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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of decision: 13th May, 2024*

ARB. P. 630/2024 & I.A. 10843/2024 (Exemption)

M/S BLOOMING ORCHIDPetitioner
Through: Mr. Devashish Chauhan, Mr. Tushar
Tyagi & Mr. Paras Mithal,
Advocates.

Versus

FP LIFE EDUCATION FOUNDATIONRespondent
Through: Mr. Varnik Kundaliay, Advocate.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

1. The present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, has been filed on behalf of the petitioner, seeking appointment of a sole Arbitrator to adjudicate the disputes.
2. It is submitted that the petitioner and the respondent entered into the Agreement dated 26.12.2018, pursuant to which the respondent was under an obligation to pay the petitioner Rs. 3,00,000/- per month (Minimum Guaranteed Amount) from 01.03.2019, until the expiry of the Agreement; or 5% of the monthly revenue, i.e. monthly Fees received from the students attending the School, whichever was higher (the BO Revenue Share).
3. It is asserted that while the respondent made payment towards the BO Revenue Share from 01.03.2019 to February 2020 however, the respondent



vide email dated 18.02.2020 sent a three months' advance Notice to the petitioner, for termination of the Agreement w.e.f. 18.05.2019.

4. It is asserted that the respondent has terminated the Agreement in violation of Clause 7 of the Agreement which provided for a Lock-in Period of 3 years for the respondent and 6 years for the petitioner and was liable to continue to pay the petitioner the Minimum Guaranteed Amount for the unexpired Lock-In period.

5. It is further submitted that the petitioner reached out to the respondent and sought payments as mandated under the Agreement, which led to several discussions between the parties and resulted in a Settlement. Pertinently, the respondent withdrew its termination Notice dated 18.02.2020 *vide* its email dated 23.06.2020. However, even after sufficient time provided by the petitioner, there was no response from the respondent.

6. **A Legal Notice was sent on 22.07.2020** to the respondent, to which a Preliminary Reply was received on 22.08.2020. Thereafter, a proper Reply to the Legal Notice was sent on behalf of the Respondent on 10.09.2020. That on 22.09.2020, the Petitioner preferred a Rejoinder to the Reply of the Respondent, rebutting all the averments of the respondent. Subsequently, a Reply dated 30.09.2020 was sent by the respondent.

7. Aggrieved, the petitioner *vide* its Letter dated 08.11.2020, invoked the Arbitration Clause i.e., Clause 39 of the Agreement and suggested the name of one Senior Advocate, as the Sole Arbitrator for the adjudication of the dispute. The respondent, however, rejected the proposed name *vide* its Reply dated 17.11.2020.

8. Thereafter, an effort was made once again by the petitioner to resolve the dispute amicably on 06.01.2021, whereby a virtual meeting was



proposed. The Respondent replied *vide* email dated 08.01.2021, asking for the virtual meeting to be held on 12.01.2021. As a result of the meeting ultimately held on 13.01.2021. The respondent *vide* email dated 18.01.2021, made an offer which was declined *ide* email dated 04.03.2021 by the petitioner. Further, it was informed that a mutually agreeable offer may be proposed, failing which recourse shall be taken under the Arbitration Clause under the Agreement.

9. Accordingly, a Notice under Section 21 of the Arbitration & Conciliation Act, 1996, dated 31.01.2024, was served to the respondent, thereby proposing to appoint one Advocate as the learned Sole Arbitrator, which was rejected by the respondent in its Letter dated 07.02.2024.

10. The petitioner left with no option has filed the present petition seeking appointment of a sole Arbitrator.

11. **The respondent has raised an Objection** regarding the limitation of the present Petition.

12. Learned counsel appearing on behalf of respondent, has submitted that the Contract dated 26.12.2018, got terminated by the respondent. The respondent *vide* its email dated 18.02.2020, has sent a three months' advance Notice for termination of the Agreement w.e.f. **18.05.2019**. However, the petitioner *vide* email dated 20.02.2020, told the respondent that it was under the obligation to make the payment of minimum guaranteed amount, till the expiry of the Lock-In-Period. A counter offer was made by the petitioner *vide* email dated 23.06.2020, wherein the petitioner proposed a massive concession. Pursuant to these negotiations for settlement, the termination Notice was withdrawn by the respondent, through email dated 26.06.2020. The negotiations for settlement continued



therein but on 13.07.2020, the respondent closed all the settlement talks.

13. The legal Notice thereafter got served by the petitioner, on 22.07.2020, which was followed by the Notice of invocation of Arbitration, dated 08.11.2020, sent by the petitioner. The respondent did not agree to the proposed name of the Arbitrator and thereafter, again the meetings continued in January till March, 2021, for settlement but again the parties were unable to settle. It is submitted that the petitioner had abandoned his first Notice of invocation dated 08.11.2020.

14. The second Notice of invocation under Section 21 of the Arbitration and Conciliation Act, has been issued on 31.01.2024. The last payment had been received from the respondent in February, 2020. It is asserted that the second Notice of invocation given in January, 2024, is patently and clearly barred by limitation. It is also argued that not only are the claims barred by the limitation, but the Petition under Section 11 is also not maintainable. It is, therefore, argued that this Petition be patently barred by limitation, is liable to be dismissed.

15. **Learned counsel for the petitioner in his Rejoinder arguments**, has asserted that since the negotiations for settlement were ongoing, the period of limitation would start only when they last got concluded, which happened in March, 2021. The cause of action arose only thereafter and thus, the Notice of invocation sent in January, 2024, is well within the time.

16. The reliance has also been placed in the Case of 'Geo Miller And Company Private Limited vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited,' (2020) 14 SCC 643, wherein, it is held that the time consumed by the parties in genuine negotiations for settlement is liable to be excluded.

17. Further, learned counsel for the petitioner, has relied on the Judgment



of *In Re: Cognizance for Extension of Limitation Suo Motu Writ Petition (C) 3/2020*, wherein it has been clarified that the period from 15.03.2020 till 20.02.2022, shall stand excluded in computing the period prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996. It is, therefore, submitted that the entire Covid period, is liable to be excluded while calculating the limitation.

18. **Submissions heard.**

19. The Sole objection raised by the respondent is that the present petition is *barred by limitation*.

20. In a petition for appointment of an Arbitrator, the Court has to consider two aspects namely: (i) *whether the claims made in the arbitration are barred by limitation under the relevant provisions of the Limitation Act*; and (ii) *whether the application under Section 21 of the Arbitration Act, 1996 is barred by limitation. (reference be had to the case of Union of India and Another vs. M/s L.K. Ahuja and Co., (1988) 3 SCC 76.*

21. The distinction between the claims being barred by time and the application for referral of disputes to Arbitration itself being barred by time was explained in the Case of *J.C. Budhraj vs. Chairman, Orissa Mining Corporation Ltd. and Another*, (2008) 2 SCC 444, wherein it was observed that while the limitation for the claim itself is to be calculated in a manner similar to limitation for filing of a suit; in the case of Arbitration, limitation for the filing of the Application under Section 11 of the Act, 1996 is to be calculated on the basis of the day on which the Arbitration is deemed to have commenced i.e. from the date of Notice of Invocation, as provided under Section 21 of the Act, 1996.

22. There is no provision which provides the limitation for filing of the



application for Arbitration under Section 11 of the Act, after the Notice of Invocation is given. In the case of M/s B and Tag 2023 SCC OnLine SC 657, it was observed that there is no specific Article in the Limitation Act, 1963, applicable to the application under Section 11 and thus, the residual Article 137 of the Schedule to the Limitation Act, 1963 would become applicable and time would begin to run “when the right to apply accrues” as held in the case of Merla Ramanna vs. Nallaparaju and Others (1955) 2 SCR 938. The period of limitation to file an application under Section 11 is thus, three years from the date of refusal to appoint the Arbitrator, which may be calculated from the expiry of 30 days from the Notice of Invocation, whichever is earlier.

23. **For the purpose of ascertaining the limitation for the claims**, the first aspect which emerges is that the differences arose between the parties and the last payment was received in February, 2020. Thereafter, the respondent served an email dated 18.02.2020, for giving three months’ advance Notice to the petitioner, for termination of the Agreement w.e.f. 18.05.2020. However, there is no denial that this Notice of termination was withdrawn by the respondent *vide* email dated 26.06.2020. The implication of withdrawal of termination Notice is that the Contract between the parties continued to subsist.

24. It is further not in dispute that the emails were exchanged between the parties, from February to June, 2020 for settlement. This continued till 22.07.2020, when the legal Notice dated 22.07.2020, was sent on behalf of the petitioner, followed by the Notice of Invocation dated 08.11.2020. However, even though the legal Notice and the Notice of invocation under Section 21 of Act, 1996 got served, the parties again got into the



negotiations talks, which continued till March, 2021. From the various correspondences relied upon by the parties, it is established *prima facie* on the record that the parties had been attempting to settle their disputes through negotiations.

25. In the Case of Geo Miller And Company Private Limited (Supra), it has been observed that period during which the parties were *bonafide* negotiating towards an amicable settlement, may be excluded for the purpose of computing the period of limitation for reference to Arbitration under 1996 Act. However, in such Cases, the entire negotiation history between the parties, must be specifically pleaded and placed on record. The Court must carefully consider the entire history to find out the breaking point at which any reasonable party would have abandoned efforts of arriving at a settlement and contemplate referral of the dispute for Arbitration. This breaking point would then be treated as the day on which the cause of action arises for the purpose of limitation.

26. In the case of M/s B and Tag (supra), after making a reference to the aforesaid observations in Geo Miller (supra), it was observed that a Court has to identify the breaking point at which any reasonable party would have abandoned the efforts to arrive at a settlement and contemplate referral of disputes for arbitration.

27. In Hari Shankar Singhania vs. Gaur Hari Singhania (2006) 4 SCC 658, the Apex Court observed that it is only when the parties reach a breaking point i.e. when the settlement with or without conciliation is no longer possible, can it be said that the cause of action has accrued for referring the matter to arbitration. The limitation period would not start so long as the parties indulge in a dialogue, even if differences surfaced during



such period, as an interpretation to the contrary would inevitably compel the parties to resort to litigation/ arbitration even where there is serious hope of the parties themselves of resolving the issues. Thus, the right to apply for arbitration would accrue “*only on the date of the last correspondence between the parties and the period of limitation commences from the date of last communication between the parties*”.

28. In the present case, as has already been discussed above, the negotiation talks took place from February to July, 2020, which again got resumed from January till March 2021, thereby establishing that all sincere efforts were being made mutually by both the parties, to settle their disputes. Thus, this period from February 2020 till March 2021, is liable to be excluded for ascertaining the date, when the cause of action accrued.

29. The Judgment relied upon by the plaintiff, for exclusion of the COVID period from March 2020 till 20.02.2022, may not necessarily further the cause of the petitioner, for the simple reason that the extension as relied upon by the petitioner, was for the Section 23(4) and 29A specifically and is not applicable to the petition under Section 11 of the Arbitration and Conciliation Act.

30. It may also be observed that the termination Notice had been withdrawn by the respondent *vide* an email and thus, it can be said that there was a subsisting Contract between the parties. The objection on behalf of the respondent that the limitation has to be calculated from the first Notice of invocation, is not tenable for the simple reason that as per the respondent itself, the first Notice for invocation got abandoned as the parties entered into the negotiation talks afresh.

31. The second Notice of invocation in January 2024, is actually the



point, which is the relevant date for considering whether the claims of the parties, which may have arisen from February 2020, onwards, are within the limitation. By excluding the period of negotiations and considering the date of invocation, it cannot be *prima facie* held that the claims of the petitioner, are barred by limitation.

32. For the same reason the second Notice of Invocation dated 31.01.2024 is within the period of limitation, having been filed within three years of giving the Notice of Invocation.

33. The observations made herein are for the purpose of adjudicating the present Petition under Section 11 of the Arbitration and Conciliation Act and is without prejudice to the rights of the parties, to agitate the same, before the learned Arbitrator.

34. Considering that the arbitral disputes have been raised and there is a valid Arbitration Clause, between the parties, Mr. J.P. Singh, Senior Advocate, Mobile No.9810034286 is hereby appointed as the learned Arbitrator, to adjudicate the disputes between the parties.

35. The parties are at liberty to raise their respective objections before the Arbitrator.

36. The fees of the learned Arbitrator would be fixed in accordance with the Delhi International Arbitration Centre Rules.

37. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of the Act, 1996 and not being ineligible under Section 12(5) of the Act, 1996.

38. The Arbitration shall be conducted under the aegis of Delhi International Arbitration Centre, Delhi High Court.

39. Learned counsels for the parties are directed to contact the learned



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Arbitrator within one week of being communicated a copy of this Order to them by the Registry.

40. This Order is without prejudice to the rights and contentions of the parties, which they are at liberty to raise before the learned Arbitrator.

41. A copy of this Order be also forwarded to the learned Arbitrator, for information.

42. Accordingly, the present Petition is allowed and disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 13, 2024/RS