



§~3

*

IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of Decision: 04th August, 2022***

+ ARB.P. 656/2022

CHEM ACADEMY PVT. LTD

..... Petitioner

Through: Mr. Murari Tiwari, Mr. Rahul
Kumar & Ms. Sakshi Agrawal,
Advocates.

versus

PRAVEEN MALIK

..... Respondents

Through: Mr. Lakshay Joshi, Advocate.

CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)**

%

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate the disputes between the parties under the “Faculty Agreement” dated 08.09.2021 [“the Agreement”]. By way of the said Agreement, the respondent was appointed as a member of faculty of the petitioner’s institution which offers online and offline classes to students.

2. Notice of the petition was issued on 27.05.2022. Mr. Lakshay Joshi, learned counsel, has entered appearance on behalf of the respondent. Although the respondent has failed to file a reply to the petition pursuant to the liberty granted by the order dated 27.05.2022, Mr. Joshi sought to resist the petition on the grounds discussed in



detail later in this judgment.

3. Mr. Murari Tiwari, learned counsel for the petitioner, submits that the respondent was appointed to the faculty of the petitioner-institute at a salary of approximately ₹2.50 lakhs per month with effect from 08.09.2021. He draws my attention to clause 1.4 of the aforesaid Agreement under which the respondent undertook not to leave the employment of the petitioner for a period of two and a half years [the initial tenure of the Agreement] i.e. until 08.03.2024, except if his emoluments were not paid for a period of three months. The Agreement also includes provisions with regard to Intellectual Property Rights [Section 4], Confidentiality [Section 5] as well as Non-Compete and Non-Solicitation provisions [Section 6].

4. Mr. Tiwari also draws my attention to clause 11 of the Agreement, which contains an arbitration clause in the following terms:-

"11. ARBITRATION AND DISPUTE RESOLUTION

11.1 In case of any dispute or difference between the "FIRST PARTY/Company/Employer" and the "SECOND PARTY/Faculty/Employee" regarding payment or non-payment of any claim (s), tenure of services, transfer of "Faculty's, termination of services, compensation and any other dispute arising out of or relating to the contract /agreement whether arising during the services or thereafter shall be referred to the sole arbitrator being Director, Business and Legal Affairs of "Company". If the arbitrator to whom the matter is originally referred to is unable to perform his duties or refused to act for any reason whatsoever, the "Company" as aforesaid at the time of such inability to act, shall appoint any other person to act as an arbitrator in accordance with the terms and



conditions of this agreement. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor, if both the parties consent to this effect, failing which the newly appointed Arbitrator will be entitled to proceed Dinovo.

The proceedings shall be conducted at New Delhi subject to the provisions of Arbitration & Conciliation Act 1996 and the courts at Delhi only shall have jurisdiction over the matter.

11.2 The "Faculty" has read and understood the terms & conditions of the agreement from clause here and above 1 to 10 and has received a copy of the same. The "Faculty" hereby undertakes to abide by the Salary Terms offered by the "Company" & the conditions as given in the agreement, which has been clearly read and understood by him and has agreed to abide by the same.”¹

5. According to the petitioner, the respondent resigned from the services of the company in December, 2021, and also commenced a rival business. The petitioner, through counsel, addressed a legal notice dated 29.12.2021 to the respondent. In the legal notice, the petitioner has made allegation of breach of the terms and conditions of the Agreement by the respondent, an allegation of defamation of the petitioner's institute on social media and also alleged breach of the non-compete and non-solicitation clauses. The petitioner therefore claimed a sum of ₹2.5 crores from the respondent.

6. As the aforesaid notice failed to elicit a response, the petitioner served a further legal notice dated 23.02.2022 broadly on the same terms and also invoked the arbitration clause. The petitioner proposed the name of the arbitrator and called for the consent of the respondent.

¹ Sic.



The respondent, through counsel, addressed a response dated 21.03.2022 to the learned counsel for the petitioner, in which the respondent took exception to the appointment of an arbitrator unilaterally by the petitioner. It was also alleged that the invocation of arbitration is intended only to harass the respondent. The respondent further declined consent to appointment of the proposed arbitrator.

7. It is in these circumstances that this petition under Section 11 of the Act has been filed.

8. Mr. Joshi resists the appointment of an arbitrator on the ground that the relief sought by the petitioner is in respect of defamation which, he contends, is non-arbitrable. He draws my attention to the order of the Madras High Court in *Srividya Krishna vs. Lakshmi Mukilan*² in this connection.

9. As far as the scope of jurisdiction under Section 11 of the Act is concerned, Mr. Joshi submits that, consistent with the judgments of the Supreme Court in *Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and Others*³ and *DLF Home Developers Limited vs. Rajapura Homes Private Limited and Another*⁴, this Court would decline to exercise jurisdiction in the event any of the claims is *prima facie* non-arbitrable.

10. Having heard learned counsel for the parties, I do not find any force in Mr. Joshi's contentions as above.

11. A three-judge bench of the Supreme Court has, in *Vidya Drolia*

² Order dated 31.07.2018 in Original Petition No. 279/2018

³ (2011) 5 SCC 532

⁴ 2021 SCC OnLine SC 781 [Arbitration Petition (Civil) 17/2020, decided on 22.09.2021]



and Others vs. Durga Trading Corporation⁵, crystallized the scope of inquiry in applications under Section 11 of the Act. With regard to questions of arbitrability, the Court has held as follows:-

“154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

*154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that **the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability.** The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

*154.4. **Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable,** though the nature and facet of non-arbitrability would, to some*

⁵ (2021) 2 SCC 1



extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”⁶

The same view has been taken in *DLF Home Developers Limited*⁷. In a concurring opinion, N.V. Ramana, J. formulated the principles thus⁸:-

“244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid

⁶ Emphasis supplied.

⁷ Supra (note 4)

⁸ In *Vidya Drolia*



arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable? ”⁹

The aforesaid principles have been reiterated in two decisions rendered earlier this year – *Mohammed Masroor Shaikh vs. Bharat Bhushan Gupta and Others*¹⁰ and *Indian Oil Corporation Limited vs. NCC Limited*¹¹.

12. The judgment in *Booz Allen and Hamilton Inc.*¹², cited by Mr. Joshi, also clearly holds¹³ that in an application under Section 11 of the Act, questions of arbitrability or appropriateness of adjudication by a private forum should rarely be gone into once the existence of the arbitration agreement is established. To this extent, the judgment is, in

⁹ Emphasis supplied.

¹⁰ (2022) 4 SCC 156

¹¹ 2022 SCC OnLine SC 896 [Civil Appeal No. 341 of 2022, decided on 20.07.2022]

¹² Supra (note 3)

¹³ Paragraph 32



fact, against the respondent herein. The discussion in the said judgment, albeit in context of Section 8 of the Act, also does not deal specifically with the question raised by Mr. Joshi regarding arbitrability of a claim arising out of an allegation of defamation.

13. The order of the Madras High Court in *Srividya Krishna*¹⁴ is also not applicable. Leaving aside the question of whether a claim in defamation can at all be arbitrable in any circumstances, I find that the principal claim in the present case arises out of an allegation of breach of contract, and not in the tortious realm of defamation. Mr. Tiwari has drawn my attention to the specific clauses of the contract which deal with tenure, the lock-in period, as well as the non-compete and non-solicitation clauses. It is of course open to the respondent to resist the claims on all grounds, including those relating to the validity of these contractual stipulations. However, that does not *per se* render the claims non-arbitrable. Indeed, it indicates the existence of the disputes which requires reference to arbitration in terms of the mechanisms specified in the contract itself.

14. As held in the aforesaid judgments, these questions are best left to the arbitrator to decide except in a situation where on a reading of the facts of the case, the Court comes to the view that the claim is *ex-facie* non-arbitrable. In such circumstances, the Supreme Court has held that the Court would be entitled to decline appointment of an arbitrator in an effort to “*cut the deadwood*”. I am unable to accede to Mr. Joshi’s submission that the present case falls within this narrow category of cases where the claim is *ex-facie* non-arbitrable or that the

¹⁴ Supra (note 2)



appointment of the arbitrator ought to be declined on the grounds mentioned in the aforesaid judgments of the Supreme Court.

15. For the aforesaid reasons, the petition succeeds and is disposed of with the following directions:-

- a. Mr. Ramesh Singh, Senior Advocate [Tel: 9810071712] is appointed as the arbitrator to adjudicate the disputes between the parties under the Agreement dated 08.09.2021.
- b. At the suggestion of learned counsel for the parties, it is directed that the arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503.
- c. The learned arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering upon the reference.
- d. The remuneration of the learned arbitrator will be computed in terms of Schedule IV of the Act.

16. It is made clear that the rights and contentions of the parties are left open, including any plea raised by the respondent as to the arbitrability of any particular claim made before the learned arbitrator.

PRATEEK JALAN, J

AUGUST 4, 2022

'pv'

[corrected and released on August 11, 2022]