

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Reserved on 23.09.2022

ARB No.49 of 2022(O&M)
Date of Decision: 30.09.2022

Extramarks Education India Pvt. Ltd.

-Petitioner

Versus

M/s DIS Chain of Institutions and another

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Gurinder Singh, Advocate
for the petitioner.

Mr. Mandeep S. Sachdev, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 read with 'Scheme of Appointment of Arbitrators' for appointment of an Arbitrator to decide the dispute.

[2]. Petitioner entered into agreements dated 01.04.2011, 21.12.2011, 11.05.2012 and 25.03.2013 with the respondents and agreed to sale, implement, install the hardware and

multimedia system accessories for the purpose of setting up 510 Smart Learn Classes at the school premises. Respondents agreed to perform all the obligations under the agreements including the timely clearances of pending dues. The agreements dated 01.04.2011 and 21.12.2011 have the arbitration clause that in case of any dispute in connection with or arising out of agreements or part thereof, the dispute shall be referred to sole Arbitrator to be appointed by the mutual consent of the parties. The venue of the arbitration shall be Jalandhar and the language shall be English. The Courts in Jalandhar shall have the jurisdiction to entertain all the disputes between the parties and fee of the Arbitrator shall be equally shared by both the parties.

[3]. As per pleadings of the petitioner, the petitioner had delivered the hardware and installed Smart Learn Classes. The respondents started delaying the payments of installments. However, the respondents gave assurance to the petitioner for clearing outstanding payments of Rs.1,84,84,040/- along with the interest @ 18% per annum till the date of actual realisation of the amount. Petitioner sent a demand notice dated 18.09.2018 for recovery of the outstanding amount. Petitioner again sent a legal notice dated 29.01.2021 for recovery of the outstanding dues. The respondents sent a reply dated

15.02.2021, to which the petitioner sent a counter reply on 05.03.2021 and thereafter, the respondents sent a reply dated 17.03.2021, stating therein that the respondents want to amicably settle the present dispute. However, no settlement talks could take place due to the reasons solely attributable to the respondents. The agreement of extension was made on 25.03.2013 between the petitioner and Chain of DIPS Institutions, whereby EM and school agreed to increase 45 number of Smart Learn Class for the duration of 60 months commencing from May, 2013, the details of which were also annexed in the agreement of extension. It was also mentioned that the school shall make payment to EM of Rs.90,000/- per month payable on monthly basis for the duration of 60 months starting from May, 2013. School shall make the payment to EM as per payment schedule listed in the annexure attached with the agreement of extension. The period of 60 months started w.e.f 25.03.2013 till 25.03.2018.

[4]. The dispute arose between the petitioner and the respondents, due to which, the petitioner sent a demand notice dated 18.09.2018 to the respondents to pay outstanding amount of Rs.1,84,84,040/-. Thereafter, on 29.01.2021, the petitioner issued a legal notice-cum-demand notice for the recovery of the aforesaid amount plus interest calculated till 31.12.2020 and

also interest @18% per annum till the date of actual realisation of the amount. The total amount computed for the aforesaid components was Rs.3,06,83,506/-, the break up of which was Rs.1,84,84,040/- as outstanding amount and Rs.1,21,99,466/- as interest till 31.12.2020 and further interest @18% per annum till the date of actual realisation of the amount. On receipt of the aforesaid legal notice dated 29.01.2021, the respondents replied to the same through their Advocate on 15.02.2021, thereby claiming that the amount has already been paid in excess to the petitioner. A request was made to withdraw the notice, claiming the same to be based on false and frivolous facts and also requested to the Advocate to advise the petitioner not to indulge in false and frivolous litigation and settle the accounts with the client of the Advocate for the respondents.

[5]. Perusal of the aforesaid reply would show that the plea of settlement of account was left open.

[6]. Thereafter, the petitioner filed a counter reply to the reply dated 15.02.2021 sent by the Advocate of the respondents on 05.03.2021, reiterating the claim of the petitioner to the tune of Rs.3,06,83,506/- along with interest @18% per annum till the date of final realisation of the amount. Petitioner also claimed that the respondents are also liable to pay an amount of Rs.1,00,00,000/- towards damages for mental agony and

harassment suffered by the petitioner due to the illegal acts of the respondents.

[7]. Advocate of the respondents filed a reply to the counter reply to the reply dated 15.02.2021 on 17.03.2021, thereby mentioning that with regard to the fixing of a meeting for amicable settlement, it was informed that Sh. Gurbachan Singh, who was the Chairman of respondent No.1 i.e. DIPS Chain of Institutions and President of Sahibzada Ajit Singh Educational Trust has expired on 11.02.2021 and after his demise, a new Chairman has to be appointed, which would take some time and only thereafter, further course of action as regards the meeting would take place. Petitioner was advised to wait till the new Chairman is appointed and thereafter, the respondents would inform the petitioner about the meetings and sittings.

[8]. Owing to the inaction on behalf of the respondents, the petitioner ultimately invoked arbitration clause, thereby giving notice of invocation on 18.10.2021. Petitioner has invoked arbitration clause of the agreements dated 01.04.2011 (Clause No.15), 21.12.2011, 11.05.2012 (as per Clause No.15 of the agreement dated 01.04.2011) and 25.03.2013 (as per Clause No.15 of the agreement dated 01.04.2011). Outstanding amount of Rs.1,84,84,040/- along with the interest @18% per annum till final realisation of the amount was claimed.

Respondents through their Advocate filed reply to the notice of invocation on 18.10.2021 on 01.11.2021. Relevant part of para No.2 of the reply reads as under:-

“2. That the alleged arbitrator which you have proposed to be sole arbitrator is not acceptable to my clients. My clients do not know credentials of Shri Abhishek Chauhan nor have his designation or his precedents been informed to my clients. My clients are not agreeable to any such appointment as you have mentioned. In fact, the arbitration proceedings cannot be initiated because the alleged claim is barred by limitation and the case has already been barred by limitation. It is to be mentioned herein that this reply is being sent in continuation to the reply which was already sent to you on 15.02.2021 under the signatures of my clients. The brief facts of the case are that Sabibzada Ajit Singh Educational Trust has been registered under the Societies Registration Act vide No.1607 of 93-94 and is having its Head Office at 191, Gujral Nagar, Jalandhar. Under this Trust, schools and colleges are running under the name and style of M/s DIPS Chains of Institutions. There are 22 schools and 5 colleges running at present in Punjab at various places.....”

[9]. Perusal of the aforesaid extracted part of para No.2 of the reply dated 01.11.2021 would show that the respondents have claimed that the alleged claim is barred by limitation and the case has already been barred by limitation. The subsequent part of para No.2 would show that the respondents have taken a

stand of payment of excess amount of Rs.23,84,220/- to the petitioner. The payment made by the petitioner has been denied being illegal.

[10]. Learned counsel for the petitioner submitted that the agreements and existence of arbitration clause have not been denied by the respondents. The only plea taken by the respondents is that the respondents have made excess payment to the petitioner and the alleged claim of the petitioner is barred by limitation and the case has already been barred by limitation. Learned counsel further submitted that after extension of agreements by five years vide agreement of extension dated 25.03.2013, the period of agreements after expiry of 60 months came to an end on 25.03.2018. Demand notice dated 18.09.2018 was issued followed by a legal notice dated 29.01.2021, to which, reply was filed by the respondents through their Advocate on 15.02.2021, in which, request was made to settle the accounts with the respondents. To the aforesaid reply dated 15.02.2021, the petitioner filed a counter reply on 05.03.2021, which was also replied by the respondents on 17.03.2021, thereby admitting the dispute between the parties and request was made to the petitioner to wait till new Chairman is appointed. Thereafter, the petitioner invoked arbitration clause by way of notice of invocation dated

18.10.2021 and it was replied by the respondents on 01.11.2021, thereby claiming that the claim of the respondents is barred by limitation. Respondents have also claimed that the case has already been barred by limitation. In a way, the respondents have taken both the pleas as regards to the claim of the petitioner to be time barred and also the application. The question whether the petitioner has provided the services arising out of agreements to the respondents on satisfactory note or not, are the questions that can be examined only by the Arbitrator and so also the question whether the claim made by the petitioner is time barred or not, shall have to be left open to be raised before the Arbitrator. It is only the time barred application/notice/ appointment of Arbitrator is to be decided by the Court.

[11]. In **Bharat Sanchar Nigam Ltd. and another Vs. M/s Nortel Networks India Pvt. Ltd., 2021(2) RCR (Civil) 337**, the Hon'ble Apex Court after considering the ratios of numerous judgments, held that the limitation of filing an application under Section 11 of the Arbitration and Conciliation Act would arise upon the failure to make the appointment of the Arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 of the Arbitration and Conciliation Act can be filed only after a

notice of arbitration in respect of the particular claim to be referred to arbitration is made and there is a failure to make the appointment. The period of limitation for filing a petition, seeking appointment of an Arbitrator cannot be confused with the period of limitation applicable to the substantive claims. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the substantive disputes is necessarily distinct from that of filing an application for appointment of an Arbitrator. Under Article 137 of the Limitation Act, 1963, an application for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act is covered being residual provision. Since none of the Articles in the Schedule of the Limitation Act, 1963 provide a time period for filing an application for appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, therefore, it is covered under the residual provision of Article 137 of the Limitation Act and the period of limitation is three years from the time when the right to apply accrues. The right to apply accrues only when there is a failure to make the appointment of the Arbitrator within a period of 30 days from issuance of notice of invoking arbitration. Application under Section 11 of the Arbitration and Conciliation Act can be filed only after a notice of arbitration in respect of the claim to be

referred to Arbitrator is made and there is a failure to make appointment by the respondents.

[12]. The issue of limitation is normally a mixed question of fact and law and would lie within the domain of the Arbitrator/arbitral Tribunal. There is a distinction between jurisdictional and admissibility issues. Jurisdictional issue pertains to the power and authority of the Arbitrator to hear and decide a case. The jurisdictional issue includes objections as regards to the competence of the Arbitrator to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. The issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, as the same pertain to the jurisdiction of Arbitrator/arbitral Tribunal.

[13]. Admissibility issue relates to procedural requirements, such as a breach of pre-arbitration requirement or a challenge to the claim being time barred. Admissibility issue relates to the nature of the claim and the same is not a challenge to the jurisdiction of the Arbitrator. The issue of limitation which concerns the admissibility of the claim, must be decided by the Arbitrator/arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

[14]. In view of **Vidya Drolia Vs. Durga Trading**

Corporation, (2021) 2 SCC1, the scope of power under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 has been illustrated and it has been held that the Court must undertake a primary first review to weed out manifestly *ex facie* non-existent and invalid arbitration agreements, and non-arbitrable disputes. The *prima facie* review at the reference is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration clause exists, or that the subject matter is not arbitrable and that reference may be refused. Reference can also be made to **BSNL Vs. Nortel Networks (India)(P) Ltd., (2021) 5 SCC 738**.

[15]. It is only in the very limited category of cases, where there is not even an instinct of doubt that the claim is *ex facie* time barred, the Court may decline to make the reference. However, if there is a slightest doubt, the rule is to refer the dispute to arbitration, otherwise, it would encroach upon what is essentially a matter to be determined by the Arbitrator/arbitral Tribunal.

[16]. There is no dispute as regards the proposition of law that the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act would be governed by

Article 137 of the First Schedule of Limitation Act, 1963 and the period of limitation will begin to run from the date when there is a failure to appoint Arbitrator. In rare and exceptional cases, where claims are *ex facie* time barred and is manifest that there is no subsisting dispute, the Court may refuse to make reference. In this regard, reference can be made to the order dated 29.07.2022 passed in **ARB No.121 of 2018** titled **Sada Ram Som Nath Rice Mill Vs. Managing Director Haryana Warehousing Corporation and another** and order dated 22.09.2021 passed in **ARB No.295 of 2019** titled **Adhmi Co-operative L/C Society, Khanna Road, Krishanpura, Panipat Vs. Haryana Power Generation Corporation Ltd. and others** by the High Court.

[17]. It is also a settled principle of law that mere correspond of limitation by way of writing letters, reminders to the other party subsequent to the date in question, could not extend the period of limitation. Limitation period for seeking appointment of Arbitrator is three years from the date on which the cause of action arose. The cause of action in any case has to be reckoned when there is a failure to make appointment of Arbitrator within a period of 30 days from the date of issuance of notice of invocation. Reference can be made to **M/s Geo Miller and Co. Pvt. Ltd. Vs. Chairman, Rajasthan Vidyut Utpadan**

Nigam Ltd., 2020(14) SCC 643.

[18]. The Hon'ble Apex Court in **Secunderbad Cantonment Board Vs. M/s B. Ramachandraiah and Sons, 2021(5) SCC 705** has held that it does not lie with the petitioner to plead that it waited for unreasonably long period of time to refer the dispute to arbitration merely on account of respondents failure to settle its claim.

[19]. In the instant case, on 25.03.2013, agreement of extension was executed, thereby extending the time by 60 months and the same ultimately came to an end on 25.03.2018. Owing to the stand taken by the respondents to settle the accounts with the petitioner in pursuance of notice/legal notice issued by the petitioner, the petitioner ultimately invoked the arbitration clause by way of notice of invocation dated 18.10.2021. In the reply to the notice of invocation dated 18.10.2021, the respondents in their reply dated 01.11.2021 have claimed that the claim is barred by limitation and so as the case. Virtually the respondents have pleaded the jurisdictional issue and the admissibility issue to be barred by limitation.

[20]. In view of **Geo Miller and Co. Pvt. Ltd. case (supra)** and **BSNL's case (supra)**, the limitation in terms of Article 137 of the Limitation Act would be of three years after expiry of 30 days from the date of invocation of arbitration clause.

[21]. The present petition was filed on 21.12.2021. In view of correspond between the parties, there is a clear cut dispute as regards to the claim of the petitioner, which has been asserted by the petitioner and the respondents have denied the same. The invocation of arbitration clause on 18.10.2021 in view of stand taken by the respondents till 17.10.2021 and thereafter, denying the claim of the petitioner vide reply to the notice of invocation dated 01.11.2021, would certainly give rise to arbitral dispute, which needs to be referred to the sole Arbitrator for decision. Even otherwise, during the entire period from March 2020 till date, a situation arose on account of COVID-19. Clause-6 of the agreement deals with force majeure/any act of God or natural calamities, which are beyond the control of the parties and prohibition of supplying such services as are envisaged in the agreement shall free the parties from the binding nature and obligations under the present agreement and subsequent amendment to the agreement. Even though, the same does not talk about the payments etc, but the rule of procedure was completely hampered by the circumstances.

[22]. Learned counsel for the petitioner has referred to directions issued by the Hon'ble Apex Court in **MA No.21 of 2022** in **MA No.665 of 2021** in **SMW(C) No.3 of 2020** with **MA**

No.29 of 2022 of 2022 in **MA No.665 of 2021** in **SMW(C) No.3 of 2020** on 10.01.2022. The aforesaid judgment is in respect of COVID-19 guidelines and extension of limitation period, though the aforesaid period of extension is not applicable in the instant case and the judgment is being referred as the petitioner has relied upon the same.

[23]. In my considered opinion, the jurisdictional issue and admissibility issue are not hit by any period of limitation in the instant case and the present controversy involves an arbitral issue between the parties, which needs to be referred to the sole Arbitrator.

[24]. For the reasons recorded hereinabove, this petition is allowed and HMJ Kuldip Singh (Retd.), House No.50, Judges and Officers Enclave, Sector-77, SAS Nagar, Mohali, Mobile No.8558809914 is appointed as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by him as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of his independence and impartiality to settle the dispute between the parties.

[25]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule

of the Act as amended from time to time. The fee shall be borne by both the parties equally.

[26]. The venue of the Arbitration shall be the place to be disclosed by the Arbitrator according to his convenience.

[27]. A copy of this order be dispatched to HMJ Kuldip Singh (Retd.) at the following address:-

House No.50, Judges and Officers Enclave,

Sector-77, SAS Nagar, Mohali.

Mobile No.8558809914.

30.09.2022
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No