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

+ **ARB.P. 870/2023 and I.A. 16066/2023**

CAPRI GLOBAL CAPITAL LIMITED Petitioner

Through: Ms. Shweta Kapoor, Advocate.

versus

MS. KIRAN Respondent

Through: Mr. Surender Gupta, Mr. Deepak
Rana, Mr. Binod Kr. and Mr.
Nagender Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

21.05.2024

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I.A. 16066/2023

By way of the present application filed on the principles of section 151 of the Code of Civil Procedure 1908, the plaintiff seeks condonation of 48 days' delay in *re-filing* the petition.

2. For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed.
3. Delay in *re-filing* the petition is condoned.
4. The petition is taken on Board.
5. The application stands disposed-of.



ARB.P. 870/2023

6. By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Facility Agreement dated 28.09.2017 ('Agreement').
7. Notice on this petition was issued on 24.08.2023; consequent upon which, reply dated 23.11.2023 has been filed by the respondent; to which rejoinder dated 08.01.2024 has also been filed by the petitioner.
8. Ms. Shweta Kapoor, learned counsel for the petitioner has drawn the attention of this court to clause 13.15 of the Agreement which comprises the arbitration agreement; and contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; with a further stipulation that the arbitration proceedings "*... shall be conducted at Mumbai or Delhi (as the Lender may elect)...*".
9. For completeness, it may be recorded that a separate territorial jurisdiction provision is also contained in clause 13.14 of the Agreement, which subjects the contract between the parties to the jurisdiction of competent courts "*... at Mumbai or Delhi, as the Lender may elect...* ".
10. Though the arbitration agreement also contemplates that a Sole Arbitrator is to be nominated by the Lender/Capri Global Capital Limited, that provision of the arbitration clause is, in any case,



untenable in law in view of the decision of the Supreme Court in *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*¹

11. As per the record, the petitioner invoked arbitration *vide* Notice dated 01.03.2023, to which the respondent did not send any reply.
12. The main objection raised by learned counsel for the respondent is that Invocation Notice dated 13.09.2019 issued by the petitioner, which was the basis of the first arbitral proceedings, was faulty and did not amount to a proper invocation notice under section 21 of the A&C Act, inasmuch as the petitioner had not set-out its claim against the respondent in that notice.
13. The record shows, that the first round of arbitral proceedings culminated in an *ex-parte* Arbitral Award dated 13.03.2020, which was set-aside *vide* judgment dated 31.10.2022 passed by the learned District Judge, Saket, on the ground that the learned Arbitrator in that proceedings had been appointed unilaterally by the petitioner; and that therefore the appointment was invalid in view of the law laid down in various judgments of the Supreme Court, as detailed in that order.
14. The record further shows, that consequent upon the setting-aside of the said arbitral award, the petitioner issued to the respondent a fresh Invocation Notice dated 01.03.2023 under section 21 of the A&C Act, claiming an outstanding amount of Rs. 6,13,562/- following the recall of the loan facility extended to the respondent and her deceased husband *vide* Loan Recall/Demand Notice dated 22.08.2019; nominating an Arbitrator; and seeking consent of the respondent for

¹ (2020) 20 SCC 760



the said nominee. It is this second Invocation Notice dated 01.03.2023 that is the foundation of the present petition under section 11 of the A&C Act. Since the second invocation notice contained the outstanding amount claimed and also duly invoked arbitration, there is no merit in the respondent's objection to that effect.

15. Next, learned counsel for the respondent contends that since the first invocation, viz. Notice dated 13.09.2019, was itself faulty, the claim made by the petitioner by way of the present petition is *ex-facie* time-barred.
16. Though counsel on both sides have relied upon certain judicial precedents in support of their respective contentions as to whether the claims are time-barred since the first invocation notice was faulty, it is observed that section 43(4) of the A&C Act expressly provides that where an arbitral award is set-aside, the period between the commencement of the arbitration and the date on which the court set-aside the arbitral award, is to be excluded for computing the time prescribed by the Limitation Act, 1963 for commencement of arbitral proceedings with respect to the disputes in question.
17. Furthermore, even if the respondent were to persist with her objection as to the claims being time-barred, this court is of the view, that for the limited purpose of the proceedings under section 11 of the A&C Act, the claims sought to be raised by the petitioner by way of the present proceedings cannot be held *ex-facie* time-barred or deadwood.
18. It is now settled law, that if a court seized of section 11 of A&C Act proceedings is in doubt as regards the question of limitation, the correct course of action for the court is to refer the matter to



arbitration, leaving it to the arbitral tribunal to delve into the details of the objection as to limitation.²

19. Upon a conspectus of the averments contained in the petition, the stand taken by the respondent, and the submissions made, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in Invocation Notice dated 01.03.2023, do not appear *ex-facie* to be non-arbitrable.
20. Accordingly, the present petition is allowed and **Mr. Amer Vaid, Advocate (Cellphone No. : +91 9818239395)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
21. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
22. The learned Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed-to between the parties and the learned Arbitrator.
23. Parties shall share the arbitrator's fee and arbitral costs, equally.

² *Bharat Sanchar Nigam LTD. & Anr. vs. Nortel Networks India Pvt. Ltd.*, (2021) 5 SCC 738, para 47



24. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
25. Parties are directed to approach the learned Arbitrator appointed within 04 weeks.
26. A copy of this order be communicated by the Registry *via* e-mail to the learned Sole Arbitrator, as also to learned counsel for the parties.
27. The petition stands disposed-of in the above terms.
28. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MAY 21, 2024/ak