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

***Date of decision: 11<sup>th</sup> September, 2018***

+ O.M.P.(COMM.) 12/2018 & I.A. No.534/2018 (Stay)

SUVIDHA INFRACON PVT LTD ..... Petitioner  
Through Mr.Prabodh Shukla, Adv.

versus

INTEC CAPITAL LIMITED ..... Respondent  
Through None.

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

1. None appears for the respondent in spite of pass-over. The reply has not been filed by the respondent. Even the Arbitral Record has not been filed by the Arbitrator.
2. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenges the Arbitral Award dated 16.06.2017 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Agreement dated 03.03.2012 executed between the petitioner and the respondent. The Arbitrator, by way of the Impugned Award has directed as under:

*“In view of the above discussion, this tribunal hereby passes an Award in favour of the Claimant and against the Respondents to the following effect:-*

- 1. That the Respondents shall be jointly and severally liable to pay to the claimant a sum of Rs.3,27,30,621/-(Rupees Three Crore Twenty Seven Lakh Thirty Thousand Six Hundred Twenty One Only) with interest @ 22.99% from 22.03.2016 till realization of the same.*
- 2. That the claimant is entitled to repossess and dispose off the property namely.*

| <i>Product</i>                              | <i>No. of Product</i> |
|---------------------------------------------|-----------------------|
| <i>Electric motor driven CNG compressor</i> | <i>1</i>              |
| <i>180 RZXB Kohlel gas gensets</i>          | <i>1</i>              |
| <i>Gas dispenser</i>                        | <i>2</i>              |
| <i>Hydraulic booster compressor 22 kw</i>   | <i>2</i>              |

*6 in number and appropriate the sale proceeds towards the satisfaction of the present award.*

- 3. The claimant is entitled to recover cost of the present arbitration proceeding which has been quantified at Rs.25,000/- from Respondents.*
- 4. The claimant shall be entitled to recover all costs and expenses that may be incurred in seeking recovery of the amount awarded including cost of repossession of the subject vehicle/equipment and expenses incurred on*

*conducting sale of the same from the Respondents.*

*The Respondents are directed to comply with the terms of the present award within 30(Thirty) days of the passing of the Award.”*

3. The primary submission of the learned counsel for the petitioner in challenge to the Impugned Award is that the petitioner was never served with the notice invoking the arbitration or the arbitration proceedings and the petitioner gained knowledge of the arbitration proceedings only when a copy of the Award was sent to the petitioner by the Arbitrator. He further submits that even a perusal of the Award would show that the petitioner was never served with a notice of the arbitration proceedings and in spite of the postal report that the notice could not be served on the petitioner, the Arbitrator considered it as deemed service, observing as under:

*“Keeping in view the fact that notice have been sent to respondent/s on the address inscribed in the subject agreement which have been delivered / or deemed to have been delivered on occasions as aforementioned, communication of change with regard to address is also not on record and overall Section-3 of Arbitration and Conciliation Act, 1996, clearly mandates assumption of services in case of communication having been sent on the last known address, respondent/s was /were proceeded ex-parte on 10.06.2016.”*

4. Learned counsel for the petitioner further submits that the Arbitrator in any case is ineligible for being appointed as an Arbitrator as he had acted as an Advocate/Advisor of the respondent

and had been appointed as an Arbitrator by the respondent itself for more than three times in the last three years.

5. Notice of this petition was issued to the respondent on 15.01.2018. On 13.03.2018, Mr. K.K.Sharma, Advocate entered appearance on behalf of the respondent and prayed for time to file the reply. In spite of opportunity being granted, the reply has not been filed by the respondent and in fact, on 06.07.2018 and even today, in spite of the petition being passed over twice, none appears for the respondent.

6. In spite of request being sent and duly served on the Arbitrator to file the Arbitral Record, even the Arbitral Record has not been filed before this Court.

7. In view of the above, the assertion of the petitioner that the petitioner was never served with a notice invoking arbitration or of the arbitration proceedings, remains uncontroverted. It further remains uncontroverted that the Arbitrator was ineligible for being appointed as an Arbitrator under Section 12(5) of the Act read with Seventh Schedule of the Act.

8. The Supreme Court in ***Sachin Gupta & Anr. v. K.S. Forge Metal Pvt. Ltd.***, (2013) 10 SCC 540 had agreed with the finding of the High Court setting aside the Award passed therein, under Section 34(2)(a)(iii) of the Act with the following observation:

*“2. We are satisfied that the High Court [Sachin Gupta v. K.S. Forge Metal (P) Ltd., FAO (OS) No. 539 of 2012, order dated 7-11-2012 (Del)] could have set aside the award only on the ground that the award has been rendered against the respondent without issuance*

*of any notice and without hearing the respondent. On this ground alone, the award was liable to be set aside under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996..... However, we agree with the conclusion of the High Court that the award had to be set aside as no notice had been served on the respondent.....”*

9. This Court in ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***, 2017 SCC OnLine Del 7228, holding the requirement of notice under Section 21 of the Act to be mandatory, has held as under:

*“30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.*

*xxx*

*36. For the aforesaid reason, the Court is of the view that the present arbitration proceedings, being held without a notice by the Respondent under Section 21 invoking the arbitration clause being received by the Petitioner, are invalid. The only exception to this would have been an agreement to the contrary between the parties. There is no such agreement by which the*

*Petitioner could be said to have waived the requirement of notice under Section 21 of the Act. The impugned Award in the present case is therefore opposed to the fundamental policy of Indian law since the mandatory requirement of the Act has not been complied with. The ground under Section 34(2)(b)(ii) of the Act is attracted. Therefore, the impugned Award is liable to be set aside on this ground as well.*

*xxx*

*47. Turning to the case on hand, there is no denial that at the time he entered upon reference, the Arbitrator was adjudicating at least one of the claims of the Respondents in other arbitration proceedings. Admittedly, he did not disclose this fact at any time at the commencement of or during the arbitration proceedings. This fact was discovered later by the Petitioner. The averment on this aspect in the present petition has not been denied by the Respondent. In the circumstances, the Court is of the view that this is yet another ground on which the impugned Award is liable to be set aside as it is opposed to the fundamental policy of Indian law. It attracts the ground under Section 14(1) read with Section 15(1), viz. the Arbitrator being rendered de jure incapable of acting as such. It also attracts Section 34(2)(b)(ii) of the Act.”*

10. In **HRD Corporation v. Gail (India) Ltd.**, (2018) 12 SCC 471, on the point of ineligibility of the Arbitrator, the Supreme Court noted as under:

*“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator*

*falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground.”*

11. In view of the above, the Arbitral Award dated 16.06.2017 passed by the Sole Arbitrator is set aside, leaving it open to the parties to initiate the arbitration proceedings afresh. Parties would be entitled to take benefit of Section 43(4) of the Act for purposes of limitation in such proceedings, if initiated. There shall be no order as to cost.

**NAVIN CHAWLA, J**

**SEPTEMBER 11, 2018/Arya**