

De Lage Landen Financial Services India ... vs Binayak Nursing Home Pvt. Ltd. & Ors on 23 February, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

\$~4

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 386/2020

DE LAGE LANDEN FINANCIAL

SERVICES INDIA PVT. LTD.

..... Petition

Through Mr K.V. Balakrishnan, Advocate.

Mr Anupam Singh, Mr Jyotsna Jain, Mr Mridu

Guliani, advocates.

versus

BINAYAK NURSING HOME PVT.

LTD. & ORS.

.....

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 23.02.2021

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the 'A&C Act'), inter alia, praying that a Sole Arbitrator be appointed in terms of Clause 53 of the Loan Agreement entered into between the parties.

2. The respondent no.1 is a company incorporated under the Companies Act, 1956 and respondent nos. 2 and 3 are stated to be its directors. The petitioner had advanced certain financial facilities to respondent no.1 in terms of the Agreement dated 30.10.2018. The said Loan Agreement includes an Arbitration Clause which reads as under:-

"53. This Agreement shall be governed by, and construed in accordance with, the laws of India. All disputes, differences and/or claims arising out of these presents or in any way touching or concerning the same or as to construction, meaning or effect or as to the rights and liabilities of the Parties hereto shall be settled through arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time or any other or further Act of the Parliament that may be enacted in relation to arbitration proceedings. Arbitration proceedings as aforesaid between the Parties shall be referred to a sole arbitrator to be appointed by the Lender at its absolute discretion. In the event of death, refusal,

neglect, inability or incapability of a person so nominated/appointed to act as the sole arbitrator, the Lender may at its absolute discretion, appoint another person instead as the new arbitrator. The arbitration proceedings shall be conducted in the English language. The award passed by the arbitrator shall be final and binding on all the Parties concerned. The costs of arbitration shall be borne by the Party(ies) as determined in the arbitration award. The arbitration proceedings, at the Lender's sole discretion, shall be held either in Delhi/National Capital Region or Mumbai. The courts in Delhi/National Capital Region or Mumbai at the Lender's sole discretion, shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and the Borrower irrevocably submits to the jurisdiction of those courts."

3. Respondent nos. 2 and 3 had also executed a separate Guarantee Agreement on the same day, that is, 30.10.2018. The said agreements also include a similarly worded Arbitration Clause as set out above.

4. The petitioner had invoked the Arbitration Clause by a letter dated 20.02.2020, however, the parties have been unable to concur on appointment of an Arbitrator.

5. The learned counsel appearing for respondents do not dispute the existence of the Loan Hypothecation Agreement dated 30.10.2018 and the Guarantee Agreements dated 30.10.2018, however, he opposes the present petition on the ground that the notice served by the petitioner is defective. He submits that since the petitioner had not acted in terms of the Arbitration Clause by suggesting the name of an arbitrator, the said letter could not be considered as an invocation of the Arbitration Clause.

6. The said contention is unmerited. As is apparent from a plain reading of the Arbitration Clause, the right to appoint a Sole Arbitrator rested with the petitioner. However, in view of the decision of the Supreme Court in Perkins Eastman Architects DPC and Anr. v. HSCC (India) Limited: 2019 SCC OnLine 1517 and as further followed by this Court in Proddatur Cable TV Digi Services v. Siti Cable Network Limited: (2020) 267 DLT 51, it was no longer permissible for the petitioner to unilaterally appoint an Arbitrator. Thus, the petitioner rightly did not proceed to appoint an Arbitrator and has approached this Court instead.

7. The learned counsel appearing for the respondents further submits that without prejudice to their rights and contentions, the respondents are keen to avail an opportunity to amicably resolve the disputes with the petitioner. The learned counsel appearing for the petitioner is also agreeable to the same.

8. In view of the above, Ms Anita Sahani, Advocate (mob: 9810113256) is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties, which fall within the scope of Clause 53 of the Loan and Hypothecation Agreement dated 30.10.2018 and Clause 13 of the Guarantor Agreements dated 30.10.2018.

9. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

10. Since the parties have sought an opportunity to resolve their disputes amicably, this Court further directs that the appointment of the learned Arbitrator shall not take effect for a period of six weeks from the date.

11. In the meanwhile, the parties are at liberty to engage with each other for an amicable resolution of the disputes. In the event, the parties are able to resolve their same, they shall inform the learned Arbitrator and the learned Arbitrator shall not take any further steps for Arbitration. However, if the parties are unable to resolve the same, the learned Arbitrator shall proceed with the Arbitration in accordance with law.

12. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J FEBRUARY 23, 2021 pkv