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

+ ARB.P. 691/2023

M/S KIMAYA BUILDTECH LLP Petitioner

Through: Mr. Mohit Nandwani, Advocate.

versus

K. C. SOFTWARE PVT. LTD & ORS. Respondents

Through: Mr. Anshu Mahajan, Advocate for
R-1, 6 & 11.

Ms. Mamta Wadhwa, Advocate for
R-2, 9 and 10.

Mr. Arunabh Banerjee, Mr.
Debashish Bhawmik, Advocates
for R-4 and 12.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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29.04.2024

1. By way of the present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of a sole arbitrator to adjudicate disputes between the parties under an Agreement dated 21.05.2018.

2. The Agreement contains an arbitration clause [clause 13] which provides that all disputes with respect to the said Agreement, shall be referred to arbitration as per provisions of the Act, and further provides that the place of arbitration shall be New Delhi.

3. Disputes having arisen between the parties, the petitioner



purportedly invoked arbitration by notice dated 08.04.2021. It is stated in the petition that replies were received to the said invocation notice, from some of the respondents, wherein they contended that the invocation was barred by limitation.

4. Pursuant to notice issued on 17.07.2023, Mr. Anshu Mahajan, learned counsel, enters appearance on behalf of respondent Nos. 1, 6 and 11, Ms. Mamta Wadhwa, learned counsel, enters appearance on behalf of respondent Nos. 2, 9 and 10, and Mr. Arunabh Banerjee, learned counsel, enters appearance on behalf of respondent Nos. 4 and 12.

5. From the order of the learned Joint Registrar dated 05.04.2024 it appears that all the 14 respondents have been served, but there is no specific mention one way or the other as to the status of service upon respondent No. 8. The service report shows that respondent No. 8 was served on 14.08.2023 and has subsequently appeared through counsel in these proceedings on 22.09.2023 and 04.10.2023. Respondent No. 3 has also been served on 30.01.2024, but is yet to enter appearance in these proceedings.

6. As all respondents have been served and sufficient time has lapsed for them to have entered appearance, it is not necessary to await their appearance any further.

7. The only objection taken by the respondents at this stage, is with respect to the petitioner's invocation being barred by limitation.

8. The judgments of the Supreme Court in *Vidya Drolia v. Durga Trading Corpn.* [(2021) 2 SCC 1] and *BSNL vs. Nortel Networks (India) (P) Ltd.* [(2021) 5 SCC 738], clearly hold that the issue of limitation may be considered by the Court at the stage of a petition under Section 11 of



the Act, only in limited circumstances – when the bar of limitation is *ex facie* evident from the petition and documents filed. The Court’s jurisdiction at the pre-reference stage is only to determine the *prime facie* existence of an arbitration agreement and the final adjudication, even on the question of limitation, is to be left to the arbitral tribunal, being the parties’ chosen forum. In cases of doubt, the default position is to refer the matter to the arbitral tribunal for final adjudication of the matter.

9. In the present case, the document placed on record shows *prima facie* existence of an arbitration clause in the Agreement dated 21.05.2018, which has been signed on behalf of the respondents. The appearing respondents have not denied the existence of the arbitration agreement, nor have they contended otherwise in their respective replies to the present petition. The notice of invocation, placed on record by the petitioner, shows that arbitration was invoked on 08.04.2021, which is within the prescribed limitation.

10. Although there is some controversy as to the genuineness of the said invocation and the actual date on which the petitioner invoked arbitration, in light of the above cited judgments of the Supreme Court, I am of the view that these issues ought to be left open for final adjudication by the arbitral tribunal.

11. In view of the above, the petition is allowed and disputes between the parties under the Agreement dated 21.05.2018, are referred to arbitration under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 [“DIAC”], and will be governed by the Rules of DIAC, including as to the remuneration of the learned arbitrator. DIAC is requested to nominate an arbitrator from its panel.



12. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

13. As all the respondents have not entered appearance in these proceedings, it is made clear that the respondents will be served afresh in the arbitration proceedings, in accordance with the DIAC Rules. All rights and contentions of the parties, including on limitation and maintainability of claims, are left open for adjudication before the learned arbitrator.

14. The petition stands disposed of with these observations.

PRATEEK JALAN, J

APRIL 29, 2024

“Bhupi/pv”/