

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 06th July, 2022

Decided on: 28th July, 2022

+ **ARB.P. 436/2022**

Piyush Kumar Dutt,
R/o. 236, Espace, Nirvana Country,
Sector - 50,
Gurgaon- 122018,
Haryana

.....Petitioner

versus

Vishal Mega Mart Private Limited,
Having its Regd. Office at:
Plot no.184, 5th Floor,
Platinum Tower, UdyogVihar,
Phase 1, Gurugram- 122016,
Haryana, through its Director

..... Respondent

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

1. A petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 has been filed for appointment of an Arbitrator.

2. The facts in brief are that the petitioner as the erstwhile senior level employee, was officiating on the post of Chief Human Resource Officer in the respondent Company till 31st May, 2021 and

has since then left the employment of the respondent Company. It is explained that the respondent Vishal Mega Mart is a Private Limited Company and is a resultant entity constituted upon merger/ amalgamation of Vishal Mega Mart Private Limited and Rishant Wholesale Trading Private Limited pursuant to order dated 12th May, 2020 of CLT, Chandigarh Bench in CP (CAA)No.21/Chd/Hry/2019 whereby Rishant Wholesale Trading Private Limited changed its name to Vishal Mega Mart Private Limited. The respondent Company is engaged in the business of wholesale cash and carry. It is stated that prior to the merger, the petitioner entered into Employment Agreement dated 14th January, 2019 with Vishal Mega Mart Private Limited. The relevant terms of employment were as under:

"I. Petitioner's services as the Chief Human Resource Officer of the company was agreed to be continued on the terms and conditions of his employment agreement dated 14.01.2019.

II. Petitioner had to subscribe to 8,41,844 Equity Shares of Rs.10/- per Equity Share of Rishant Wholesale Trading Private Limited and subsequently through the merger of Rishanth Wholesale Trading Private Limited and the Company, a corresponding number of equity shares in the surviving entity post-merger by paying the applicable Employee Purchase Consideration.

III. Petitioner, besides agreed remunerations/bonus, was also granted 42,63,807 stock options of Rishant Wholesale Trading Private Ltd. Or the resultant entity at the strike price of Rs.10/- per Equity Share which were to vest over the following 5 years with 50% Time Based Options based upon tenure of employee and 50% Performance Based Options based upon performance of the company as per the applicable ESOP Plan/Scheme formulated in that regards.

The Respondent Company has since framed and brought into effect the relevant Rishanth Employee Stock Option Plan 2019 as supplemented by the Rishanth Employee Stock Option Scheme 2019 - "Scheme-II" which read with the Companies (Share Capital and Debentures) Rules, 2014 provides for grant of "Employees Stock Options" to the eligible employees."

3. The respondent Company has since framed and brought into effect the relevant Rishant Employee Stock Option Plan 2019 as supplemented by the Rishant Employee Stock Option Scheme 2019-Scheme2 which read with the Company's (Share Capital and Debentures Closed Rules 2014) provides for grant of employees stock options to the eligible employees.

4. The petitioner tendered his resignation in terms of letter dated 01st March, 2021 and after successfully completing his Notice period of 90 days, he was relieved from his duties on 31st March, 2021. The petitioner in his Resignation Letter duly communicated his **intention of retaining 8,41,844 equity shares** subscribed/purchased by him and also opted to exercise his rights to acquire the vested stock options as per the terms and conditions of the Employment Agreement dated 14th January, 2019 and the relevant Rishant Employee Stock Option Plan 2019 as supplemented by Rishant Employee Stock Option Scheme 2019-Scheme II.

5. It is submitted that during the course of the continued employment of the petitioner with the respondent Company and in accordance with Scheme II read with the Company's rules, 2014, a total of **17,05,523 stock options came to be vested with the petitioner and the exercise period of the same is admittedly 10 years** (Clause 10.1 of ESOP Plan 2019). This fact is also clearly acknowledged and borne from the letters dated 09th January, 2021, 18th August, 2021 and subsequent Legal Notices dated 02nd September, 2021, 29th September, 2021 and 09th November, 2021 exchanged between the parties.

6. In addition to the aforementioned stock options, the petitioner has asserted that he was also entitled **to 426381 equity shares against performance based stock options** which as scheduled, vested in the financial years 2020-2021 ending on 31st March, 2021.

The petitioner has asserted that being in the employment of the respondent Company till 31st May, 2021, he is entitled to the same. The petitioner made his repeated requests on numerous occasions to the respondent Company to allow him to exercise his rights qua the additional stock options, but the respondent Company failed, neglected and refused to take any requisite steps or to permit him to exercise his stock options which vested in him during the currency of his employment and denied him the equity shares (performance based) which had accrued to him by the end of Financial Year ending on 31st March, 2021. Such arbitrary capricious actions of the respondent are claimed to be in contravention of the Employment Agreement.

7. The petitioner has further submitted that the respondent Company in its letter dated 09th August, 2021 conveyed its intention to purchase 8,41,844 equity shares owned by the petitioner in addition to 17,05,523 vested stock options that had accrued to the petitioner at the purported Fair Market Value (FMV) price. It was also indicated that the said equity shares/ vested options were sought to be purchased by Samayat Services LLP which is the majority shareholder in respondent Company owning 99.3% share holding. However, the petitioner reiterated his intention to retain his shareholding and to exercise his rights qua the stock options which

had accrued in his favour. He also conveyed his entitlement to 4,26,381 performance based options in regard to which no information was furnished to him. Consequently, he rejected the offer of the respondent Company and sought details of vested options both time based and performance based, so as to enable the petitioner to acquire the same by paying the exercise price. At the same time, he requested to clear the outstanding dues/ salaries which had been arbitrarily withheld by the respondent Company. Correspondence in this regard was again exchanged between the parties.

8. The respondent Company served a Legal Notice dated 02nd September making persistent and illegal demands and coercing the petitioner to sell his equity shares and vested stock options and also denying his entitlement to equity shares as performance based options. The Legal Notice was responded to by the petitioner vide Notice cum Reply dated 03rd November, 2021 to which a Reply dated 09th November, 2021 was served by the respondent Company denying the claims of the petitioner.

9. The respondent Company along with Samayat Services LLP filed a *Civil Suit CS(OS) No.594/2021 seeking Specific Performance against the petitioner*. The matter was referred to Delhi High Court Mediation & Conciliation Centre but no settlement could be arrived at between the parties, but the outstanding salary/ dues of the petitioner were paid during the Mediation proceedings. The petitioner filed an application under Order 7 Rule 10 and 11 CPC and Section 5 and 8 of Arbitration & Conciliation Act, 1996 and in

view of Clause 21 of Rishant ESOP Scheme/Plan providing for arbitration for resolution of disputes, the respondent withdrew its suit with liberty to initiate fresh proceedings which was allowed by the Court vide letter dated 16th march, 2022.

10. It is submitted that there exists bonafide dispute in respect of equity shares and stock options. A prayer is, therefore, made that an Arbitrator may be appointed.

11. **The respondent in its reply** has taken a preliminary objection that the Employment Agreement executed between the parties, which is the basis of the claims of the petitioner, does not contain an Arbitration clause. Therefore, the matter is not referable to Arbitration. The petitioner is selectively relying only on the Arbitration Clause as contained in ESOP Plan. Clause 7 of the Employment Agreement clearly indicates the right of an employee to claim ESOP's either Time Based Options or Performance Based Options, while the ESOP plan merely governs and administers the procedure by which the options granted to an employee under the Employment Agreement are to be exercised. The claims of the petitioner arise from the Employment Agreement which does not contain an arbitration clause. The petition, therefore, deserves to be dismissed in *limini*. Without prejudice to this contention the arbitration clause as contained in the ESOP plan indicates that it covers within its ambit only disputes arising out of or in relation to the provisions of ESOP Plan and any notified scheme. The scope of Arbitration Clause in the ESOP is extremely narrow and does not cover the disputes arising under the Employment Agreement. It is

not even the petitioner' case that Employment Agreement is integrally connected to the ESOP's Plan or that the Arbitration Clause contained in the ESOP Plan is wide enough to cover the disputes arising out of the Employment Agreement which is the principal document and forms the genesis of the relationship between the parties. The dispute which forms subject matter of ESOP Plan, cannot be referred to arbitration.

12. It is further submitted that ESOP Plan does not even govern the Performance Based Options and as the same did not ever vest in the petitioner, the terms and conditions governing the vesting of Performance Based Options is governed solely by the Employment Agreement and the claim regarding 4,26,381 options (performance based) cannot referred to arbitration.

13. **On merits**, it has been explained by the Respondent that as per Clause 18.2 of the ESOP Plan respondent had a "Call Option" on the petitioner's 1705523 Vested Options at Fair Market Value ("FMV Price"). Accordingly, by way of letter dated 09th August, 2021, the respondent exercised the Call Option and based on the difference between FMV, price of INR 15.7 per share as per the Merchant Banker Valuation Report and the exercise price of INR 10 per share, the respondent proposed to pay the petitioner an amount of INR 97,21,480 (option consideration) for 1705523 vested options.

14. In response thereto the petitioner in his letter dated 13th August, 2021 conveyed that he was desirous of availing his right to exercise all the vested options and offered to tender the exercise price amounting to Rs.1,70,55,230/- along with the applicable taxes.

It was also contended that until such time the actual transfer of 1705523 equity shares is made in his Demat account, the respondent Company right to exercise its call option did not arise. The respondent, however, asserted that it was mandatory for the petitioner to sell the shares upon exercise of the vested option by the respondent and that in case it was not acceptable to the respondent, the vested option automatically lapsed without any surviving rights and remedies. Various correspondences were exchanged between the parties thereafter in respect of the transfer of shares to the respondent Company. Despite the passage of 26 days, no response was received from the petitioner making it evident that he had nothing to state in regard to the matters in respect of which Legal Notice had been given by the respondent Company.

15. The respondent has thus, asserted that the petitioner is not entitled to the claims which have been raised in the present petition. It also asserts that in view of the facts, there is no dispute between the parties which is covered by the Arbitration Clause contained in ESOP Plan. It is thus, asserted that the present petition is liable to be dismissed.

16. **Learned counsel on behalf of the petitioner has argued** that admittedly the Employment Agreement dated 14th January, 2019 was executed between the parties and Clause 7 of the Employment Agreement deals with ESOP's and provides that the employee shall be granted with the stock options in accordance with the terms set out in Annexure-B (ESOP's) and the Transfer Provisions are set out in Annexure-B. Clause 13.9 of the Employment Agreement provides

specifically that in the event of termination of this Agreement, provisions of Clause 7 (which deals with ESOP's) and the provision of the Annexure to the extent applicable post termination, shall survive. It is argued that even after the termination of service, the Arbitration Clause which forms part of Clause 21 of ESOP's, continues to survive and, therefore, any dispute in respect of ESOP's is referable to arbitration. It is further argued that though the Civil Suit had been filed by the respondent along with Samayat Services LLP claiming it to be a beneficiary, but Samayat Services LLP was not a party to the Employment Agreement; neither Samayat Services LLP a necessary party nor does the petitioner have any claim against Samayat Services LLP. It is thus submitted that arbitrable disputes have arisen between the parties post his resignation which are referable to arbitration and thus, an Arbitrator may be appointed under Section 11(6) of the Arbitration & Conciliation Act, 1996.

17. Learned counsel on behalf of the respondent has vociferously contended that Annexure-A and ESOPs are independent Agreements and not part of Employment Agreement. The entitlement of the petitioner to Stock Options and Equity Performance Shares arises from the Employment Agreement and there being no arbitration clause in the Employment Agreement, the disputes are not referable to the arbitration.

18. It is further contended that within the scheme of ESOPs since the petitioner has failed to exercise his stock options despite Notice having been served by the respondent, he has lost his right to claim either stock options or equity shares. The petitioner, therefore, has

no right, title or entitlement to stock options or equity shares and, therefore, there exists no disputes between the parties which can be referred to arbitration.

19. Submissions heard.

20. It is an admitted case of the parties that the petitioner was the Chief Human Resource Officer in the respondent Company. He had signed an Employment Agreement dated 14th January, 2019 at the time of joining the present Respondent Company. It is also admitted that the petitioner submitted his resignation on 1st March, 2021 and he was relieved from his duties on 29th May, 2021 after successful completion of Notice period of 90 days . It is not in dispute that the service conditions of the petitioner were defined and controlled by the Employment Agreement dated 14th January, 2019. According to the terms and conditions, on resignation, he became entitled to the following :

- (i) 841844 equity shares;
- (ii) 17,05,523 Stock Options which became vested in him by virtue of Employment Agreement dated 14th January, 2019; and
- (iii) 4,26,381 equity shares towards Performance Based Stock Options.

21. In respect of 841844 equity shares a Civil Suit was filed against the petitioner by the respondent Company, but the matter got settled and the claim of the petitioner in respect of the equity shares was settled. The disputes have survived between the parties in respect of stock options and performance based stock options.

22. The first argument raised by the respondent is that the

petitioner became entitled to the stock options under Employment Agreement and there is no arbitration clause in the said document. Therefore, the dispute in respect of the stock options cannot be referred to arbitration.

23. It is undisputed that the petitioner is governed by the Employment Agreement dated 14th January, 2019. Clause 7 of the Employment Agreement reads as under :

*"7. ESOP. The Employee will be granted stock options in accordance with the terms set out in **Annexure B** ("ESOPs"), which shall vest and which may be exercised subject to the terms and conditions provided in the relevant employee stock option policy or terms approved by the Board. For avoidance of doubt, it is clarified that **the transfer provisions as set out in Annexure A** shall also apply in relation to the equity securities issues to the Employee pursuant to the ESOPs."*

24. From the bare perusal of this Clause, it is evident that the transfer provisions as contained in Annexure A and ESOPs which is Annexure B, are the two Annexures to the Employment Agreement thereby apart of the Employment Agreement. The two documents i.e. Annexure A and Annexure B are part of the Employment Agreement which explain and define the manner in which the ESOPs have to be exercised or transferred. It cannot be said that any dispute in respect of transfer or ESOPs to which Annexure A or B is applicable would not be in conjunction with the Employment Agreement. The main operative document is the Employment Agreement and it cannot be read independently of the two Annexures appended with it.

25. This aspect is clarified by Clause 13.9 of the Employment Agreement which reads as under :

"13.9. Survival. To the extent that any of the provisions of this Agreement are not in compliance with any applicable laws, they shall be modified so as to achieve the commercial intent thereof, in compliance with the provisions of applicable law. In the event of termination of this Agreement, the provisions of Clauses 7 (to the extent applicable post-termination), Clause 8 (Confidentiality), 10 (Non-Compete and Non-Solicitation), 11 (Termination), and Clause 13.7 (Notices), 13.8 (Governing Laws & Jurisdiction) and this 13.9 (Survival), and the provisions of the Annexure (to the extent applicable post-termination) shall survive."

26. This clause itself provides that in the event of termination of the Employment Agreement, the Annexures A & B shall survive. Clause 7 of Annexure A deals with ESOPs and provides that the stock options shall be exercised in accordance with Annexure A and Annexure B. It is quite evident from a conjunctive reading of the Clause 7 and the provisions that Annexure A and Annexure B form part of the Employment Agreement which provides for an Arbitration clause and even after the services of the employee are concluded, any dispute in respect of ESOPs shall survive. This implies that any dispute in respect of ESOP which forms part of the Employment Agreement, would be referable to arbitration as provided in Clause 21 of ESOP.

27. There is, therefore, a valid provision for referring the disputes pertaining to stock options to arbitration as per the Employment Agreement read with Annexure A and Annexure B. The argument

on behalf of the respondent that Employment Agreement is independent of Annexure A and Annexure B is not tenable. It is shown that there is a valid arbitration Agreement in respect of the disputes in hand.

28. The second argument addressed on behalf of the respondent is that there is no arbitrable dispute. The petitioner has raised a claim in respect of his entitlement to stock options and performance based stock options as detailed above. The respondent has denied the same on various grounds and has claimed that since the petitioner had failed to exercise his stock options, he has ceased to be entitled to the same. Whether the claims of the petitioner are tenable or not cannot be considered in the present proceedings. The limited jurisdiction of the Court under Section 11(6) of the Arbitration & Conciliation Act is only to see if there is a dispute. The justiciability of the claims and the defences as put by the respondents can only be determined through adjudication and both the parties are at liberty to raise their claims and the disputes before the Arbitrator.

29. The third argument which has been vehemently contended by the respondent is that M/s Samayat Services LLP is a limited liability partnership firm and is a majority shareholder in Plaintiff No.1 holding 445,31,18,981 shares i.e. 99.3% share holding in Plaintiff No.1. It is claimed that as per the Annexure A dealing with transfer of employees securities **Clause 7.5 defines the “counter party”** with regard to equity securities held by employees in Rishi Nath as Samayat Services LLP. The right of exercising the option vests with Samayat Services LLP, but it has not been impleaded as a

party and is also not a signatory to the contract. The relief being claimed by the petitioner cannot be bifurcated and since Samayat Services LLP is not a party to the Employment Agreement, the dispute cannot be referred to arbitration.

30. This argument though appears to be convincing in the first instance, but a closer look at the documents would prove its futility. Annexure A which deals with transfer of employees securities provides for “**Drag Along Rights**” in **Clause 3** and **Tag Along Rights** in **Clause 4** in respect of counter party. Under the Agreement, certain rights may have been given to the counter party i.e. Samayat Services LLP, but it is only a beneficiary to whom certain rights have been given. The rights and responsibilities of the **counter party** as defined in Annexure A, is a moot point which can only be considered after due adjudication. The question whether the stock option has been validly exercised by Samayat Services LLP or by the petitioner or by the respondent cannot be adjudicated in the present proceedings. Whether Samayat Services LLP which is not a signatory to the Employment Agreement, is a necessary party, is left open for the parties to agitate before the Arbitrator. The parties are at liberty to raise this objection before the Ld Arbitrator.

31. The existence of an Arbitration Agreement and arbitrable disputes have prima facie been made out in the present petition entailing appointment of an Arbitration Tribunal.

32. In the wake of a valid Arbitration Agreement, Hon'ble Mr. Justice V.K. Jain (Retired) (Mobile No.9650116555) is appointed as the Sole Arbitrator to conduct the arbitration under the aegis of

Delhi International Arbitration Centre.

33. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act, 1996 and not being ineligible under Section 12(5) of the Arbitration & Conciliation Act, 1996.

34. The parties are at liberty to approach the learned Arbitrator for further proceedings.

35. It is clarified that all rights and contentions of the parties are reserved.

36. Accordingly, the petition is allowed in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 28, 2022
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