

\$~1 & 2

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

+ **ARB.P. 235/2016**

M/S INDIACAN EDUCATION PVT. LTD. Petitioner

Through Mr Raveesh Thukral and Ms Shubham Mahajan, Advocates.

versus

AMIT POPLI

..... Respondent

Through: Mr Rikki Gupta, Advocate.

+ **ARB.P. 241/2016**

M/S INDIACAN EDUCATION PVT. LTD. Petitioner

Through Mr Raveesh Thukral and Ms Shubham Mahajan, Advocates.

versus

RAKESH KUMAR MEHTA

..... Respondent

Through: Mr Rikki Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J

1. These are the petitions filed under Section 11 of the Arbitration & Conciliation Act, 1996 (hereafter 'the Act') for appointment of arbitrator(s) to adjudicate the disputes which have arisen between the petitioner and the respondents.

2. The Agreements in question entered into between the petitioner and the respondents are identically worded and the controversies involved in these petitions are identical; therefore, these petitions were heard together

and are being disposed of by this common order.

3. The petitioner is engaged in imparting education and training in various fields of education. The petitioner claims that it has a network of technology based satellite coaching centres for coaching students for the course of chartered accountancy. The petitioner operates its coaching programme under the brand name of 'ETEN CA'. For the purposes of its business/coaching centres, the petitioner entered into a Faculty Engagement Agreement with Amit Popli (respondent in ARB 235/2016) on 16.10.2013. As the caption of the said agreement indicates, the agreement was for engagement of Mr. Amil Popli as a faculty member for the Coaching Centres. The term of the said agreement was for a period of two years, that is, up to 15.10.2015. This Agreement was subsequently extended for a period of one year. In the meantime, the parties entered into another Agreement titled 'Contract Addendum' on 12.08.2014. Similarly worded Faculty Engagement Agreement and Contract Addendum, were also executed between the petitioner and Rakesh Kumar Mehta (respondent in ARB. P. 241/2016) on 02.09.2013 and 12.08.2014 respectively. The Faculty Engagement Agreement contained an arbitration clause, which reads as under:-

“Dispute Resolution; Arbitration. The Parties shall attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of or relating to this Agreement. Any Party may initiate negotiations by providing written notice in letter form to the other Party, setting forth the subject of the dispute and the relief requested. The other Party who is the recipients of such notice will respond in writing within five days with a

statement of its position on and recommended solution to the dispute. If the dispute is not resolved by this exchange of correspondence, then the matter will be referred to final and binding arbitration under the provisions of Arbitration and Conciliation Act, 1996. For this purpose, the Parties shall jointly appoint a sole arbitrator. If the Parties fail to agree on the sole arbitrator within 30 days, then the sole arbitrator shall be appointed by the High Court of Delhi. The place of arbitration shall be at New Delhi. The arbitration award shall be final and binding upon the Parties.”

4. The Contract Addendum dated 12.08.2014 entered into with the respondents does not contain an arbitration clause.

5. In terms of the Faculty Engagement Agreement, the respondents agreed to discharge the following obligations:-

“3. Faculty Member’s Responsibilities

3.01 Faculty Member’s responsibilities shall be as detailed in Exhibit A attached to this Agreement. It is hereby agreed that Exhibit A may be subject to further revisions and amendment as mutually agreed to between the parties.

3.02 The faculty shall devote full time, attention, skill and efforts exclusively towards the performance of duties and responsibilities assigned to you from time to time as specified in the Exhibit A.

3.03 The faculty member shall discharge its duties and responsibilities with the highest standards of professional conduct and quality in accordance with the rules and regulations of ICAN.

3.04 The Faculty agrees that it shall not, directly or indirectly, in any capacity or manner, make express,

transmit, write verbalize or otherwise communicate in any manner any remark, comment, message information, declaration, communication or other statement of any kind, whether written or verbal, electronically transferred or otherwise, or cause or encourage others to make any statements, whether written or verbal, electronically transferred or otherwise that might be construed to be derogatory or defamatory, disparage or in any way criticize ICAN or any of its employees, directors, officers Affiliates, subsidiaries, employees, agents or representatives.”

6. The petitioner alleges that the respondents have been promoting themselves for offering VSAT classes for CA courses which is in breach of the agreements between the parties. The Faculty Engagement Agreement also contained Confidentiality and Non-Compete clauses whereby the respondents agreed not to disclose any proprietary information of the petitioner and to maintain confidentiality. The respondents also agreed not to compete with the petitioner or solicit any students, staff or associates of the petitioner.

7. It is, *inter alia*, alleged that the respondents threatened to leave the ongoing batches if their certain demands were not met. It is stated that the petitioner gave-in and entered into the Contract Addendum to Faculty Engagement Contract whereby the non-compete clauses under the Faculty Engagement Agreement were withdrawn.

8. The petitioner alleges that certain disputes have arisen between the parties in relation to the aforesaid agreements. It is alleged that respondents have been posting material on social media and thereby adversely affecting the reputation and goodwill of the petitioner. It is further alleged that the

respondents have been promoting themselves on social media and have also joined hands with other ex-faculty members to run a competitive business under the name of “Aldine”. In addition, it is claimed that the respondents have breached the terms of the agreement and in terms of Clause 10 of the Contract Addendum dated 12.08.2010, the respondents are liable to pay damages to the petitioner.

9. The respondents do not dispute the execution of the Faculty Engagement Agreement or the Contract Addendum; however, the respondents state that there is no arbitration agreement between the parties. The learned counsel for the respondents submitted that since the Contract Addendum does not contain an arbitration clause, the disputes in relation to the said agreements cannot be referred to arbitration. He further submitted that Contract Addendum novated the Faculty Engagement Agreement and the effect of not including an arbitration clause in the Contract Addendum is that the arbitration clause under the Faculty Engagement Agreement also stood terminated; consequently there is no arbitration agreement between the parties. He referred to the decisions of this Court in M/s Jai Prakash Associates Limited v. M/s National Hydroelectric Power Corporation Limited: 2010 (3) R.A.J. 82 (Del); Seema Bhatia v. Yamaha Motor India P Ltd: 2007 (144) DLT 772 in support of his contention that with the execution of the Contract Addendum, the arbitration agreement under the Faculty Engagement Agreement perished. He also relied on the decision of the Supreme Court in M.R. Engineers and Contractors Pvt. Ltd. v. Som Dutt: (2009) 7 SCC 696 in support of his contention that an Arbitration clause contained in an independent document would be imported in a

contract only if the reference to the independent document was such so as to make the arbitration clause in the independent document a part of the contract. He submitted that since the Contract Addendum did not contain any reference by which the arbitration clause in the Faculty Engagement Agreement could be read to be incorporated by reference.

10. I have heard the learned counsel for the parties.

11. There can be no dispute that by virtue of Section 62 of the Indian Contract Act, 1872 if a party to a contract agrees to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

12. There is merit in the contention advanced on behalf of the respondents that if a contract is novated then what is to be performed is the subsequent contract and the earlier contract stands obliterated. Clearly, in such cases, the arbitration clause contained in the initial agreement would also perish. The decisions cited by Mr Rikky Gupta, learned counsel for the respondents, clearly support the aforesaid view.

13. However, the principal question to be addressed in the facts of the present case is whether the Contract Addendum had brought in place a new contract which substituted the Faculty Engagement Agreement or was Contract Addendum a mere addition to the Faculty Engagement Agreement? In order to answer the aforesaid question, it would be necessary to ascertain the intention of the parties as reflected in the two documents, namely, the Faculty Engagement Agreement and the Contract Addendum. The Faculty Engagement Agreement provided the terms for engagement of the faculty members. It contained provisions as to the responsibilities of the faculty

members, and the petitioner. The said agreement also provided for the compensation payable to the faculty members. In terms of Article 5 of the Faculty Engagement Agreement, a faculty member is entitled to compensation as per Exhibit B appended to the said agreement, which provided that a faculty member is entitled to 15% of the Annual Gross Revenue for the subject depending upon the students enrolled in that subject. It is further provided that the Annual Gross Revenue would be the simple average of Category Fee listed in PRD, minus Taxes, multiplied by the number of students. In terms of the Faculty Engagement Agreement, 50% of the compensation is payable to the faculty members on completion of 50% of the course and 50% is to be paid at the end of the course.

14. The respondents do not dispute that they are entitled to compensation as faculty members; there is no other agreement other than the Faculty Engagement Agreement that provides for computation of the compensation payable to the respondents. It is relevant to note that clause 7 of the Contract Addendum also provides that 50% of the compensation would be paid upon completion of 50% classes of the batch and the balance 50% would be paid within 60 days from the completion of classes. Thus, the only added condition is that the final tranche would be paid within 60 days from completion of classes.

15. The opening words of the Contract Addendum also read as: "*This Contract Addendum to the Faculty Engagement Agreement..*". This also indicates that the Contract Addendum is in fact meant as an addendum to the Faculty Engagement Agreement and cannot stand independent of the same. Clause 11 of the contract Addendum also expressly provides that: "*This*

Contract Addendum shall be co-terminus with the Principal FEA and any term or word not defined herein shall be read from Principal FEA." The said clause also makes it amply clear that the parties had agreed that the Contract Addendum was co-terminus with the Faculty Engagement Agreement; in other words, the Faculty Engagement Agreement would continue to be operative. It is apparent from the above that the intention of the parties was not to give a go-by to the Faculty Engagement Agreement but only to modify certain terms. As mentioned earlier, the respondents would be entitled to the remuneration not under the Contract Addendum but under the Faculty Engagement Agreement and thus, the contention that the Arbitration clause perished with the Faculty Engagement Agreement is in my view, not merited.

16. The authorities referred to by Mr. Gupta are not applicable in the facts of the present case. In ***Seema Bhatia v. Yamaha Motor India P Ltd*** (*supra*), the parties had settled their disputes relating to the principal agreement by entering into Memorandum of Understanding (MOU) and, thereafter, it was the MOU that was required to be performed; the court found that the parties had given a go-by to the arbitration agreement. In ***M/s Jai Prakash Associates Limited v. M/s National Hydroelectric Power Corporation Limited*** (*supra*) the disputes arose in respect of incentives that were payable under a subsequent agreement which was an independent agreement. The court found that the claimant had entered into the main agreement – which contained the arbitration clause – in its individual capacity and the subsequent agreement was entered into as a leader of a consortium. Further the incentives payable under the subsequent agreement were payable for

commissioning of the project, which included works to be performed by other consortium members. In a recent decision of this Court in WSP Engineering Services Ltd. v. R.C. Panwar: Arb. P. 407/2012 & 408/2012, decided on 10.05.2013, the Court held as under:-

"22. Therefore, an arbitration clause which contains in the Lease Deeds would get attracted into the MOU by reference. In case, the Clauses 1 to 7 of the MOU above are read together which clearly indicate the intention of the parties to continue and incorporate or compliance with the terms and conditions of the Lease Deeds..".

17. The question whether a subsequent agreement is in addition to the main agreement, would depend on the facts and circumstances of each case. In the present case it is not possible to accept that the intention of the parties was not to perform the Faculty Engagement Agreement.

18. Accordingly, the petition is allowed and Mr Sanjoy Ghose, Advocate (Mobile No.9811118889) is appointed as an Arbitrator for considering the disputes between the Petitioner and Mr Amit Popli. Mr Sanjoy Ghose, Advocate (Mobile No.9811118889) is also appointed as an Arbitrator for deciding the disputes between petitioner and Rakesh Kumar Mehta. The fees of the Arbitrator shall be in terms of the Schedule IV to the Arbitration and Conciliation Act, 1996.

19. A copy of this order be sent to the Arbitrator.

VIBHU BAKHRU, J

AUGUST 04, 2016
pkv/RK