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

\+ ARB.P. 642/2024

M/S N. J. GARMENTS PRIVATE LIMITED .....Petitioner
Through: Mr. Zeeshan Hashmi, Mr. S.A. Hashmi, Mr. Salman Hashmi and Ms. Sana Hashmi, Advs.

Versus

M/S CAPITALGRAM MARKETING AND TECHNOLOGY PVT LTD .....Respondent
Through: Ms. Mansi Binjrajka, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 09.08.2024

ARB.P. 642/2024

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996[1] for reference of the dispute between the parties to arbitration.

2. The dispute arises in the context of a Lease Deed dated 30 July 2021, whereby certain premises were leased by the petitioner to the respondent. Article 16 of the Lease Deed envisages resolution of disputes between the parties by arbitration, and reads thus:

> "16.1 Subject to arbitration, any dispute arising between the Parties shall be subject to the exclusive jurisdiction of courts in New Delhi.

[1] "the 1996 Act", hereinafter

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> 16.2 Any dispute arising howsoever in connection with the interpretation or implementation or purported termination of this Agreement, the Parties shall attempt in the first instance to resolve such dispute by friendly consultations between the senior representatives of each of the Parties and such resolution period shall be ninety (90) days.
>
> 16.2 If such dispute is not resolved through friendly consultations within 90 days after commencement of discussions or such longer period as the Parties agree to in writing, then any Party may refer the dispute for resolution by arbitration.
>
> 16.3 All such disputes shall be referred to and finally resolved by arbitration tribunal consisting sole arbitrator to be appointed by mutual consent of the parties or by the Hon'ble Delhi High Court. The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act 1996 as may be applicable from time to time or any other enactment replacing it. The language of the arbitration shall be English."

3. The petitioner addressed various emails to the respondent on 3 October 2023, 16 November 2023, 7 December 2023, 11 December 2023 and 12 March 2024, raising monetary claims against the respondent.

4. When the dispute remained unresolved, despite the aforesaid emails having been sent, the petitioner, by notice dated 31 March 2024, invoked the arbitration clause in the Lease Deed and sought reference of the dispute to arbitration.

5. At this stage, the respondent replied on 29 April 2024 denying any liability to the petitioner and further stating that the reference to arbitration was premature as the petitioner had not attempted any friendly consultation with the respondent before issuing the Section 21 notice.

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6. The petitioner, in these circumstances, has approached this Court under Section 11(6) of the 1996 Act seeking reference of the dispute to arbitration.

7. Ms. Mansi Binjrajka, learned Counsel for the respondent advances, as the only ground to oppose the petition, the contention that the Section 21 notice could not have been sent without, in the first instance, exhausting the avenue of friendly consultation.

8. The Supreme Court has, in ***Visa International Ltd v. Continental Resources USA Ltd***[2] and ***Demerara Distilleries Pvt Ltd v Demerara Distillers Ltd***[3], observed thus:

> ***Visa International***
>
> "38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. *From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other.* In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated "… since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed". In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an

[2] **(2009) 2 SCC 55**
[3] **(2015) 13 SCC 610**

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amicable settlement but without any result leaving no option but to invoke the arbitration clause."

(Emphasis supplied)

Demerara Distilleries

5. Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. *The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application.* Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration."

(Emphasis supplied)

9. It may be possible to argue in a case where, without prelude or preface, a party straightway invokes an arbitration clause, even though the clause requires a pre-invocation process of negotiation to be undertaken, that the invocation was premature. In the present case, however, before issuing a Section 21 notice on 31 March 2024, the petitioner had addressed numerous e-mails to the respondent raising its claims, the respondent never condescended to respond. It was for the first time, by way of response to the petitioner's Section 21 notice on 29 April 2024, that the respondent sought to contend that the petitioner ought to have attempted friendly negotiations before

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invoking arbitration.

10. The respondent has, moreover, contested the petitioner's claims on merits in the reply to the present petition in no unequivocal terms.

11. There, therefore, does not appear to be any scope for negotiation between the petitioners, much less friendly negotiation. The Supreme Court has, in the afore-noted decisions in ***Visa International*** and ***Demerara Distilleries***, held that arbitral clause which envisages an undertaking of exercise of negotiation between the parties before arbitration is invoked, have to be realistically interpreted. Where the parties have joined issue on the entitlement of one to claims from the other, and the Section 21 notice issued by one has either not been responded or refuted by the other, it would be futile to relegate the parties to "friendly negotiations" at this stage.

12. I am not, therefore persuaded to hold that the present petition is premature on account of the petitioner having not formally attempted "friendly negotiations" before issuing the Section 21 notice.

13. The recent decision of the Supreme Court in ***SBI General Insurance Co Ltd v. Krish Spinning***[4] permits the Section 21 Court only to examine whether there exists an arbitration agreement between the parties and whether the Section 11(6) petition has been filed within three years of issuance of the Section 21 notice. Both these questions being entitled to be answered in the affirmative in the present case.

[4] **2024 SCC OnLine SC 1754**

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14. The parties having been unable to agree on the modalities of arbitration, the Court has necessarily to step in.

15. The claim of the petitioner against the respondent is stated to be in the region of ₹ 1,60,00,000/-

16. This Court appoints Ms. Neeru Vaid, Advocate (Tel. 9582619834) to arbitrate on the dispute between the parties.

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

18. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

19. All questions of law and fact shall remain opened to be adjudicated before the learned Arbitrator.

20. The petition stands allowed in the aforesaid terms, with no order as to costs.

C.HARI SHANKAR, J

AUGUST 9, 2024/rb

Click here to check corrigendum, if any

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