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

Date of decision: 22nd February, 2023

+ **ARB.P. 1221/2022**

M/S FIITJEE LTD.

..... Petitioner

Through: Ms.Revati Gulati, Ms.Diksha
Narula, Adv.

versus

ASHISH KHARE & ANR.

..... Respondents

Through: Mr.Apoorva Bhumes and
Ms.Madhavi Khare, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the employment of the respondent no.1 with the petitioner as a faculty member in the Department of Math on 17.04.2010.

2. It is the case of the petitioner that the respondent no.1 was, during his employment with the petitioner, transferred to M/s USA UNIVQUEST with effect from 01.05.2016. The said M/s USA UNIVQUEST amalgamated with the petitioner Company on 03.04.2019. In the meantime, the respondent no.1 left the services of the petitioner on 05.02.2018.

3. It is the case of the petitioner that the respondent no.1 thereafter co-founded a competitor academy namely 'Venkateshwara Academy' and started working there as Founder, Mentor and Director. The petitioner claims that the same was in violation of the Service Rules.

4. The petitioner, thereafter, vide notice dated 19.02.2019, invoked the Arbitration Agreement as contained in Clause 36(a) of the Service Rules for the Employees of M/s FIITJEE Ltd (Faculty Members) (hereinafter referred to as the 'Service Rules'). As the Arbitration Agreement granted a right to the petitioner to appoint the Sole Arbitrator, a Sole Arbitrator was appointed by the petitioner. Certain proceedings also took place before the Sole Arbitrator so appointed. Details of the same are not relevant for the purpose of the present petition.

5. The respondent thereafter filed an application under Section 14 of the Act seeking termination of the mandate of the Arbitrator so appointed by the petitioner, being OMP(T)(COMM) 17/2021. By an order dated 14.03.2022, the learned District Judge (Commercial-02), South District, Saket, New Delhi was pleased to hold the Sole Arbitrator appointed by the petitioner to be *de-jure* ineligible to act as an Arbitrator and accordingly terminated his mandate. The petitioner thereafter filed the present petition seeking appointment of an Arbitrator.

6. The learned counsel for the respondents submits that in terms of Section 14 of the Act, it would be for the Court which terminates the mandate of the earlier Arbitrator to appoint a substitute Arbitrator. He submits that the petitioner cannot invoke the provision of Section 11 of the Act, having failed to pray for appointment of a substitute Arbitrator before the learned District Judge.

7. He further submits that in the present case, the purported invocation of the arbitration agreement by the petitioner itself cannot be relied upon. He submits that the petitioner has invoked the Arbitration Agreement as contained in Service Rules. The said Service Rules were applicable when the respondent no.1 was in employment with the petitioner. He submits that the respondent no.1 had left such employment and joined M/s USA UNIVQUEST on 01.05.2016, and was thereafter governed by the 'Corrigendum and Addendum' dated 12.05.2016 between the respondent no.1 and the said company. The said Corrigendum contained a separate Arbitration Agreement, which has not been invoked by the petitioner. He submits that a notice under Section 21 of the Act is a *sine qua non* for initiating a proceeding under Section 11 of the Act. The same having not properly been given, the present petition is not maintainable. In support, he places reliance on the judgment of this Court in ***Alupro Building System Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***, 2017 SCC OnLine Del 7228, and of the High Court of Bombay in ***D.P. Construction v. Vishvaraj Environment Pvt. Ltd.***, 2022 SCC OnLine Bom 1410.

8. The learned counsel for the respondent submits that Clause 36(a) of the Service Rules would not be attracted even though the Corrigendum executed with the M/s USA UNIVQUEST states that the respondent no.1 shall be bound by all the terms and conditions of the Service Rules signed at the time of joining the petitioner. Placing reliance on the judgment of the Supreme Court in ***M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.***, 2009 (7) SCC 696, he submits that for an Arbitration Agreement to be incorporated into the subsequent agreement, the said incorporation has to be specific and cannot be implied.

9. He further submits that the petitioner cannot also seek benefit of its assertion that M/s USA UNIVQUEST is a group company of the petitioner. Placing reliance on the judgment of the Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*, (2022) 8 SCC 1, he submits that a non-signatory cannot be bound by an Arbitration Agreement even though it is a group company. He submits that the letter of invocation is also by M/s USA UNIVQUEST, which has a separate Arbitration Agreement. Though M/s USA UNIVQUEST may have subsequently amalgamated with the petitioner, the same would have no bearing, its invocation being bad in law.

10. The learned counsel for the respondent no.1 further submits that the respondent no.1 had executed a full and final settlement on 03.04.2018 with M/s USA UNIVQUEST at the time of leaving its employment. With the execution of the said document, the *inter-se* claims between the parties stood fully and finally settled and the Arbitration Agreement as contained in Corrigendum or in the Service Manual cannot be invoked either by the M/s USA UNIVQUEST or by the petitioner. In support, he places reliance on the judgment of the Supreme Court in *M/s Meenakshi Solar Power Pvt. Ltd. v. M/s Abhyudaya Green Economic Zones Pvt. Ltd. & Ors*, 2022 SCC OnLine SC 1616.

11. He finally submits that even otherwise the claim made by the petitioner is in derogation of settled principles of the Indian Contract Act, 1872 and against the Public Policy of India. The petitioner is seeking compensation on the ground of violation of the non-compete-clause which has been held to be invalid and unenforceable in *Percept D'Mark*

(India) Pvt. Ltd. v. Zaheer Khan & Anr., (2006) 4 SCC 227. In fact, the petitioner is the successor in interest of M/s USA UNIVQUEST and, therefore, even otherwise cannot enforce the said covenant.

12. The learned counsel for the petitioner in rejoinder submits that the respondent no.1 never left the service of the petitioner. He was merely transferred to M/s USA UNIVQUEST as is evident from the transfer letter dated 24.04.2016. On such transfer, even in terms of the Corrigendum, the respondent no.1 remained bound to the Service Rules of the petitioner. She submits that, therefore, the M/s USA UNIVQUEST rightly invoked the Arbitration Agreement as contained in Clause 36(a) of the Service Rules.

13. On the question of the substitute Arbitrator being appointed under Section 14 of the Act, the learned counsel for the petitioner submits that the Court having terminated the mandate of the Arbitrator appointed by the petitioner, the parties were relegated to the procedure agreed upon for appointment of the Arbitrator, failing which the petitioner has rightly invoked the provision of Section 11 of the Act.

14. She submits that the plea of the respondent no.1 on full and final accord and satisfaction as also claim of the petitioner being not maintainable under the Indian Contract Act, cannot be considered by this Court while exercising its power under Section 11 of the Act. She submits that even with the execution of full and final settlement, the respondent no.1 remained bound by the terms of the employment contract, which are sought to be now enforced by the petitioner. She submits that it was merely a settlement of accounts that was executed by the respondent no.1.

15. I have considered the submissions made by the learned counsels for the parties.

16. The respondent no. 1 was admittedly appointed with the petitioner on 17.04.2010. Clause 36(a) of the Service Rules contained an Arbitration Agreement between the parties, and is reproduced herein below:-

“36(a) All disputes and differences of any nature FIITJEE service manual and the interpretation & adjudication of clauses and claims respectively shall be referred to the Sole Arbitrator appointed by the Company i.e FIITJEE Ltd.. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and statutory modification thereof & rules made thereunder. The award of arbitrator shall be final & binding on both the parties. The award of the arbitrator shall be final & binding on every matter arising hereunder. It is further agreed that in spite of the fact that the Sole Arbitrator may be known to any of the Directors or share-holders and that he may have been dealing with the Company or had occasion to deal with any matter of this agreement shall not disqualify him. Even if the Arbitrator may have expressed opinion in similar matter earlier shall also not render him disqualified. The venue of the arbitration shall be Delhi /New Delhi only.”

17. While the respondent no. 1 claims that he resigned from the service of the petitioner and joined M/s USA UNIVQUEST, it is the case of the petitioner that the respondent was transferred to M/s USAUNIVQUEST, which was a group Company of the petitioner. The learned counsel for the petitioner has produced a copy of the letter dated 24.04.2016 in support of her above stand. The said letter reads as under:-

“Subject: Transfer of Services

Dear Mr. Khare,

The management is pleased to inform you that as per the terms of your appointment letter, your services are being hereby transferred to 'USA UNIVQUEST PRIVATE LIMITED' on same terms and conditions of your appointment letter, with effect from May 1, 2016 with continuity of employment. The amount accumulated upto April 30, 2016 in sincerity fund shall be transferred in due course. Your present emoluments shall be protected. All other terms and conditions of your employment shall remain the same.

Kindly acknowledge the receipt and return a signed copy of this letter as token of your acceptance."

18. In view of the above letter, there is an underlying dispute between the parties as to whether the employment of the respondent no.1 with the petitioner was terminated on his transfer to M/s USA UNIVQUEST, or it was merely a case of transfer.

19. The Corrigendum itself states that the respondent no.1 shall remain bound by all the terms and conditions of the Service Rules Manual and Code of Conduct signed by him at the time of joining and amendments made thereto. The said Corrigendum also contained the Arbitration Agreement, which is *pari materia* to Clause 36(a) of the Service Rules, and is reproduced herein below:-

"All disputes and differences of any nature with regard to the USA UnivQuest Service Rule Manual/terms and conditions and the interpretation & adjudication of clauses and claims respectively shall be referred to the Sole Arbitrator appointed by the Company. The employee hereby agrees to the appointment of the Sole Arbitrator by the Company whenever any dispute arises. The employee undertakes not to

oppose the said appointment of the Sole Arbitrator. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and statutory modification thereof & rules made thereunder. The award of arbitrator shall be final & binding on both the parties. The award of the arbitrator shall be final & binding on every matter arising hereunder. It is further agreed that in spite of the fact that the Sole Arbitrator may be known to any of the Directors or share holders or may have been appointed as an arbitrator earlier by the company shall not disqualify him. Even if the Arbitrator may have expressed opinion in similar matter earlier shall also not render him disqualified. The venue of the arbitration shall be Delhi/New Delhi only.

Subject to hereinabove, the exclusive jurisdiction in the matter shall vest in Delhi/New Delhi Courts.”

20. M/s USA UNIVQUEST invoked the Arbitration Agreement, albeit as contained in Clause 36(a) of the Service Rules. Even assuming that the respondent no. 1 is governed only by the Arbitration Agreement as contained in the Corrigendum, it is settled law that mere reference to a wrong provision or terms of the Agreement cannot invalidate the notice if otherwise such power or provision exists in the document. Therefore, even assuming that Clause 36(a) of the Agreement would not be applicable to the parties, as there cannot be a dispute on existence of the Arbitration Agreement in Corrigendum, which is relied upon by the respondent himself, it cannot be said that the invocation of the arbitration by the M/s USA UNIVQUEST cannot be acted upon.

21. In *Alupro Building Systems Pvt. Ltd.(supra)*, the Court was considering a case of unilateral appointment of an arbitrator by one of the

parties to the agreement without issuing a notice under Section 21 of the Act. The Court held that issuance of a notice under Section 21 of the Act is a mandatory condition. The said judgment shall have no application to the facts of the present case as it is not disputed that M/s USA UNIVQUEST had issued notice dated 19.02.2019 to the respondents.

22. In ***D.P. Construction*** (*supra*), the Court was considering whether a petition under Section 11 of the Act can be filed without first invoking the Arbitration Agreement by way of a notice under Section 21 of the Act. The Court answered in the negative. The said judgment, however, again has no application to the facts of the present petition inasmuch as the present petition is preceded by a notice under Section 21 of the Act.

23. The submission of the learned counsel for the respondent no. 1 that the notice having been issued by M/s USA UNIVQUEST, the present petition cannot be filed by the petitioner herein, is also ill founded. It is not disputed that M/s USA UNIVQUEST has amalgamated with the petitioner company on 03.04.2019. Therefore, the petitioner shall be entitled to maintain the present petition. The judgment of ***Cox and Kings Ltd.*** (*supra*) shall have no application to the facts of the present petition.

24. As far as the reliance on Section 14 of the Act is concerned, the same is as under:

“Section 14

Failure or impossibility to act.—(1) *The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—*

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) *If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.*

(3) *If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”*

25. In terms of Sub-Section (1) of Section 14 of the Act, the mandate of an Arbitrator shall terminate, and he shall be substituted by another Arbitrator if he becomes *de jure* or *de facto* unable to perform his functions. In Sub-Section (2), it is stated that in case a controversy remains concerning an Arbitrator’s ineligibility, a party may apply to the “Court” to decide on the “Termination of the Mandate”.

26. In the present case, the respondent no.1 invoked the said provision and applied for termination of the mandate of the Arbitrator appointed by the petitioner unilaterally. The same was rightly terminated by the learned District Judge vide its order dated 14.03.2022.

27. Sub-Section 2 of Section 15 of the Act states that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed in accordance to the rules that were applicable to the appointment of the arbitrator being replaced. In the present case, as the Arbitration Agreement provides for appointment of a Sole Arbitrator by the petitioner, the said Arbitrator could not have been appointed in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC and Another vs. HSCC (Limited)*, (2020) 20 SCC 760. The

petitioner has, therefore, rightfully approached this Court for appointment of an Arbitrator.

28. In view of the above, I find no merit in the objection of the respondent no. 1 to the maintainability of the present petition relying upon Section 14 of the Act.

29. On the issue of the full and final settlement, the said document is dated 03.04.2018, and is reproduced hereinbelow:

*“Received Cheque No. “115393” Dated March 21, 2018 for Rs.10,47,245/- (Rupees Ten Lacs Forty Seven Thousand Two Hundred Forty Five only.) and Cheque No. “115894” Dated March 21, 2018 for Rs.9,69,462/- (Rupees Nine Lacs Sixty Nine Thousand Four Hundred Sixty Two only.) drawn on Axis Bank, Green Park New Delhi-110016 from **USA UNIVQUEST PVT LTD**, on account of payment towards all dues till February 2, 2015.*

*I am satisfied & happy with the amount given to me and now there is no claim pending against **USA UNIVQUEST PVT LTD** in any manner whatsoever.*

*I hereby undertake that I had not used and shall not use/divulge any confidential information acquired by me during my services at **USA UNIVQUEST PVT LTD** regarding working in **USA UNIVQUEST PVT LTD** to any of the competitors of **USA UNIVQUEST PVT LTD** or anybody else from the date of leaving **USA UNIVQUEST PVT LTD** by word of mouth or any written communication to anybody.*

*I hereby undertake that since I have already left **USA UNIVQUEST PVT LTD**, therefore, I will not continue to show my association/ working in any forum/ on websites/social media etc. or otherwise in any manner whatsoever, as if I am still working with **USA UNIVQUEST PVT LTD** or its associate /subsidiary companies etc. Further, I undertake to refrain myself from posting any slanderous, libellous posts/comments/articles or giving interviews on*

social/electronic/print media with respect to my association with USA UNIVQUEST PVT LTD, its working and functioning or for any reason whatsoever which may result in defaming USA UNIVQUEST PVT LTD or its associate /subsidiary companies etc., employees or its directors etc. Further, I also undertake to provide assistance with respect to tasks, assignments or any other matters thereto, whenever I am called upon by USA UNIVQUEST PVT LTD.

In the event of any non-compliance /failure on my part to the terms & conditions, I shall be liable for appropriate action by USA UNIVQUEST PVT LTD as it deem fit.”

30. A reading of the above document *prima facie* shows merit in the submissions of the learned counsel for the petitioner that the same was merely an acknowledgment of settlement of accounts owed to the respondent no.1. In any case, in terms of the judgment of the Supreme Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*, (2021) 2 SCC 1, the effect of the said document is best left to be determined by the learned Arbitral Tribunal. This Court, at the stage of exercising its power under Section 11 of the Act, should not venture into the said disputed question of fact. Even in *M/s Meenakshi Solar Power Pvt. Ltd.* (*supra*) relied upon by the learned counsel for the respondent no. 1, it has been held as under:-

“16. In Vidya Drolia (supra), it has been further observed in relation to the aforesaid three categories in Boghara Polyfab Pvt. Ltd. (supra). The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to a more thorough examination in comparison to the second and third

categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, the question or issues are relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralized adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions or by necessary implication non-arbitrable as per mandatory statutes. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

17. Further, this Court observed that the court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. In the context of issue of limitation period, it should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”.

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19. In view of the aforesaid discussion, we find that High Court was not right in dismissing the petition under Section 11(6) of the Act of 1996 filed by the appellant herein by giving a finding on novation of the Share Purchase Agreement between the parties as the said aspect would have a bearing on the merits of the controversy between the parties. Therefore, it must be left to the Arbitrator to decide on the said issue also. Hence, the impugned judgment and order passed by the High Court has to be set-aside.

20. In the result, the appeal filed by the appellant is allowed and the impugned judgment and order passed by the High Court is hereby quashed and set aside.”

31. Similar is the fate of the submissions of the learned counsel for the respondents that the claim of the petitioner otherwise is not maintainable being in violation of the provision of the Indian Contract Act, 1972. Such plea is necessarily to be determined by the Arbitrator and not by this Court while exercising its power under Section 11 of the Act.

32. In view of the above, I see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above-mentioned agreement. I accordingly appoint Mr. Davinder Singh, Senior Advocate (Mobile: 9810039326), as a Sole Arbitrator for adjudicating the disputes between the parties.

33. The Arbitrator shall give the disclosure in terms of Section 12 of the Act before proceeding with the reference.

34. The fee of the Arbitrator shall be governed by Schedule IV of the Act.

35. It is made clear that the Arbitrator shall undertake the arbitration proceedings afresh. Any proceedings that had been undertaken by the earlier Arbitrator shall be treated as *non-est*. In such arbitration proceedings all objections of the respondents shall remain open and the learned Arbitrator shall decide the same remaining uninfluenced by any observation made herein above.

36. The petition is disposed of in the above terms.

NAVIN CHAWLA, J

FEBRUARY 22, 2023/Arya