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

Date of Decision: 9th August, 2021

+ ARB. P. 267/2021

DE LAGE LANDEN FINANCIAL SERVICES INDIA PVT. LTD.

..... Petitioner

Through: Mr. Anupam Singh, Ms. Tanya
Tikiya, and Ms. Jyotsna Jain,
Advocates.

versus

PARHIT DIAGNOSTIC PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr. Jay Savla, Senior Advocate with
Mr. Rajpal Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The Petitioner-lender seeks adjudication of disputes that have arisen in relation to a loan transaction with the Respondent-borrower. Since the Arbitration Clause, as worded, gives unilateral right of appointment to the Petitioner-lender, which is impermissible under the scheme of the Arbitration and Conciliation Act, 1996 [*hereinafter, 'the Act'*], the present petition has been filed under Section 11(4) and 11(6) of the Act for appointment of an independent Sole Arbitrator.

BRIEF FACTS

2. The facts leading up to the filing of the present petition are encapsulated in brief, as follows: -

2.1. The parties entered into a Loan and Hypothecation Agreement dated 31st July, 2018 for a sum of Rs. 1,65,15,000/-. The loan was disbursed in two tranches, which were identified under separate loan account numbers. In order to secure the loan, Respondent No. 2 (Mr. Dharendra Kumar Mishra) and Respondent No. 3 (Mr. Satya Prakash), being Directors of Respondent No. 1-Company, executed two separate Guarantee Agreements also dated 31st July, 2018, in their personal capacity, undertaking to repay the entire dues, as and when demanded by the Petitioner.

2.2 The Arbitration Agreement contained in Clause 53 of the afore-noted Loan and Hypothecation Agreement and Clause 13 of the Guarantee Agreements, is identical. The same is extracted hereinbelow: -

“53. This Agreement shall be governed by, and construed in accordance with, the laws of India. All disputes, differences and or claims arising out of these presents or in any way touching or concerning the same or as to construction, meaning or effect or as to the rights and liabilities of the Parties hereto shall be settled through arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time or any other or further Act of the Parliament that may be enacted in relation to arbitration proceedings. Arbitration proceedings as aforesaid between the Parties shall be referred to a sole arbitrator to be appointed by the Lender at its absolute discretion in the event of death, refusal, neglect, inability or incapability of a person so nominated appointed to act as the sole arbitrator, the lender may at its absolute discretion, appoint another person instead as the new arbitrator. The arbitration proceedings shall be conducted in the English language. The award passed by the arbitrator shall be final and binding on all the Parties concerned. The costs of arbitration shall be borne by the Party(ies) as determined in the arbitration award. The arbitration proceedings, at the Lender's sole discretion, shall be held either in Delhi National Capital Region or Mumbai. The courts in

Delhi/National Capital Region or Mumbai at the Lender's sole discretion, shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and the Borrower irrevocably submits to the jurisdiction of those courts."

- 2.3 The Petitioner contends that Respondent No. 1 has defaulted in repayment of the loan. The installments envisaged in the repayment schedule to the Loan and Hypothecation Agreement have not been paid. An amount of Rs. 1,91,03,322/- is alleged to be due and payable as on 30th December, 2020.
- 2.4 On 13th May, 2019, notices for "*facility cancellation/acceleration*" was issued to all the Respondents, calling upon them to settle the outstanding dues, failing which the Petitioner threatened legal action for enforcement of their rights under the agreements. As noted above, since the loan was disbursed under two distinct loan account numbers, separate notices were issued in respect thereof.
- 2.5 Guarantee Invocation Notices was issued on 17th July, 2019 to Respondents Nos. 2 and 3.
- 2.6 On 29th August, 2019, a letter titled "*Invocation of Arbitration/Reference of Dispute for the adjudication*" was sent by the Petitioner to Shri M. S. Sabharwal (Retd. Additional District & Sessions Judge, Delhi) unilaterally appointing him as the Sole Arbitrator and requesting him to enter upon the reference and initiate arbitration proceedings, between all the parties herein.
- 2.7 The parties appeared before the learned Arbitrator and filed their respective Statements of Claim and Defense. On 22nd December, 2020, upon a request from the counsel for the Claimant (Petitioner herein) to withdraw the claim petition in light of the judgment of the Supreme

Court in *Perkins Eastman Architects DPC v. HSCC India Ltd.*¹, the arbitration proceedings were terminated as withdrawn.

3. In these circumstances, the Petitioner has filed the instant petition seeking appointment of a Sole Arbitrator in respect of the afore-noted three Agreements i.e., the Loan and Hypothecation Agreement and the two Deeds of Guarantee, all dated 31st July, 2018.

CONTENTIONS OF THE PARTIES

4. The existence of the afore-noted Agreements is not denied by the Respondents, however, Mr. Jay Savla, learned Senior Counsel for the Respondents, takes strong objection to the maintainability of the petition by raising the following grounds: -

4.1 The Petitioner has not validly invoked Arbitration prior to filing of the present petition. He contends that communications sent by the Petitioner are only cancellation letters for the loan facility, and do not amount to invocation of arbitration as required under Section 21 of the Act. The unilateral appointment of the Arbitrator also does not meet the requirement of invocation of arbitration under Section 11(5) of the Act. On this submission, reliance is placed upon the judgment of this Court in *Kailash Prajapati v. Citicorp Finance (I.) Ltd.*² and the decision of the Supreme Court in *BSNL v. Nortel Network India Pvt. Ltd.*³

4.2 Without prejudice to the foregoing, even if the letter dated 29th August, 2019 is considered to be a valid invocation of arbitration, yet, the

¹ 2019 SCC OnLine SC 1517.

² 187 (2012) DLT 433.

³ 2021 SCC OnLine SC 207.

petition is not maintainable, because, the letter was sent only in respect of the Loan Agreement and not in respect of the two Guarantee Agreements. There would thus be no invocation qua Respondents Nos. 2 and 3, who were parties to Deeds of Guarantee containing independent and separate (though identical) arbitration clauses. Thus, the Petitioner cannot request for appointment of a Sole Arbitrator in respect of all the three agreements in the present petition on the strength of the said letter.

- 4.3 As no request for reference of disputes to arbitration was received by the Respondents, it cannot be said that the arbitration proceedings before the erstwhile Arbitrator had validly commenced under law, in accordance with Section 21 of the Act.
- 4.4 In light of withdrawal of the claim petition before the erstwhile Arbitrator, the present petition under Section 11 of the Act is not maintainable and remedy, if any, would be under Section 14 of the Act.

5. Mr. Anupam Singh, learned counsel for the Petitioner, on the other hand, argues that there is no lacuna in the present petition and makes the following submissions: -

- 5.1 The Petitioner had notified its intent to arbitrate while issuing the notices of recall of facility on 13th May, 2019, by expressing that the Petitioner shall take recourse to enforcement of its rights under the agreements, which, predictably, includes arbitration.
- 5.2 Respondents Nos. 2 and 3 were not just guarantors under the Deeds of Guarantee, but are also signatories to the Loan Agreement, in their capacity as Directors of Respondent No. 1.
- 5.3 The guarantees were invoked independently, and even therein, the

Petitioner had expressed its intention to take steps in terms of the Guarantee Agreements, in the event the invocation was not complied with. Thus, all the Respondents had sufficient notice.

- 5.4 The arbitration clauses, as worded, gave unilateral right of appointment to the Petitioner-lender. Prior to the judgment of the Supreme Court in *Perkins (supra)*, such a right was being upheld by the courts. The Petitioner invoked arbitration in terms of the said clause and called upon the Arbitrator to enter upon the reference. The said notices were also sent to all the Respondents. The notice dated 29th August, 2019 sent to the Arbitrator meets the requirement of Section 21 of the Act. Pertinently, before the erstwhile Arbitrator, the Respondents did not take any objection regarding non-invocation in terms of Section 21 of the Act.

ANALYSIS

6. The Court has considered the contentions of the parties. The Arbitration Clause in all the three Agreements indicates that the parties had agreed to settle their disputes in accordance with the provisions of the Act, before a Sole Arbitrator, to be appointed by the lender at its sole discretion. Arbitration Clause, as noted above, was invoked by the Petitioner-lender by making a unilateral appointment of a Sole Arbitrator. Such proceedings, though commenced, were later terminated in view of the Petitioner's application to withdraw the claim in light of the judgment of the Supreme Court in *Perkins (supra)*. In these circumstances, there being no Arbitral Tribunal in place as on date, the remedy with the Petitioner is under Section 11 and not Section 14 of the Act.

7. The notice under Section 21 of the Act is a request for initiation of arbitration proceedings, by reference of disputes to arbitration. There is no defined or specific requirement prescribed under the Act. Nevertheless, the notice must specify that arbitration is being resorted to. The significance of such a notice is evident from the language of Section 21 which prescribes the date of commencement of arbitral proceedings. Section 21 indicates the date for commencement of arbitral proceedings to be when the other party receives a notice of the same, except for an agreement to the contrary. Thus, unless otherwise agreed, arbitration would commence as soon as a request for reference of the dispute is received by the Respondent. The implication is that limitation will begin to run from the date when there is failure to appoint the Arbitrator, as observed by the Supreme Court in the case of *Nortel Networks (supra)*.

8. This Court, in paragraphs number 25 to 28 of *Alupro Building Systems Pvt Ltd v. Ozone Overseas Pvt Ltd*,⁴ while dealing with challenge to an award under Section 34 of the Act, examined the purpose of notice under Section 21. The reasoning contained in the said paragraphs has been well-summarized by the Madras High Court in *Globe Detective Agencies v. Gammon India Ltd.*,⁵ which is extracted as follows: -

“12.2. (...) The above decision of the Delhi High Court arrived at its conclusion to hold that Section 21 notice is mandatory for the following reasons:

- (i) To make the other party know what the claims are.*
- (ii) Whether the claims made in the notice are within the purview of limitation or barred by any law.*
- (iii) The notice facilitates the parties to arrive at consensus for appointing an Arbitrator.*
- (iv) It enables the parties to know whether the proposed arbitrator*

⁴ (2017) SCC Online Del 7228.

⁵ MANU/TN/4774/2019.

named by one party is acceptable for the other or he is otherwise qualified or disqualified.
(v) *Unless the notice is issued, the application under Section 11(6) of the Act cannot be filed.”*

9. The Court in ***Alupro*** (*supra*) explained the relevance of Section 21 for filing a petition under Section 11 of the Act, by holding that the trigger for the Court's jurisdiction under Section 11 of the Act is the failure of the receiver to respond to the sender's communication invoking arbitration.⁶ On this basis, it was held that the requirement of notice under Section 21 of the Act is mandatory. However, the said judgment is distinguishable on facts. In the said decision, there was no notice of invoking the arbitration proceedings at all. Whereas, in the instant case, the facts demonstrate that Respondent certainly had due notice of the arbitration proceedings. These proceedings have also afforded full opportunity to the Respondent to put forth its stand.

10. A similar view has been adopted by a co-ordinate bench of this Court in ***Badri Singh Vinimay Pvt. Ltd. v. MMTC Ltd.***⁷ Therein, a notice served by the Petitioner to the Respondents, sought payment of monies, and further stated that, “*failing which my client shall be constrained to initiate appropriate legal action against you for recovery of the said amounts and interest thereon including initiation of arbitration proceedings*”. This was held to be sufficient notice of arbitration under Section 21 of the Act.

11. In the instant petition as well, although the notices dated 13th May, 2019 for “*facility cancellation/ acceleration*” did not specifically mention that the Petitioner is resorting to arbitration, but it was clearly stated that the

⁶ See: Para 28 of ***Alupro*** (*supra*).

⁷ 2020 SCC OnLine Del 106.

Petitioner would take recourse to legal proceedings under the agreement.

The relevant paragraph of the said notice is extracted as under: -

“Please settle the aforementioned Sum Total Amount Due forthwith failing which DLL will commence legal proceedings to enforce all DLL's rights under the Agreement including but not limited to recovery of all amounts due under the Agreement.”

12. Moreover, in the present case, the purpose of giving notice could not have been achieved because, the arbitration clause, as worded, conferred complete discretion to the Petitioner-lender to make an appointment. The Petitioner, thus, invoked arbitration by sending a notice to his appointed Arbitrator, with copy thereof to the Respondents. The Respondents, thereafter, appeared before the Arbitrator and joined the proceedings without raising any objection of non-issuance of pre-arbitration notice, and instead filed their Statement of Defence. The Respondents thus, had due notice of the proceedings, and Petitioner's intent to resort to arbitration was duly conveyed to them.

13. If one were to argue that regardless of the language of the clause, notice under Section 21 is still necessary to enable the Respondent to oppose the appointment on the ground of disqualification; that would be inconsequential, in light of facts of the present case. It would, indeed, be a non-issue, as the learned Arbitrator has himself, on the request of the Petitioner, terminated the arbitration proceedings. Moreover, the Respondent did not raise any ground of disqualification when it joined the arbitral proceedings.

14. The other purpose of notice – being the commencement of the period of

limitation – also cannot be a ground to oppose the instant petition. The three Agreements were executed on 31st July, 2018. Invocation of disputes was done within three years from the date the disputes have arisen. In fact, it is not even the case of the Respondents that the cause of action is barred by limitation. Commencement of arbitration under Section 21 of the Act, construed from the date of notice to the unilaterally appointed arbitrator dated 29th August, 2019, is not barred by limitation.

15. Subsequently, Guarantee Invocation Notices were sent by Petitioner on 17th July, 2019, however, no response was received from the Respondents to either the Notices dated 17th July, 2019 or 13th May, 2019, thereafter, the Petitioner appointed an Arbitrator *vide* notice of invocation dated 29th August, 2019. This notice, coupled with the fact that the Respondents joined and participated in the ensuing arbitration proceedings, clearly shows that Respondents became aware of the Petitioner's intent to arbitrate, choice of Arbitrator, and identification of claims; and thus, could have formed an opinion as to whether the disputes were time barred. Hence, for all intents and purposes, the rationale for giving notice, stood fulfilled. In the opinion of the Court, the entire argument of the Respondents is hinged on a hyper-technical plea. No prejudice whatsoever has been pleaded nor shown to have occurred on any of the above counts. Mr. Savla, however, states that the thirty-days' notice is mandatory for the parties to come to an agreement on the name of the Arbitrator. The present petition has been pending since May, 2019. The parties, till date, have not been able to agree on any name. Therefore, this objection of Mr. Savla is also completely implausible. Dismissing the petition on the ground of non-compliance of Section 21 of the Act is not warranted.

16. Lastly, the contention raised by Mr. Savla that there has been no invocation of arbitration qua the guarantors (Respondents No. 1 & 2), is also without merit. The arbitration agreement contained in all three Agreements is identically worded. The notice of invocation and the proceedings which commenced before the Arbitrator, were in respect of all the three Agreements in question. Petitioner invoked arbitration, and also notified Respondents No. 2 and 3 of its intent to resort to arbitration. The Court has been informed that the Statement of Defence before the Arbitrator was filed on behalf of all the three parties, and in respect of all three agreements. Thus, it cannot be urged that the Respondents had not been notified of the arbitration.

17. In view of the above, the Court does not find merit in the objections raised by the Respondents and considers it appropriate to allow the present petition.

18. Accordingly, Mr. Tej Singh Kashyap, (Retd.) former Addtl. District Judge [Contact No.: +91 9910384674] is appointed as the common Sole Arbitrator in respect of the three Agreements, i.e., Loan Agreement and two Deed of Guarantees, all dated 31st July, 2018.

19. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

20. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Act.

21. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

22. In view of the foregoing, the present petition is disposed of.

AUGUST 09, 2021

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(corrected and released on 26th August, 2021)

SANJEEV NARULA, J