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

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Date of decision: 27.07.2017

+ O.M.P. (T) (COMM.) 56/2017

APEX ENCON PROJECTS PVT. LTD.

..... Petitioner

Through Mr.L.B. Rai and Mr.Mohit Sharma,
Advs.

versus

UNION OF INDIA & ANR.

..... Respondents

Through Mr.Ripu Daman Bhardwaj, CGSC
with Mr. Sanjay Singh

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking termination of the mandate of the Arbitrator, namely, Brig. Neeraj Parashar and for appointment of an independent arbitrator in his place.

2. Some of the relevant facts are that the petitioner was awarded a contract for construction of residential accommodation in Hyderabad in April 2013. It is the case of the petitioner that he executed the work successfully at site. On 02.12.2013, respondent No.2 terminated the contract and got the work executed through some other agency. Disputes having arisen between the parties, it is stated that on 27.01.2015, the respondent invoked the arbitration clause. On 28.04.2016, respondent No.2 on the request of respondent No.1 is said to have appointed Brig. Neeraj Parashar as

the sole Arbitrator to adjudicate the disputes between the parties. It is the contention of the learned counsel for the petitioner that the said Arbitrator is a serving officer of respondent No.1 and his appointment is prohibited in terms of Schedule Seven read with Section 12(5) of the Act.

3. It is further stated by the petitioner that on 16.03.2017, it raised an objection regarding the appointment of the learned arbitrator. The learned Arbitrator by communication dated 29.03.2017 rejected the objection of the petitioner. Hence, the present petition has been filed.

4. I have heard learned counsel for the parties.

5. Learned counsel for the petitioner submits that in terms of the Amended Act which came into force on 23.10.2015, the appointment of an employee as an arbitrator is prohibited under the 7th Schedule read with Section 12 (5) of the Act. He submits that clause 1 of the 7th Schedule states that an arbitrator who is an employee, consultant or advisor with the party is ineligible for appointment as an arbitrator. Hence, he submits that the appointment of Brig. Neeraj Parashar by the respondents is illegal in terms of Section 12(5) of the Act. He relies upon the judgment of this court in the case of ***Era Infra Engineering Ltd. vs. Aravali Power Company Pvt. Ltd., MANU/DE/1790/2016*** and ***Ardee Infrastructure Pvt. Ltd. vs. Ms.Anuradha Bhatia, 237 (2017) DLT 140*** to support his submission that the appointment of the Arbitrator having been made after 23.10.2015 is illegal and void.

6. Learned counsel for the respondents has however contended that under Section 21 of the Act, the arbitration proceedings commenced on the date on which a request that the disputes be referred to arbitration is received by the petitioner. It is stated that in the present case, the concerned authority of the respondent had invoked the arbitration clause on 20.07.2015 when a

request was made to the competent authority with a copy enclosed to the petitioner to appoint an arbitrator in terms of Clause 60 of the general conditions of the contract. Hence, he submits that prior to the amendments in Section 12 of the Act, the respondent had invoked the Arbitration clause and hence, the amended provision of the Act would not apply. He relies upon the order of a Single Judge of this court in the case of ***Omaxe Infrastructure & Construction Pvt. Ltd. vs. Union of India & Anr.*** passed in OMP (T) (COMM.) 41/2016 dated 27.05.2016 to support his contention.

7. The crucial question is as to whether the amended provisions would apply to the facts of the present case. The said provisions have come into force on 23.10.2015. In case the amended provisions apply, Section 12(5) read with Seventh Schedule of the Act would be applicable to the appointment made by the respondent and the present arbitrator would be ineligible to be appointed as an arbitrator.

8. The Division Bench of this court in ***Ardee Infrastructure Pvt. Ltd. vs. Ms. Anuradha Bhatia(supra)*** was dealing with the case where the award was passed by the arbitral tribunal prior to enforcement of the amending act on 23.10.2015. Objections under Section 34 of the Act were filed subsequently on 04.01.2016. Hence, the issue was as to whether the amending act would apply or the pre-amendment act would apply. In those circumstances, the court summed up the proposition of law as follows:-

“32. On the other hand, if the expression “to the arbitral proceedings” used in the first limb of Section 26 is given the same expansive meaning as the expression “in relation to arbitration proceedings” as appearing in the second limb of Section 26, then, the matter becomes very simple and does not result in any anomaly. All the arbitral proceedings (and here we mean the entire gamut, including the court proceedings in

relation to proceedings before the arbitral tribunal), which commenced in accordance with the provisions of Section 21 of the said Act prior to 23.10.2015, would be governed, subject to an agreement between the parties to the contrary, by the unamended provisions and all those, in terms of the second part of Section 26, which commenced on or after 23.10.2015 would be governed by the amended provisions.”

9. The Division Bench was interpreting Section 26 of the Arbitration & Conciliation (Amendment) Act, 2015, which reads as follows:

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

10. Another relevant provision is Section 21 of the Arbitration & Conciliation Act, 1996 which reads as follows:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

11. Reference may be had to the judgment of the Supreme Court in the case of *Milk Food Ltd. V. GMC Ice Cream (P) Ltd.*, (2004) 7 SCC 288/(MANU/SC/0316/2004). The controversy there pertained to as to whether the Arbitration Act, 1940 would apply or the new Arbitration Act, 1996 would be applicable to the facts of the case. The court (majority view) held as follows:

“45. Commencement of an arbitration proceeding' and 'commencement of a proceeding before an arbitrator' are two different expressions and carry different meanings.

46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purpose. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedures required therefore. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning is given to the expression 'commencement of an arbitration' which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regard the procedure under the one Act or the other is required to be followed. It is only in that limited sense the expression 'commencement of an arbitration' qua 'a notice of arbitration' assumes significance.

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49. Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having

regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding.

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70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non-obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall be apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceeding which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act where for also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give an pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the fact of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression 'commencement of arbitration proceedings must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commences only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case laws do not suggest the same. On the contrary the decisions of this Court operating in the field beginning from Shetty Construction (supra) are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible to make a

departure from the decisions of this Court as referred to hereinbefore.

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72. Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression 'commencement of the arbitral proceeding' as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding”

12. A Coordinate Bench of this court in the case of ***Omaxe Infrastructure & Construction Pvt. Ltd. vs. Union of India & Anr. (supra)*** held as follows:-

“6. Suffice to state, Section 21 of the Arbitration and Conciliation Act, 1996 gets attracted in the present case, inasmuch as invocation was before 23rd October, 2015. I do not see any merit in the petition and the same is dismissed.”

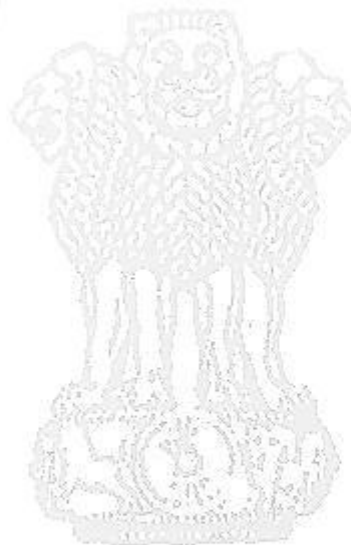
13. Hence, in view of the Section 21 of the Act, in the facts of this case, the arbitration proceedings are deemed to have commenced when the notice of invocation of the arbitration clause was received by the petitioner admittedly on 27.01.2015, i.e. prior to enforcement of the Arbitration and Conciliation (Amendment) Act, 2015. Hence, the arbitration proceedings are deemed to have commenced on the said date. In view of Section 26 of the Amending Act, the amended provisions would have no application to the present case.

14. Keeping in view the legal position as enunciated by this court, it is manifest that in the facts of this case, the Amended Act would have no application. Hence, Schedule Seven of the Amended Act would not be attracted and the appointment of the Arbitrator by the respondent cannot be termed to be illegal on this ground.

15. There is, hence, no merit in the present petition. The same is dismissed.

**(JAYANT NATH)
JUDGE**

**JULY 27, 2017
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