to her entitlement and when the Petitioner continued to press the issue of allotment of a different class of shares, the Applicant sought to state that the transaction has now been closed, the price of shares has increased, and the Petitioner will not be allotted any shares whatsoever.

3.2. Prior knowledge of Petitioner and/ or stipulations in SHA have no bearing on the fact that the manner in which Applicant and other Respondents have acted is oppressive to the Petitioner as a shareholder of Respondent No. 1, and that the same ought to be adjudicated by this Hon'ble Tribunal. the issues arising under the present Petition are arbitrable nor the arbitral tribunal constituted thereunder is empowered to pass reliefs as sought by the Petitioner.

3.3. In any event, the events and facts elaborated by the Petitioner in her Petition are not even remotely contractual disputes which can be arbitrated but are oppressive acts by the Respondents which have an effect of prejudicing the rights of the Petitioner in her capacity as minority shareholder and also casts a serious concern in the manner the Respondents have been running Respondent No. 1 resulting in undue benefits and gain to the Respondents and prejudice and losses to the Petitioner.

3.4. The Petitioner also actively contributed to the fund-raising efforts of

Respondent No. 4, although she was relegated to back-end functions such as deck building, business readiness, drafting investor notes, reviewing business models, etc., and as a direct consequence of the time and effort invested by the Petitioner, Respondent No. 1 successfully raised one round of funding in May - June, 2015, and thereafter raised subsequent rounds of funding in November, 2016.

3.5. Respondent No. 1 grew in leaps and bounds under the leadership, vision and efforts of the Petitioner. It is further submitted that the Respondent No. 1 raised another round of funding in July 2017, in respect of which, the SHA was executed, by and between the petitioner and the Respondents. In terms and consequence of the SHA, the Petitioner's shareholding in Respondent No. 1 Company was diluted from 26.23% to 18.89%. The Respondent No.1 subsequently raised funds again in January,2019; April,2019; in and around November, 2019; and in April, 2020.

3.6. When the Petitioner asked the reason for increasing Authorized Capital of Respondent No.1, the Applicant addressed a response dated 21 November 2020, clarifying that the Respondent No. 1 has USD 17,500,000 outstanding in convertible notes and needs to have adequate share capital to cover the same.

3.7. The Petitioner's legal counsels were reviewing the documents pertaining to the restructuring of Respondent No. 1 shared by the Applicant, and had cautioned her of several taxation concerns arising out of and in connection with the transaction. Accordingly, the legal counsel of the Petitioner addressed an email dated 28 December 2020 to Respondent No. 1, raising several queries about the taxation aspects of the transaction as well as the valuation of assets of the Respondent No. 1 and allocation of shares to the Petitioner. The Petitioner,

accordingly, attended the EGM held on 29 December 2020, but abstained from voting at the same, in light of the fact that the transactional documents as shared by Applicant were still being reviewed by her legal counsels, and the Applicant had not satisfactorily answered any of their queries pertaining to the same.

3.8. It is pertinent to highlight here that the email dated 20 January 2021 did not set out any timeline for execution of the agreement or making payment, and merely informed the Petitioner that the same could be made at the Petitioner's "earliest convenience".

3.9. In particular, the Petitioner noted that her shareholding in the Respondent No. 1 Company would be converted to Class 'A' Shares in Respondent No. 4, whereas the shareholding of the Applicant would convert to Class 'B' Shares, and thus sought a clarification on the differences in rights, obligations and protections between Class 'A' and Class 'B' shares. The shareholding of the Petitioner was sought to be diluted by 15 times, as opposed to her entitlement based on allotment of class 'A' Shares. When the Petitioner continued to press the issue of allotment of a different class of shares, the Applicant sought to state that the transaction has now been closed, the price of shares has increased, and the Petitioner will not be allotted any shares whatsoever.

3.10. In addition to the queries raised by the Petitioner regarding the differences between Class 'A' and Class 'B' shares, her legal counsel raised additional queries pertaining to Right of First Refusal ("ROFR") and co-sale of the Petitioner's shares. However, the Petitioner and her legal counsel received no response from the Applicant or any of the representatives of Respondent No. 1, despite repeated follow—ups and reminders. Thereafter, the legal counsel

tried to set up a call to have clarity and after much persuasion, the applicant agreed to set up a call on 24.03.2021. The officials of Respondent No. 1 informed her that the transactions with the Respondent No. 4 had concluded by the end of January, 2021, and that the transaction documents had been executed by all shareholders except for the Petitioner. The legal counsel of the Petitioner was also informed by the officials of Respondent No. 1 that the sale / assignment / transfer of assets of Respondent No. 1 to Respondent No. 2 was expected to conclude by 31 March 2021, in light of the end of the Financial Year 2020 - 21, and that it would not be possible for shares in Respondent No. 4 to be allotted to the Petitioner, since she had not made payment of the subscription monies or executed the agreements.

3.11. The Petitioner was flabbergasted to note the aforementioned developments, and realized that these were all concerted actions taken by the Applicant along with Respondent Nos. 6 - 32, and particularly by the Applicant and Respondent Nos. 6 and 7, to oust the Petitioner from the Respondent No. 1, and keep her in the dark about the status of transactions with Respondent No. 2 and 4, and that the Applicant has aggressively pursued his vendetta against the Petitioner, in order to deny and deprive her of her share in Respondent No. 4 by virtue of her shareholding in Respondent No. 1.

3.12. It is most humbly submitted that in parallel, the Petitioner made payment of $250 towards subscription amount for shares of the Respondent No. 4, on 26 March 2021. in light of the acceptance of the payment of the subscription amount of $250, the Petitioner was under the impression that shares in the Respondent No. 4 had been allotted to her. However, she was not kept informed of the status of the transactions between the Respondent Nos. 1, 2 and 4 and her repeated requests for documents and information fell on deaf ears. The

petitioner has also not been kept informed of the capital structure of the Respondent Nos. 2 and 4, nor was she made signatory to, inter alia, any of the agreements between Respondent Nos. I, 2 and 4. The Petitioner also was not kept aware of the status of her shareholding in the Respondent No. 4.

3.13. The Petitioner was constrained to cause issuance of notice dated 2 September 2021 to the Respondent Nos. 1, 2, 4, 5, 6 and 7 herein, calling upon them to furnish all information and documentation regarding (a) the transactional relationship between Respondent No. 1, 2 and 4; (b) the capital structure of the Respondent No. 4, along with details of the various classes of shares; and (c) the Petitioner's shareholding in the Respondent Nos. 1 and 4. Even on this occasion, the Respondents have failed to place on record information and documentation sought by the Petitioner.

3.14. The Respondent Nos. 1, 5 and 6, in a complete volte face, alleged that the Petitioner had not resigned from the employment of Respondent No. 1, and that she had been terminated for cause. It is pertinent to highlight that the allegations contained in the Response dated 8 October 2021 are belated in nature and only a counterblast to the Petitioner's bona fide attempts to gather information about the status of her shareholding in the Respondent No. 1 and / or the Respondent No. 4.

3.15. On 08 October 2021, the legal counsels of Respondent No. 4, Arnold & Porter, responded to the notice dated 2 September 2021 and stated that the Petitioner is not entitled to any information as sought by her as she is not a stockholder in the company. It is, therefore, apparent that the restructuring is a concerted attempt by the Respondents to oust the Petitioner from the Respondent Companies.

3.16. The Petitioner, upon conducting enquiries, learnt that Respondent No. 3 had been incorporated in December, 2020, and only had the Respondent Nos. 5 and 7 as Directors. Moreover, from a review of the 'User Terms & Conditions' page of the Respondent No. 1, viz., https://getsimpl.corn/ the Petitioner further noted that the trademark 'Simpl' had been transferred to Respondent No. 2, and Respondent Nos. 1 - 3 are referred to collectively as 'Simpl'.

3.17. The Petitioner also came across an article dated 22 September 2021, published by a prominent media and research company, 'The Morning Context', titled 'Trouble brewing at Simpl?'. The article stated that former employees and current employees of the Respondent No. 1 stated that they were unaware of its restructuring, and how it would affect their stock options with the Respondent No. 1. The article further stated that the Respondent No. 1 had not been transparent in providing updated information on the value of the ESOP pool and how it has been affected by the restructuring. It then became clear to the Petitioner that there was a clear and calculated design by the Respondents, particularly by the Respondent Nos. 5 - 7, to create multiple entities as a mere front, to perpetuate their illegalities under the guise of restructuring of the Respondent No. 1, while unjustly enriching themselves.

3.18. After filing of the present Petition, the Applicant along with other Respondents have proceeded with raising funding of USD 40 million further diluting the entitlement of the Petitioner whereby the funding was raised basis the intellectual property of Respondent No. 1 which was developed by the Petitioner.

4. The applicant filed a rejoinder dated 30.05.2022 stating that the detailed narration of disputes makes at least one thing apparent, viz. that the above

Petition is nothing other than a dressed-up petition which, although alleging oppression and mismanagement in Respondent No. 1, is nothing more than seeking enforcement of certain alleged rights under the Shareholders' Agreement dated 14th July 2017 (SHA). These are contractual rights which are sought to be enforced and in respect of which there is a contractual remedy for adjudication of disputes in Clause 7(d) of the said Shareholders' Agreement.

4.1. Petitioner has admitted that the captioned dispute arises in light of her not "having a seat at the table of Respondent No. 4".

4.2. Neither Respondent No. 1 nor the applicant are to blame if any shareholder '**misses the bus'** in completing formalities and making payment of the subscription amount and then belatedly insists that the company allow her to get a seat at the table.

4.3. The Petitioner while detailing the factual matrix ought to have disclosed to this Hon'ble Tribunal that she was helming the entire process of restructuring of Respondent No. 1 between 2015 to 2019 and was continuously in touch with PWC for carrying out the restructuring. The said restructuring could not be completed in the year 2018 as Respondent No. 1 was facing financial strain (as is often the case with start-ups). However, given that the Petitioner's case is on the alleged illegality of the restructuring, it was incumbent on her to mention her role in planning and execution of the restructuring. In fact, the Petitioner's legal counsel specifically stated that "in principle we are supportive", in response to the restructuring documents.

4.4. The Petitioner admits that the restructuring took place as per Clause 2(e) of the Shareholder's Agreement. The allocation of Class A vs Class B shares is not oppressive.

4.5. The dispute is arbitrable as all Respondents are not necessary and

proper parties in the arbitration proceedings. While Respondent Nos. 2, 3 and 4 are not parties to the arbitration agreement, no reliefs have been sought against them.

4.6. During the hearing, the Counsel for the Applicant placed reliance on the following decisions rendered by –

a. the Hon'ble Bombay High Court in the matter of ***Rakesh Malhotra vs. Rajinder Kumar Malhotra*** (2014) SCC Online Bom 1146 holding that the Company law Board is a 'judicial authority' within the meaning of the Arbitration Act;

b. The Hon'ble National Company Law Appellate Tribunal, in the case of ***Thota Gurunath Reddy and Ors. v. Continental Hospitals Pvt. Ltd. and Ors. 2018 SCC Online NCLAT 885*** holding that "*it is clear that under Section 420 of the Companies Act, 2013.* ***The National Company Law Tribunal*** *passes an order as a "Tribunal"… and the* ***same Tribunal in the capacity of 'judicial authority' passes order under*** *Section 8 or Section 45 of the Arbitration Act, 1996".*

c. Hon'ble NCLT, Bangalore Bench, in the case of ***Panorama Investments (Mauritius) Pte. Ltd. and Ors. v. Richa Kar and Ors., (2018) SCC Online NCLT 31688***, holding that:

> *"17…it is more or less settled position of law as to whether issue can be referred to arbitration or not, will depend on facts available in each case. In light of the settled principles of law in case of referring a matter to arbitration, Court/Tribunal has to come to a conclusion by analyzing the facts and circumstances of the case on hand, when an undisputed, valid, enforceable agreement exists between/among the parties with regard to the arbitration, the issue has to be referred to arbitration, however, subject to issue raised in the or litigation is arbitrable. Whether the issue raised in a litigation is arbitrable or not, will depend upon the facts and*

circumstances of each case as analyzed by competent court of law…."

4.6.1. It was pleaded by the Counsel for Applicant that while looking at the question of "who decides non-arbitrability", the Supreme Court has held that "*issue of non-arbitrability can be raised at three stages. First,… for stay of pending judicial proceedings and reference under section 8 of the Arbitration Act: Secondly, before the Arbitral Tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of challenge to the award or its enforcement.?"* At the Section 8 stage, reference of the parties to arbitration must be made if the action brought is a subject matter of an arbitration agreement, unless if finds that no valid arbitration agreement exists. It was further argued that the Supreme Court has mandated that the test to be applied under Section 8 would be no different than the test applied under Section 11 (6-A) of the Arbitration Act. Therefore, all that is required is for judicial authority to be satisfied that there is in existence an arbitration agreement between the parties. Pertinently this is not to be confused with the merits of the put up the parties which has to be established before the Arbitral Tribunal. A bare perusal of the present company petition reveals that the petitioner's cause of action and/or grievances arises out of the Shareholders Agreement. In paragraph 8, the petitioner has stated her grievance as being the restructuring of Respondent No.1. Such restructuring of Respondent No.1 and incorporation of Respondent No.4 emanates out of Clause 2(g) in the Shareholders Agreement, which was executed by and between the Petitioner, Respondent No.1, the Applicant herein and other investors in Respondent No.1. It was agreed between all the signatories to the shareholders agreement that Respondent No.1 would eventually have to be restructured into a foreign-based entity. Hence, the disputes in relation to the

restructuring are of purely contractual in nature and relatable to the Shareholders agreement. The Resolution passed at the board meeting held on 19 December 2020 and extra ordinary general meeting on 29 December 2020 and were squarely to give effect to the terms of the Shareholders Agreement. Pertinently, Respondent No.1 and its officers have fulfilled all their obligations under the Companies Act and the Shareholders Agreement. The petitioner does not establish or demonstrate a case for violation of any shareholder rights, hence, the Petitioner malafide has dressed up contractual disputes as disputes pertaining to oppression and mismanagement in order to the avoid the binding arbitral clause.

5. We heard the counsel and perused the material available on record.

5.1. We find that the grievance of the Petitioner mainly pertains to non-allotment of shares in Respondent No.4 company because of delayed remittance by her, as well as the type of share offered for subscription to her. This allotment was to be done, in consequence to the restructuring contemplated in SHA amongst the Shareholder of Respondent No.1 company, to have mirror shareholding in Respondent no.4 company.

5.2. Clause 2 (g) of the SHA, which contemplates the restructuring of Respondent No. 1 and its reincorporation into a 'Delaware based entity, reads as –

The Company shall evaluate the proposal to change the state of incorporation of the company to the State of Delaware or such other jurisdiction as may be mutually agreed between the Company, the Founders and GVCIL, as soon as practicable and in any event within a period of 180 days from the initial closing date and place before the Shareholders and Investors a plan to achieve the same (within the

aforementioned time period) including the various legal and taxation implications. Subject to applicable laws and upon receiving the consent of the Majority Investors including GVCIL, the company shall implement such approved plan and convert itself to a Delaware Corporation (the "Reincorporation") in accordance with such plan. For avoidance of doubt, it is hereby clarified that notwithstanding anything to the contrary contained in this clause or elsewhere, the Company shall, and founders shall ensure that the company shall provide a mutually acceptable reincorporation plan to the Investors and implement the same as per the terms thereof, save and except as agreed by majority Investors (Including GVCIL) in writing. In the case when company fails to provide a mutually acceptable Reincorporation plan to the Investors, Majority Investors (Including GVCIL) shall be at a liberty to provide an alternative Reincorporation plan and the Company, Founders and other Shareholders shall be under an obligation to implement the same as per the terms thereof and subject to applicable laws.

All the Shareholders shall provide all assistance and cooperation as may be required for Reincorporation. In an event of Reincorporation, the Company shall provide the Investors rights corresponding to the rights set out in this agreement, in accordance with the applicable laws in the State of Delaware. In addition, the company shall also provide registration rights to the Investors."

5.3. The SHA was signed by the petitioner and the applicant, apart from other shareholder(s) who are arrayed as Respondents in the petition. Clause 7(d) of the SHA contains the dispute resolution clause, which reads as under:

"(d) The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy or

dispute. The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to the Centre for Advanced Mediation Practice, or its successor, for mediation, and if the matter is not resolved through Mediation, then it shall be submitted for final and binding arbitration pursuant to this Clause 7(d). Without prejudice to any right of the parties to apply to any competent court for injunctive relief, any dispute, claim or controversy arising under or relating to this agreement, including without limitation any dispute concerning the existence or enforceability hereof, shall be resolved by arbitration in Bangalore in Bangalore in accordance with the Arbitration Conciliation Act, 1996 ("Rules"). Which Rules are deemed to be incorporated by reference in this clause. The dispute shall be settled by a sole arbitrator appointed by the parties to the dispute. The Language of the arbitration shall be English. Any arbitration award by the arbitral tribunal shall be final and binding upon the parties hereto, shall not be subject to appeal, and shall be enforced by judgment of a court of competent jurisdiction."

5.4. The Applicant has relied upon following decisions:

a. ***Rakesh Malhotra vs. Rajinder Kumar Malhotra (2014) SCC Online Bom 1146,*** to contend that *"when a vexatious and dressed-up petition is mala fide under the garb of proceeding alleging oppression and mismanagement, with a view to evade a valid and binding arbitration agreement between the parties, such a proceeding ought to be referred to arbitration under Section 8 of the Arbitration Act. That is precisely what this Hon'ble Tribunal is faced with in the present proceedings where the alleged oppression and mismanagement related squarely to the Shareholders Agreement and the mechanics contemplated therein".*

b. ***Sadbhav Engineering Limited vs. Monte Caro Limited 2013 SCC Online Guj 4375*** to contend that *once an application under section 8 of the Arbitration Act is filed, it is obligatory and mandatory for the Company Law Board to decide or prime facie find out as to whether the conditions mentioned in section 8 of the Arbitration Act are fulfilled or not and, once it comes to the conclusion that the conditions under section 8 are satisfied, then the Company Law Board has no option but to refer the parties to an arbitration, and nothing remains to be decided in the original action after such an application was made, except to refer the dispute to an arbitrator*.

5.5. The Petitioner has relied upon following decisions:

a. ***Rakesh Malhotra vs. Rajinder Kumar Malhotra (2014) SCC Online Bom 1146,*** to contend that *the suit should be in respect of a 'a matter' which the parties have agreed to refer, and which comes within the ambit of arbitration agreement. Where however, a suit is commenced 'as to a matter' which lies outside the arbitration agreement and is also between some of the parties who parties to the arbitration agreement are not, there is no question of application of section 8. The words 'a matter' indicate that the entire subject-matter of the suit should be subject to arbitration agreement.*

b. ***Sukanya Holding Pvt Ltd v Jayesh H Pandya (2003) 5 SCC 531*** to contend that "*There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply*

that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application".

c. ***Vidya Drolia v Durga Trading Corporation (2021)2 SCC 1*** to contend that the following fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable came to be propounded -

(1) When a cause of action and subject-matter of the dispute relates to action in rem, that do not pertain to subordinate rights in person that arise from rights in rem.

(2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.

(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

d. ***Dhananjay Mishra v Dynatron Services Private Limited 2019 SCC Online NCLAT 163*** to contend that '*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'.

e. ***Hotel Indira Private Limited 2022 SCC Online NCLT 103 (MA No.1/GB/2021 in CP No. 14/GB/2019)*** to contend that *there is no allegation of Company Petition being 'dressed up' or based on some mala-fide. The only contention raised is since there is an Arbitration clause as aforementioned and therefore, the subject matter of the Company Petition under Section 241 and 242 of Companies Act should be referred to the arbitration.*

f. ***Indus Motor Co. Private Limited 2020 SCC Online NCLT 19929 (IA No.44/KOB/2020 in CP No. 02/KOB/2020)*** to contend that *it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the CP or in some cases bifurcation of the CP between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before the judicial authority is not allowed. Such bifurcation of a suit in two parts, on to be decided by the Arbitral Tribunal and other to be decided by this Tribunal would inevitably delay the proceedings.*

5.6. From the perusal of the decisions relied by both the parities, we find that an issue arising out of a shareholder agreement, which contains an arbitration clause to decide the dispute arising from such

agreement, can be referred to arbitration provided (a) the parties to the agreement are also parties to the petition u/s 241-242 of the Companies Act, 2013; (b) The petition making out a case of oppression and mismanagement has to be looked through to find out what is a real dispute and the relief sought; (c) if all the relief can be granted by the arbitrator to resolve the dispute, such petition ought not to be entertained u/s 241-242, in stead ought to be referred to the arbitration.

5.7. This bench finds that the Petitioner has impleaded shareholders of Respondent No.1 Company as Respondent No.8 to 32, and these shareholders in addition to Mr. Steven Stuart are signatory to SHA also. Further, the Petitioner and Respondent No.5 are signatory to the shareholder agreement as founder of Respondent No.1. Principally, the dispute is in relation to the Reincorporation plan of Respondent No.1 Company as Daleware Company and consequential rights of the shareholders of Respondent No.1 company in terms of clause 2(g) of SHA.

5.8. We find that, the para 2 of clause 2(g) of SHA provides that "*In an event of Reincorporation, the Company shall provide the Investors rights corresponding to the rights set out in this agreement, in accordance with the applicable laws in the State of Delaware.* Further, clause 7(d) provides that the parties that *"the parties agree that any and all disputes, claims or controversies arising out of or relating to this agreement, including without limitation any dispute concerning the existence or enforceability thereof shall be resolved by arbitration in Bangalore in accordance with the arbitration rules of the Arbitration and Conciliation Act, 1996".*

5.9. Accordingly, the question for consideration is -

(a) Whether the disputes, claims or controversies raised in the

petition arises out of or relating to SHA, including, without limitation any dispute concerning the existence or enforceability thereof;

(b) Whether the mediator or arbitrator, as the case may be, shall be competent to grant the relief prayed in the petition;

5.10. The Petitioner has prayed for the following reliefs in the Petition –

a. *Declare that the Resolution passed during the Meeting of the Board of Directors of the Respondent No. 1 on 19 December 2020 is null, void, bad in law and not binding on the Respondent No. 1;*

b. *Declare that the Resolution passed during the Extraordinary General Meeting dated 29 December 20200 is null, void, had in law and not binding on the Respondent No. 1,*

c. *Consequently, set aside any and all actions, measures and transactions contemplate, discussed and taken pursuant to the Resolution passed at the Board-Meeting dated 29 December 2020,*

d. *Appoint administrator(s) and / or special officer(s) and/or independent committee to carry on the business of and manage the affairs of the Respondent No. 1.*

e. *Appoint an independent auditor to make an investigation into the affairs of the Respondent No. 1 and make a report to this Hon'ble Tribunal;*

f. *Appoint an independent third party valuer to conduct valuation of the Respondent No. 1, including the shares held by the Petitioner in Respondent No. 1;*

g. *Direct the Respondents to maintain status quo of the shareholding pattern of the Respondent Nos. 1;*

h. Remove the Respondent Nos. 5 and 6 from the Board of Directors of the Respondent No. 1 Company;

i. Issue appropriate orders, directions and reliefs to bring an end to the aforesaid acts of oppression of the Petitioner being perpetrated by the Respondent Nos. 5-7;

j. Issue necessary directions to restore the equity shareholding of the Respondent No. 1 Company as it was prior to the resolutions passed at the Extraordinary General Meeting dated 29 December 2020,

k. *Permanently restrain the Respondent Nos. 2-4 Companies from dealing with the Respondent No. 1 Company.*

5.11. We find that the Supreme Court in the case of Vidya Drolia & Ors. Vs. Durga Trading Corporation (2021) 2 SCC 1 has held that "*issue of non-arbitrability can be raised at three stages. First,… for stay of pending judicial proceedings and reference under section 8 of the Arbitration Act: Secondly, before the Arbitral Tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of challenge to the award or its enforcement.?"* Further, it was mandated by the Court that *A*t the Section 8 stage, reference of the parties to arbitration must be made if the action brought is a subject matter of an arbitration agreement, unless if finds that no valid arbitration agreement exists. It was further argued that the Supreme Court has mandated that the test to be applied under Section 8 would be no different than the test applied under Section 11 (6-A) of the Arbitration Act. Therefore, all that is required is for judicial authority to be satisfied that there is in existence an arbitration agreement between the parties. Pertinently this is not to be confused with the merits of the put up the parties which has to be established before the Arbitral Tribunal. It is not in dispute that this Tribunal is a judicial authority, and has the power

to refer the matter to Arbitration if it finds that the dispute is arbitral and falls within the scope of Arbitration Agreement.

5.12. From the perusal of the pleading in the petition, we find that the grievance of the petitioner is that the alleged restructuring of the Respondent No.1 Company has been carried out in a secretive and clandestine manner and the petitioner's various questions of its legality land tax implications remained unanswered. Accordingly, she could not pay the subscription money to subscribe to the shares of Respondent No.4 company as per her entitlement under the SHA. The Petitioner has, mainly, sought invalidation of resolution passed in EOGM dated 29.12.2020 and the Board Resolution dated 19.12.2020. We find that both of these resolutions pertain to Reincorporation plan contemplated in first para of Clause 2(g). The crux of the allegations is that in the absence of information/clarifications from time to time, she could not subscribe to the shares of Respondent No.4 company because the due diligence in relation thereto could not be completed by her attorney.

5.13. We also find that, in paragraph 8, the petitioner has stated her grievance as being the restructuring of Respondent No.1. Such restructuring of Respondent No.1 and incorporation of Respondent No.4 emanates out of Clause 2(g) in the Shareholders Agreement, which was executed by and between the Petitioner, Respondent No.1, the Applicant herein and other investors in Respondent No.1. It was agreed between all the signatories to the shareholders agreement that Respondent No.1 would eventually have to be restructured into a foreign-based entity. Hence, the disputes in relation to the restructuring are of purely contractual in nature and relatable to the Shareholders agreement. The Resolution passed at the board meeting held on 19 December 2020 and extra ordinary

general meeting on 29 December 2020 and were squarely to give effect to the terms of the Shareholders Agreement. Pertinently, Respondent No.1 and its officers have fulfilled all their obligations under the Companies Act and the Shareholders Agreement.

5.14. From this, we find that this issue arises from the SHA i.e. Reincorporation plan of Respondent No.1 and consequential rights of the Petitioner under that reincorporation. We feel this does not require repudiation of the resolutions passed in EOGM dated 29.12.2020 and the Board Resolution dated 19.12.2020, and the issue pertaining to the right of the petitioner to claim mirror shareholding in the respondent No.4 company despite her belated remittance is a factual issue which can certainly be looked into by mediator/arbitrator as contemplated in the clause 7(d) of SHA.

5.15. Coming to the allegation of non-provision of explanation/clarification obstructing her decision making process whether to subscribe the Respondent No. 4 shares or not and equitable offer to subscribe because Class A and Class B shares have differential voting rights where Class B Shareholders voting rights are 1/15th of the Voting Rights vested in Class A Shareholders, from the series of email communications placed before us, we find that sufficient explanation and opportunity was granted to the Petitioner and her Counsel. The email communication dated 28.12.2020 from the Petitioner's Counsel explicitly states that "*Chitra is in principle fine with whatever needs to be done from a business stand-point. However, we need to see the new US structure, shareholders agreement etc. before I can confirm that is fine."* We find that these documents were sent to the Applicant on December 11, 2020 to the Applicant and again thereafter prior to 28.12.2020. We find that the Applicant had consented to the EOGM to be held on 29.12.2020 in express terms

vide email dated 28.12.2020, as well as to EOGM held on 27.11.2020 vide her email dated 21.11.2020.

5.16. As regards no date having been prescribed for payment of subscription money in email dated 28.12.2020, we find that, vide e-mail communication dated 20.1.2021, the Applicant had specifically asked Mr. Nitin Parakh to share wire transfer details, which was provided to her on same day along with the documents required to be executed by her. Though, Mr. Nitin Parakh had asked her to remit the amount of subscription in the said mail "as per her earliest convenient after execution of the documents", this can not be interpreted the remittance in the month of March, 2021 satisfy the requirement of subscription amount and it was not late.

5.17. The issues of taxation in the hands of each subscriber is a personal matter, and can not be said to be an act of Oppression qua other members, as other members will also have similar taxation issues considering the fact that the terms of offer to subscribe shares of Respondent No. 4 was on same terms, except variation in voting rights of class of shares offered. Nonetheless, we find that the PwC note on restructuring circulated to the existing shareholders of the Respondent No. 1, including the Applicant, explains the tax implications under Indian and US Tax laws.

5.18. As regards differential voting rights, we find that Restated Certificate of Incorporation of Simple Inc., the Respondent No. 4, provides for the differential voting rights, whereby each Class A Shareholders has one vote in terms of clause C.4 of Article IV thereof, and each Class B shareholder has 15 votes in terms of clause D.4 Article IV. Holders of preferred stock, which is allotted to seed investors also have one vote. The Petitioners and the Investors party to SHA,

except the Petitioners, were eligible to subscribe Class A Common Stock Shares, while the Applicant were eligible to subscribe Class B Common Stock shares. There is no explanation in the reply filed by the Applicant to the Petition, as well as in the present Application. On perusal of PwC presentation, it can only be gathered that more than 50% of shares of Respondent no. 4 Company were to be held by US Residents, to optimize the tax incidence under US Tax Laws. We feel that all the other signatory (Other than Applicant who was given Class B shares) to the SHA, except the Petitioner, consented to this proposition and subscribed to the Class A shares. Accordingly, their consent to such arrangement to this structure can certainly be said to have effect of amendment of SHA qua them. However, the Petitioner had not consented to allotment of Class A Shares, though she had conveyed in unequivocal terms that she, in principle, agrees to the Reincorporation Plan. Whether such in-principal approval can justify the differential vote rights to the Applicant qua other Signatory Shareholders to SHA, including the Petitioner. Needless to say that there was consistent stand of the Applicant that the proposed restructuring shall entitle to such shares to the Signatories of SHA so as to ensure mirror shareholding in Respondent No. 4 Company. Hence, it can be inferred that the interest of Petitioner is prejudiced to this extent, and such entitlement certainly arises from the SHA, and is an arbitrable issue. The question whether the Petitioner could also have arranged her affairs in the manner so as to hold the entitlement in Respondent No. 4 in the name of US Resident was to be addressed by her, and there can not be any presumption that only Applicant was responsible to consider this aspect.

5.19. The petitioner does not establish or demonstrate a case for violation

of any shareholder rights, other than offer for allotment of Class A Shares as offered to other signatory shareholders to SHA in contrast to Class B shares having offered to the Applicant. It is merely a single act arising from SHA agreement, ensuring mirror shareholding to all signatories thereto under the restructuring plan envisaged in SHA, and the email communications suggest that the Petitioner had no objection to the allotment of Class A Shares of Respondent No. 4 till the holding of general meeting on 29.12.2021, even though she was provided the presentation of PwC in relation to Reincorporation. Accordingly, we do not hesitate to hold the Petition is in realm of dressed up petition so as to make a contractual disputes as disputes pertaining to oppression and mismanagement to the avoid the binding arbitral clause.

5.20. Having held so, the question before this Tribunal is whether Arbitrator can ask Respondent No. 4 and its shareholders other than signatories to SHA, who are not party to SHA, to allot the shares to the Petitioners in the same manner as allotted to the Applicant and his associate company?

5.21. This Bench feels that an Arbitrator can not direct Respondent No. 4 and its shareholders, other than signatories to SHA, who are not party to it, to have shares allotted to the Petitioners in terms of SHA. Further, this Tribunal can also not direct Respondent No. 4 and its shareholders, who are not party to SHA, even if comes to the conclusion that the present petition is not a dressed up petition and has to be dealt with in accordance with Section 241-242 of the Companies Act, 2013.

5.22. In substance, the claim of the Petitioner pertains to the equitable treatment to her qua Applicant, who were initial founder of the

business of Respondent No. 1, having been transferred to Respondent No. 4's subsidiary. In other words, she claims that she must have been offered Class B shares, as were offered to Applicant, and she ought to be allotted to shares at initial offered price, even though she failed to remit the money because there was no cut off date prescribed for making such remittance. This Bench feels that this is an issue arising purely from the SHA, and between two parties i.e. Petitioner and Applicant, which can be referred to the Arbitrator **by either of parties**, not by this Tribunal, to decide (a) whether the Petitioner's claim for equitable treatment, in the fact and circumstances of the case, is tenable; and (b) whether the Petitioner's claim for allotment of shares, against delayed remittance, at initial offered price is also tenable in terms of SHA, if yes, whether Applicant may be made liable to compensate to the Petitioner for the monetary loss resulting from the approach of the Applicant.

6. In view of foregoing conclusion, this Bench is of the considered view that the present Application CA-67/2022 deserves to be **dismissed**.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Kishore Vemulapalli
Member (Judicial)

06.10.2023/-