

**2022 LiveLaw (Del) 449**

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

**SANJEEV SACHDEVA; J.**

**ARB.P. 326/2022; 13<sup>th</sup> May, 2022**

**MILLENNIUM EDUCATION FOUNDATION**

*Versus*

**EDUCOMP INFRASTRUCTURE AND SCHOOL MANAGEMENT LIMITED**

**Arbitration and Conciliation Act, 1996; Section 11 - Insolvency and Bankruptcy Code, 2016; Section 9 - Mere pendency of an insolvency petition is not a bar to the appointment of the arbitrator. Merely because an insolvency petition is pending, it cannot be an embargo on the power of the Court to decide arbitration applications. It is only when the insolvency petition is admitted and the moratorium is declared that the proceedings under the Arbitration Act would be non-maintainable.**

**Advocates who appeared in this case:**

For the Petitioner: Ms. Ekta Rai and Mr. Aadil Khan, Advocates

For the Respondent: Mr. Sanjeev Kumar and Mr. Anshul Sehgal, Advocates

**J U D G M E N T**

**SANJEEV SACHDEVA, J**

- 1.** Petitioner seeks reference of disputes arising out of collaboration agreement dated 20.10.2014 to arbitration and appointment of an Arbitral Tribunal.
- 2.** It is submitted by learned counsel for petitioner that a demand notice was issued by the respondent, which was duly responded. A counter-demand was made on the respondent which has not been paid and even the respondent was directed to agree to reference of disputes. On failure of the respondent, the present petition has been filed.
- 3.** Learned counsel for respondent submits that respondent has already filed a petition under Section 9 of the Insolvency and Bankruptcy Code, which is pending before the National Company Law Tribunal (NCLT). Consequently, the remedy of the petitioner is to file an application under Section 8 of the Arbitration and Conciliation Act (Arbitration Act, for short) before the NCLT for reference of the disputes to arbitration.
- 4.** He further submits that there is no demand raised by the petitioner against respondent and petitioner had merely replied to the demand raised by the respondent and instead of raising a demand, petitioner has proceeded further to appoint an Arbitrator under clause 17 of the collaboration agreement.
- 5.** To buttress his arguments, learned counsel for respondent relies on the judgment of the Supreme Court in *Indus Biotech Private Ltd. Vs. Kotak India Venture (Offshore)*, (2021) 6 SCC 436 to contend that an application under Section 8 of the Arbitration Act should have been filed before the NCLT.
- 6.** The subject arbitration clause contained in the collaboration agreement reads as under:-

## **“17 ALTERNATIVE DISPUTE RESOLUTION**

*All disputes arising in connection with or arising out this Agreement will be referred to final and binding arbitration under the provisions of Arbitration and Conciliation Act, 1996. For this purpose, the Parties hereby agree that MEF shall be entitled to appoint a sole arbitrator for the settlement of the dispute. The place of arbitration shall be at New Delhi and the language English. The arbitration award shall be final and binding upon the Parties.*

## **18 JURISDICTION**

*The obligations of the Parties under this Agreement shall be interpreted and construed according to the laws of India. Subject to Clause 17 herein above, the courts at New Delhi.”*

7. It is observed that there is no dispute with regard to the execution of the collaboration agreement or the fact that it contains an arbitration clause.

8. Respondent had issued a demand notice demanding certain payment of unpaid operational dues from the petitioner by its demand letter dated 31.12.2021.

9. The demand letter was responded to by the petitioner by its reply-cum-notice of dispute dated 13.01.2021. In the said reply while disputing the claim of the respondent, petitioner had in paragraph 4(i) called upon the respondent to pay a sum of Rs.1,97,70,192/- to the petitioner and thereafter, in the last paragraph contended that clearly the disputes had arisen and consequently proceeded to appoint an Arbitrator under clause 17 of the collaboration agreement.

10. In view of the above, it clearly cannot be held that no demand was made by the petitioner on the respondent. The merits of the demand or the validity of the same are not to be adjudicated in a petition under Section 11 and as such the same is not being commented upon. However, what is clear, from the notice of demand sent by the respondent and the reply by the petitioner, is that there are disputes between the parties with regard to the entitlement either of the respondent or the petitioner to receive certain amount from the other side.

11. Parties, as per the collaboration agreement, have clearly agreed to reference of disputes arising in connection with or out of the said agreement to arbitration under the Arbitration Act. The clause stipulates that in case of a dispute, petitioner shall be entitled to appoint a sole Arbitrator for settlement of disputes. Consequently, the petitioner in its reply appointed an Arbitrator, however, in view of the judgment of the Supreme Court in *Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.*, (2020) 20 SCC 760, the petitioner is not entitled to appoint an Arbitral Tribunal. Consequently, the petitioner has filed the subject petition seeking intervention of this Court for reference of disputes to arbitration and appointment of an Arbitral Tribunal.

12. The contention of learned counsel for respondent that petitioner should file a Section 8 application in the petition filed under Section 9 of the Insolvency and Bankruptcy Code before the NCLT is without any merit.

13. Further reliance placed by learned counsel for respondent on *Indus Biotech Private Ltd.*(supra) is misplaced. The Supreme Court in *Indus Biotech Private Ltd.*(supra) has held that the proceedings under the Insolvency and Bankruptcy Code would take precedence and NCLT would have to adjudicate the petition filed before it on its merit without being influenced by the pendency of the application filed under Section 8 of the Arbitration Act.
14. The Supreme Court has categorically held that the adjudicating authority i.e., NCLT has a duty to advert to the contentions put forth on the application filed under the Insolvency and Bankruptcy Code and to examine the material placed before it and record its satisfaction as to whether there is a default or not.
15. The Supreme Court has further held that if a petition under the Insolvency and Bankruptcy Code is admitted, upon the adjudicating authority recording its satisfaction then an application under Section 8 of the Arbitration Act would not be maintainable and the application under the Insolvency and Bankruptcy Code has to be decided first and the natural consequence of the same would befall on the application under Section 8 of the Arbitration Act.
16. In view of the judgment in *Indus Biotech Private Ltd.*(supra), the proceedings under the Insolvency and Bankruptcy Code would take precedence and any moratorium issued therein would automatically bind the proceedings under the Arbitration Act. I
17. In case the petition filed before the NCLT is admitted and moratorium comes into play, the legal consequences of the same would automatically apply to the proceedings under the Arbitration Act.
18. So long as the petition is merely pending and not admitted and no moratorium has commenced, there can be no embargo on the proceedings under the Arbitration Act and on the petitioner seeking reference of disputes and appointment of an Arbitral Tribunal.
19. In view of the above, there is no merit in the objection raised by the respondent on the appointment of an Arbitral Tribunal.
20. Accordingly, Mr. Justice S.P. Garg, (Retd) Former Judge of this Court (Mobile # +91 991384627, email: [spgard.ddc@nic.in](mailto:spgard.ddc@nic.in)) is appointed as the sole Arbitrator to adjudicate the claims and counter claims, if any, of the parties.
21. The fees of the learned Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996.
22. The Arbitrator shall furnish the requisite disclosures under section 12 of the Arbitration and Conciliation Act, 1996 within two weeks of entering reference.
23. Petition is disposed of in the above terms.