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

Date of decision: 23rd September 2022

\+ ARB.P. 91/2022

EXTRAMARKS EDUCATION INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr. Zeeshan Hashmi, Advocate with Ms. A. Chaudhary, Advocate, Mr. Ankit Parashar, Advocate.

versus

SHRI RAM SCHOOL & ANR. ..... Respondents

Through: Mr. Siddharth Batra, Advocate with Mr. Chinmay Dubey, Advocate, Ms.Shivani Chawla, Advocate and Ms. Archna Yadav, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on 27.09.2022)

ANUP JAIRAM BHAMBHANI, J. (ORAL)

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Agreement dated 02.05.2014 ('Agreement' for short), which related to the sale, implementation and installation by the petitioner of certain hardware and multi-media system accessories along with software for the purpose of setting-up 24 Smart Learn Classes at several schools run by the respondents.

2. Notice on this petition was issued on 25.01.2022.

3. Mr. Zeeshan Hashmi, learned counsel for the petitioner has drawn the attention of this court to clause 11 of the Agreement which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration; with courts of law at New Delhi to have exclusive jurisdiction over disputes that so arise.

4. Although reply is stated to have been filed by the respondents, the same is not on record. A copy of the reply has been handed-up by learned counsel appearing for the respondents in court, which is taken on record.

5. Learned counsel for the respondents submits that their principal objection to the reference of disputes to arbitration is that the claims made by the petitioner, of which reference is sought, are *ex-facie* time-barred.

6. It is submitted on behalf of the respondents that the disputes between the parties have arisen from Agreements dated 02.05.2014, 31.03.2015, 30.05.2015 and 06.06.2016, all of which related to the setting-up of Smart Learn Classes at the respondents' schools, as referred to above.

7. All else apart, learned counsel appearing for the respondents points-out that, on their own admission, the petitioner invoked arbitration *vide* notice dated 28.07.2021 issued to the respondents, in which notice the petitioner itself set-out the following claims and also indicated the time when the said claims became due:

> *"5. However, once Our Client had delivered the hardware and installed the SLC's you started delaying payment instalments. Further, You the Noticees again misrepresented and gave false assurances that the said delay (sic) Therefore, the outstanding amount pending to be*

> *recovered from you the Noticees by our Client* ***is Rs. 29,28,100 (Rupees Twenty Nine Lakhs Twenty Eight Thousand One Hundred Only) Alongwith Interest @ 18% P.A. till the date of actual realisation/payment.***
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> *"6. Our Client had sent Legal Notice dated 04.01.2017 and a reminder notice dated 24.03.2017 for the recovery of outstanding dues. Further, Our Client has sent an Intimation Notice dated 22.08.2017 before the initiation of the judicial proceedings to you the Noticee.*
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> *"7. A dispute has arisen between you and Our Client, due to the fact that you the Noticee have completely failed to fulfil your obligations/liabilities with respect to the payment to be made to Our Client as per the terms and conditions of the Agreements. You have therefore, completely failed to perform your contractual obligations which have caused irreparable harm to Our Client's reputation and goodwill. You have further failed to clear the mounting outstanding debt of* ***Rs. 29,28,100 (Rupees Twenty Nine Lakhs Eight Thousand One Hundred Only) alongwith interest @ 18% P.A. till the date of actual Realisation/Payment*** *inspite of repeated reminders and various settlement talks."*
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> (emphasis in original)

8. It is further submitted, that it is admittedly the petitioner's case, that by legal notice dated 04.01.2017, the petitioner terminated agreement dated 02.05.2014 (in addition to Agreements dated 01.05.2015 and 01.06.2015) with the respondents; and, as narrated in para 6 of the invocation notice, the petitioner also sent reminder notices dated 24.03.2017 and 22.08.2017 to the respondents. However, the present petition under section 11 of the A&C Act has come to be filed only on 19/21.01.2022, which was well beyond the 03-year limitation provided for the petitioner to seek recovery of monetary dues.

9. The respondents argue that to invocation notice dated 28.07.2021, they issued reply dated 31.08.2021, wherein they disputed and denied the claims made by the petitioner; and though in reply dated

31.08.2021, the respondents did say that irrespective of the nature of the disputes *"...if your client proposed for appoint any one arbitrator near to the locality of my clients area they agree for give their consent for appoint an arbitrator to resolve the dispute...",* that in itself would not extend the period of limitation for the petitioner to seek remedy for recovery of its alleged claims.

10. In response to the objection taken, learned counsel for the petitioner has urged that, as is evident from Annexure-3 to Agreement dated 31.03.2015, the schedule of payments for the respondents to pay for the hardware extended upto May 2018; and furthermore, that in para 11 of reply dated 31.08.2021 issued by the respondents, they have admitted that the hardware in question was lying in the premises of the respondents until 2019 in the following words:

> *"11. My clients states that your client representatives unlawfully entered into my clients school premises in the year 2019 and took all the Hardwar (sic) and Multimedia accessories from my client school without the permission and consent of my clients. The act of your client's representatives would put my clients into great mental depression and worries and it will spoil the reputation of my clients school. Your clients had not acted upon the agreements entered into between your client and my clients."*

Learned counsel for the petitioner places reliance on the 03-year limitation period prescribed in Article 137 of the Limitation Act, 1963 to urge that since the petitioner's money claims against the respondents are founded *inter-alia* on the recovery of hardware from the respondents, the claims sought to be referred are within limitation.

11. In support of its submissions, the petitioner has cited decisions of Co-ordinate Benches of this court in ***Huawei Telecommunications***

(India) Co. Pvt Ltd & Anr vs. WIPRO Ltd[1] (para 32) and ***GAIL (India) Ltd vs. Rathi Steel and Power Ltd***[2] (para 14).

12. On the other hand, learned counsel for the respondents has placed reliance upon the decision of the Hon'ble Supreme Court in ***BSNL & Anr vs. Nortel Networks India Pvt. Ltd***[3] *inter-alia* drawing attention to paras 47 and 51 of that judgment, which read as follows:

> *"47.* ***It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference****. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.*
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> *"51.* ***The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise.*** *Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail."*
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> (emphasis supplied)

[1] 2022 SCC Online Del 195
[2] 2022 SCC Online Del 523
[3] (2021) 5 SCC 738

13. To be abundantly clear as to the concept of 'limitation' barring a legal remedy, the following observations of the Hon'ble Supreme Court *in* ***N. Balakrishnan v. M. Krishnamurthy***[4] may be noticed:

> *"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finislitium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."*
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> (emphasis supplied)

14. What is evident from a conspectus of the foregoing, is that the petitioner's claim against the respondents as raised in invocation notice dated 28.07.2021 is *only one*: *viz.* for payment of arrears of licence fee/other dues amounting to Rs.29,28,100/-, which is founded upon the termination of the contract by the petitioner *vide* notice dated 04.01.2017. To be sure, the petitioner's invocation notice does *not* contain any reference to any claim for recovery of hardware, supposedly lying with the respondents upto the year 2019.

[4] (1998) 7 SCC 123

15. Regardless of any correspondence exchanged between the parties thereafter, it is clear that the petitioner's cause of action *first arose* when the respondents failed to pay the monies due under the contract in addition to damages, as claimed by the petitioner *vide* its notice dated 04.01.2017. In fact, counsel for the petitioner has himself placed reliance upon Article 137 of the Limitation Act 1963 which reads as under:

Description of application	*Period of limitation*	*Time from which period begins to run*
"137. Any other application for which no period of limitation is provided elsewhere in this division	*Three years*	*When the right to apply accrues.*

16. As observed above, the claim in money is the *only claim* that was raised in invocation notice dated 28.07.2021; and the argument that the petitioner was also entitled to get back the hardware and other equipments lying with the respondents, is to be considered only to be rejected, since reply dated 31.08.2021 issued by the respondents records that such hardware was picked-up by the petitioner, which the petitioner does not dispute. Even more importantly, the law is clear that an invocation notice must set-out clearly the claims that a party wants referred to arbitration; and in the present case, no claim for recovery of hardware was at all contained in invocation notice dated 28.07.2021.

17. In the above view of the matter, the period of limitation applicable to the petitioner's claim is as follows: having terminated the contract with the respondents *vide* notice dated 04.01.2017, and the respondents having failed to pay the amounts claimed to be due, the petitioner ought to have issued the notice invoking arbitration within 03 years of that date, *viz.* by or before 03.01.2020. However, the petitioner issued the notice invoking arbitration only on 28.07.2021, which was evidently beyond the limitation prescribed in law.

18. To be clear, the limitation in this case is not saved even by order dated 10.01.2022 made by the Hon'ble Supreme Court in *Suo Motu* Writ Petition (Civil) No. 03/2020 whereby the Hon'ble Supreme Court was pleased to direct that running of limitation would be held in abeyance for the period *from 15.03.2020 to 28.02.2022* since the limitation in respect of the petitioner's claim ran-out on *03.01.2020 i.e.* before the date of which the Hon'ble Supreme Court's order takes effect.

19. For completeness, the two other objections raised on behalf of the petitioner may also be answered. The petitioner's objection that the schedule of payments, as set-out in Annexure 3 to Agreement dated 31.03.2015, ran up-to May 2018 is of no relevance of consequence, for the reason that admittedly the petitioner terminated the contract with the respondent by Notice dated 04.01.2017; and could not therefore have demanded payment up-to May 2018 in the same breath. The petitioner's other objection, that since in its reply dated 31.08.2021 the respondent themselves were willing to accept and had given their consent for appointment of an arbitrator *"near to the locality"* where the respondents were located, is neither here nor

there, since if the court finds that the payments made are *ex-facie* time-barred, limitation *for invoking a legal remedy* cannot be extended even by consent. Conceptually, limitation bars a *legal remedy* and not a *legal right*, the legal policy being to ensure that legal remedies are not available endlessly but only up-to a certain point in time. Needless to add however, that if the respondents are conceding the petitioner's claim itself, and are ready and willing to pay-up, such payment would not be illegal and there could not be any legal impediment in doing so. A party may concede a claim at any time; *but cannot concede availability of a legal remedy* beyond the prescribed period of limitation.

20. As a sequitur to the above discussion, this court is of the opinion that the petitioner's claim against the respondent is *ex-facie* time barred and is accordingly 'deadwood'; and does not require to be referred to arbitration.

21. The present petition is accordingly dismissed.

22. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

SEPTEMBER 23, 2022/Ne