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

Date of decision: 15th May, 2024

+ **O.M.P. (T) (COMM.) 13/2024**

EXTRAMARKS EDUCATION INDIA PVT. LTD. Petitioner

Through: Mr. Zeeshan Hashmi and Mr. Ankit
Parashar, Advocates (M:
8802310640).

versus

SARASWATI SHISHU MANDIR Respondent

Through: Mr. Vivek Sharma, Advocate.

AND

+ **O.M.P. (T) (COMM.) 14/2024**

EXTRAMARKS EDUCATION INDIA PVT. LTD. Petitioner

Through: Mr. Zeeshan Hashmi and Mr. Ankit
Parashar, Advocates (M:
8802310640).

versus

SARASWATI SHISHU MANDIR Respondent

Through: Mr. Vivek Sharma, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petitions being ***O.M.P. (T) (COMM.) 13/2024*** and ***O.M.P. (T) (COMM.) 14/2024*** under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter, '*the Act*'), have been filed by the Petitioner-Extramarks Education India Private Limited, seeking substitution of the Id. Sole Arbitrator. The disputes in the present petition arise out of agreements dated 20th May, 2013 and 4th February, 2014 for sale, installation and services relating to Smart Learn Classes. Eventually the



agreements were terminated and there were outstanding dues. Petitioner is stated to have sent repeated emails dated 29th March, 2017, 31st March, 2017, 19th June, 2017 and final warning letter dated 24th July, 2017 for clearing the outstanding dues of the Petitioner. The Petitioner then sent a “Full and Final Settlement of Dues and Hardware” letter dated 13th November, 2017 conveying the intention to terminate the contract and also is stated to have offered settlement terms. Subsequently, owing to the non-responsiveness of the Respondent, a legal notice is stated to have been sent on 28th May, 2018 seeking recovery of outstanding amount and a reminder letter to the same was sent on 28th August, 2018.

3. In the present petitions, notice invoking arbitration under Section 21 of the Act, was sent by the Petitioner to the Respondent- Saraswati Shishu Mandir on 4th October, 2018 as per clause 13.1 of the agreement dated 20th May, 2013. Consequently, the Id. Sole Arbitrator was appointed in both the petitions. Id. Arbitrator sent notice dated 26th October, 2018 informing about the first procedural hearing to be conducted on 14th November, 2018. Hearings were conducted by the Id. Sole Arbitrator from 14th November, 2018 to 25th February, 2020 and the cross examination of the Petitioner was deferred to 25th February, 2020, after which nationwide lockdown was imposed, and hearings were deferred again. Further, attempts were made to resume the arbitration proceedings, but the same could not take place due to various reasons.

4. It is the case of the Petitioner that in view of the decision of the Id. Supreme Court in *Perkins Eastman Architects DPC & Am. v. HSCC (India) Ltd. [(2020) 20 SCC 760]*, any unilateral appointment would be



invalid and hence he has filed the present petition seeking appointment of Id. Sole Arbitrator to adjudicate the disputes.

5. On behalf of the Respondent-Mr. Vivek Sharma, Id. Counsel takes two objections:-

- i) that the petition is barred as it has been filed beyond the permissible time period. He relies upon the facts that pleadings were completed before the Id. Arbitrator in 2019 and the last date of hearing was 25th February, 2020. No steps were taken till 2024 by the Petitioner.
- ii) the second objection is that the Arbitration Agreement is not stamped.

6. The Court has considered the matter. Various dates which are relevant are set out herein below:-

Event	Dates
Date of reference of Id. Arbitrator	26 th October, 2018
Date of first procedural hearing	14 th November, 2018
Date of filing of statement of defence	26 th September, 2019
Last date of hearing of arbitral tribunal	25 th February, 2020 (6 months from 26 th September, 2019)
Twelve months from the completion of proceedings	26 th September, 2020 (excluded period)
Nation-wide lockdown	23 rd March, 2020
Limitation period as per the Supreme Court judgement in <i>Suo Moto Writ Petition (C) No. 3/2020</i>	15 th March, 2020 till 28 th February, 2022
Time period remaining after 1st March, 2022	6 months <i>i.e.</i> , till 1st September, 2022
Email sent to the Id. Sole Arbitrator	28 th December, 2022



7. Insofar as the time period till 28th February, 2022 is concerned, the same was excluded in view of the decision of the Id. Supreme Court in *Suo Moto Writ Petition (C) No. 3/2020*, which excluded the period from 15th March, 2020, to 28th February, 2022. After the said date, the Petitioner has written an email dated 28th December, 2022 asking the Id. Arbitrator to enter reference again. This according to the Id. Counsel for the Respondent is beyond the period of limitation.

8. The e-mail dated 28th February, 2022 reads as under:

IN THE MATTER OF ARBITRATION BETWEEN :- M/S. EXTRAMARKS EDUCATION INDIA PVT. LTD. Versus SARASWATI SHISHU MANDIR

Parashar A <a.parashar@albatlawoffices.com>

Wed, Dec 28, 2022 at 5:10 PM

To: arushilaw@gmail.com

Cc: advocatavivek17@gmail.com, info@saraswatishishumandir.com, Zeeshan Hashmi <hashmielba@gmail.com>, Kashi Zafar <k.zafar@albatlawoffices.com>, JAVED ANSARI <javed.ansari@extramarks.com>

Respected Me'am,

We are the counsel for the claimant in the captioned matter. The present matter was pending before your good self for adjudication but the same could not be concluded due to efflux of time as per the Arbitration and Conciliation Act. The counsels for the claimant tried to contact your goodself on various occasions but no reply was received by them. It is hereby requested to kindly provide the certified copy of the Arbitral Record so that the claimant may avail the succeeding legal proceedings as per law.

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Thanks and regards,

Ankit Parashar

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9. Section 14 of the Act applies when an Arbitrator becomes *de jure* or *de facto* unable to perform their duties, fails to act without undue delay, withdraws from office, or the parties agree to terminate their mandate. In such scenarios, the Arbitrator's mandate terminates. Section 15 provides for the termination of the arbitrator's mandate and the appointment of a substitute arbitrator. This substitution allows the arbitration proceedings to



continue from where the original arbitrator left off. These provisions ensure that arbitration can proceed efficiently by replacing arbitrators who are unable to fulfil their roles, but they do not apply when the mandate terminates solely due to the expiry of the award-making period specified under Section 29A. In ***Religare Finvest Limited v. Widescreen Holdings Private Limited and Others*** (2024 SCC OnLine Del 2769), the Court held as under:

17. Section 14 of the Act delineates the circumstances in which there is Failure or impossibility of the Arbitrator to act. Section 15 of the Act provides for the Termination of mandate and substitution of Arbitrator. From conjoint reading of Sections 14 and 15, it is evident that the mandate of an Arbitrator shall terminate, if he becomes de jure or de facto unable to perform his functions or he withdraws from his office or the parties agree to the termination of his mandate.

18. In both the situations, it is only the mandate of the Arbitrator which comes to an end and, therefore, provision is made for the appointment of substitute Arbitrator who can continue from the stage where the earlier Tribunal left the proceedings. For this, reference may be made to the decision in Chemical Sales Corporation v. A & A Laxmi Sales and Service Private Limited, 2011 SCC OnLine Del 3847, wherein the Co-ordinate Bench of this Court observed that the termination of arbitral proceedings is different from the termination of the mandate of Arbitrator. The mandate of the Arbitrator depending upon the facts and circumstances of the case, may come to an end, but not the arbitral proceedings. For example, if the parties to the Arbitration Agreement had fixed a period of six months from the completion of arbitral proceedings and the Arbitral Tribunal fails to do so, the mandate of the Arbitral Tribunal shall come to an



end, but not the arbitration proceedings and in such eventually, the substitute Arbitrator, if appointed, shall continue with the arbitration proceedings from the stage where it had been left by the earlier Arbitrator.

19. Similarly, in the decision in the case of SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited, 2017 SCC OnLine SC 1210, the Supreme Court highlighted that in the case of termination of arbitral proceedings, the proceedings itself do not survive and there is no scope for the appointment of a substitute Arbitrator. Whereas in the case of termination of the mandate of the Arbitrator, the proceedings survive thereby leaving the scope for appointment of a substitute Arbitrator.”

10. In the present case the Id. Sole Arbitrator was appointed by the parties in 26th October, 2018 and the Statement of Defence was filed by on 26th September, 2019. The pleadings were thus, completed and the period of 12 months for the completion of the trial by the Id. Arbitrator, commenced. However, due to COVID pandemic, the proceedings were discontinued. Subsequently, after the period of exclusion, the Petitioner is stated to have reached out to the Id. Arbitrator on multiple occasions. However, the said Arbitrator did not respond back. Thus, in view of the circumstance, the arbitral proceedings in the matter were not terminated but the Id. Arbitrator has been non-responsive and is unable to perform his functions. Accordingly, in view of provisions of Section 14 and 15 of the Act, the present circumstance is suited for appointment of a substitute Arbitrator for adjudicating the disputes.



11. In so far as the issue regarding stamping of the arbitration agreement is concerned, reliance is placed on a recent decision of the Seven Judges' Bench in *In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899 (2023 SCC OnLine SC 1666)* which holds that the stamping of the arbitration agreement is not compulsory for invoking arbitration. Thus, the said objection by the Respondent does not stand. Accordingly, the matter is referred to DIAC.

12. Considering the fact that the Petitioner has delayed the arbitral proceedings for some time and the Respondent being a school, which has already borne one set of fee to the Id. Arbitrator, it is agreed by Id. Counsel for the Petitioner that the Petitioner will bear the entire fee of the new Id. Arbitrator.

13. In view of the above, **Ms. Zubeda Begum Advocate (Mob.:9868119078)** is appointed as the new arbitrator. The arbitration proceedings shall take place under the aegis of the Delhi International Arbitration Centre (hereinafter, 'DIAC'). The arbitration proceedings shall be conducted under the Rules of DIAC. The fee of the Id. Sole Arbitrator shall be as per the Fourth Schedule of the Act, as amended by the DIAC Rules, 2023. The fee of the Id. Arbitrator shall now be borne by the Petitioner. The new Id. Arbitrator shall now proceed from the stage where the earlier Id. Arbitrator had stopped the proceedings. Id. Counsel for the Petitioner and the Respondent shall reconstruct the arbitral record and submit the same to the DIAC.



2024:DHC:4084



14. List before the DIAC on 8th July, 2024 at 3:00 p.m. Let a copy of the present order be emailed to Secretary, DIAC on the email id- delhiarbitrationcentre@gmail.com. All contentions of the parties are left open.

15. Petition is disposed of with all pending applications, if any.

PRATHIBA M. SINGH
JUDGE

MAY 15, 2024

mr/bh

(Corrected & released on 20th May, 2024)