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

+ O.M.P.(T) 2/2021 & IA 15048/2021 and 15049/2021

**BHARAT CHUGH**

..... Petitioner

Through Mr. Ravjyot Singh and Ms.  
Hiba Shah, Advs.

versus

**M C AGRAWAL HUF**

..... Respondent

Through Mr. P.K. Agrawal and Ms.  
Kavita, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E N T (O R A L)**

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**03.12.2021**

1. This petition, under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), seeks termination of the mandate of the learned arbitrator presently in seisin of the disputes between the parties.

2. The limited issue in controversy is whether the learned arbitrator is *coram non judice*, on the ground that his appointment has been made in violation of the provisions of the 1996 Act.

3. The contractual relationship between the petitioner and the respondent consisted of an agreement dated 25<sup>th</sup> January, 2020, followed by a supplementary agreement dated 20<sup>th</sup> June, 2020.

4. Learned Counsel for the parties are *ad idem* that the arbitration clause which would apply is Clause 14 of the supplementary agreement dated 20<sup>th</sup> June, 2020, which reads thus:

“14. That in case any dispute or difference arising out of or touching this agreement and/or the agreement date 25.01.2020, the same shall be referred to the arbitration of the sole arbitrator, Hon’ble Mr. Justice NK Modi Retired judge Madhya Pradesh High Court and failing him Mr. Brajesh Kumar Retired Additional District and Sessions Judge, Delhi. The Arbitrator shall give the reasoned award.”

5. According to the petitioner, the dispute, which was raised by the respondent against the petitioner, was totally frivolous and without merit. That, however, is clearly an issue which, in exercise of its jurisdiction under Section 14 of the 1996 Act, this Court cannot examine, as Section 14 is restricted to the issue of whether the learned arbitrator has been rendered *de facto* or *de jure* incapable of continuing to function as arbitrator.

6. The main contention of Mr. Ravjot Singh, learned Counsel for the petitioner, is that the learned arbitrator could not have assumed jurisdiction over the arbitral proceedings, as they were initiated in violation of Section 21 of the 1996 Act, no notice of arbitration, as envisaged by the said provision, having ever been served on the petitioner by the respondent.

7. The petition avers that, on 9<sup>th</sup> October, 2021, the petitioner received an e-mail from the learned arbitrator, intimating the petitioner that he had been appointed as arbitrator by the respondent,

*vide* the communication dated 6<sup>th</sup> October, 2021. The learned arbitrator, apparently, thereafter, entered on reference and proceeded to fix the hearing.

8. The petitioner, in the circumstances, addressed a communication to the learned arbitrator on 20<sup>th</sup> October, 2020, disputing the authority of the learned arbitrator to arbitrate, for lack of any notice invoking arbitration under Section 21 of the 1996 Act.

9. It was also averred, in the said communication, that a necessary prerequisite for valid arbitral proceedings was reference of an arbitrable dispute. In the absence of a notice under Section 21, the petitioner contended that there was no dispute referred to arbitration, on which the arbitrator could assume jurisdiction.

10. On these objections, the learned arbitrator proceeded to pass the following order on 20<sup>th</sup> October, 2021:

“Vide notice dated 09.10.2021, the parties were directed to appear before the Tribunal on 20.10.2021 at 02:30 p.m. In compliance of the said notice, the Claimant appeared through advocates but Respondents remained absent. Vide email dated 20.10.2021 sent at 02:11 p.m. on behalf of Respondents, it is informed that the Respondents have received the intimation about the appointment as arbitrator and also about the date of hearing. However in the said email it is stated that there is no dispute between the parties which requires adjudication. It is also stated that appointment of undersigned as Sole Arbitrator is not proper. In the said email it is also stated that because of prior obligations, the Respondents are unable to attend the hearing.

So far as appointment of undersigned as sole arbitrator is concerned, *prima facie* it appears that both the parties *vide*

agreement dated 25.01.2020 appointed the undersigned as sole arbitrator. However the Respondents are free to raise objections by moving appropriate application. So far as the statement of Respondents that there is no dispute that requires adjudication is concerned, the submission of the Respondents is pre-mature. It can be examined only after submission of statement of Claim.

Learned Counsel for Claimant prays time to submit the statement of Claim. Let the Statement of Claim alongwith documents be filed by the next date of hearing with advance copy to the Respondents.

Both the parties are directed to deposit a sum of Rs. One Lac each towards fee of the tribunal. The Respondents are also directed to deposit a sum of Rs. 25,000 towards initial expenses as Claimant has already deposited the same. Bank details have already been given vide notice dated 09.10.2021.

Case shall be taken up on 24.11.2021 at 2 pm. Proceeding of this Tribunal be sent to the Respondents by speed post and also through email.”

11. Aggrieved thereby, the petitioner has moved this Court, seeking termination of the mandate of the learned arbitrator under Section 14 of the 1996 Act.

12. The respondent has filed a reply to the petition.

13. Mr. P.K. Agarwal, who appears on behalf of the respondent, submits, essentially, that, in view of the peculiar nature of the arbitration clause in the agreement between the parties, there was no requirement of issuing a separate Section 21 notice, before initiating arbitral proceedings.

14. Once the arbitrator had been named in the arbitration agreement, Mr. Agarwal would submit that the arbitral proceedings could be initiated even by a communication to the arbitrator by one of the parties to the agreement. Mr. Agarwal has placed reliance on the judgment of the Supreme Court in *State of Goa v. Praveen Enterprises*<sup>1</sup>, the judgment of a coordinate Bench of this Court in *De Lage Landen Financial Services India Pvt. Ltd. v. Parhit Diagnostic Pvt. Ltd.*<sup>2</sup>. and of the High Court of Calcutta in *Universal Consortium of Engineers Pvt. Ltd. v. Kanak Mitra*<sup>3</sup>.

15. He has placed especial reliance on para 17 of the decision in *Universal Consortium of Engineers*<sup>3</sup>, where the High Court of Calcutta has noticed the earlier decision of this Court in *Alupro Building System Pvt. Ltd. v. Ozone Oversees Pvt. Ltd.*<sup>4</sup>.

16. Qua the judgment in *De Lage*<sup>2</sup>, Mr. Agarwal placed reliance on paras 2.4, 2.5, 2.6, 8, 9, 10, 11, 12 and 13 of the said decision which may be reproduced thus:

“2.4. On 13<sup>th</sup> May, 2019, notices for “facility cancellation/acceleration” was issued to all the Respondents, calling upon them to settle the outstanding dues, failing which the Petitioner threatened legal action for enforcement of their rights under the agreements. As noted above, since the loan was disbursed under two distinct loan account numbers, separate notices were issued in respect thereof.

2.5. Guarantee Invocation Notices was issued on 17 July, 2019 to Respondents Nos. 2 and 3.

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<sup>1</sup> (2012) 12 SCC 581

<sup>2</sup> SCC OnLine Del 4160

<sup>3</sup> AIR 2021 Cal 127

<sup>4</sup> (2017) 162 DRJ 412

2.6. On 29<sup>th</sup> August, 2019, a letter titled “Invocation of Arbitration/Reference of Dispute for the adjudication” was sent by the Petitioner to Shri M.S. Sabharwal (Retd. Additional District & Sessions Judge, Delhi) unilaterally appointing him as the Sole Arbitrator and requesting him to enter upon the reference and initiate arbitration proceedings, between all the parties herein.

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8. This Court, in paragraphs number 25 to 28 of *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*<sup>4</sup> while dealing with challenge to an award under Section 34 of the Act, examined the purpose of notice under Section 21. The reasoning contained in the said paragraphs has been well-summarized by the Madras High Court in *Globe Detective Agencies v. Gammon India Ltd. MANU/TN/4774/2019*, which is extracted as follows:—

“12.2. (...) The above decision of the Delhi High Court arrived at its conclusion to hold that Section 21 notice is mandatory for the following reasons:

- (i) To make the other party know what the claims are.
- (ii) Whether the claims made in the notice are within the purview of limitation or barred by any law.
- (iii) The notice facilitates the parties to arrive at consensus for appointing an Arbitrator.
- (iv) It enables the parties to know whether the proposed arbitrator named by one party is acceptable for the other or he is otherwise qualified or disqualified.
- (v) Unless the notice is issued, the application under Section 11(6) of the Act cannot be filed.”

9. The Court in *Alupro*<sup>4</sup> (supra) explained the relevance of Section 21 for filing a petition under Section 11 of the Act, by holding that the trigger for the Court's jurisdiction under Section 11 of the Act is the failure of the receiver to respond to the sender's communication invoking arbitration. On this

basis, it was held that the requirement of notice under Section 21 of the Act is mandatory. However, the said judgment is distinguishable on facts. In the said decision, there was no notice of invoking the arbitration proceedings at all. Whereas, in the instant case, the facts demonstrate that Respondent certainly had due notice of the arbitration proceedings. These proceedings have also afforded full opportunity to the Respondent to put forth its stand.

10. A similar view has been adopted by a co-ordinate bench of this Court in *Badri Singh Vinimay Pvt. Ltd. v. MMTC Ltd.*<sup>5</sup> Therein, a notice served by the Petitioner to the Respondents, sought payment of monies, and further stated that, “failing which my client shall be constrained to initiate appropriate legal action against you for recovery of the said amounts and interest thereon including initiation of arbitration proceedings”. This was held to be sufficient notice of arbitration under Section 21 of the Act.

11. In the instant petition as well, although the notices dated 13 May, 2019 for “facility cancellation/acceleration” did not specifically mention that the Petitioner is resorting to arbitration, but it was clearly stated that the Petitioner would take recourse to legal proceedings under the agreement. The relevant paragraph of the said notice is extracted as under:—

“Please settle the aforementioned Sum Total Amount Due forthwith failing which DLL will commence legal proceedings to enforce all DLL's rights under the Agreement including but not limited to recovery of all amounts due under the Agreement.”

12. Moreover, in the present case, the purpose of giving notice could not have been achieved because, the arbitration clause, as worded, conferred complete discretion to the Petitioner-lender to make an appointment. The Petitioner, thus, invoked arbitration by sending a notice to his appointed Arbitrator, with copy thereof to the Respondents. The Respondents, thereafter, appeared before the Arbitrator and joined the proceedings without raising any objection of non-issuance of pre-arbitration notice, and instead filed their Statement of Defence. The Respondents thus, had due notice

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<sup>5</sup> 2020 SCC OnLine Del 106

of the proceedings, and Petitioner's intent to resort to arbitration was duly conveyed to them.

13. If one were to argue that regardless of the language of the clause, notice under Section 21 is still necessary to enable the Respondent to oppose the appointment on the ground of disqualification; that would be inconsequential, in light of facts of the present case. It would, indeed, be a non-issue, as the learned Arbitrator has himself, on the request of the Petitioner, terminated the arbitration proceedings. Moreover, the Respondent did not raise any ground of disqualification when it joined the arbitral proceedings.”

17. In *Praveen Enterprises*<sup>1</sup>, Mr. Agarwal has invited my attention to paras 10, 14, 15, 16, 18, 19, 26 and 27, which read thus:

***“What is “reference to arbitration”***

10. “Reference to arbitration” describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the “reference” contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the “reference” contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration

agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

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### ***Sections 21 and 43 of the Act***

#### **14. Section 21 provides that:**

***“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.

**15.** Taking a cue from the said section, the respondent submitted that arbitral proceedings can commence only in regard to a dispute in respect of which notice has been served by a claimant upon the other party, requesting such dispute to be referred to arbitration; and therefore, a counterclaim can be entertained by the arbitrator only if it has been referred to him, after a notice seeking arbitration in regard to such counterclaim. On a careful consideration we find no basis for such a contention.

**16.** The purpose of Section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceeding in regard to a dispute commences. This becomes relevant for the purpose of Section 43 of the Act. Sub-section (1) of Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of Section 43 provides that for the purposes of Section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21 of the Act. Having regard to Section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be

barred by limitation and the Arbitral Tribunal will have to reject such claims as barred by limitation.

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**18.** In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As the Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of the Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of “institution” for arbitration proceedings. Section 21 of the Act supplies the omission. But for Section 21 there would be considerable confusion as to what would be the date of “institution” in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under Section 11 of the Act. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which “a request for that dispute to be referred to arbitration is received by the respondent” the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.

**19.** There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding Claims A and B and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said Claims A and B. Subsequently if the claimant amends the claim statement by adding Claim C [which is permitted under Section 23(3) of the Act] the additional Claim C would not be preceded by a notice seeking arbitration. The date of amendment by which Claim C was introduced, will become the relevant date for determining the

limitation in regard to the said Claim C, whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims A and B. Be that as it may.

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26. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, “unless the parties have otherwise agreed as to the required elements” of such claim statement. It is also made clear that “unless otherwise agreed by the parties” the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made.

27. Similarly, Section 23 read with Section 2(9) makes it clear that a respondent is entitled to raise a counterclaim “unless the parties have otherwise agreed” and also add to or amend the counterclaim, “unless otherwise agreed”. In short, unless the arbitration agreement requires the arbitrator to decide only the specifically referred disputes, the respondent can file counterclaims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and the respondent are entitled to make any claims or counterclaims and further entitled to add to or amend such claims and counterclaims provided they are arbitrable and within limitation.

18. Mr. Agarwal also contests the maintainability of the present petition, for which he relies on para 32.5 of *Alupro Building System*<sup>4</sup>. He also points out that, the petitioner had, in fact, raised the issue of jurisdiction of the learned arbitrator before the learned arbitrator himself, and, by the order dated 20<sup>th</sup> October, 2021, the learned

arbitrator has reserved liberty to the petitioner to move a separate application in that regard. He submits that the proper course of action for the petitioner to follow would be to move a separate application before the learned arbitrator and that, therefore, this proceeding is not maintainable before this Court at this stage.

19. Mr. Singh, learned counsel for the petitioner, submits, *per contra*, that the facts in *Alupro Building System*<sup>4</sup> are identical to those in the present case and that, in the said case, after discussing Section 21 of the 1996 Act and the legal position that obtains in respect of the said provision in detail, and after noticing, further, the judgment of the Supreme Court in *Praveen Enterprises*<sup>1</sup>, a learned Single Judge of this Court (Dr. S. Muralidhar, J., as he then was) has held, in no uncertain terms, that Section 21 of the 1996 Act is mandatory and non-negotiable.

20. I have heard learned Counsel for the parties at length and have also perused the judgments on which they place reliance.

21. To my mind, the issue is elementary. Section 21 of the 1996 Act is a provision which specifically deals with commencement of arbitral proceedings. That which does not commence, obviously, cannot continue. When the statutory scheme envisages commencement of proceedings in a particular fashion, they have to commenced in that fashion or not at all. One may rely, for this purpose, on the line of authorities starting with *Taylor v. Taylor*<sup>6</sup> and

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<sup>6</sup> (1875) LR 1 Ch D 426

proceeding through *Nazir Ahmed v. King Emperor*<sup>7</sup> to *State of Uttar Pradesh v. Singhara Singh*<sup>8</sup> and *Municipal Corporation of Greater Mumbai v. Abhilash Lal*.<sup>9</sup>

22. Section 21 clearly states that arbitral proceedings, in respect of a dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the opposite party. Admittedly, there is no such communication, from the respondent to the petitioner, envisaging reference of the disputes between them to arbitration. Mr. Agarwal has drawn my attention to a communication dated 17<sup>th</sup> June, 2020, addressed by him to the petitioner. The communication set outs, in graphic detail, the specifics of the dispute between the petitioner and the respondent. Thereafter, the communication concludes with the following passages:

“We therefore, hereby call upon you to return back all the shares given by our client vide agreement dated 25.01.2020 except 1750 shares of Cipla Ltd. and 260 Shares of Ultra Tech Cement Ltd (the shares returnable on Feb 20 and March 2020) and also make the payment of interest and dividend payable by you on the said shares and also give/transfer the right shares as per agreement dated 25.01.2020, within a period of 7 days of the receipt of this notice. Kindly note that in case you fail to do so, our client shall take appropriate action both under the criminal, and also the civil law, by filing an FIR against you and also by taking appropriate steps under civil law for recovery of equity shares and amount of interest at your cost risk and liability.”

23. Mr. Agarwal submits that, even if the aforesaid communication dated 17<sup>th</sup> June, 2020 did not specifically envisage reference of the

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<sup>7</sup> AIR 1936 PC 253

<sup>8</sup> (1964) 4 SCR 485

<sup>9</sup> (2020) 13 SCC 234

dispute to arbitration, it, nonetheless, put the petitioner on notice that the respondent, in the event of default on the part of the petitioner in complying with the demands of the respondent, intended “to take appropriate action both under the criminal, and also the civil law .... by taking appropriate steps under civil law for recovery of equity shares and amount of interest.” This, according to Mr. Agarwal, would suffice as a notice invoking arbitration, as arbitration is also a civil law remedy. For this purpose, Mr. Agarwal also placed reliance on certain passages from the judgment of a Coordinate Bench of this Court in *De Lage*<sup>2</sup>.

24. As against this, Mr. Singh points out that the notice dated 17<sup>th</sup> June, 2020 was prior to the supplementary agreement dated 26<sup>th</sup> June, 2020, whereunder the arbitral proceedings have been initiated. Accordingly, he submits that it cannot be treated as a notice invoking arbitration.

25. A notice invoking arbitration, to my mind, must necessarily do that. It has to invoke arbitration. At the very least, it has to refer to the clause in the contract which envisages reference of the dispute to arbitration. Merely sending a notice, setting out the disputes between the parties and informing the addressee that civil and criminal legal remedies would be availed in the event of failure, cannot, in my view, constitute a notice invoking arbitration.

26. Turning now, to the judgments on which Mr. Agarwal places reliance. The judgment of the Supreme Court in *Praveen*

*Enterprises*<sup>1</sup>, in my view, is clearly distinguishable and, in fact, may, to an extent, support the case of the petitioner. The issue in that case was whether, prior to arbitration of counter claims, a separate notice under Section 21, by the counter claimants, was necessary before the counter claims could be referred to the arbitral proceedings which were already in progress. It was in these circumstances, that the Supreme Court held that no separate reference, under Section 21, referring counter claims to arbitration was required, and that the counter claims could be preferred before the proceedings of which the arbitrator was *in seisin*.

27. A holistic reading of paras 16 to 18 of the judgment makes it clear that the Supreme Court has noted the public purpose behind Section 21 of the 1996 Act, namely, to ascertain the *terminus ad quem* so as to fix the period of limitation. As the Supreme Court observes, the very purpose of a Section 21 notice was to decide whether the claims would be barred by time. Such a situation, the Supreme Court holds, would not arise in the case of a reference to counter claims, as the arbitral proceedings were already in progress. That decision, therefore, can be of no assistance to the respondent.

28. In fact, the judgment in *Alupro Building System*<sup>4</sup>, on which Mr. Singh places reliance and which, in my view, squarely applies to the facts of the present case, distinguishes *Praveen Enterprises*<sup>1</sup> precisely on this ground, in the passages already reproduced hereinabove.

29. *Alupro Building System*<sup>4</sup> is an authority for the proposition that a Section 21 notice is indispensable before an arbitral proceeding is initiated. The law in that regard has been elucidated with commendable clarity in the said decision, and it hardly lies on me to reinvent the wheel. I express my respectful agreement with the decision in *Alupro Building System*<sup>4</sup> which, according to me, covers the case in favour of the petitioner and against the respondent on this issue.

30. Insofar as the judgment of the Coordinate bench in *De Lage*<sup>2</sup> is concerned, the issue in controversy in that case was completely different.

31. The arbitration clause in the agreement between the parties, in *De Lage*<sup>2</sup>, read thus:

“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.”

32. Consequent to disputes arising out between the parties, *vide* communication dated 29<sup>th</sup> August, 2019, the petitioner before the learned Single Judge (who would be referred to hereinafter as “De Lage”) addressed a communication to one Mr. M.S. Sabharwal, a retired Additional District & Sessions Judge, Delhi unilaterally appointing him the sole arbitrator to arbitrate on the disputes between De Lage and the respondent, and initiate the arbitral proceedings.

33. De Lage appeared before the learned arbitrator and disputed his authority to continue with the proceeding, citing the judgment of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC India Ltd.*<sup>10</sup> according to which a provision that confers exclusive authority on one of the parties to the agreement to appoint the arbitrator is unenforceable in law. Accepting the submission, the arbitral proceedings were withdrawn. De Lage, in the circumstances, approached the High Court for appointment of an arbitrator. It was that application which was decided by the judgment of the coordinate bench. As such, the coordinate bench was not seized with any challenge to the authority of an arbitrator to arbitrate on the proceedings.

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<sup>10</sup> 2019 SCC OnLine SC 1517

34. One of the contentions advanced by the respondent (referred to, hereinafter, as “PDPL”) before the coordinate bench was that no notice invoking arbitration had been sent by De Lage to PDPL.

35. The learned Single Judge initially dealt with the decision in *Alupro Building System*<sup>4</sup> and distinguished the judgment on the ground that whereas, in that case, there was no notice invoking the arbitration as required by Section 21 of the Act, in the case before him, PDPL had due notice of the arbitration proceedings.

36. The coordinate bench additionally found that, as the arbitration clause in the agreement between De Lage and PDPL conferred complete authority on De Lage to appoint the arbitrator, the purpose of giving a Section 21 notice could not be achieved. Accordingly, the learned Single Judge held that, as De Lage had invoked arbitration by sending a notice to the appointed arbitrator, the objection related to Section 21 of the 1996 Act could not sustain. An additional circumstance, which persuaded the coordinate Bench to reject the plea of non-invocation of Section 21 was the fact that PDPL did not question the jurisdiction of the arbitrator in the arbitral proceedings, but, instead, participated in the proceedings and filed their statement of defence. In any event, held the learned Single Judge, this aspect had been rendered a non-issue, as the learned arbitrator had himself terminated the arbitral proceedings.

37. In these circumstances, I am unable to appreciate how the decision in De Lage could be cited to support a proposition that an

arbitral proceeding could be initiated in the absence of a Section 21 notice. That apart, the judgment in *De Lage*<sup>2</sup> does not notice the decision of the Supreme Court in *Praveen Enterprises*<sup>1</sup>, which, if properly read, clearly underscores the mandatory nature of a Section 21 notice, as a precursor to a valid arbitral proceeding.

38. I also find substance in the contention of Mr. Singh that an arbitral proceeding must necessarily be preceded by a reference of the dispute to the arbitrator. Disputes can be referred to arbitrator only in a manner known to law. In the absence of any notice under Section 21, Mr. Singh submits that the learned arbitrator did not have, before him, any dispute which had been validly referred to arbitration. This, too, in my view, is, *prima facie*, a valid objection.

39. In these circumstances, I am in agreement with Mr. Singh that the learned arbitrator was *coram non judice*, as his appointment was made in contravention of the provisions of the 1996 Act, especially Section 21 thereof.

40. The objection as to the maintainability of the present petition, as raised by Mr. Agarwal is, in my view, bereft of substance. No doubt, it is open to a party to question the authority of an arbitrator, before the arbitrator himself. That was done in the present case. The learned arbitrator has not decided that issue and has, after expressing a *prima facie* view that his appointment was valid, left it open to the petitioner to file a separate application.

41. In these circumstances, there can be no legal objection to the maintainability of the present petition. That apart, a bare reading of Section 14(1) & 14(2) of the 1996 Act is sufficient to maintain the present petition.

42. Section 14(1)(a) of the 1996 Act clearly envisages termination of the mandate of an arbitrator where he becomes *de jure* incapable of performing his functions. Where the appointment of the arbitrator was without the mandatory Section 21 notice, the arbitrator was, *ab initio*, *de jure* incapable of continuing to function as arbitrator.

43. Section 14(2) empowers any party to approach the court to terminate the mandate of the arbitrator, where a controversy remains concerning the ground envisaged by Section 14(1)(a). That controversy, clearly, is in existence as on date and, therefore, even on this ground, the present petition was maintainable under Section 14 (2) of the 1996 Act.

44. For all the aforesaid reasons, I am of the opinion that this petition is entitled to succeed. Accordingly, the mandate of the learned arbitrator, presently in *seisin* of the dispute between the parties, shall stand terminated forthwith.

45. The petition stands allowed accordingly, without any order as to costs.

46. It is made clear that this judgment merely decides the legality of the mandate of the arbitrator presently *in seisin* of the disputes between the parties. It shall not fetter either of the parties in initiating arbitral proceedings in any manner known to law, if that is permissible.

**C. HARI SHANKAR, J.**

**DECEMBER 3, 2021**

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