

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT) NO.319 OF 2017

(Arising out of order dated 31.08.2017 passed by the National Company Law Tribunal, Single Bench, Chennai in CA No.159/2012 in CP No.71/2012, CA No.190/2012 in CP No.80/2012 and CA No.1 of 2013 in CP No.45/2013).

IN THE MATTER OF:

Before NCLT

Before NCLAT

K. Vaidyalingam
S/o Late S. Kandasamy,
2-A, Saradha College Road,
Hasthampatty Post, Salem-636007

Respondent No.2

Appellant

Vs

01.Mr. S. K. Ganesan
S/o late S. Kandasamy,
287, M.G. Road, New Fairlands,
Alagpuram East, Salem-636016

Petitioner No.1

Respondent No.1

02.Mrs. G. Chitra,
W/o Mr. S. K. Ganesan
287, M.G. Road, New Fairlands,
Alagpuram East, Salem-636016

Petitioner No.2

Respondent No.2

03.Mr. SKG Sri Balaji
S/o S. K. Ganesan
287, M.G. Road, New Fairlands,
Alagpuram East, Salem-636016

Petitioner No.3

RespondentNo.3

04.Mrs C. Jagajothi,
W/o K. Chettippan
260/108, Periyasamy Nagar 2nd Cross,
Alagapuram Periapudur Post,
Salem-636016

Petitioner No.4

Respondent No.4

05.Mr C. Prakash,
S/o K. Chettippan
260/108, Periyasamy Nagar 2nd Cross,
Alagapuram Periapudur Post,
Salem-636016

Petitioner No.5

Respondent No.5

06.Mrs N. Revathi,

- W/o Late a. Narendran,
M-12, Kadampatty Housing Board,
Kandampatty, Salem-636005 Petitioner No.6 Respondent No.6
- 07.Mr C. Gopal,
S/o Chinnamuthu,
Yerikadu, Masinaickenpatty,
Salem-636103 Petitioner No.7 Respondent No.7
- 08.Balaji Rubber Industries Pvt Ltd,
Surya Towers,
12 Maravaneri Extension,
Second Cross,
Salem-636007 Respondent No.1 Respondent No.8
- 09.Mr. V. Sudhakar,
S/o K. Vaidyalingam,
2A, Saradha College Road,
Hasthampatty,
Salem-636007. Respondent No.3 Respondent No.9
- 10.Mr. V. Tamilarasi,
W/o K. Vaidyalingam,
2A, Saradha College Road,
Hasthampatty,
Salem-636007. Respondent No.4 Respondent No.10
- 11.Mrs V. Shalini,
D/o K. Vaidyalingam,
2A, Saradha College Road,
Hasthampatty,
Salem-636007. Respondent No.5 Respondent No.11
- 12.Mrs S. Dhavamani,
W/o K. Subramani,
352/2, KSV Nagar,
Narsothipatty Post,
Salem-636004. Respondent No.6 Respondent No.12
- 13.Mr K. Subramani
S/o Late S. Kandasamy
352/2, KSV Nagar,
Narsothipatty Post,
Salem-636004. Respondent No.7 Respondent No.13
- 14.Mr S. Arun,
S/o K. Subramani,
352/2 KSV Nagar,
Narsothipatty Post,

Salem-636004. Respondent No.8 Respondent No.14
 Present:
 For Appellants: Mr. Rana Mukherjee, Sr. Advocate with Mr. Goutham Shivshankar and Ms Sreoshi Chatterjee, Advocates.
 For Respondents: Mr. K.S. Ravichandran, PCS and Ms S. Manjula Devi, Advocate for Respondent No.1 to 3.
 Mr. S.M. Vivek Anand and Mr. Saurabh Gupta, Advocates for Respondents No.7.
 Mr. Prasanna S, Advocate for Respondents No.9 to 14.

And

COMPANY APPEAL (AT) NO.320 OF 2017

IN THE MATTER OF:

K. Vaidyalingam
 S/o Late S. Kandasamy,
 2-A, Saradha College Road,
 Hasthampatty Post, Salem-636007 Respondent No.2 Appellant

Vs

- 01.Mr. S. K. Ganesan
 S/o late S. Kandasamy,
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.1 Respondent No.1
- 02.Mrs. G. Chitra,
 W/o Mr. S. K. Ganesan
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.2 Respondent No.2
- 03.Mr. SKG Sri Balaji
 S/o S. K. Ganesan
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.3 Respondent No.3
- 04.Mr C. Prakash,
 S/o K. Chettippan
 260/108, Periyasamy Nagar 2nd Cross,
 Alagapuram Periapudur Post,
 Salem-636016 Petitioner No.4 Respondent No.4
- 05.Mrs N. Revathi,
 W/o Late a. Narendran,
 M-12, Kadampatty Housing Board,
 Kandampatty, Salem-636005 Petitioner No.5 Respondent No.5

06. Bidar Rubber and Reclaims Private Ltd,
Surya Towers,
12 Maravaneri Extension,
Second Cross,
Salem-636007 Respondent No.1 Respondent No.6
07. Mr. V. Tamilarasi,
W/o K. Vaidyalingam,
2A, Saradha College Road,
Hasthampatty,
Salem-636007. Respondent No.3 Respondent No.7
08. V. Sudhakar,
S/o K. Vaidyalingam,
2-A, Saradha College Road,
Hasthampatty Post,
Salem-636007. Respondent No.4 Respondent No.8
09. Mrs V. Shalini,
D/o K. Vaidyalingam,
2A, Saradha College Road,
Hasthampatty,
Salem-636007. Respondent No.5 Respondent No.9
10. V. Kalaivani,
W/o K. Lenin,
2-A, Saradha College Road,
Hasthampatty Post,
Salem-636007. Respondent No.6 Respondent No.10
11. Mr K. Subramani
S/o Late S. Kandasamy
352/2, KSV Nagar,
Narasothipatty Post,
Salem-636004. Respondent No.7 Respondent No.11
12. S. Dhavamani,
W/o K. Subramani
352/2 KSV Nagar,
Narasothipatty Post,
Salem-636004. Respondent No.8 Respondent No.12
13. Mr S. Arun,
S/o K. Subramani,
352/2 KSV Nagar,
Narasothipatty Post,
Salem-636004. Respondents

For Appellants: Mr. Rana Mukherjee, Sr. Advocate with Mr. Goutham Shivshankar and Ms Sreoshi Chatterjee, Advocates.
 For Respondents: Mr. K.S. Ravichandran, PCS and Ms S. Manjula Devi, Advocate for Respondent No.1 to 3.
 Mr. S.M. Vivek Anand and Mr. Saurabh Gupta, Advocates for Respondents No.4 and 5.
 Mr. Prasanna S, Advocate for Respondents No.7 to 13.

And

COMPANY APPEAL (AT) NO.321 OF 2017

IN THE MATTER OF:

K. Vaidyalingam
 S/o Late S. Kandasamy,
 2-A, Saradha College Road,
 Hasthampatty Post, Salem-636007 Respondent No.2 Appellant

Vs

01.Mr. S. K. Ganesan
 S/o late S. Kandasamy,
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.1 Respondent No.1

02.Mrs. G. Chitra,
 W/o Mr. S. K. Ganesan
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.2 Respondent No.2

03.Mr. SKG Sri Balaji
 S/o S. K. Ganesan
 287, M.G. Road, New Fairlands,
 Alagpuram East, Salem-636016 Petitioner No.3 Respondent No.3

04.C. Gopal
 S/o Chinnamuthu,
 Yerikadu,
 Masinaichenpatty,
 Salem-636103 Petitioner No.5 Respondent No.4

05.G. Parimala,

W/o K. Subramani,
352/2, KSV Nagar,
Narasothipatty Post,
Salem-636004.

Respondent No.8 Respondent No.13

14.Mr S. Arun,
S/o K. Subramani,
352/2 KSV Nagar,
Narasothipatty Post,
Salem-636004.

Respondent No.9 Respondent No.14

For Appellants: Mr. Rana Mukherjee, Sr. Advocate with Mr. Goutham Shivshankar and Ms Sreoshi Chatterjee, Advocates.

For Respondents: Mr. K.S. Ravichandran, PCS and Ms S. Manjula Devi, Advocate for Respondent No.1 to 3.

Mr. S.M. Vivek Anand and Mr. Saurabh Gupta, Advocates for Respondents No.4 and 5.

Mr. Prasanna S, Advocate for Respondents No.8 to 14.

JUDGEMENT

BALVINDER SINGH, MEMBER (TECHNICAL)

These three appeals, being Appeal No.319/2017, 320/2017 and 321/2017 have been preferred by the appellant against the common order dated 31st August, 2017 passed by the National Company Law Tribunal (hereinafter referred to as 'the Tribunal'), Single Bench, Chennai in CA No.159/2012 in CP No.71/2012, CA No.190/2012 in CP No.80/2012 and CA No.1 of 2013 in CP No.45/2013. In these appeals though relate to different companies the facts are the similar, parties are the same and similar relief has been sought, therefore, we will dispose off these appeals by a common order/judgement.

2. The Tribunal vide its impugned order dated 3rd October, 2017 has held as under:

“18. In the present case, it is on record that the parties to the MOU dated 20.07.2011 are (should be and) the parties in the main petitions are different. The cause of action shown in the main petitions are different from the cause of action of the MOU dated 20.08.2011. Further the applicant has not filed either the original MOU dated 20.07.2011 or a duly certified copy as per Section 8(2) of the Arbitration Act, whereas it is stated that he is withholding the MOU for purpose of prosecuting the matters before this Tribunal. Evidently not filing of the original MOU or its certified copy is fatal to the case of applicants. Further, the Respondents have made their submissions that the MOU dated 20.07.2011 has been cancelled by the Respondents by way of a letter dated 10.11.2011 sent by them. Therefore, it is clear that there is no MOU or agreement inforce on date of filing of the applications for considering the prayers for referring the matters to the Arbitral Tribunal.

The case laws referred by the learned Practicing Company Secretary for the Respondents herein are in support of contentions of the Respondents. I am not inclined to accept the case laws referred to by the applicant for the reasons the facts and circumstances in this case are otherwise.

19. In view of the above discussions, the prayers made in instant applications are rejected.”

3. The appellant has filed three appeals under Section 421 of the Companies Act, 2013 against the impugned order dated 31.08.2017 passed by the Tribunal dismissing the applications filed by the appellant under Section 8 of the Arbitration and Conciliation Act, 1996 and refusing to refer the dispute for arbitration despite the said Arbitration Agreement between the parties. The parties, who are known as Vaidyalingam Group (Mr Vaidyalingam, appellant herein) and Ganesan Group (Mr. Ganesan is Respondent No.1), are engaged in the rubber industry through various companies and partnership firms. The appellant herein is a shareholder of the company and is also a Director on its Board in each of the company. In 2010-11, some differences arose between the two groups and in order to resolve the same a MOU dated 20.07.2011 was entered into between the

parties and Clause 19 of the MOU provides for resolution of disputes by Arbitration. It is stated that pursuant to signing of the MOU, some differences arose between the above said two groups and the “Ganesan Group” filed Company Petition under Section 397, 398 and 402 of the Companies Act, 1956 alleging oppression and mismanagement in the affairs of the Company. The appellant sought dismissal of the company petition on the ground that the dispute is subject matter of an arbitration clause contained in MOU signed between the parties and the arbitrators were already seized of the dispute. After hearing the respective parties the Tribunal dismissed the company applications filed by the appellant. Being aggrieved of the said impugned order dated 31.8.2017 the appellant herein have filed the three appeals.

4. Respondents No.1 to 3 have filed a common reply in all the appeals. Respondents No.1 to 3 have stated that the appellant has already succeeded in delaying the filing of a counter to answer the allegations in the original petitions before the Tribunal for about 5 years. It is further stated that the scope of petitions filed under Sections 397/398 of the Companies Act, 1956 with scope of powers conferred upon the Tribunal are quite distinct and cannot be granted by an Arbitrator at all, therefore, the appeals should fail. It is next contended that the Arbitration agreement will show there was no “consensus ad idem” at all between the parties on resorting to arbitration in relation to the disputes forming the cause of action in the company petitions. It is further stated that there was no fresh arbitration clause at all. It is stated that even the companies concerned are not parties. It is stated that if a party who is not a party to the alleged arbitration agreement is a necessary party, Section 8 of the Arbitration Act will not apply. It is next stated that the Company Appeal (AT) No.319, 320 and 321 of 2017

companies are not party to the arbitration agreement and all the respondents are also not parties in the said agreement. It is further stated that the said MOU was cancelled vide letter dated 10.11.2011 and the same has not been challenged by the appellant. It is next stated that the appellants have failed to even produce the original Arbitration Agreement. It is next stated that the appeals are liable to be dismissed and the Tribunal may be directed to dispose off the company petitions in a time bound manner as per Section 422 of the Companies Act, 2013.

5. We have heard the learned counsel for the parties and perused the appeal, reply and rejoinder and all other record.

6. Learned counsel appearing on behalf of the appellants argued that the both the parties had entered into a MOU on 20th July, 2011 at Salem to resolve their differences. It is further argued that there is Clause 19 in the said MOU which provides for resolution of disputes by Arbitration and after signing the MOU some differences arose between the parties, therefore, the arbitration proceedings have already been commenced. It is further argued that there being arbitration clause in the MOU, the respondents filed three company petition before the Tribunal. Learned counsel further argued that they sought dismissal of the company petitions on the ground that the matter in dispute is subject matter of an arbitration clause contained in an MOU signed between the parties and the arbitrators are already seized of the dispute. Therefore, the Tribunal has wrongly dismissed the company applications and not properly appreciated the mandate of Section 8 of the Arbitration and Conciliation Act, 1996. Learned counsel for the appellants further argued that the respondents can not cancel the MOU in absence of any termination

clause permitting the same. The counsel further argued that even if the MOU stood cancelled, the arbitration clause would survive the cancellation of MOU.

7. Learned counsel appearing on behalf of the respondents argued that they have already cancelled the MOU vide communication dated 10.11.2011 and the same have not been challenged and have not actually initiated any steps under Section 21 of the Arbitration Act. Learned counsel for the respondents further submitted that the companies are not parties to the MOU and if a party who is not a party to the alleged arbitration agreement is a necessary party, Section 8 of the Act will not apply. The counsel further argued that as all the respondents are not parties and companies are also not a party to the alleged arbitration agreement, appeals must fail. Further the appellants have failed to even produce the original arbitration agreement.

8. The main plea of the appellant in these appeals is that there is MOU dated 20.7.2011 between the parties and the clause 19 of the MOU clearly provides that the dispute can be referred to arbitration whereas the respondents argued that the so called MOU has already been cancelled vide letter dated 10.11.2011 and as on date it is not in existence. The appellants have not challenged the said cancellation, therefore, it has now become final and attained finality. In the light of cancellation of MOU having achieved its finality it does not seem to be an option that the parties could be referred to Arbitral Tribunal at this stage.

9. A chart has been filed showing that who are the party to the MOU and the company petition. We have verified from the chart that some of the

respondents are not party to the MOU but they are party in appeal. It shows that all the members are not signatory to the MOU. We find that neither all Members of the companies are party to the said MOU, nor the Companies were party to the MOU, nor the Companies adopted the MOUs. Even if it is assumed that the arbitration clause survives even after cancellation, as all respondents are not party to the MOU, therefore, the Arbitral Tribunal has no jurisdiction to pass an award in favour of a third party who is not party to the arbitration agreement. Further the appellants has not been able to produce the original agreement or a duly certified copy of the same as per Section 8(2) of the Arbitration and Reconciliation Act, 1996. Again, the scope of petition under Section 397, 398 of the Old Act is much wider than what can be subject of arbitration.

10. Therefore, we are in agreement with the conclusion reached by the Tribunal. The appeals filed by the appellants are accordingly dismissed. No order as to costs. The Tribunal is directed to dispose off the company petitions expeditiously as per Section 422 of the Companies Act, 2013.

(Justice A.I.S. Cheema)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

New Delhi

Dated:28 -3-2018

bm