

Calcutta High Court

Uphealth Holdings Inc vs Glocal Healthcare Systems on 23 December, 2022

CD-1

AP/809/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

UPHEALTH HOLDINGS INC
Vs
GLOCAL HEALTHCARE SYSTEMS
PRIVATE LIMITED AND ORS

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 23rd December, 2022.

Appear
Mr. S.N. Mukherjee, Sr. Adv.
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Anand S. Pathak, Adv.
Mr. Amit K. Mishra, Ad
Mr. Vijay Purohit,
Mr. Shivam Pandey, Adv.
Mr. Anujit Mookherji, Ad
Mr. Anirudhya Dutta, Adv.
Ms. Didon Misri, A
Ms. Shyra Hoon, Adv
. . .for the pet
Mr. Jishnu Saha, Sr. Adv
Mr. Dipendra Nath Chander, Adv.
. . .for the respondent no

Mr. Joy Saha, Sr. Adv.

Mr. Debashri Karmakar, Adv.

Mr. Ishan Saha, Adv.

Mr. Satyam Ojha, Adv.

. . .for the respondent nos.2 to 4.

The Court: This is an application under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act).

The disputes between the parties arise out of a Share Purchaser Agreement dated 30 October 2020 (SPA).

Briefly the petitioner, Uphealth Holdings Inc, is incorporated under the laws of Delaware, USA. Uphealth Holdings (UPH) is also a wholly owned direct subsidiary of Uphealth Inc. UPH is a public listed company and is also subject to the Security and Exchange Commission (SEC), USA. UPH is inter-alia engaged in providing global digital health services essential to personalize, affordable and effective global health care.

The respondent no.1, Glocal Healthcare Systems Private Limited is a private limited company incorporated under the Companies Act, 1956, engaged in the business of providing technology enabled healthcare services. The respondent nos. 2 and 3 are the promoter directors of the respondent no.1. The respondent no. 3 is a shareholder and a director of the respondent no. 1.

In or about, October 2020 the parties entered into a SPA with the ultimate aim that the petitioner would acquire the majority stake in the respondent no.1. The present disputes relate to the breach of obligations by the respondents under the SPA.

It is alleged that the petitioner has paid approximately Rs.2100 crores to the respondents in terms of the SPA. Such amounts have been paid both in cash and stocks of UPH. In consideration, the petitioner has acquired 94.81% of shares in the respondent no. 1. The fact that the petitioner is the single largest majority shareholder of the respondent no. 1 is also evident from a number of documents filed by the respondent no. 1 before different statutory authorities in compliance with extant laws. It is also alleged that portion of the aforesaid amount had been paid by the petitioner to repay the debts of the respondents including the corporate debts where the respondent no. 2 was a personal guarantor.

The petitioner complains of breach of diverse obligations by the respondent under the SPA. In particular, the petitioner contends that the respondent is in breach of its obligations under Clause 5.2.1 of the SPA which inter alia include non- transfer of shares of the respondent no. 1, non filing of statutory compliances with different authorities, failure to provide financial results of the respondent no.1 and refusal to furnish duly stamped transfers forms in favour of the petitioner.

On behalf of the respondents, it is contended that present disputes are not arbitral in nature. It is also submitted that the order passed by the Emergency Arbitrator is not an award and cannot be enforced under the Act. In this connection, reliance is placed on the decision in Raffles Design International India Private Limited & Anr. Vs. Educomp Professional Education Limited & Ors. 2016 SCC OnLine Del 5521. Reliance is also placed on Rakesh Malhotra Vs. Rajinder Kumar Malhotra and Others reported in 2014 SCC OnLine Bombay 1146 on the aspect of maintainability.

Clause 14 of SPA provides as follows:

14. GOVERNING LAW, JURISDICTION AND DISPUTE RESOLUTION 14.1 Notwithstanding any conflicts of laws doctrines or provisions to the contrary, the Agreement will be governed by and

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

14.2 Arbitration 14.2.1 Except as expressly provided elsewhere in this Agreement, any dispute, controversy, or claim arising under or relating to this Agreement or any breach or threatened breach hereof ("Arbitrable dispute") shall be resolved by final and binding arbitration administered by the International Court of Arbitration of the International Chamber of Commerce (the "ICA"); provided that nothing in this Clause 14.2.1 shall prohibit a party from instituting litigation to enforce any Final Determination. 14.2.2 In the event that any party asserts that there exists an Arbitrable Dispute, such party shall deliver a written notice to each other party involved therein specifying the nature of the asserted Arbitrable Dispute and requesting a meeting to attempt to resolve the same. If no such resolution is reached within thirty (30) days after such delivery of such notice, the party delivering such notice of Arbitrable Dispute (the "Disputing Person") may, within forty-five (45) days after delivery of such notice, commence arbitration hereunder by delivering to each other party involved therein a notice of arbitration ("Notice of Arbitration") and by filing a copy of such Notice of Arbitration with the ICA. Such Notice of Arbitration shall specify the matters as to which arbitration is should, the nature of any Arbitrable Dispute and the claims of each party to the arbitration and any other matters required by the rules and procedures of ICA as in effect from time to time to be included therein, if any.

14.2.3 Within twenty (20) days after receipt of the Notice of Arbitration, each of the two Disputing Persons shall appoint/nominate one arbitrator, and the two arbitrators so appointed, shall appoint/nominate the third arbitrator (together, the "Arbitral Tribunal"). 14.2.4 The arbitration shall be conducted under the rules and procedures of ICA as in effect from time to time, except as otherwise set forth herein or as modified by the agreement of all of the parties. The venue and seat of the arbitration shall be Chicago, Illionis. The Arbitral Tribunal shall conduct the arbitration so that a final result, determination, finding judgment and/or award (the "Final Determination") is made or rendered as soon as practicable, but in no event later than sixty (60) days after the delivery of the Notice of Arbitration nor later than ten (10) days following completion of the arbitration. The final Determination must be agreed upon and signed by the Arbitral Tribunal. The Final Determination shall be final and binding on all parties hereto and there shall be no appeal from or reexamination of the Final Determination, except as permissible under Applicable law.

Prior to the filing of this application, the petitioner had invoked the emergency powers under the Rules and Regulations of the International Chambers of Commerce (ICC). For the sake of convenience, the relevant Rules and Regulations relating to emergency powers are set out hereinbelow; Article 29: Emergency Arbitrator

1) A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

2) The Emergency Arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.

3) The Emergency Arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.

4) The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

5) Articles 29(1)-29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to Such signatories.

6) The Emergency Arbitrator Provisions shall not apply if:

a) the arbitration agreement under the Rules was concluded before 1 January,2012

b) the parties have agreed to opt out of the Emergency Arbitrator Provisions;

or

c) the arbitration agreement upon which the application is based arises from a treaty.

7) The Emergency Arbitrator provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. ICC ARBITRATION RULES, Appendix -V

1. A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of the ICC (the "Rules") shall submit its Application for Emergency Measures (the "Application") to the Secretariat at any of the offices specified in the Internal Rules of the Court in

Appendix II to the Rules.

2. The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.

3. The Application shall contain the following information:

a) the name in full, description, address and other contact details of each of the parties;

b) the name in full, address and other contact details of any person(s) representing the applicant;

c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;

d) a statement of the Emergency Measures sought;

e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;

f) any relevant agreements and, in particular, the arbitration agreement;

g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;

h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and

i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

4. The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

5. If and to the extent that the President of the Court (the "President") considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall

transmit a copy of the Application to them for information.

6. The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

The petitioner has also made a request for arbitration dated 4th November, 2022 before the ICC.

Pursuant to the request for an Emergency Arbitrator, hearings had taken place in Case no. 27329/PDP/(EA) on 9th November, 2022. The emergency proceedings concluded on 16th November, 2022 wherein the Emergency Arbitrator published two orders dated 10th November, 2022 and 16th November, 2022 respectively. The order dated 10th November, 2022 directed as follows:

- a. Declares that the Emergency Arbitrator has jurisdiction to render a temporary standstill order pending issuance of the Decision.
- b. Orders the Respondents jointly and individually to refrain from taking any steps to access the funds in the Share Account pending issuance of the Decision whether on the basis of the 15 August, 2022 board resolution or otherwise (the Temporary Order).
- c. Orders the Claimant to refrain from taking any steps to access the funds in the share Account pending issuance of the Decision.
- d. The Temporary Order may be shown to representatives of ICICI Bank for the purpose of ensuring compliance with its terms.
- e. Issues of costs will be dealt with in the Decision."

The operative portion of the order dated 16th November, 2022 is as follows:

- a. Declares that the Emergency Arbitrator has jurisdiction to rule on Application.
- b. Declares that the requests made in the Application are admissible.
- c. Directs the Respondents, both individually and jointly, to immediately provide to Applicant, and to any PCAOB-registered accounting firm identified by Applicant, access to all unaudited financial statement(s), data, documents, books and records necessary to be consolidated into UPH's 10- Q for 2022, in the form and manner requested (the Financial Statements request);
- d. Orders the Applicant to refrain from causing the unaudited financial statements to enter the public domain;
- e. Directs the Respondents, both jointly and individually, to cooperate with any PCAOB-registered accounting firm identified by Applicant in their review of the information provided pursuant to paragraph (a) above, including responding to any questions, making any company employees or officers available to respond to

questions, and complying with any requests for further information or clarifications (the Cooperation request); f. Orders the Respondents jointly and individually to refrain from taking any steps to access the funds in the Share Account whether on the basis of the 15 August, 2022 board resolution or otherwise;

g. Orders the Applicant to refrain from taking any steps to access the funds in the Share Account;

h. Dismisses the Remaining requests for relief;

i. Reserves to the Tribunal once constituted all issues of costs.

The reliefs which the petitioner prays at the ad interim stage are restricted to prayers (b) and (d) of the Notice of Motion which are set out hereinbelow;

b) Directing Respondents, both individually and jointly, to immediately provide to Petitioner, and to any PCAOB-registered accounting firm identified by Petitioner, access to all financial statement(s), data, documents, books and records necessary to be consolidated into UPH's Q3 10-Q for 2022, in the form and manner requested.

d) Restraining Respondents, both jointly and individually, from making, or causing to be made, any changes to the authorized signatory to access Glocal Healthcare ICICI Bank account(s).

Prima facie, two crucial facts which are unassailable are that (a) The petitioner in terms of the SHA has invested a substantial sum of money aggregating to approximately to Rs. 2100 crores and (b) The petitioner is the single largest majority shareholder of the respondent no.1 holding approximately 94.5% shares in the respondent no. 1, whereas, the respondent nos. 2 to 4 being the erstwhile promoters of the respondent no. 1 hold a miniscule shareholding in the company. The petitioner having infused substantial funds in terms of the SHA is now being made to run from pillar to post. The respondents have filed proceedings before the National Company Law Tribunal, Commercial Court at Rajarhat and also a criminal complaint.

I find no merit in the argument of the respondent that the proceeding before the National Company Law Tribunal is a bar to the arbitration process. The arbitration clause between the parties is wide and explicit. The disputes raised are capable of adjudication and settlement by arbitration. There is no question of non-arbitrability of any of the disputes raised in this proceeding. The decision cited by the respondent in Rakesh Malhotra vs. Rajinder Kumar Malhotra & Ors. (2015) 192 Comp Cas 516 is distinguishable and inapposite.

Insofar as the orders of the Emergency Arbitrator are concerned, the Act does not provide for enforcement of orders passed by an Emergency Arbitrator in cases of a foreign seated arbitration. There is no pari materia provision under Part II of the Act similar to section 17(2) of the Act [Raffles Design International India Private Limited & Anr. Vs Educomp Professional Education Limited &

Ors. (2016) 6 ArbLR 426]. However, it cannot be ignored that both the parties had participated in the proceeding before the Emergency Arbitrator. The parties also agreed to be bound by the orders of the Emergency Arbitrator. The orders of the Emergency Arbitrator has not been interfered with or set aside. I also find that the order of the Emergency Arbitrator is elaborate, detailed and reasoned. There appears to be no illegality nor perversity nor contravention of any law shown in the order of the Emergency Arbitrator. Thus, in my view, the order of the Emergency Arbitrator is an additional factor which can be taken into account at this stage of the proceeding. This approach is also in conformity with the principle of autonomy of parties which is fundamental to the Act. (Amazon.Com NV Investment Holdings LLC vs. Future Retail Limited & Ors. (2022) 1 SCC 209).

In respect of the prayer (b), it is alleged that since the petitioner company has to comply with certain regulatory filings in the USA, hence, the information sought for by the petitioner from the respondent no. 1 is necessary. The consequences which are triggered by the delay in filing of the aforesaid documents by the petitioner may culminate in a waterfall effect insofar as the petitioner is concerned. The petitioner is a majority shareholder of the respondent no.1 and is lawfully entitled to the information, books on accounts and records which they seek. There are statutory consequences which follow from withholding such information under US laws. On the other hand, there can be no prejudice to the respondents in providing such information. This is also in compliance with the contractual obligations of the respondents under the SHA.

Insofar as prayer (d) is concerned, it is submitted that a nominee and authorized signatory of the petitioner is already having access to the ICICI bank of the respondent no.1. In view of the aforesaid, there can be no prejudice which can be caused to the respondents if prayer (d) is allowed.

Both the aforementioned reliefs are in aid of protecting the subject matter of the arbitration and preserving the rights of the parties under the SHA.

In view of the aforesaid, the petitioner has a prima facie case on merits. The balance of convenience is also in favour of orders being passed as prayed for herein. I am also satisfied that the petitioner will suffer irreparable prejudice if orders as prayed for herein are not passed.

Accordingly, there shall be an order in terms of prayers (b) and (d) of the Notice of Motion. The parties are directed to exchange affidavits.

Affidavit in Opposition be filed within one week from date. Reply, thereto, be filed one week thereafter.

Let this matter appear on 10th January, 2023 under the heading 'Adjourned Motion'.

(RAVI KRISHAN KAPUR, J.) J.Das/S.Bag/S.K./D.Ghosh