

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.Nos.247 and 248 of 2019
and
A.Nos.2399 and 2402 of 2019

Ind Trust Travels and Cargo Pvt. Ltd.,
No.10, Thiru Vi Ka Road,
Royapettah,
Chennai-600 014.
rep by its Director

.. Petitioner in
O.P.No.247 of 2019

Rasi Travels & Cargo Pvt. Ltd.,
No.498, Karumuthu Centre,
Anna Salai, Chennai-600 035.
rep by its Director.

.. Petitioner in
O.P.No.248 of 2019

Vs.

Interglobe Technology Quotient Pvt. Ltd.,
A Company having its Registered office at
Central Wing, Ground Floor,
Thaper House,
124, Janpath,
New Delhi-110 001.
rep by its Director.

.. Respondent in
both O.Ps.

O.P.No.247 of 2019 is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 20.11.2018 passed by Hon'ble Mr.Justice M.Vijayaraghavan (Retd.), Sole Arbitrator in Arbitration Case No.1 of 2016.

O.P.No.248 of 2019 is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 20.11.2018 passed by Hon'ble Mr.Justice M.Vijayaraghavan (Retd.), Sole Arbitrator in Arbitration Case No.1 of 2016.

For Petitioners : Mr.P.Giridharan

For Respondent : Mr.Krishna Srinivasan
of M/s.S.Ramasubramaniam Associates

COMMON ORDER

This common order will dispose of both these 'Original Petitions' ('O.Ps' for brevity). 'Original Petition' in singular shall be referred to as 'O.P' for brevity. Besides this, O.P.No.247 of 2019 shall be referred to as 'senior O.P' and O.P.No.248 of 2019 shall be referred to as 'junior O.P' for clarity.

2 Both O.Ps, i.e., senior and junior O.Ps have been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) assailing the same arbitral award, i.e., an 'Arbitral Award dated 20.11.2018' ('impugned award' for convenience and clarity) made by an 'Arbitral Tribunal' ('AT' for brevity), constituted by a Sole Arbitrator, who has been appointed by this Court vide order dated 27.10.2015 made in O.P.No.206 of 2013 under Section 11 of A and C Act.

3 There is a sole petitioner and lone respondent in both O.Ps. Lone respondent in both O.Ps is the same entity, i.e., Interglobe Technology Quotient Pvt. Ltd., which shall hereinafter be referred to as 'SFP' denoting

'Software Provider'. To be noted, SFP is the lone claimant before AT. Petitioner in senior O.P is 'Ind Trust Travels and Cargo Pvt. Ltd.', (second respondent before AT) and this entity shall hereinafter be referred to as 'Ind Travels' for the sake of convenience and clarity. Likewise, petitioner in junior O.P is 'Rasi Travels & Cargo Pvt. Ltd.', (first respondent before AT) and this entity shall hereinafter be referred to as 'Rasi Travels' for the sake of convenience and clarity.

4 To be noted, Ind Travels and Rasi Travels are travel agents and as mentioned supra, the respondent SFP is a software provider.

5 Considering the nature of the matter, it is necessary to give a broad outline of common facts in instant two O.Ps.

6 **Common Facts :**

(a) Ind Travels and Rasi Travels are travel agents. SFP had a software which goes by the name 'Galileo System' and it is a software for 'Computerised Reservation Systems' ('CRS' for brevity). This court is informed that such software is also referred to as 'GDS Systems' wherein GDS stands for 'Global Distribution System'. This software shall hereinafter be referred to as 'Galileo GDS' for the sake of convenience and clarity.

(b) Each of the travel agents, namely Ind travels and Rasi travels entered into separate agreements, both dated 21.09.2017 with SFP and these agreements constitute the fulcrum of instant O.Ps. and are also the epicentre of instant lis.

(c) Agreement of SFP with Ind travels dated 21.9.2017 shall be referred to as 'said agreement-I' and agreement of SFP with Rasi travels

dated 21.9.2017 shall be referred to as 'said agreement-II'.

(d) Under these agreements, i.e., said agreements I and II, the business module is such that SFP will provide Galileo GDS software to travel agents and while so providing Galileo GDS software, SFP besides providing the software, also gives specified sums of money to each of the two travel agents. To be noted, a sum of Rs.15 lakhs was given to Ind travels (Rs.1 lakh as signup fee and Rs.14 lakhs thereafter). Rasi traels was given Rs.30 lakhs by SFP (Rs.2 lakhs as signup fee and Rs.28 lakhs thereafter). It was agreed that these specified sums of money paid by SFP to travel agents shall be adjusted against incentive amounts payable by SFP to travel agents. In other words, this court is informed that vide said agreements I and II, travel agents undertook to use Galileo GDS and provide certain minimum quantum of business in different segments. In other words, there was a minimum guarantee. It has been covenanted in said agreements that this will operate for 36 months from 01.10.2007.

(e) In this regard, it is to be noted that it has been specifically covenanted that offer is valid for a minimum period of 12 months. Be that as it may, this court is informed that minimum guarantee in terms of volume of business which the travel agents assured SFP are such that such volumes of business will generate income for SFP by way of commissions from end beneficiaries. It is also submitted that this Galileo GDS is broadly for airline booking, hotel booking, cab service, other travel related services and when travel agents do such volumes of business in these segments, SFP would benefit out of said agreements I and II.

(f) In the backdrop of aforesaid business module, disputes arose as SFP alleged that travel agents are using other GDS software and have also made several additions to the software resulting in not meeting minimum guarantee in various segments and also drop in volume of business which would have brought commissions to SFP.

(g) Correspondence were exchanged between the parties and ultimately, SFP invoked arbitration clause in said agreements I and II by issuing separate notices both dated 21.10.2010 to Ind travels and Rasi travels, they being Exs.C.10 and C.9 respectively before AT. The date of receipt of these notices by noticees / addressees is not available in the case file and both learned counsel before this court submitted on instructions that they are unable to give the date of receipt of Exs.C.9 by Rasi travels. However, Rasi travels has sent a reply dated 15.11.2010 (Ex.C.14) and therefore, it can be safely presumed that Rasi travels has received Ex.C.9 notice on some day between 21.10.2010 and 15.11.2010 and that date will be the date of commencement of arbitration proceedings within the meaning of Section 21 of A and C Act. However, as both counsel on instructions submitted that the exact date of receipt of Ex.C.9 by Rasi travels is not available, as Rasi travels could not have received Ex.C.9 notice prior to 21.10.2010, which is the date of notice itself, this date is taken as notional date of commencement of arbitral proceedings. With regard to Ind travels, it is the specific submission of learned counsel for Ind travels that Ex.C.10 notice was never received by Ind travels and it is not in dispute that Ind travels has not sent a reply. To be noted, SFP is unable to produce even the postal

receipt evidencing despatch of Ex.C.10.

(h) Thereafter, SFP filed a petition in District Court in Delhi inter-alia under Section 9 of A and C Act. This Court is informed that petitions under section 9 are also assigned nomenclature 'suit' in the said court in Delhi and therefore, it is Suit No.356 of 2010. In this, an Advocate Commissioner (referred to as 'Local Commissioner' in the order) was appointed vide order dated 7.9.2010 made by District Court in Delhi.

(i) Advocate Commissioner made local inspection on 22.09.2010 in the office of Ind Travels. There is nothing to show that Advocate Commissioner visited Rasi travels.

(j) The arbitration clause in said agreements I and II refer to New Delhi as the venue, but ultimately (after filing section 11 petitions inter-alia in Delhi and withdrawing the same with leave and liberty to file a section 11 petition in Madras High Court), O.P.No.206 of 2013 came to be filed in this Court under section 11 of A and C Act and as mentioned supra, vide order dated 27.10.2015, Sole arbitrator (former Hon'ble Judge of this Court) was appointed. To be noted, in this O.P.No.206 of 2013, both Ind Travels and Rasi Travels are respondents and both travel agents have been duly represented by a counsel.

(k) In the aforesaid backdrop, AT entered reference and after full contest, passed the impugned award. On the side of SFP, which was the claimant before AT, one witness (C.W.1) was examined and 19 exhibits (Exs.C.1 to C.19) were marked. On the side of travel agents, who were respondents 1 and 2 before AT (to be noted, Rasi travels is respondent No.1

and Ind travels is respondent No.2), one witness (R.W.1) was examined and one document, namely Ex.R.1 was marked.

(I) On rival pleadings, AT framed 11 issues which reads as follows:

“6.After considering the pleadings of the parties, this Tribunal framed the following 11 fair issues.

1.Whether the offer made by the Claimant under offer Number ITPL/BLR/044-1912 (agreement) was made to the Respondents 1 and 2 jointly and individually?

2.Whether the Respondents have used Galileo as the Sole GDS in all their offices as per the terms of the Agreement dated 21.09.2007?

3.Whether the Respondents were to jointly or individually generate the segments under the agreement bearing number ITPL/BLR/044-1912 dated 21.09.2007?

4.Whether the Respondents have jointly or individually achieved the minimum number of segments per quarter as per the Agreement dated 21.09.2007?

5.Whether the Respondents have violated the provisions of the Agreement dated 21.09.2007;

6.Whether the Claimant/Respondents have filed a forged/fabricated copy of the agreement entered between the parties?

7.Whether the termination of the agreement by the claimant is wrongful?

8.Whether the arbitration claim is barred by limitation?

9.Whether the Claimant is entitled to interest at the rate of 18% per annum on the amounts prayed for under prayers a,b,c and d of the Claim Statement?

10.Whether the Claimant is entitled to costs?

11.To what reliefs are the parties entitled to?”

(m) AT answered issue Nos.1 and 3 together, other issues were answered separately, taking one issue at a time. Ultimately, vide impugned award, AT directed Rasi travels to pay aforesaid sum of Rs.30 lakhs together with interest at the rate of 18%. Likewise, Ind travels was directed to pay Rs.15 lakhs together with 18% interest. Assailing the impugned award, instant O.Ps have been filed.

(n) Grounds on which instant O.Ps are predicated and more specifically grounds of challenge which were argued before this Court shall be set out and dealt with under the caption 'Discussion and dispositive reasoning', infra.

7 Discussion and dispositive reasoning :

(a) Mr.P.Giridharan, learned counsel for petitioner in both senior and junior O.Ps (i.e., Ind travels and Rasi travels respectively) and Mr.Krishna Srinivasan of M/s.S.Ramasubramaniam Associates (Law firm) on behalf of sole respondent in senior and junior O.Ps (i.e., SFP) were before this Court. Learned counsel for SFP had accepted notice. Both learned counsel agreed that main O.Ps can be heard out and main O.Ps were taken up by consent.

(b) Challenge to impugned award by travel agents was threefold and the same can be summarized and set out as below:

(i) Claim of SFP before AT is barred by limitation
and AT erred in holding that claims are not time barred.

As limitation is founded on public policy, impugned award

is in conflict with public policy of India owing to being in contravention with fundamental policy of Indian law;

(ii) With regard to said agreements, photocopies produced and marked by SFP and travel agents were at variance and AT erred in not calling for originals though this was highlighted.

(iii) Advocate Commissioner appointed by Delhi District Court who conducted local inspection was not examined.

(c) To be noted, though very many grounds were raised in the O.Ps, arguments were confined to the aforesaid threefold grounds of attack and according to learned counsel for travel agents, grounds of attack (ii) and (iii) supra also are such that they qualify as grounds for setting aside the impugned award being in contravention with the fundamental policy of Indian law.

(d) This Court now embarks upon exercise of examining the aforesaid threefold grounds of attack.

(e) With regard to first ground of attack, namely limitation, the same has been raised before AT and an issue has been framed (issue No.8) and the same has also been answered by AT. Nonetheless, considering the detailed submissions that were made before this Court regarding limitation, as limitation goes to the root of the matter and as limitation has to be decided by a Court even if it is not set up as defence, this court considers it appropriate

to examine the detailed submissions made regarding limitation ground.

(f) Before embarking upon the exercise of examining the arguments with regard to limitation ground, it has to be borne in mind that for testing limitation in arbitral proceedings, the date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act is the reckoning date. This principle was laid down by Hon'ble Supreme Court in the oft-quoted Praveen Enterprises case being **State of Goa Vs. Praveen Enterprises** reported in **(2012) 12 SCC 581**. In **Praveen Enterprises** case, wherein Hon'ble Supreme Court, after analysing Section 21 of A and C Act and Section 3 of the Limitation Act, held that limitation Act talks about 'institution of suit', but it does not talk about institution of arbitral proceedings and therefore, section 21 supplies the omission in section 3 of Limitation Act. In other words, with regard to suits, date of presentation of suits will be the reckoning date and this has been clearly set out in section 3 of the Limitation Act itself, but as there is no such specification in section 3 for arbitral proceedings, the date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act is the reckoning date.

(g) In the instant case, with regard to Rasi travels, it is submitted that the date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act is 21.10.2010. For this purpose, this court was taken through a notice through lawyer dated 21.10.2010 issued by SFP to Rasi travels, wherein it has been clearly mentioned that SFP is invoking arbitration clause or in other words, SFP made a request for the dispute to be referred to arbitration and called upon Rasi travels to decide upon a mutually

agreeable arbitrator. To be noted, caption to this notice itself clearly mentions that it is under section 21 of A and C Act.

(h) This Court is constrained to observe that 21.10.2010 cannot be taken as date of commencement of arbitral proceedings as it is the date of notice and it is not the date of receipt of the notice by noticee / addressee. In this regard, the language in which section 21 of A and C Act is couched assumes significance. This court therefore extracts section 21 of A and C Act 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.”

(i) A perusal of the language in which section 21 of A and C Act is couched will reveal that the date of commencement of arbitral proceedings is not the date of notice on which request for dispute to be referred to arbitration is made, but it is the date on which such request is received by noticee/ addressee, who has been described as respondent in section 21.

(j) Therefore, the date on which Rasi travels received Ex.C.9 communication dated 21.10.2010 is the date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act, but unfortunately, both parties are unable to give this date. In other words, learned counsel for Rasi travels is unable to give the date on which Rasi travels received Ex.C.9. Likewise, learned counsel for SFP is unable to

produce any acknowledgement to show the date of receipt of Ex.C.9 by Rasi travels. However, it is not in dispute that Rasi travels sent a reply dated 15.11.2010 which has been marked as Ex.C.14. Owing to this reply, i.e., Ex.C.14 dated 15.11.2010, it comes to light that Rasi travels has received Ex.C.9 notice on some day between 21.10.2010 and 15.11.2010. One of the 26 dates from 21.10.2010 to 15.11.2010 (both dates inclusive) is the date of commencement of arbitral proceedings as far as Rasi Travels is concerned. Therefore, as there is no dispute or disagreement before me that Ex.C.9 was in fact received by Rasi travels which has also sent a reply, 21.10.2010 can at best be taken as notional date for commencement of arbitral proceedings as obviously Rasi travels could not have received Ex.C.9 prior to the date of notice itself, i.e., prior to the date of Ex.C.9.

(k) This takes us to the question of date of commencement of arbitral proceedings with regard to Ind travels. With regard to Ind travels, it is the case of SFP that similar notice, i.e., notice similar to Ex.C.9 was sent to Ind travel also and that notice is Ex.C.10, but it is the categoric stand of Ind travels that Ex.C.10 notice was never received by the noticee / addressee. Learned counsel for SFP is also unable to produce any acknowledgement to show that Ex.C.10 was in fact served on the addressee / noticee, namely Ind travels. Therefore, it has to be inevitably concluded that date of commencement of arbitral proceedings within the meaning of Section 21 of A and C Act is not available with regard to Ind travels concerned. Earliest date available with regard to Ind travels is 27.10.2015 being the date on which orders were passed by this Hon'ble Court in O.P.No.206 of 2013 by which

sole arbitrator who constituted AT was appointed. The reason is, post Ex.C.10, SFP has sent another legal notice dated 02.11.2011 to Ind Travels (Ex.C.12). Though Ex.C.12 describes that it has been sent by Registered Post with Acknowledgement Due, learned counsel for SFP is unable to produce any acknowledgement card to show that Ex.C.12 was served on Ind travels. Admittedly, there is no reply to Ex.C.12. After appointment of sole arbitrator on 27.10.2015, first proceedings of the AT (without any dispute) was on 06.01.2016. However, as O.P.No.206 of 2013 was contested by both ways by Rasi travels and Ind travels, limitation can be decided by taking 27.10.2015 as reckoning date as far as Ind travels is concerned (without even stretching on to 06.01.2016). To be noted, one more scenario in this regard is also being examined infra elsewhere in this order.

(l) There is no dispute before this court that article in the limitation Act which is applicable to the instant case is Article 55 and therefore, the period of limitation is three years.

(m) This takes us to the question as to the date on which cause of action accrue and the date which shall be the reckoning date to compute the commencement of period of limitation. There were different kinds of submissions that were made with regard to the date of accrual of cause of action. One submission regarding the cause of action. There are three communications dated 20.02.2008, 12.03.2008 and 23.03.2009 being Exs.C.4, C.5 and C.6 from SFP to Rasi travels, wherein there was a reference about not meeting minimum requirement in various segments. With regard to Ex.C.6 dated 23.03.2009, it was pointed out that there is specific

reference by SFP that there is breach of said agreements. It was contended that therefore, 23.03.2009 should be taken as the reckoning date qua accrual of cause of action and for commencement of limitation.

(n) The other argument was that, alleged breach is in the nature of continuing breach and therefore, said agreements being for three years and said agreements being dated 21.9.2007, 20.9.2010 being the date on which said agreements works itself out (to be noted, said agreements were never terminated) should be taken as the date of commencement of accrual of cause of action. Third kind of submission that was made will apply only to Ind travels. There is no dispute or disagreement that an Advocate Commissioner / Local Commissioner was appointed by Patiala House Courts, Delhi in principal arbitral proceedings for an interim measure and said Local commissioner / Advocate Commissioner, after inspecting the office of Ind travels, filed a report dated 08.10.2010 (Ex.C.8), wherein it has been mentioned that the office of Ind travels was visited and examined on 22.09.2010. It was contended that SFP could have at best come to know about the breach only on 22.09.2010 and therefore, this should be taken as date of commencement of limitation.

(o) Be that as it may, as far as Rasi travels is concerned, there is no disputation that date of commencement of arbitral proceedings albeit notional date is 21.10.2010 (vide Ex.C.9), at best the real and actual date is somewhere between 21.10.2010 and 15.11.2010. Testing on this basis, arbitral proceedings which commenced notionally on 21.10.2010 and actually somewhere between 21.10.2010 and 15.11.2010 cannot be held to be time

barred, it is well within three years limitation within the meaning of Article 55 of the Limitation Act.

(p) Now, this Court proceeds to examine limitation aspect qua Ind travels. As far as Ind travels is concerned, the date of accrual of cause of action or commencement of limitation period as alluded to supra can only be 22.09.2010 when Local Commissioner inspected office of Ind Travels. As the date on which arbitral proceedings commenced within the meaning of section 21 is not available, the date on which sole arbitrator constituting AT was appointed being 27.10.2015 has to be taken as cut off date notional though. If this is taken as the cut off date, the claim qua Ind travels is clearly time barred. If SFP is unable to give date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act with regard to Ind travels, they have to blame themselves.

(q) This takes us to how AT has dealt with the limitation issue in the impugned award.

(r) As already mentioned, limitation was raised as one of the issues before AT and issue framed in this regard is issue No.8 which reads as follows :

“8. Whether the arbitration claim is barred by limitation?”

(s) This issue was answered in one paragraph of the impugned award made by AT and that is paragraph is No.14 and the same reads as follows :

“14.ISSUE NO.8

It is the definite case of the respondents that the notice for appointment of arbitrator was never served upon the respondents and hence the present arbitration claim is barred by limitation. No doubt through C.W.1 notice dated 16.09.2011 for appointment of arbitrator addressed to R1 as well as notice dated 02.11.2011 for appointment of arbitrator addressed to R2 were marked through C.W.1 as Exs.C11 and C12 with objection. Apart from the above documents through C.W.1, separate notice dated 21.10.2010 addressed to R1 and R2 were marked through C.W.1 of course with objection of the learned counsel for the respondents. For this Ex.C.9 notice, reply notice filed by R1 is marked as Ex.C14. Thus, it is proved that R1 was fully aware of the notice of request made under Ex.C.9, requested him to fix date, time, place for a meeting to appoint a mutually agreeable arbitrator. Eventhough, C9 was marked with objection in the light of Ex.C14 reply filed, objections are not sustained for marking C9 and hence C9 is a valid evidence to prove the case of the claimant. Having fully participated in the earlier court proceedings initiated by the claimant during the year 2010, now a stand taken by the respondents shall not sustain and the notice subsequent to Exs.C9 and C10 issued under Exs.C11 and C12 which have not been served upon the respondents 1 and 2 shall not have any bearing in the light of the facts and circumstances of the case. Hence, the arbitration proceedings initiated by the claimant is not barred by limitation and accordingly this issue is answered.”

(t) Aforesaid one paragraph in which limitation aspect has been dealt with by AT sidesteps Ex.C.10 though the same has not been served on noticee. Further more, after having clearly articulated that exhibits were

marked with objection, there is nothing that says that the objections cannot be sustained. Even without articulating what the objection is, if the AT had merely said that objections, subject to which exhibits were marked were considered and the same are not sustained, the dynamics and dimensions of this order may have been very different as that may have taken the matter into the realm of appreciation of evidence. In the instant case, without doing so, after clearly observing that Ex.C.9, C.10, C.11 and C.12 have been marked subject to objection, AT has side stepped the issue of Ex.C.10 not being served by holding that Exs.C.11 and C.12 not being served will have no bearing. In other words, crucial Ex.C.10 which is admittedly notice within the meaning of section 21 of A and C Act not being served on noticee Ind Travels has not been addressed at all. This is plainly incorrect and patently illegal. Besides this, as the issue decided is limitation, which forms part of 'public policy' as laid down in ***Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai*** reported in **(2012) 5 SCC 157**, as a result of this finding that is patently illegal as far as Ind travels is concerned, the impugned award is clearly in conflict with public policy of India also owing to being in contravention of the fundamental policy of Indian law.

(u) To be noted, this issue pertaining to limitation and this issue touching upon non issuance of notice making a request for referring a dispute to arbitration within the meaning of section 21 of A and C Act applies only to Ind Travels and not to Rasi travels. With regard to Rasi travels, though there is no acknowledgment for the notice within the meaning of section 21 of A and C Act being notice dated 21.10.2010 (Ex.C.9), as Rasi travels has sent a

reply dated 15.11.2010 (Ex.C.14), it is concluded that there was a notice within the meaning of section 21 of A and C Act, therefore, there was commencement of arbitral proceedings between 21.10.2010 and 15.11.2010 and that date between 21.10.2010 and 15.11.2010 is clearly within the limitation when viewed from all possible scenarios and perceptions.

(v) Having made aforesaid position with regard to Rasi travels clear, this Court now reverts to examining these two issues pertaining to limitation and issuance of notice / commencement of arbitral proceedings within the meaning of section 21 of A and C Act with regard to Ind travels in greater detail making further elaboration. This course is adopted as these two in the considered opinion of this Court are of immense importance.

(w) With regard to Ind travels, as already alluded to supra, for notice within the meaning of section 21 of A and C Act being notice dated 21.10.2010 (Ex.C.10), there is no acknowledgement. There is no reply from Ind travels either. In other words, there is nothing before this Court to show that notice within the meaning of section 21 of A and C Act was issued with regard to Ind travels. Therefore, the date of commencement of arbitral proceedings qua Ind travels is not available. This takes us to the question as to what at all can be taken as notional date of commencement of arbitral proceedings.

(x) As already mentioned supra, sole arbitrator, who constituted AT was appointed vide order dated 27.10.2015 made by this Court in O.P.No.206 of 2013. While alluding to this aspect of the matter supra, elsewhere in this order, this Court has made it clear that one more scenario

in this regard will also be examined in the latter part of this order. This court shall examine that one more scenario now with regard to O.P.No.206 of 2013.

(y) As limitation goes to the root of the matter and as section 3 of the Limitation Act mandates that limitation shall be looked into and examined by the Court even if it is not set up as defence, considering the immense significance, this court with the intention of making the examination of impugned award as exhaustive as possible, called for the entire case file in O.P.No.206 of 2013. An examination of case file in O.P.No.206 of 2013 revealed that Ind travels is the second respondent in the said O.P. To be noted, Rasi travels is the first respondent in said O.P and as these two issues, namely limitation and service of notice within the meaning of section 21 of A and C Act have already been concluded with regard to Rasi travels, this Court is not delving into that aspect with regard to Rasi travels.

(z) With regard to Ind travels, which is second respondent in O.P.No.206 of 2013, the case file reveals that this court has ordered notice to Ind Travels (second respondent) on 5.7.2013 and permitted private notice to be taken. Pursuant to the order of this court, private notice has been taken out and second respondent Ind travels has been duly served on 9.7.2013. An affidavit of service dated 24.07.2013 vide D.No.21156 of 2013 has been filed and that forms part of the case file in O.P.No.206 of 2013. Therefore, instead of taking the date of the order in O.P.No.206 of 2013, namely 27.10.2015 as reckoning date, one can consider another scenario of taking this 09.07.2013 as reckoning date. To be noted, for Rasi travels also (first respondent in

O.P.No.206 of 2013), same date applies, but it has not been examined as limitation and section 21 notice points do not help Rasi travels and the same have already been concluded.

(aa) If 09.07.2013 is taken as the reckoning date, the next question is what is the date from which limitation has to be computed. As already mentioned supra, with regard to the date of cause of action from which limitation has to be computed or in other words, the date of breach which is the date of reckoning for computing limitation, different kinds of submissions have been made. Sum totality of analysis of these submissions and records before this court reveal that four scenarios emerge. The first scenario is 4.6.2010. This is the date on which application under section 9 of A and C Act was filed by SFP before Delhi Court. In this petition under section 9 of A and C Act, SFP has clearly alleged breach on the part of Ind travels. This is articulated in sub paragraph (g) of paragraph 4 and paragraph 5 of a petition under section 9 before Delhi Court. Considering the importance and significance, this court deems it appropriate to extract the aforesaid sub paragraph and paragraph 5 which read as follows :

“g.That despite having received the said amount specifically subject to the conditions abovementioned, the Respondent has consistently failed to meet the contractually specified targets and has remained in breach of its contractual obligations to the Petitioner which is evident from the Monthly Productivity Statement. That the Respondent was contractually obliged to achieve 12000 segments per quarter, at an average of 4000 segments per month to be entitled to get incentives. However, the respondent has continually failed to achieve its target segments.

5. That the Petitioner had been duly complying with its obligations under the said contracts till date without any complaint or demur on the part of the Respondent. However, the Respondent continually breached the terms agreed in the contract. Moreover, the Respondents are illegally withholding the printers supplied by the Petitioner and using them on competing CRS."

(ab) Therefore, as SFP has conclusively alleged breach on the part of Ind travels on 4.6.2010, in a petition filed before Delhi Court (certified copy has been placed before this court as part of case file), this is the first scenario.

(ac) Second scenario is 20.09.2010. The said agreement is dated 21.09.2007. Said agreement clearly says that it is initially for a period of 12 months, but it would be for a maximum of 36 months. It also covenants that the term will be negotiated at the end of 12 months. There is also dispute about the exit clause which has been adverted to and alluded to supra. Putting it aside, even if the worst scenario of 36 months is taken into account and even if it is taken that it is a case of breach continuing for a period of 36 months, 36 months period ends on 20.09.2010.

(ad) Third scenario is 22.09.2010. To be noted, this is the date on which Advocate Commissioner / Local commissioner appointed by Delhi Court visited the premises of Ind travels and took screen shots and other material which ultimately culminated in local commissioner's report dated 08.10.2010 before Delhi Court, it can be contended that breach came to light when Advocate Commissioner visited the premises on 22.09.2010.

(ae) Fourth scenario is 30.09.2010. Said agreement is dated 21.09.2007, but it says that it is with effect from 01.10.2007. Again, the 12 to 36 months period and exit clause are grey areas. Therefore, putting this aside, even if the three years is computed from 01.10.2007, the contract by efflux of time expires on 30.10.2010.

(af) Therefore, there are four scenarios. In these four scenarios, if scenario No.1, i.e., 04.6.2010 is taken and if aforesaid 9.7.2013 (date of service of notice in O.P.No.206 of 2013) is taken as notional date, the claim is clearly barred by limitation. If the other three scenarios are taken, it can well be argued that it is well within the period of limitation.

(ag) This Court has very carefully and critically examined these dates and principles. Article 55 of the Limitation Act, 1963 makes it clear that reckoning date is three years. Therefore, it is the date of breach. In the instant case, SFP which is the protagonist of arbitral proceedings, by its own volition has categorically submitted on 04.06.2010 itself that breach has already occurred. As already alluded to supra, this has been categorically articulated in sub paragraph (g) of paragraph 4 and paragraph 5 of a petition under section 9 before Delhi Court being Suit No.356 of 2010. Therefore, SFP cannot now be heard to contend that breach occurred or reckoning date of breach is any day beyond or after 4.6.2010. Therefore, if 4.6.2010 is taken as date of breach, even on worst case scenario of taking 09.07.2013 as date of arrest of limitation that was running, SFP's claim qua Ind travels is clearly barred by limitation.

(ah) This takes us to another realm of this entire matter. That realm is whether notice within the meaning of section 21 of A and C Act is mandatory. As already alluded to supra, in **Praveen Enterprises** case, Hon'ble Supreme Court made it clear after analysing section 21 of A and C Act and section 3 of the Limitation Act that Section 21 supplies the omission in section 3. In other words, in very simple terms, receipt of notice within the meaning of section 21 of A and C Act by noticee / addressee is the date of commencement of arbitral proceedings and this date is clearly the reckoning date for computing limitation.

(ai) Thereafter, a question as to whether issue of notice within the meaning of section 21 of A and C Act is mandatory came up for consideration before Hon'ble Delhi High Court in **Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.** reported in **2018 (3) R.A.J. 94 (Del)**. In the considered opinion of this Court, views expressed by Hon'ble Delhi High Court in this regard are very instructive, elucidative and illuminating. Delhi High Court, in **Alupro Building** case, after referring to **Praveen Enterprises** case of Hon'ble Supreme Court held that **Praveen Enterprises** case also lays down the law that section 21 will not be the reckoning date for counter claim.

(aj) Thereafter, addressing itself to the question as to whether notice under section 21 is mandatory, five clear purposes which a notice within the meaning of section 21 serve have been laid down. First is, party against whom claim is made should know what the claims are. It is quite possible that it can get ironed out then and there. Second purpose is, notice

provides an opportunity to the recipient to point out if some or all claims are time barred or barred by any other law or untenable in facts and also to highlight if there are any counter claim and so on. Third purpose is that in the absence of notice within the meaning of section 21 of A and C Act, it will not be possible to know whether the procedure envisaged in the arbitration clause for appointment of arbitrator has been followed. The fourth purpose is, it gives an opportunity to the noticee to bring to light if a person suggested / nominated is disqualified to act as an arbitrator for any reason. The fifth purpose is that failure by the respondent to respond will be the trigger for invoking jurisdiction of the Court under section 11 for appointment of an arbitrator.

(ak) This Court has also noticed that no counter affidavit has been filed by respondents in O.P.No.206 of 2013. However, the scope of appointment of arbitrator under section 11 is very limited and owing to such appointment, it does not prevent the parties from raising the issue of limitation before AT as the plea of limitation has to necessarily be gone into by AT in the light of section 3 of the Limitation Act read with section 43(1) of A and C Act. While section 3 of the Limitation Act makes it clear that there is an obligation to examine the plea of limitation even if it is not set up as defence. Section 43(1) of A and C Act makes Limitation Act applicable to arbitration proceedings. Therefore, duty cast upon the court vide section 3 of Limitation Act will apply to AT also. In the instant case, as already alluded to supra, limitation has been raised as an issue and an issue (issue No.8) has been framed and the same has been dealt with. To be noted, limitation turns

on the issue of notice under section 21 of A and C Act. In other words, the plea of limitation cannot be raised without reference to issue of notice under section 21 of A and C Act. In the course of this limitation issue being raised, with regard to aforementioned Ex.C.10 dated 21.10.2010 which pertains to Ind travels, it is clear that Ex.C.10 has been marked subject to objection. To be noted, subsequent notice dated 02.11.2011 (Ex.C.12) has also not been served on Ind Travels. The admission and denial placed before this Court as well as deposition (cross examination) show that Ex.C.12 and of course, Exs.C.9, C.10 and C.11 have also been marked subject to objection.

(al) While on this, it is to be noted that the objection has not been dealt with at all by AT. If AT had dealt with the objection and returned a finding, the dynamics and dimensions of this section 34 exercise could well have taken a different drift and gravitated towards different set of issues.

(am) Be that as it may, reverting to **Alupro Building** case, after addressing itself to the question as to whether notice within the meaning of section 21 of A and C Act is mandatory and after laying down five different purposes which a notice within the meaning of section 21 of A and C Act serve, Delhi High Court concluded that proper interpretation of section 21 of A and C Act would mean that notice within the meaning of section 21 of A and C Act by claimant, invoking arbitration clause preceding reference of dispute to arbitration is mandatory. In other words, it was held that without such notice, arbitration proceedings that are commenced would be unsustainable in law.

(an) This court has no hesitation in accepting the view in **Alupro Building** case that running theme of A and C Act is consent or agreement between parties at every stage and section 21 performs an important function of forging such consensus on several aspects which have been alluded to supra. Therefore, in the light of factual matrix of this case, this court has no difficulty in accepting the **Alupro Building** principle that notice within the meaning of section 21 is so important and arbitral proceedings commenced without the same is unsustainable in law. In the considered opinion of this court such a conclusion is inescapable.

(ao) There is one more reason as to why this court in its considered opinion has come to the conclusion that notice within the meaning of section 21 is imperative. The reason is, A and C Act has made lack of proper notice of appointment of an arbitrator as one of the grounds for setting aside an arbitral award. This principle finds its statutory expression in section 34(2)(a)(iii) which reads as follows :

“(iii)the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or”

(ap) A careful perusal of section 34(2)(a)(iii) of A and C Act extracted reproduced supra will reveal that it talks about three scenarios or in other words, it has three limbs. First limb is, protagonist of section 34 O.P not being given proper notice of appointment of arbitrator, second limb is, such protagonist of section 34 O.P not being given proper notice of arbitral

proceedings and third limb is generic and expansive (in contradistinction to limbs 1 and 2 which are specific) i.e., whether protagonist of section 34 O.P. was otherwise unable to present his case. To be noted, these three limbs are separated from one another by (or), therefore, they are not conjunctive. To put it differently, even if any one of these three limbs are established by a protagonist of a O.P under section 34, such a party will be entitled to have the impugned award set aside under section 34.

(aq) A sum totality of the discussion in this regard thus far will make it clear that absence of notice within the meaning of section 21 of A and C Act by itself invalidates the impugned award (on a extreme demurrer even if it clears the limitation hurdle). Besides these, as proper notice of appointment of an arbitrator has not been given to Ind travels which is the petitioner in O.P.No.247 of 2019, Ind travels is entitled to have the impugned award dislodged and set aside under first limb of section 34(2)(a)(iii) of A and C Act. To put it differently, the impugned award is invalidated, dislodged and set aside with regard to Ind travels which is the petitioner in O.P.No.247 of 2019, owing to three phenomena, viz., (a) lack of notice within the meaning of section 21 of A and C Act, (b) Ind travels not being given proper notice of appointment of arbitrator and (c) limitation.

(ar) With regard to Ind travels, this is the end of the campaign qua instant O.P, but that is not the case with regard to Rasi travels and therefore, this court deems it appropriate to examine the other two grounds of attack also.

(as) As set out supra, the second ground is that only a photocopy of

said agreement was marked, while there is clear interpolation, resulting in substantial difference in covenants. Ex.C.1 that was marked before AT and a copy of said agreements with travel agents which have now been placed are at variance, is learned counsel's say. Learned counsel for travel agents called upon this court to compare the two.

(at) It was submitted that AT should have called for the original. There is nothing on record to show that any application was taken out before AT pointing out such interpolation and variance and requesting AT to summon the original. Under such a situation, all these are in the realm of appreciation of evidence and may not qualify as a ground within the contours and confines of section 34 of A and C Act.

(au) Third and last ground of attack was that Local commissioner who examined the software was not examined and travel agents did not get an opportunity to cross examine the local commissioner / advocate commissioner. As already mentioned supra, report of the local commissioner / advocate commissioner has been marked as Ex.C.8 being report dated 08.10.2010 and there is nothing on record to show that applications were taken out seeking to summon the advocate commissioner and cross examine the advocate commissioner. Therefore, this ground also cannot be sustained within the contours and confines of section 34 of A and C Act.

8 Conclusion :

(a) In the light of the narrative supra, this court comes to the conclusion that impugned award as far as first respondent before AT, i.e., Rasi travels (petitioner in O.P.No.248 of 2019) calls for no judicial intervention

and the same deserves to be sustained.

(b) Impugned award as far as it relates to Ind travels, which is second respondent before AT (petitioner in O.P.No.247 of 2019) is liable to be set aside as being in conflict with public policy of India owing to being in contravention with the fundamental policy of Indian law, which in turn is due to entertaining a claim which is clearly barred by limitation, besides being invalidated on the ground of lack of notice within the meaning of section 21 of A and C Act.

9 **Decision :**

- (a) O.P.No.247 of 2019 is allowed.
- (b) O.P.No.248 of 2019 is dismissed.
- (c) Considering the nature of the matter, parties are left to bear their respective costs in O.P.Nos.247 and 248 of 2019. Consequently, connected applications are closed.

30.04.2019

Speaking order

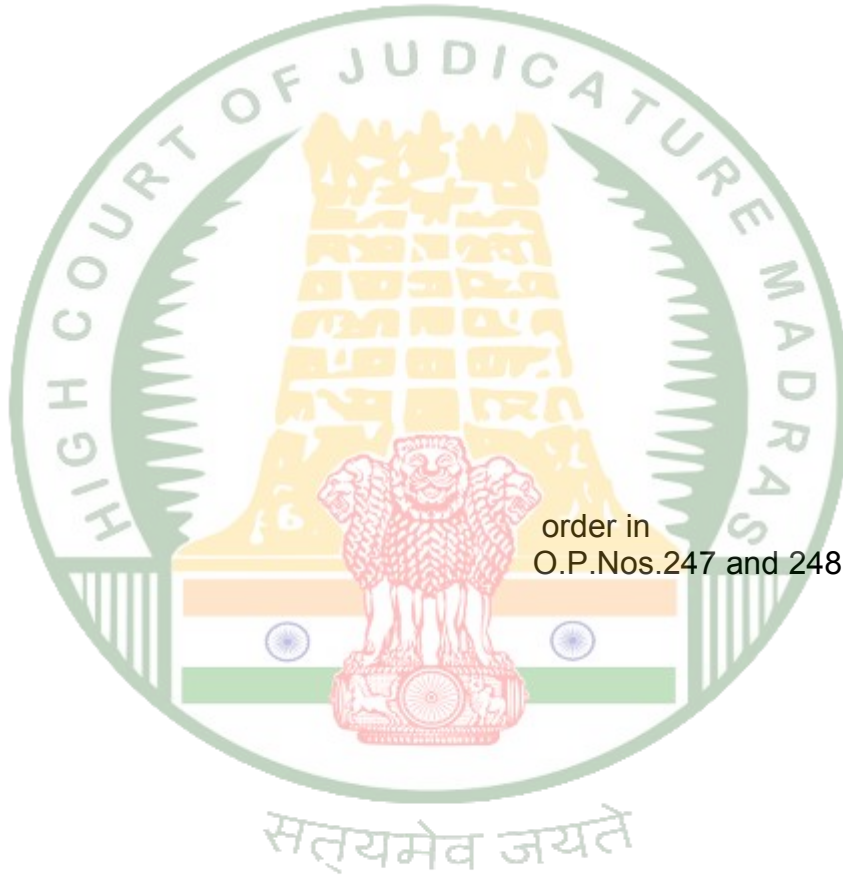
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M.SUNDAR, J.

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order in
O.P.Nos.247 and 248 of 2019

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30.04.2019