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

+ ARB.P. 749/2024

M/S PROFICIENCY LEARNING SOLUTIONS
PVT LTD

.....Petitioner

Through: Mr. Himanshu Mahajan, Mr.
Lakshay Chhabra, Advocates.

versus

M/S TULIP EDUCATIONAL AIDS & ANR.Respondents

Through: Mr. K.B. Rao, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

28.08.2024

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1. The petitioner has filed this petition, under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], for appointment of an arbitrator to resolve disputes between the parties under an agreement, stated to have been entered into on 11.02.2022, entitled “Agreement for supply of Educational Books” [“the Agreement”].

2. Mr. Himanshu Mahajan, learned counsel for the petitioner, submits that the Agreement was signed alongwith a “Customer Registration Form and Agreement” dated 11.02.2022, and included two annexures (“Annexure A” and “Annexure B”). The Agreement contains an arbitration clause (Clause 15), which provides for adjudication by a sole arbitrator mutually appointed by the parties. It is also provided that the arbitration would be held in Delhi and the seat of the arbitration would be Delhi. Clause 14 further provides for exclusive jurisdiction of the Courts



in Delhi.

3. Disputes having arisen between the parties, the petitioner invoked arbitration by an email dated 17.02.2024. There was further correspondence between the parties, which shall be adverted to later in this order. However, parties were unable to achieve consensus on the appointment of an arbitrator. The petitioner has therefore approached this Court under Section 11 of the Act.

4. Pursuant to notice issued on 27.05.2024, Mr. K.B. Rao, learned counsel, enters appearance on behalf of the respondent. He states that a reply has been filed, which is not yet on record. A copy of the reply has been handed over in Court, and is taken on record.

5. Mr. Rao states that, in the reply, the respondent has broadly made two points to resist the appointment of an arbitrator: (i) that the Agreement is undated; and (ii) that the Agreement is not signed by the respondent.

6. At the stage of adjudication of a petition under Section 11 of the Act, the Court is only required to examine *prima facie* as to whether an arbitration agreement exists between the parties. The recent judgment of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024 SCC OnLine SC 1754], makes it clear that the exercise of jurisdiction at the pre-referral stage is limited to this aspect, and that too only on a *prima facie* consideration.¹ If the Court is *prima facie* satisfied in this regard, a conclusive determination, even on the question of the existence of an arbitration agreement, is to be left to the arbitral tribunal, consistent with the principle of *kompetenz kompetenz*.



7. Viewed from this perspective, the petitioner has made out a case for reference to arbitration. Document No. 4 of the petition consists of the “Customer Registration Form and Agreement”, the “Agreement for supply of Educational Books” (in which the arbitration clause is incorporated), and two annexures. The points urged by Mr. Rao is that the document entitled “Agreement for Supply of Educational Books” is undated, and the respondent No. 1 has also not signed the said document. However, the document itself refers, in Clause 3, to discounts on the products in question as stated in an annexure. “Annexure A” (at page 44 of the petition) provides for a discount of 55%, and is signed, both by the authorised representative of the petitioner and by the proprietor of the respondent No. 1, being the respondent No. 2 herein. While the signature of the respondent No. 2 does not appear at the appropriate place on the Agreement itself, the petitioner has *prima facie* been able to establish that “Annexure A” is a part of the Agreement, and does bear the signature of respondent No. 2, on behalf of respondent No. 1.

8. Further, the chain of correspondence thereafter also establishes this position. The notice invoking arbitration was served upon the respondents by an email of the petitioner, dated 17.02.2024. In a response dated 02.03.2024, the respondents contended that they were not given a copy of the Agreement and were therefore unaware of the arbitration clause. While disputing the appointment of the arbitrator proposed by the petitioner, however, the respondents stated, “*Hence the arbitrator may be appointed as per our mutual consent*”. Further emails from the petitioner, dated 02.03.2024 and 07.03.2024, have also been placed on record, by

¹ Paragraphs 110 to 114.



which a copy of the Agreement has been sent to the respondents and the respondents have been invited to propose the name of an arbitrator. The respondent did not respond to these further communications.

9. The judgments of the Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.* [(2009) 2 SCC 55] and *Powertech World Wide Ltd. v. Delvin International General Trading LLC.* [(2012) 1 SCC 361], make it clear that the existence of an arbitration clause is ultimately dependent upon the intention of the parties, which can be ascertained from the terms of the agreement and attendant circumstances, including correspondence exchanged between the parties. Having regard to the aforesaid correspondence in the present case, it appears *prima facie* that the parties were *ad idem* on the decision to refer the parties to arbitration.

10. Needless to say, in terms of the judgment of the Supreme Court in *SBI General Insurance Co. Ltd.* [*supra*], these observations are only *prima facie* conclusions, necessary to determine the application under Section 11 of the Act. It will be open to the respondents to raise their contentions with regard to the existence of the arbitration agreement, before the arbitral tribunal for a final decision in accordance with law.

11. The petition is therefore allowed and the disputes between the parties are referred to arbitration under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 ["DIAC"]. DIAC is requested to nominate an arbitrator from its panel. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

12. The arbitration proceedings will be governed by the Rules of



DIAC, including as to the remuneration of the learned arbitrator.

13. It is made clear that all rights and contentions of the parties are left open for adjudication by the learned arbitrator.

PRATEEK JALAN, J

AUGUST 28, 2024/“Bhupi”/