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

+ **ARB.P. 1178/2024**

M/S SMARTSCHOOL EDUCATION PRIVATE LIMITED

.....Petitioner

Through: Mr. Sachin Dhamija and Ms.
Ashmeet Kaur, Advs.

versus

M/S BADA BUSINESS PVT. LTD AND ORSRespondents

Through: Mr. Aditya Vardhan Sharma, Mr.
Yash Singhal, Advocates for R-1, R-3
& R-4

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

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07.03.2025

1. The Petitioner has approached this Court under Section 11(6) of the Arbitration & Conciliation Act for appointment of an Arbitrator to adjudicate upon the disputes which have arisen between the parties.
2. The facts of the case as stated in the petition are that the Petitioner is a private limited company, which is into the business of providing digital education services and provides software.
3. It is stated that Respondent No.2 and 3 approached the Petitioner to take on lease the software. An Agreement dated 28.05.2022 was entered into between the Petitioner and Respondent No.1. It is stated that the Petitioner decided to take on lease the software under the said agreement.
4. It is stated that after making the Petitioner spend a substantial amount of money in developing the software, the Respondents did not abide by their



portion of the agreement.

5. A legal notice dated 02.03.2023 was issued stating that the Respondents have failed to honour their commitments under the said agreement. The said legal notice was followed by another notice dated 30.05.2024, invoking arbitration in terms of Clause 11.2.2 of the agreement. The said notice was replied by the Respondent *vide* Letter dated 10.07.2024.

6. Material on record indicates that the Petitioner had approached the Micro, Small and Medium Enterprises Development (MSMED) Council for redressal of its grievance. However, the said application before the MSMED Council was withdrawn by the Petitioner *vide* Letter dated 18.07.2024 stating that the case was not maintainable before the MSMED Council and the Respondent did not proceed further in the matter. Now, the Petitioner has approached this Court by filing the instant petition for appointment of an Arbitrator.

7. Clause 11 of the agreement reads as under:-

“11. GOVERNING LAW, DISPUTE RESOLUTION & ARBITRATION

11.1. This Agreement shall be governed by and construed In accordance with the laws of India, and subject to the other provisions of this Clause, the courts at New Delhi, India shall have exclusive jurisdiction on the matters arising from this Agreement.

11.2. Dispute Resolution:

11.2.1. In the event any dispute or differences arises In connection with the interpretation, Implementation or purported termination of this Agreement as specified above; the Parties shall attempt, In the first Instance, to resolve such dispute through amicable discussions. If such dispute Is not resolved within 7 (seven) days



thereafter or such longer period as the Parties agree to In writing, then, any Party may refer the dispute for resolution by arbitration in accordance with the provisions of this Clause 11.2.

11.2.2. All such disputes shall be referred to and finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, including any amendments thereof. The Parties agree to submit such dispute to arbitration by a sole arbitrator appointed jointly by both parties, failing which such arbitrator shall be appointed by recourse to the provisions of Section 11 of the Arbitration and Conciliation Act, 1996. The language of the arbitration shall be English. The seat of arbitration shall be New Delhi, India.

11.2.3. The successful Party may seek to enforce the award in an appropriate jurisdiction, including India. Each Party shall bear its own costs and expenses, Incurred in connection with the arbitration proceedings.

11.2.4. Nothing herein shall preclude either party from seeking Interim or permanent equitable or Injunctive relief, or both, from the courts at Delhi, India which shall have exclusive jurisdiction to determine any dispute arising under this Agreement. The pursuit of equitable or injunctive relief shall not be a waiver of the right of the parties to pursue any remedy for monetary damages through the arbitration.

11.2.5. The arbitration panel shall have the right to appoint such experts as it may deem fit.

11.3. When any dispute is under arbitration, except for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations under this



Agreement to the extent practicable. ”

8. Learned Counsel for the Respondent contends as under:-
- i. He states that Clause 11.2.1 is not a binding arbitration agreement, as the clear intent of the parties to refer the disputes to arbitration is missing. He states that as per Clause 11.2.1 of the agreement, if the parties are unable to amicably resolve the disputes through discussions, then the parties may refer the dispute for resolution through arbitration.
 - ii. He states that there is no clear and binding intention between the Petitioner and Respondent No.1 to refer the disputes to arbitration and the phrase only signifies that the parties contemplated a possibility to go into arbitration, which in itself is non-binding.
 - iii. Learned Counsel for the Respondent relies on the judgment passed by the Apex Court in Jagdish Chander v. Ramesh Chander & Ors., 2007 (5) SCC 719, to contend that if merely there is a possibility of the parties to agree to arbitration, there is no valid or legal arbitration agreement. He states that in the absence of a legal and binding arbitration agreement between the parties, the petition must be dismissed.
 - iv. Learned Counsel for the Respondent further states that the petition is not maintainable as the Petitioner did not comply with the procedure prescribed in the arbitration agreement. He states that as per Clause 11.2.1 only if the dispute resolution through amicable discussion failed, then the dispute may be referred to arbitration.
 - v. He states that the Petitioner did not make any attempt to hold amicable discussion. He states that first legal notice by the Petitioner



only seek compliance of obligations by the Respondent under the agreement and is a general notice which is not related to any reference to arbitration. He states that the second legal notice dated 30.05.2024 was issued to Respondent No.1 for reference of disputes to arbitration and even the Petitioner suggested names to two nominee arbitrators without calling upon Respondent No.1 to amicably settle the disputes. He relies on the judgment passed by this Court in Sushil Kumar Bhardwaj v. Union of India, **2009 SCC OnLine Del 4355**, to contend that the procedure provided in the agreement necessarily needs to be followed before invocation of arbitration.

- vi. Further, learned Counsel for the Respondent relies on the judgments passed by this Court in Chabbras Associates v. HSCC India Limited, **2023 SCC OnLine Del 232**; Haldiram Manufacturing Company v. DLF Commercial Complexed Limited, **2012 SCC OnLine 2139**.
- vii. Learned Counsel for the Respondent states that the petition is also not maintainable due to a pending reference under the MSMED Act, 2006. He states that the Petitioner filed an application before the MSMED Council on 03.04.2024 and *vide* letter dated 18.07.2024, sought liberty to withdraw the said application. However, there is no communication from the MSMED Council granting leave to withdraw and granting liberty to file afresh.
- viii. He states that the Petitioner has not been granted leave to withdraw and liberty to file afresh by the MSMED Council and recourse to *ad hoc* arbitration is not available once provisions of MSMED Act have been invoked. He also places reliance on the judgment of the Apex Court in Gujarat State Civil Supplies Corporation Limited v.



Mahakali Foods Private Limited, **2023 (6) SCC 401**, to contend that the provisions of the MSMED Act will override the provisions of the Arbitration & Conciliation Act. He further states that Respondents No.2 to 4 are not parties to the agreement dated 28.05.2022 under which the disputes have arisen between the parties.

9. It is stated that Respondents No.2, 3 and 4 were not the signatories to the arbitration agreement. Learned Counsel for the Petitioner states that Respondents No.2, 3 and 4 may be deleted from the array of the parties at this juncture with liberty to the Petitioner to implead them, if necessary, by moving an appropriate application under Order I Rule 10(2) CPC.

10. Heard learned Counsel for the parties and perused the material on record.

11. This Court is of the opinion that Clause 11.2.2 of the agreement contains an arbitration clause which provides that the seat of arbitration shall be at New Delhi. The Petitioner issued notice dated 02.03.2023 followed by another notice dated 30.05.2024 invoking arbitration. The Respondent has chosen to deny its liability and therefore there is no question of making any attempt to settle the disputes amicably. The Petitioner has therefore approached this Court for appointment of arbitration and this Court has issued notice in the matter on 05.08.2024.

12. Admittedly, the Petitioner had approached the MSMED Council but the Petitioner has withdrawn from the MSMED Council *vide* Letter dated 18.07.2024 and the fact that there is no correspondence from the MSMED Council accepting the withdrawal does not mean that the Petitioner cannot approach this Court under Section 11 of the Arbitration & Conciliation Act.

13. The decisions relied on by the Respondent does not apply to the facts



of the present case. In view of the unambiguous arbitration clause as stated by the Respondent and the conduct of the Respondent in categorically denying the claim of the Petitioner and in fact the Respondent not being prepared to go for any amicably solution, this Court is inclined to appoint an Arbitrator to adjudicate the disputes between the parties.

14. Accordingly, Mr. R. Sudhinder, Advocate (Mob: 9810339088) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties.

15. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

16. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the Arbitration & Conciliation Act within a week of entering on reference.

17. 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.

18. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

19. The present petition stands disposed of in the above terms along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

MARCH 7, 2025

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