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

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Reserved on: 18.12.2019

Pronounced on: 04.03.2020

+ ARB.P. 694/2019

ACTIVE MEDIA

..... Petitioner

Through Mr. Rishabh Jetley, Advocate.

versus

DIVISIONAL COMMERCIAL MANAGER, NORTHERN
RAILWAY

..... Respondent

Through Mr. Amitaya Poddar and Ms. Reshma
Gehlot, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, ('Act').
2. An Agreement dated 13.09.2014, was entered between the parties for provision of onboard TV and Information Dissemination and Entertainment System in all executive class and chair car coaches of the Delhi Kalka New Delhi Shatabdi Express.
3. Certain disputes arose between the parties and the petitioner invoked the Arbitration Clause mentioned in the Agreement and sought appointment of the Arbitrator through a notice dated 22.01.2019. The petitioner also communicated that it had not waived the applicability of Section 12(5) of the Act.
4. Respondent neither replied to the notice nor took any steps for

constitution of the Arbitral Tribunal. Relevant part of the Arbitration Clause between the parties reads as under:-

“(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as, to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within 120 days, then and in any such, but except in any of the excepted matters” referred to in Clause 63 of these conditions, the contractor after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.”

5. Learned counsel for the respondent had sought time to take instructions in the matter. Learned counsel submits that he is not filing a reply to the petition but has two preliminary objections to the maintainability of the present petition. He submits that the first objection is that no notice of invocation of Arbitration was sent by the petitioner to the respondent and secondly it was the petitioner who had abandoned the contract and cannot take advantage of its own wrong by seeking to invoke the Arbitration Clause.

6. Learned counsel for the petitioner, per contra, argues that there is no merit in the objections raised by the respondent. Attention of the Court is drawn to the notice of invocation sent to the respondent on 22.01.2019 which has been filed along with the petition. Responding to the second objection, learned counsel for the petitioner submits that it is wrong to contend that it was the petitioner who had abandoned the contract and in any case, as per the settled law, it is not open for this Court to enter into the merits of the

disputes at the stage of examining the petition under Section 11(6) of the Act.

7. Learned counsel for the respondent responding to the arguments of the petitioner vehemently contends that it is not correct for the petitioner to argue that the notice of invocation was sent to the respondent. He submits that a perusal of the notice dated 22.01.2019 would show that the notice was addressed to Divisional Commercial Manager, Northern Railway and the address was NDCR Building, State Entry Road, New Delhi. He submits that the correct address should have been DRM Office and not NDCR Building and hence no notice was received by the respondent herein. In response to the petitioner's argument on the second objection raised by the respondent, learned counsel submits that under Section 11(6) of the Act the Court is required to adjudicate as to which party is guilty of breach of contract before referring the matter to Arbitration.

8. I have heard the learned counsels for the parties and examined their contentions.

9. I find merit in the contention of learned counsel for the respondent that the notice invoking Arbitration was sent to the office of Divisional Commercial Manager, Northern Railway but at a wrong address i.e. NDCR Building, State Entry Road. A perusal of several other documents filed by the petitioner clearly indicates that the petitioner has corresponded with the respondent at the address of DRM office. Even the last communication sent by the petitioner which is a letter dated 20.03.2018 has been addressed to Senior Divisional Commercial Manager at DRM Office. It is not understood as to why the notice for invocation of Arbitration is sent at the wrong address. Since the address mentioned is NDCR Building, State Entry Road

while the address of the respondent is DRM Office which is situated at State Entry Road, Pahar Ganj, Delhi-110 055, the respondent is right that it has not received the notice of Arbitration. Section 11 of the Act clearly stipulates that the party desirous of appointing an Arbitrator would send a notice to the other party seeking appointment of an Arbitrator. If the opposite party fails to appoint the Arbitrator within a period of thirty days from the receipt of a request to do so from the other party, a petition under Section 11 (6) may be filed by the party invoking the Arbitration. However, if the notice of invocation is not received by the other party, the period of thirty days would not commence and needless to state there would be no failure of the other party to appoint an Arbitrator.

10. I am fortified in my view by a judgment of a Coordinate Bench of this Court in the case of ***Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*** 2017 SCC OnLine Del 7228. Relevant paras of which are extracted hereunder:

“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.”

11. In the case of ***Indus Ind Bank Ltd. vs. Mulchand B. Jain & Ors.***

2013 SCC OnLine Mad 555, a Division Bench of the High Court of Madras has held as under:

“8. Therefore, the learned Single Judge clearly held that there is absolutely no material to hold that Section 21 of the Act has been complied with. A perusal of Section 21 of the Act would go to show that the proceedings would commence on the date on which a request for the dispute to be referred to arbitration, is received by the concerned Respondent. Therefore, the commencement of Arbitral proceedings is incumbent on the receipt of the notice to be sent in accordance with Section 21 of the Act, which in other words, if no notice is received by the concerned Respondent, then there is no commencement of Arbitral proceedings at all. The provision is very clear to the effect that it does not even say that it should be served, but it specifically says that such notice will have to be received. Section 21 will have to be read with Section 34 of the Act. Section 34(2)(iii) provides for a ground for setting aside an award, in a case where the Applicant was not given proper notice of the appointment of an Arbitrator or the Arbitral proceedings. In this case, the factual position is that the First Respondent was not given proper notice of an appointment of an Arbitrator. Here again, we have to consider the specific language used under Section 34(2)(iii) of the Act, which clearly mandates that the Applicant will have to be given a proper notice. Therefore, proper notice is the notice, which has to be served and received by a person concerned. We are of the view that Section 34(2)(iii) has to be read with Section 21 of the Act. On a conjoint reading of Section 21 read with 34(2)(iii), we have no doubt that the Arbitral proceedings have not been commenced insofar as the First Respondent is concerned.

9. In view of such position, Section 43 of the Act will have to be pressed into service. Section 43 speaks about limitation. Section 43(2) states that for the purpose of this Section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.”

12. Thus, in my view, the petitioner has failed to send a notice invoking Arbitration at the correct address resulting in there being no invocation notice to the respondent herein. The present petition is thus not maintainable and deserves to be dismissed. Since the petition is being dismissed on the ground of there being no notice of invocation of Arbitration to the respondent, the second objection raised by the respondent need not be considered in the present petition and is left open.

13. Petitioner is at liberty to send a fresh notice of invocation to the respondent, if it so desires, in accordance with law.

14. Petition is disposed of with the above direction.

JYOTI SINGH, J

MARCH 4th, 2020

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