IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
[Through Physical Hearing / VC Mode (Hybrid)]

IA No.104 of 2017 in
CP No.74/BB/2017
U/s 8 of the Arbitration & Conciliation Act, 1996

IN THE MATTER OF:

1. Mr. Puthucode Vaidyanathan Balasubramanian
S/o. Mr. PP Vaidyanathan
R/a No.46/4, 1st A Cross,
'TRIDIPA', Cambridge Layout,
Ulsoor, Bengaluru – 560 008. - Applicant No.1/Respondent No.2

2. Mr. Parakkel Sukumaran
S/o. Mr. VK Menon
R/a No.F155, Mayata Residency,
Hebbal Outer Ring Road, Nagawara,
Bengaluru – 560 045. - Applicant No.2/Respondent No.3

3. Mr. U. Haridas
S/o Mr. VD Menon
R/a No.361, 'Shantam',
MM Layout, Kaval Byrasandra,
RT Nagar, Bengaluru – 560 032. - Applicant No.3/Respondent No.4

4. Mr. U. Balakrishnan
S/o Mr. VD Menon
R/a No.8163, Tower 8,
Prestige Shanti Niketan, Whitefield
Main Road, Bengaluru – 560 048. - Applicant No.4/Respondent No.5

5. M/s. Modular Cold Rooms Pvt. Ltd.
Registered Office at No.29, 1st Cross,
2nd Main, Cambridge Layout Extension,
Ulsoor, Bengaluru – 560 008. - Applicant No.5/Respondent No.6

Versus

M/s. Metmin Investments Holdings Ltd.
A Company incorporated under the
Laws of Mauritius
Having its Registered Office at
C/o. AAA Global Services Limited
1st Floor, The Exchange,
18, Cyber City, Ebene,
MAURITIUS - Respondent / Petitioner in C.P.

Order pronounced on: 01st April, 2024

CORAM: 1. Hon'ble Shri K. Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For IA 104/2017 : Shri A.M. Sridharan, Adv. for Applicant Nos.1 to 4

For IA 104/2017 : Shri Karan Joseph with Shri Dushyanth Narayanan, Adv. for Applicant No.5/R-6 in CP No.74 of 2017

For IA 104/2017 : Shri Avinash Balakrishna with Shri Aditya Sethi, Adv. for Respondent in IA No.104 of 2017 and Petitioner in CP No.74 of 2017

ORDER

Per: K. Biswal, Member (Judicial)

1. This Application has been filed by Mr. P. Vaidyanathan Balasubramanian and four others (hereinafter referred to as the 'Applicants / Respondent Nos.2 to 6 in main Petition') u/s 8 of the Arbitration and Conciliation Act, 1996 seeking to refer the Parties in CP No.74/BB/2017 to arbitration and stay all further proceedings before this Hon'ble Tribunal in this Company Petition.

2. At the outset, it is to be noted that IA No.104 of 2017 in CP No.74/BB/2017 was filed by the Applicants herein under Section 8 of the Arbitration and Conciliation Act, 1996, *inter alia*, seeking to refer the matter to arbitration. *Vide* order dated 27.07.2018 passed in IA No.104 of 2017 it is observed that this Tribunal cannot decide the matter, since the matter is sub-judice in the Hon'ble Supreme Court of India. Being aggrieved with Order dated 27.07.2018 Applicants herein have filed an appeal before the Hon'ble Supreme Court in SLP (Civil) No.28620 of 2018. The Hon'ble Supreme Court *vide* Order dated 02.02.2024 has disposed of the same by, *inter alia,* observing at Para 4 that *"In this view of the matter, all that needs to be observed, at this stage, is that the Tribunal shall reconsider the application which has been filed by the petitioners under Section 8 of the 1996 Act. All the rights and contentions of the parties are kept open, including on the question of arbitrability."* In view of the above, the instant Application is taken up for hearing and pursuant to the arguments advanced by both the Parties, the instant IA was reserved for Orders on 04.03.2024.

3. Brief facts of the case as stated by the Applicants are given hereunder:

(a) The Petitioner filed CP No. 74/BB/2017 alleging that the relief sought falls within the purview of Section 241 of the Companies Act, 2013, and seeks a declaration that the conduct of the affairs of Respondent No.1 (R-1) Company has been oppressive to the Petitioner, among other claims. The crux of the aforementioned Petition is that Respondent Nos.1 to 6 have refused to accept the appointment of Mr. Singhi, nominated by Petitioner, as a Director on the Board of Respondent No. 1 Company. Consequently, the Petitioner has specifically requested for direction at relief V (C) in CP No. 74/BB/2017 as follows:

"Direct Respondents 1 to 6 to appoint Mr. Singhi, the Petitioner's nominee, as a Director on the Board of Respondent No. 1 Company."

(b) It is apt to refer Paras 19 and 20 of the main Petition as contended by the Petitioner in C.P., which reads thus:

*"**19.** Respondents 2 to 6 have caused Avigo to sell its shares, thereby becoming majority shareholders of the Company. The Petitioner having rescinded its offer to exit the Company on account of the conduct of the Respondents 2 to 6 is now a continuing minority shareholder of the Company. As a continuing shareholder of the Company the Petitioner has certain rights in the management of the affairs of the Company such as nominating a member to the board of directors of the Company. As per the terms of the Articles, the Respondent No.2 to 6 are required to facilitate the same. The Petitioner had from time to time in the past exercised its right and had appointed its nominee on the Board. Currently, however, no nominee of the Petitioner is on the Board.*

***20.** Further, the Petitioner after having noted serious lapses in the management of the affairs of the Company had requested for the appointment of its nominee on the Board. In this regard, the Petitioner had issued two letters dated 2 May 2017 and 9 May 2017 (collectively referred to as the 'Appointment Letters"), requesting the Company to convene a meeting of the Board to appoint the Petitioner's*

nominee Mr. Uday Singhi as a director on the Board. It is pertinent to mention that the Petitioner is entitled to have its nominee appointed as a director on the Board in accordance with its right under Article 13(b) of the Articles However, in spite of repeated requests and despite the issue of the Appointment Letters the Board has not yet taken any action to appoint Mr Singhi as a director on the Board. Such an act amounts to grave disregard to the rights of the Petitioners in the Company and thereby constituting act of oppression. Copies of the Appointment Letters dated 2 May 2017 and 9 May 2017 are produced as Annexure – L and M."

(c) The aforementioned Annexures L & M of the main Petition explicitly cite Clause 6.2.1 of the Shareholders Agreement. According to the Petitioner, this Clause grants "investors" the authority to nominate a Director to the Board of R-1 Company. Annexure-M further confirms the nomination of Mr. Uday Singhi as a Director by the Petitioner, citing the same Clause 6.2.1. The said Agreement referred to by the Petitioner forms part of the Annexures to main Petition, spanning pages 24 to 66. This Shareholders Agreement dated 05.06.2007 incorporates an arbitration agreement under Clause 11.2.

(d) The Applicants averred that the Petitioner cannot rely on Article 13 of the Articles of Association individually. Clause 2(x) of Articles of Association defines "investors" as Avigo Venture Investments Limited and Metmin (Petitioner) collectively, and not the Petitioner alone. Since the Petitioner has already invoked Clause 6.2.1 of Shareholders Agreement, it cannot now revert to Article 13 to claim the right to appoint a Nominee Director. Despite the Petitioner's filing of the Petition u/s 241 of the Companies Act, 2013, the Applicants focus solely on disputing the Petitioner's right to nominate Mr. Uday Singhi as Director of R-1 Company. While the Petition suggests reliance on Article 13, it is argued that this Article is inapplicable due to the existence of the Shareholders Agreement dated 05.06.2007. Although the Petitioner included this Agreement in the Petition, it was not marked as an Annexure.

(e) The dispute over the Petitioner's right to nominate a Director to the Board of R-1 Company, as per the Shareholders Agreement, is considered an arbitral matter. The Applicants argued that the Petitioner's offer to sell shares to Respondent No.6, accepted under Clause 8.2.7 of Shareholders Agreement dated 05.06.2007, forms a concluded contract, rendering the nomination of a Director irrelevant.

(f) Further, Paras 12 and 13 of the main Petition reveal that Respondent Nos.2 to 6 filed CP No.17/BB/2017 against the Petitioner and Avigo Venture Investments Limited, seeking relief u/s 241 & 242 of the Companies Act, 2013, with a direction to Respondent Nos. 2 and 3 to sell their 57,68,279 shares in the Company to M/s. Modular Cold Rooms Private Limited for Rs. 47,00,00,000 as per the terms of the Share Purchase Agreement dated 16.12.2016, and to declare that the termination of the said Agreement by Respondent Nos. 2 and 3 invalid.

(g) The Petitioner acknowledges filing an application u/s 8 of the Arbitration and Conciliation Act on 16.06.2017 within CP No.17/BB/2017, which was noted by this Tribunal *vide* Order dated 29.06.2017, leading to permission for Respondent Nos.2 to 6 to withdraw the main Petition. This action reveals the issue of selling shares in R-1 Company to Respondent No.6 or other Promoters as subject to an Arbitration Agreement under Clause 11.2 of the Share Purchase Agreement. The Petitioner, having admitted in letters dated 28.04.2017 (with Avigo Venture Investments Limited) and 02.05.2017 that its right to nominate a Director is based on Clause 6.2.1 of the Shareholders Agreement, also constitutes an arbitral dispute. Consequently, presenting the CP No.74/BB/2017 before this Tribunal is inappropriate and the same is therefore referable to arbitration instead. Hence, this Petition.

4. The Respondent Company *i.e.* M/s. Metmin Investments Holdings Limited filed its objections on 07.09.2017 by *inter alia* contending as under:

(a) This Application should be dismissed due to the non-joinder of M/s. Rinac India Limited ('Company'), a necessary party named in the Company Petition concerning serious mismanagement. It emphasizes that the dispute is not contractual but stems from legal and fiduciary breaches by

the Applicants. Moreover, the Application, allegedly filed by multiple Applicants, was witnessed by only one without proper authorization, as the Power of Attorney was not provided. Therefore, the Tribunal should not entertain the Application on this basis alone. Additionally, the Application is deemed not maintainable as it fails to meet the mandatory requirements u/s 8 of the Arbitration and Conciliation Act, 1996, rendering it dismissible without further consideration.

(b) The Respondent asserts that filing the main Petition u/s 241 of Companies Act is the sole recourse available to it due to the severe oppression and mismanagement by the Applicants. Despite requests for its nominee's directorial appointment, the Applicants and the Company have failed to act. The Respondent contends that the Applicants herein are attempting to encumber the Company's assets for unjust enrichment, repeatedly obstructing the Respondent's nominee's directorial appointment to perpetuate these unlawful acts.

(c) The Applicant has deliberately obstructed the Respondent from appointing its Nominee Director on the Board of Directors of the Company, as it is clearly aware that Article 20 of the Company's Articles of Association mandates the affirmative vote of said nominee. This obstruction is an attempt to suppress the Respondent's rights due to fear of scrutiny. It is contended that these actions constitute oppression and mismanagement, which are non-arbitrable, and that the grievances having stem from the Applicants' oppressive acts and mismanagement are unfit for arbitration.

(d) The Respondent, in Letters of Appointment (Annexures L, M and Q of CP), cites both Shareholders Agreement and Articles of Association, particularly Article 13 and 20. Denying the inability to invoke Article 13 individually without Avigo Investment Ventures Limited, the Respondent contends that such interpretation would frustrate the purpose of Articles. It is also not the case of the Respondent that its rights per se are not being given effect to but that serious mismanagement and oppression are continuing to take place and the Respondent is prevented from effectively protecting itself or the interests of the Company. Such contention clearly shows that the Applicant's aim in acquiring the Avigo Venture Investments Limited's

shareholding was to manipulate the Company's affairs, disregarding the Respondent's legal rights.

(e) It is submitted that the denial that Article 13 cannot be relied upon is unfounded as the Articles of Association take precedence over Agreements. Since the Respondent did not place reliance on Shareholders' Agreement, it did not produce the same. By contravening the Articles, especially 13 and 20, Applicants have undermined the legitimate expectations of the Respondent as an investor/shareholder.

(f) There's no dispute over the Respondent's rights under Articles 13 and 20 of the Company's Articles. It is stated that Claims of a concluded contract for the sale of Respondent's shares are false; the Respondent refused due to lack of faith in the Applicants. Applicants have not sought specific performance, giving the Respondent the right to protect its interests and prevent mismanagement as a shareholder.

(g) The Respondent filed an application under Section 8 of the Arbitration and Conciliation Act due to reliefs sought by Applicants in CP No.17/BB/2017, all pertaining to the Share Purchase Agreement dated 16.12.2017. The analogy drawn by the present Applicants between the two Petitions and Arbitration Clauses is illogical and misleading. Additionally, the Applicants withdrew CP No.17/BB/2017 as per an undertaking given before the Hon'ble High Court of Bombay.

(h) It is contended that sale of the Respondent's shares to Applicant No. 5 is irrelevant as the same has been finalized before the Hon'ble High Court of Bombay. The Respondent's rights under Article 13 and 20 of Company's Articles of Association stand independently of any Agreements, and no contrary admissions were made by it in pleadings or communications, including the Appointment Letters dated 28.04.2017 and 02.05.2017.

5. Applicant Nos. 1 to 4 have filed written submissions *vide* Diary No.1490 dated 06.03.2024 by, *inter alia*, stating as under:

(a) The Applicants assert that disputes in the main Company Petition are contractual and in personam, not in rem in view of the below mentioned reasons. The Petitioner's preliminary objection regarding the absence of a

Power of Attorney (POA) in the I.A. is countered by highlighting that the Shareholders Agreement (SHA) was signed by the 1st Applicant on behalf of others as a POA holder. Moreover, the objection is challenged on the grounds of technicality, especially when the main Petition lacks supporting Affidavit, potentially indicating fraudulent practices. The main Petition and Vakalath were executed on 19.07.2017 in Bengaluru, while the verifying Affidavit was signed on the very same date in Mauritius, by same person, suggesting inconsistency. Additionally, the Affidavit in support of the Petition lacks proper affirmation before a qualified authority, merely certifying the signature without administering an oath. Furthermore, it fails to comply with Section18 of the Karnataka Stamp Act regarding stamp duty. The Petition's defective nature due to the absence of a valid Affidavit makes it liable for rejection. The verifying Affidavit for the counter to the instant I.A. is also deemed invalid. Despite the withdrawal of IA No.1 of 2021 as not pressed, these defects remain incurable and persist.

(b) The Petitioner's objection regarding Rinac India Limited not being made a Party to the Petition is rebutted by asserting that the Company is a pro-forma party. It is deemed sufficient if one of the Respondents, being a shareholder or member involved in the main Petition, files an application. The Petitioner has opposed the Application stating that the Petition relates to oppression and mismanagement and is a proceeding in rem and are not arbitrable disputes. It is stated that in terms of Clause 4.1 of the SHA and Article 60 of AoA, the Applicants shall only endeavour to create an exit for the Petitioner and other investors.

(c) The Applicants contend that the Petitioner approached the Tribunal with unclean hands. In another CP No.17/BB/2017 filed by the Applicants, the Petitioner along with Avigo Venture Investments Limited, offered to sell shares to the Applicants *vide* letter dated 19.05,2017 as the Applicants possessed the first right of refusal. Despite the Applicants' readiness to buy shares, during the hearing on 14.06.2017, the Petitioner threatened arbitration. The Petitioner in Para 12 of the CP stated that it received an offer letter dated 18.05.2017 from M/s. Geosansar Mauritius Limited to buy its shares. This whole fact has been concealed from this Tribunal in the present Petition. Further, the Petition is deemed an abuse of due

process, as it brings up a suit for specific performance under the pretext of oppression and mismanagement, likely to evade significant court fee stamp payments.

(d) Besides the Petitioner, Avigo Trustee Company Pvt. Ltd. and Avigo Venture Investments Ltd. entered definitive Agreements with the Company. Avigo Trustee Co. Pvt. Ltd. sold 4,50,670 shares (4.31%) to the 1st Applicant on 28.12.2015, while Avigo Venture Investments Ltd., now in liquidation, sold 40,56,000 shares (38.78%) to the 5th Applicant on 27.06.2017.

(e) The Petitioner solely relied on the SHA rather than the AoA regarding Director Appointment. In its letters dated 28.04.2017 and 03.05.2017, it invoked only Clause 6.2.1 of the SHA for Director Appointments, neglecting any mention of the AoA. Article 13(c) of the AoA specifies the collective right of investors to nominate a Director, whereas, SHA's Clause 6.2.2 also confirms this collective right. Although the Petitioner referenced Article 13(b) of AoA in its e-mail dated 02.05.2017, issued alone by the Petitioner without Avigo Venture Investments Limited, it cannot be considered an invocation of AoA rights, as it was sent by a single investor, aligning with SHA's provisions. Additionally, while SHA allows singular investors to appoint Directors, AoA mandates collective action for such appointments. The disparity between the interpretation of singular and plural terms in SHA (Clause 1.2(b)) and AoA (Article 2(ww)) reinforces this distinction. Hence, the Petitioner's communication exclusively under SHA underscores its reliance on SHA over AoA for Director Nominations, as evident from the provided clauses and articles.

(f) It is stated that the dispute is contractual, not statutory, as the Petitioner solely invoked the SHA, and not Section 160 of the Companies Act, 2013, for Director Appointment, as evident from its letter and email dated 28.04.2017 and 02.05.2017, respectively. Further, the petition pertains to a subordinate dispute proceeding in personam, not in rem, as it concerns the appointment of a Director by a single investor, a personal right under the SHA, which is distinct from proceedings under Section 241.

(g) The Petitioner failed to cite any instance of Material Adverse Effect, crucial for invoking mismanagement under Article 2(z) of AoA, supporting the

contention of mortgaging / creating pari passu charge on the properties in violation of SHA Clause 6.11.12 and AoA Article 20. These allegations were made to invoke Section 241, indicating a contractual dispute. Additionally, a contempt petition (I.A. No.36 of 2018) filed by this Petitioner in the present CP regarding similar charges was dismissed by this Tribunal *vide* Order dated 27.09.2019.

(h) It is stated that the statement in Para 20 of the counter regarding the supremacy of the AoA is false, as Article 35(II)(c)(f) demonstrates the binding nature of the Shareholders Agreement. Additionally, Articles 2(z), 20(b)(ii) and 68 of the AoA affirm the binding nature of the Shareholders Agreement. The Petitioner's reliefs lack specificity except for relief V(C), which pertains to a contractual dispute. Further, no instances of actions against the Company's interests were cited. Therefore, it is prayed that in view of the relief V(C) being a contractual dispute, the matter may be referred to Arbitral Tribunal appointed by the Hon'ble Supreme Court notwithstanding the fact that SHA contemplates appointment of Arbitral Tribunal with 3 Members.

(i) In support of their contentions, the Applicant Nos.1 to 4 relied on following decisions *vide* Diary No.1492 dated 06.03.2024:

(i.) *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others, 2021 SCC OnLine SC 13, Para 4.3;*

(ii.) *M. Thimme Gowda and Others Vs. SPR Sugars P. Ltd and Others, 2007 SCC OnLine CLB 47, Para 24;*

(iii.) *Naresh Chandra Sanyal Vs. Calcutta Stock Exchange Association Limited (1971) 1 Supreme Court Cases 50, Para 14;*

(iv.) *Booz Allen & Hamilton Inc. Vs. SBI Home Finance Limited and others (2012) 173 Comp. Cas 184 (SC), Para 38;*

(v.) *Vidya Drolia Vs. Durga Trading Corporation, http://indiankanoon.org/doc/28390841, Para 15;*

(vi.) *Rakesh Malhotra Vs. Rajinder Kumar Malhotra and Others etc. (2015) 2 Comp LJ 288 (Bom), Paras 86 and 91.*

6. Additionally, *vide* Diary No.1491 dated 06.03.2024, Applicant Nos.1 to 4 have also placed on record a copy of the Order dated 14.06.2017 passed in CP No. 17/BB/2017 along with a copy of letter dt.19.05.2017 issued by Respondent Nos.2 and 3 therein.

7. Applicant No. 5 filed a Memo *vide* Diary No.1406 dated 04.03.2024 enclosing the following documents:

(i.) A copy of the Order dated 19.05.2017 in CP No.17 of 2017 before this Hon'ble Tribunal.

(ii.) A copy of the Memo dated 19.05.2017 filed by Metmin Investments Holdings Limited in CP No.17 of 2017 before this Hon'ble Tribunal.

(iii.) A copy of the Order dated 29.03.2023 passed by the Hon'ble Supreme Court of India in Arbitration Petition (Civil) No.42 of 2017.

8. Applicant No. 5 also filed its written submissions *vide* Diary No.1538 dated 07.03.2024 by, *inter alia*, stating as under:

(a) The Applicant No. 5 i.e., M/s. Modular Cold Rooms Pvt. Ltd. is holding a 38.79% shareholder in the Respondent No. 1 Company – Rinac India Ltd. Section 8 of the Arbitration and Conciliation Act ('Act') mandates that a judicial authority (this Hon'ble Tribunal has been held to be a judicial authority by the Hon'ble NCLAT in *Thota Gurunath Reddy & Ors. v. Intercontinental Hotels Pvt. Ltd. & Ors., 2018 SCC Online NCLAT 855)* before whom an application is made must refer the parties to arbitration unless it finds that prima facie that no valid Arbitration Agreement exists.

(b) Further, the Hon'ble Supreme Court in *Intercontinental Hotels Group (India) Pvt Ltd & Anr. v. Waterline Hotels Pvt Ltd., (2022) 7 SCC 662* has reiterated that all judicial authorities while dealing with applications u/s 8 of the Act must *"when in doubt, refer"*.

(c) It is submitted that the Petitioner is attempting to enforce rights under the Shareholders Agreement dated 05.06.2007, Clause 11.2 of which provides for settlement of disputes through arbitration. The Petitioner in the Company Petition and the Respondent in the present Application *i.e.* Metmin has admitted the existence of a valid and binding arbitration agreement and that further, Metmin has crucially admitted in its pleadings that the reliefs claimed before this Hon'ble Tribunal form part of the subject matter of arbitration. This is clear for the reasons, namely the CP indicates the Petitioner's intent to enforce rights under the Shareholders Agreement. An Arbitral Tribunal, led by Hon'ble Mr. Justice Krishna Bhat (Retd.), was

appointed by the Hon'ble Supreme Court in Arbitration Petition (Civil) No. 42/2017 on 29.03.2023 to resolve disputes. Further, the Petitioner initially opposed Arbitrator appointment before the Hon'ble Supreme Court, yet the Hon'ble Court established a Tribunal. In Arbitration Petition (Civil) No. 42/2017, the Petitioner admitted under oath that disputes before this Tribunal and the Hon'ble Supreme Court are identical. Further, the operative portion of the Order dated 29.03.2023 reads as under:

"*In view of the arbitration agreement between the parties,* ***the parties have agreed*** *to the appointment of a sole arbitrator. Mr. Justice P. Krishna Bhat former Judge of the Karnataka High Court is appointed as sole arbitrator under the provisions of the Arbitration and Conciliation Act 1996.*"

(d) The Petitioner, by admitting that the disputes in Arbitration Petition (Civil) No. 42/2017 and before this Tribunal are identical, and by consenting to arbitrator appointment, is estopped from opposing the current Application.

(e) In the previous CP No. 17/BB/2017, Metmin, now the Petitioner herein, expressed its intention to sell its shares in Rinac India Ltd. but was bound by a ROFR Clause, leading to the filing of CP No. 17/BB/2017. On the first hearing, Metmin *(Respondent in CP No.17/BB/2017)* filed a Memo on 19.05.2017 indicating its intent to file an application under Section 8 and offering its shares to existing shareholders as per the ROFR Clause. This demonstrates Metmin's clear stance on arbitration and its disinterest in Rinac's management. Further, as of 19.05.2017, there is no whisper of any allegations of oppression or mismanagement. It is stated that the present Applicant accepted the offer made by Petitioner under the ROFR Clause. However, the present Petitioner reneged on the arrangement illegally. The current Petition is seen as a retaliatory measure to cover up its own breach of the ROFR Clause and harass the Applicants.

(f) It is stated that the main Petition disguises itself as an oppression and mismanagement case but essentially revolves around the breach of the SHA dt.05.06.2007, specifically Clause 6.2.1 concerning the appointment of a nominee Director to the Board. The reasons stated hereunder elucidates the lack of substantial allegations regarding oppression and mismanagement:

(i.) The Petitioner alleges that the act of filing multiple petitions across different forums by Respondent Nos. 2 to 6 is deemed oppressive, aimed at harassing the Petitioner.

However, filing of such petitions, including an application for interim protection under the Act and a Petition for appointing an Arbitrator before the Hon'ble Supreme Court, does not constitute oppression or mismanagement.

(ii.) The Petitioner alleges oppression and mismanagement due to the Respondents' failure to appoint Mr. Singhi as a Director to the Board of Rinac India Ltd., citing Clause 6 of the SHA granting this right.

However, this appointment issue falls under the contractual interpretation of the SHA, subject to arbitration. The SHA designates Metmin and Avigo (including their successors in interest) collectively as 'investors', entitling them to appoint directors. The present Applicant, as Avigo's successor, holds this right collectively with the Petitioner. Thus, the nomination without the Applicant No.5's approval is invalid. Moreover, as the SHA is governed by an arbitration clause, these grievances fall within its purview.

(g) The Petitioner's claims of oppression and mismanagement lack substance and clarity, and that these allegations appear as an afterthought to evade arbitration proceedings over a breach of the ROFR Clause. It is stated that all claims in the Petition must be considered together, and the Petitioner cannot cherry-pick certain grievances to avoid arbitration. The Petitioner cannot be permitted to escape an arbitration clause by dressing up the reliefs sought. The true motive behind the Petition must be scrutinized by this Tribunal to distinguish genuine claims of oppression from mere attempts to settle personal disputes. This matter lacks public interest and appears to be driven solely by disgruntled shareholders seeking personal benefits through pressure tactics on other shareholders.

(h) The Petitioner's contention opposing the Application is that the disputes raised fall under the AoA, not the SHA. However, letters provided by the Petitioner clearly indicate requests under SHA's Clause 6.2.1 for nominee

Directors. Additionally, assertions about prior written consent stem from SHA's Clause 6.11.2. Despite citing AoA breaches, the SHA aligns with AoA under Article 68.

(i) The Petitioner argues that its reliefs are in rem, not arbitrable. The prayers sought for are entirely vague and general. It is settled law that a vague prayer such as for an order regulating the companies' affairs is not enough. The prayers in the petition are primarily related to issues arising from the SHA. Except for vague requests regarding oppression/mismanagement, all other prayers can be addressed by an Arbitral Tribunal. The Petitioner is clearly attempting to enforce a private agreement *viz.* the SHA in a clear abuse of process. Additionally, it was stated that the original SHA, containing the Arbitration Agreement, has already been submitted to the Tribunal *vide* Memo dated 11.06.2018.

(j) Further, the Petitioner's allegations regarding ordinary business activities lack substance and are deemed as an afterthought, raised only after breaching the ROFR Clause. These allegations do not demonstrate oppression/mismanagement and are neither detrimental to the Company's interests nor to public interest, a prerequisite for a petition u/s 241 of the Companies Act, 2013. Furthermore, the Company Petition is dressed-up and camouflaged to scuttle the arbitration proceedings pending before the arbitrator duly appointed by the Hon'ble Supreme Court of India in Arbitration Petition No. 42/2017, and therefore seeks to dismiss the main CP and refer the Parties to arbitration.

(k) In support of its contentions, Applicant No.5 also relied on the following decisions *vide* Diary No.1606 dated 12.03.2024:

(i.) Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC Online Bom 1146, para 103;

(ii.) Srikanta Datta Narasimharaja Wadiyar v. Sri Venkateswara Real Estate Enterprises (Pvt) Ltd., ILR 1989 KAR 2652, para 12;

(iii.) Airtouch International (Mauritius) Limited v. RPG Cellular Investments and Holdings Pvt. Ltd., 2003 SCC Online CLB 23, para 9;

(iv.) 20th Century Finance Corporation Ltd. v. Union of India & Ors., 2004 SCC OnLine Del 923, para 9-10;

(v.) Gleneagles Development Pte. Limited v. Mr. Thota Gurunath Reddy & Ors., 2017 SCC Online NCLT 1177, para 18-22;

(vi.) Ramnish Kumar Sharma v. D.R. Johns Lab Pvt. Ltd. & Ors., 2016 SCC Online NCLT 364, para 15-17;

(vii.) Spray Engineering Devices Ltd. v. Shree Saibaba Sugars Limited & Anr., 2008 SCC Online CLB 9, para 17;

(viii.) Vodafone International Holdings BV v. Union of India & Anr., (2012) 6 SCC 613, para 264;

(ix.) Mohta bros (P) Ltd. v Calcutta Lending and Shipping Ltd. & Ors., 1970 40 Comp Cas 119 (Cal), para 12, G. Govindraj v Venture Graphics, 2005 128 Comp Cas 632 (CLB);

(x.) Deepa Goyal v. Nanda Devi Builders (P) Ltd. & Ors. [2002] 47 C LA 15 (CLB).

(xi.) AEZ Infratech Pvt. Ltd. v. SNG Developers Ltd., 2014 SCC Online Del 3386, para 13.

9. The Respondent Company filed written submissions *vide* Diary No.1332 dated 28.02.2024 by, *inter alia*, contending as under:

(a) In June 2017, the Respondent discovered that the Company's Board was contemplating creating a first pari passu charge over its fixed and current assets without prior approval, as required by the Articles. Additionally, the Respondent alleges that the Company paid Rs. 25,00,000 to Piramal Finance without the Petitioner's consent, thereby violated Article 20 of the Company's Articles of Association, as Article 20 mandates affirmative votes from all Investor Directors for Board actions, unless prior written consent is obtained, which was not the case here. Despite entitlement under Article 13(b) of the Articles, the Respondent's nominee was not appointed to the Board of R-1 in the Company Petition despite repeated requests, leading to oppression. Moreover, the Applicants' actions, including contemplated related party transactions, allegedly breach fiduciary duties and aim to force the Respondent's exit. Furthermore, the filing of multiple proceedings against the Respondent by the Applicants constitutes further oppression.

(b) The Respondent has raised numerous oppression and mismanagement issues in the Company Petition, which were unaddressed by the Applicants in their Application for arbitration reference. Despite acknowledging the Respondent's right to nominate a Director, the Applicants vaguely claim arbitrability under the Shareholders Agreement. However, any violation of the Company's Articles, including this right, is deemed non-arbitrable. Furthermore, besides vaguely asserting that certain grounds raised by the Respondent are arbitrable under the Shareholders Agreement without

substantial basis, the Applicants fail to provide any other supporting averments in their application.

(c) The Respondent contends that issues raised in the C.P. pertain to rights in rem, falling under the jurisdiction of this Tribunal. Moreover, allegations of oppression and mismanagement are not specifically referred to arbitration, as the Arbitration Act stipulates that the entire subject-matter of a proceeding should be arbitrable. Furthermore, an Arbitral Tribunal lacks jurisdiction to adjudicate oppression and mismanagement issues, necessitating resolution by this Tribunal. It is therefore alleged that given the nature of the issues and reliefs sought, the dispute is deemed non-arbitrable, and also unless the Company Petition is alleged to be 'dressed up' or based on mala fide intentions, it should not be subject to arbitration.

(d) In support of its contentions, Respondent relied on the following decisions *vide* Diary No.1333 dated 28.02.2024:

(i.) Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532;

(ii.) Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1;

(iii.) Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146;

(iv.) Emgee Housing (P) Ltd. v. ELS Developers (P) Ltd., 2016 SCC OnLine Bom 2391;

(v.) Dhananjay Mishra v. Dynatron Services Private Limited and others, 2019 SCC OnLine NCLAT 163;

(vi.) Indus Motor Company Private Limited and Others v. T.P. Anilkumar and others, 2023 SCC OnLine NCLAT 372;

(vii.) Hotel Indira v. Shiuli Roy, 2022 SCC OnLine NCLT 103;

(viii.) Atul Singh v. Sunil Kumar and others, (2008) 2 SCC 602;

(ix.) N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72.

10. The Respondent Company filed its additional written submissions *vide* Diary No.1598 dated 11.03.2024 by, *inter alia*, further contending as under:

(a) The Applicants have failed to submit the original or certified copy of the arbitration agreement as required by Section 8(2) of the Arbitration Act. They have not claimed unavailability of the original or certified copy of the Agreement. The purported original SHA submitted with the Memo dated 02.11.2017 lacks the Respondent's signature and is contested. The unsigned Agreement produced along with the Memo is not admitted by the

Respondent and does not constitute an Arbitration Agreement as it does not satisfy the mandatory requirements of Section 7 of the Arbitration Act.

(b) The appointment of Mr. Uday Singhi as Director is contended to be governed by both the SHA and the AoA. However, the Respondent argues that director appointments fall under the purview of the AoA, specifically Article 13(b) and (c). Rights conferred by AoA are deemed non-arbitrable.

(c) Petitioner / Respondent in this Application had filed an application u/s 8 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") in CP No. 17 of 2017 filed by the Applicants herein, which was withdrawn by them. The reliefs sought in CP No. 17 of 2017 were:

(i.) Direct the Respondent Nos. 2 and 3 to sell their 57,68,279 shares in the Company, for a total sale consideration of Rs.47,00,00,000/- to Modular Cold Rooms Private Limited, as per the terms of the Share Purchase Agreement dated 16.12.2016;

(ii.) Declare the purported termination of Share Purchase Agreement dated 16.12.2016 by the Respondent Nos.2 and 3 to be invalid and non est;

(iii.) Direct the Respondent Nos. 2 and 3 to sell their 57,68,279 shares in the Company, for a total sale consideration of Rs.47,00,00,000/- to Modular Cold Rooms Private Limited, as per the terms of the Share Purchase Agreement dated 16.12.2016;

(iv.) Declare the purported termination of Share Purchase Agreement dated 16.12.2016 by the Respondent Nos.2 and 3 to be invalid and non est;

(d) It is further stated that, CP No. 17 of 2017, initiated by the Applicants herein, relied on an agreement with an arbitration clause, prompting the Respondent to seek arbitration. Conversely, in CP No. 74 of 2017, issues stem from violations of the AoA by the Applicants, with no reliance on any agreement for the reliefs sought.

(e) It is stated that the Applicants have not made any averment in the Sec.8 Application about other issues of oppression and mismanagement, which includes, M/s. Innovador Traders Pvt. Ltd. offered R-1 a Term Loan of Rs. 10,00,00,000, which would be secured by R-1's assets as collateral. This

arrangement would give Innovador Traders a first pari-passu charge over the fixed assets and current assets of R-1, and Innovador Traders also offered R-6 a Term Loan of Rs. 55,00,00,000. This loan would be used to purchase fully paid up equity shares of R-1 Company from Avigo and the answering Respondent. In exchange for this loan, Innovador Traders would have a pledge over 77% of the fully paid up equity shares of R-1 Company and a first pari-passu charge over its fixed and current assets. All these actions are in complete contravention of Article 20 of AoA. The Applicants do not even contend that these issues are arbitrable.

(f) In support of its contentions, Respondent relied on the following additional decisions:

(i.) Sporting Pastime India Limited v. Kasthuri & Sons Limited, 2006 SCC OnLine Mad 551;

(ii.) Triumphant Institute of Management Education P. Ltd. and another v. Inspire Educational Services P. Ltd. and others, 2013 SCC OnLine AP 864, paras 19 to 23.

11. The issue raised in the main C.P. was regarding Petitioner's right to appoint a nominee Director in accordance with Clause 6.2.1 of Shareholders' Agreement (SHA) dated 05.06.2007 which has been rejected by the Respondents / Applicants in this I.A. The Applicants have filed the I.A. on the basis of Clause 11.2 of the same SHA, which provides for Arbitration in case of any dispute arising out of the SHA. However, the Petitioner contends that this dispute was not arising out of the SHA; but was a violation of Article 13 of the Articles of Association (AoA), according to which it had a right to appoint one nominee Director. Therefore, it is stated that it squarely fall under 'Oppression and Mismanagement' under Sections 241-242 of Companies Act, 2013; which was not Arbitrable.

12. The Applicants, however, in the I.A. contend that Article 13 of AoA cannot be invoked due to the SHA. Moreover, vide letter dated 28.04.2017, the Petitioner itself invoked Clause 6.2.1 of the SHA for appointment of Directors, without any reference to the AoA. The same was again reiterated in letter dated 03.05.2017 / e-mail dated 02.05.2017. Therefore, it was averred that once SHA was invoked, it necessarily follows that its Clause 11.2 providing for

Arbitration was to be applied for any dispute arising out of Clause 6.2.1 of the SHA.

13. The Applicant No.5 in its written submissions has adequately explained, relying on the judicial precedents cited therein, as to how the Petition lacks the ingredients of 'oppression and mismanagement' so as to attract the provisions of Sections 241-242 of the Companies Act, 2013. It has been emphasized that no specific case of 'oppression' and 'mismanagement' has been brought out by the Petitioner. Further, if any dispute arises out of a contractual arrangement, it can be referred for Arbitration when there is a specific Arbitration Clause. Here, Clause 11.2 of the SHA duly provides for Arbitration, thus the dispute arising out of the Clause 6.2.1 of the SHA invoked by the Petitioner was correctly to be referred for Arbitration. The Applicant No.5 has also referred to the Order of the Hon'ble NCLAT in the case of *Thota Gurunath Reddy & Ors. (Supra)* on this issue.

14. Further, as submitted in the pleadings, Hon'ble Apex Court in the Judgment dated 25.01.2022 in the case *of Intercontinental Hotels Group (Supra)* has relied upon the legal principle decided in the case of *Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1* that all judicial authorities while dealing with application u/s 8 of the Arbitration Act, must *"when in doubt, do refer."*

15. Analyzing the factual matrix of the matter with reference to the pleadings, documents placed in support thereof, relied on decisions and the arguments advanced by respective parties, it is abundantly clear that in the Shareholders Agreement dated 05.06.2007 incorporates an arbitration agreement under Clause 11.2. For the present disputes as noted above, one of the parties seek to refer the matter to the arbitration agreement under Clause 11.2 for settlement of the dispute which has been objected to. Thus, this Tribunal is called upon to decide as to whether taking into consideration the present dispute the matter is liable to be referred to arbitrator for decision. In this regard, we have to begin our discussion with regard to the Arbitration and Conciliation Act, 1996. In so far as the said Act is concerned, it does not make any specific provision excluding any category of disputes terming them to be non-arbitrable. Number of pronouncements have been rendered laying down the scope of judicial intervention, in cases where there is an arbitration clause,

with clear and unambiguous message that in such an event judicial intervention would be very limited. However, the Act contains provisions for challenging the arbitral awards. These provisions are Section 34 and Section 48 of the said Act. Section 34(2)(b) and Section 48(2) of the said Act, *inter alia*, provide that an arbitral award may be set aside if the Court finds that the 'subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.' Even when such a provision is interpreted, what is to be shown is that there is a law which makes subject matter of a dispute incapable of settlement by arbitration. The aforesaid position in law has been culled out from the combined readings of Sections 5, 16 and 34 of the said Act. When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non-obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the Court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the Court in proceedings under Section 34 of the Act while challenging the arbitral award. The aforesaid scheme of the Act is succinctly brought out in the following discussion by the Hon'ble Apex Court in ***Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr., (2012) 5 SCC 214*** as under:

> *"**3.** There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule*

on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. *A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.*

5. *In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."*

16. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause under Clause 11.2 of the agreement made between the parties in this lis. However, the question is as to whether the dispute raised before this Tribunal is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable:

(i) patent, trademarks and copyright;

(ii) anti-trust/competition laws;

(iii) insolvency/winding up;

(iv) bribery/corruption;

(v) fraud;

(vi) criminal matters.

17. Fraud is one such category spelled out by the decisions of the Hon'ble Apex Court where disputes would be considered as non-arbitrable. In this case, taking into consideration the present dispute in the context of Section 8 of the said Act, as to whether the subject matter of the lis was 'arbitrable' i.e. capable of being adjudicated by a forum (Arbitral Tribunal). The allegation in the present matter, as it appears is of fraud simplicitor and such allegations are merely alleged. Mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by this forum. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by this forum. An arbitration agreement specifies the means whereby some or all disputes under the contract in which it is contained are to be resolved. The basic principle which must guide judicial decision making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with knowledge of the efficacy of the arbitral process. The above view is gained support by the decision of the Hon'ble Apex Court in the case of *A. Ayyasamy vs A. Paramasivam & Ors.,* in Civil Appeal Nos. 8245-8246 of 2016 disposed of on October 04, 2016.

18. In view of the above discussion we are of the considered opinion that this matter is liable to be resolved through Arbitration proceedings in terms of Clause 11.2 of the SHA dated 05.06.2007.

19. Accordingly, **IA No.104 of 2017 stands allowed** by referring the dispute between the Parties for Arbitration in terms of Clause 11.2 of the SHA dated 05.06.2007. Consequently, Company Petition bearing **C.P. No.74/BB/2017 stands disposed of.** Pending IAs, if any, are also deemed to be disposed of.

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

K. BISWAL
MEMBER (JUDICIAL)

jsr