

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 11, 2022

+ ARB.P. 861/2021

FLORENTINE ESTATES OF INDIA LTD & ANR.

..... Petitioner

Through: Mr. Pravin Bahadur, Mr. Vishnu
Kant and Mr. Rahul Meena, Advs.

versus

LOKESH DAHIYA & ANR.

..... Respondents

Through: Mr. Mukesh Vatsa, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate upon the disputes that have arisen between the parties.

2. The petitioner No.1 is a company incorporated under the provisions of the Companies Act, 1956 and the respondents are private persons residing in Dhanwapur Village, Gurugram, Haryana. The respondents together owned 1/3rd share of land admeasuring 64 kanals comprised in Rect. No. 18, Killa No. no.1(7-0), 10(7-0), Rectangle no. 19, Killa No.4 (8-0), 5(8-0), 6(8-0), 7(8-0), 14(8-0), 15(8-0), 16(2-0), Kitta 9, situated in Village Dhanwapur, Tehsil and District Gurgaon,

Haryana. Apart from the respondents herein, there was one more landowner, one Mr. Jai Bhagwan, who also owned 1/3rd share in the said land. The remaining 1/3rd of the land was owned by the petitioner No. 1 company. In other words, the respondents and Mr. Jai Bhagwan together owned 2/3rd share in the land admeasuring 64 kanals.

3. In the year 2006, the respondents approached the petitioner No. 1 for developing the said land into a Group Housing Scheme. The petitioner No. 1 agreed to the proposal of the respondents as it owned the adjacent land. Accordingly, the parties herein, along with Mr. Jai Bhagwan, entered into a Development Agreement dated February 24, 2007. Later, Mr. Jai Bhagwan sold his 1/3rd share to the petitioner company *vide* Sale Deed dated, July 29, 2009. The petitioner No. 1 in furtherance of the Development Agreement was responsible for carrying out development and marketing of the proposed Group Housing Scheme. The petitioner No. 1 was entitled to 65% share of the total built-up area, as well as the land underneath. The respondents were liable to transfer the said land through a registered deed, either in favour of the petitioner No. 1 or its nominees, or directly to individual buyers. The respondents were to get 35% share in the total built-up area in lieu of their contribution of land. In addition, an amount of ₹1,33,33,332/- was given as security deposit to the respondents, out of which, 50% was refundable/adjustable and the remaining 50%, i.e., ₹66,66,666 was non-refundable. The respondents were to execute and register a General Power of Attorney in favour of the petitioner No. 1, which was duly executed on February 24, 2007. The petitioner No. 1 obtained a License bearing No. 68/2012 and developed a Group

Housing Project namely 'Emerald Bay', situated in Sector 104, Gurugram, under the aegis of its parent company M/s Puri Construction Pvt. Ltd., which has been impleaded in the present petition as petitioner No. 2 *vide* order of this Court dated December 15, 2021 and an amended memo of parties is filed along with application being I.A. 14465/2021.

4. The petitioner No.1 in furtherance of the Development Agreement allocated the developed area/apartment to the respondents, which is either being personally utilized or put up on rent by the respondents.

5. It is stated that the petitioner No.1 has fulfilled and discharged all its obligations under the said agreement. However the respondents have not fulfilled their part of the obligations under the agreement, which are as shown below:-

- a. Refund of ₹66,66,666/- as refundable security to the petitioner No. 1;
- b. Transfer of the portion of land under collaboration by way of registered sale deed in favour of the petitioner No. 1 or its nominee(s) or directly to the individual buyers;
- c. Failure to make payment of ₹40 Lacs [approx.] calculated at the rate of ₹ 50/- per sq. ft. towards IFMS for the total developed area allocated to the respondents;
- d. Amounts pertaining to excess area allocated to respondent no.2;
- e. Payment of requisite/applicable EDC charges as per terms of the Agreement;

- f. Payment of applicable Common Area Maintenance Charges for the developed area allocated to the respondents;
- g. Payment of requisite Stamp Duty, Registration Charges and Legal Administrative Charges for the execution and registration of respective conveyance deeds of the apartments in favour of the respondents;
- h. Non-adherence to the rules and regulations of living in a group housing complex;

6. The case of the petitioners is that the petitioner No.1 had attempted several times to meet with the respondents, but to no avail. As disputes have arisen between the parties which could not be solved amicably, the petitioner No.1 issued notices invoking arbitration on June 18, 2021 and July 2, 2021 to respondent Nos.1 and 2 respectively as per clause 20 of the Development Agreement, i.e., the arbitration clause. The said arbitration clause this is reproduced as under-

"20. ARBITRATION

20.1 All the disputes and differences between the parties hereto arising out of or in connection with this agreement, which cannot be settled amicably, the same shall be referred by the parties to the sole arbitration of a Retired Judge of the Delhi High Court or of the Supreme Court who shall act as a Sole Arbitrator to adjudicate the disputes between the parties. The arbitration proceedings shall be conducted at New Delhi in terms of Arbitration and Conciliation Act, 1996, and any statutory modification thereof. An Award/Order of the Arbitrator will be a condition precedent to any action under the agreement."

7. The petitioner No. 1 in the said notices invoking arbitration

had suggested the names of three retired judges of this Court to be named as the Arbitrator. However the respondent neither consented to any of the above mention names nor suggested any alternatives. As more than 30 days have passed since the notices invoking arbitration, the petitioner No.1 has filed the present petition.

8. Mr. Pravin Bahadur, learned counsel for the petitioners has stated at the outset that petitioner No. 2 is 100% a holding company of petitioner No.1, and both the petitioners are therefore closely interconnected companies of the same Group, involved in the same transaction.

9. Further, he submitted that though under the Development Agreement, both the respondents had transferred all the development, marketing and sale rights in relation to their 2.26 acres of land in Gurugram to the petitioner, they retained their ownership rights on the said 2.66 acres. In the project in question, while 2.66 acres of land was owned by the respondents, about 12.5 acres is owned by the petitioner No.1. The License bearing No. 68/2012 received under the Haryana Development and Regulation of Urban Areas Act, 1975, was for the composite land and was, *inter alia* issued in the name of both the petitioner No. 1 and the respondents. He stated that under the said Act, license is always issued in the name of the landowners only, irrespective of the fact that the actual work of development is being carried out by a third party. All obligations under license are also exclusively of the licensees, irrespective of the fact that the actual work of the development is carried out by a third party.

10. He submitted that under Clause 8.4 of Development

Agreement, the petitioner No. 1 was permitted to assign its rights to another company. On January 12, 2013, the petitioner No. 1 entered into an agreement with petitioner No. 2, transferring the development rights in relation to its own 12.5 acres and also the 2.66 acres of the respondents. This was communicated to the respondents on January 18, 2013, pursuant to which, a fresh Power of Attorney was issued by the respondents in favour of petitioner No.2 on August 14, 2013.

11. According to him, the respondents, in their respective replies dated September 02, 2021 to the notices invoking arbitration, alleged that the respondents have several claims against the petitioner No. 1 under the Development Agreement, General Power of Attorney dated February 24, 2007 and General Power of Attorney dated August 14, 2013. Further, the respondents specifically agreed to the appointment of any one of the three arbitrators suggested by the petitioner in the notices invoking arbitration. The relevant part of the reply in this regard is reproduced as under:-

“On the contrary, the undersigned has several claims against you under the agreement dated 24.02.2007, General Power of Attorney dated 24.02.2007 in favour of Florentine and General Power of Attorney dated 14.08.2013 in favour of M/s Puri Construction Pvt. Ltd. The undersigned has already communicated to you verbally in our meeting at your office on 05.08.2021 that you may appoint anyone of the three arbitrators mentioned in the notice but you have not taken any steps instead sent us a copy of petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.....”

12. Mr. Bahadur has sought specific reference of all four parties herein to arbitration, by invoking the Doctrine of Group of Companies.

He has relied upon the judgment of this Court in the case of **KKR India Private Financial Services Limited and Ors v. Williamson Magor & Co. Limited and Ors., 278 (2021) DLT 234** wherein this Court had, after considering relevant judgments of the Supreme Court on the said issue, laid down guidelines for invoking the Doctrine of Group of Companies. It is his contention that the decision in **KKR India (supra)** is applicable in the facts and circumstances of the present case, for the following reasons:

- i. The petitioner No. 1 is the 100% subsidiary of petitioner No. 2, and are therefore, closely interlinked sister concerns in the same group.
- ii. The Development Agreement was initially negotiated and entered into by petitioner No. 1.
- iii. While after assignment of development rights, the petitioner No. 2 is responsible for development, marketing and sales in the Project 'Emerald Bay', the petitioner No. 1 and the respondents were and continue till today as the co-landowners and co-licensees of the Project land. Therefore, all issues of the Project in relation to statutory compliances remain the primary responsibility of both the petitioner No. 1 and the respondents.
- iv. Even after the assignment, both the petitioners have and continued to deal with the respondents as a single economic entity. This is also evident from the reply of the respondents to the invocation notice, wherein the respondents themselves have claimed that they have grievances and

claims against both petitioner No. 1 and petitioner No. 2.

v. There are certain obligations under the Development Agreement, which can only be concluded between the petitioner No. 1 and the respondents, despite the assignment in favour of petitioner No. 2. In this regard, specific reference is made to the obligation under Clause 4.1 of the Development Agreement, which requires the respondents to transfer title of 65% of their land to the petitioner No. 1 after completion of development. This right has not been assigned under the Assignment Agreement between the petitioner No. 1 and petitioner No. 2. Similarly, under Clause 7.7, petitioner No. 1 is required to register the built-up area forming part of the respondents' allocation upon payment of stamp duty and other charges by the respondents.

13. Thus, according to Mr. Bahadur, it is clear that the transaction in the present case is a composite transaction with the rights and obligations of petitioner Nos. 1 and 2 as sister concerns on one side, and the respondent Nos. 1 and 2 on the other side. No proper adjudication of the disputes would be possible without all the parties being part of the adjudicatory process. Further, there would be no prejudice whatsoever caused to the respondents on account of both the petitioners being part of process of arbitration. He has sought prayers as made in the petition.

14. A reply has been filed on behalf of the respondents, wherein it is stated that until recently, the respondents were not aware of the

arrangements/transaction between petitioner Nos. 1 and 2, as they were not supplied any copy of the Agreement dated January 12, 2013 between the petitioners.

15. Mr. Mukesh Vatsa, learned counsel for the respondents has stated that though the respondents have various grievances and claims in terms of the Development Agreement dated February 24, 2007 and General Power of Attorney dated August 14, 2013, they have not invoked arbitration and were trying to amicably resolve the issues out of court.

16. He has submitted that the letter dated January 18, 2013 stated as under:-

“...with reference to our above agreement, M/s Florentine Estates of India Ltd. have collaborated with M/s Puri Construction Pvt. Ltd. and have assigned all their rights and obligations under the above agreement to M/s Puri Construction Pvt. Ltd. M/s Puri Construction Pvt. Ltd. has stepped into the shoe of M/s Florentine Estates of India with respect to our above agreement and shall enjoy all rights and obligations of M/s Florentine Estates of India Ltd.”

According to him, the above shows conclusively that the petitioner No. 1 has no claim against the respondent as all their rights have been assigned to M/s Puri Construction Pvt. Ltd., and as such petitioner No. 1 has *locus standi* to file the present petition.

17. He has also submitted that though an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908, has been filed by the petitioner No. 2 for its impleadment, it has not complied with the mandatory provision contained in Section 21 of the Arbitration and Conciliation Act, 1996. Such non compliance would make the

proceedings illegal and void. In other words, it is his contention that as the respondents have not received any request from the petitioner No. 2 requesting reference of disputes to arbitration, arbitration cannot be initiated between the respondents and petitioner No. 2. To buttress his argument, he has placed reliance upon the judgments of this Court in the cases of **Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., OMP 3/2015**, decided on February 28, 2017 and **Rajesh Batra v. Ranbir Singh Ahlawat, OMP 396/2011** decided on August 8, 2011.

18. He stated that the petitioner No. 1 being the first company to enter into the Development Agreement, had an inherent right to invoke arbitration with the consent of the respondents. However, when they forfeited their rights and obligations in favour of the petitioner No. 2, any right of the petitioner No. 1 to enter into arbitration with the respondents ceased to exist.

19. It is the submission of Mr. Vatsa that the respondents accepted the letter dated January 18, 2013 with the intent that the contract is an exclusive singular contract with petitioner No. 2. They had not consented to the fact of being in contract with two separate legal entities. Subsequently, the respondents, on the request of petitioner Nos.1 and 2, executed the fresh General Power of Attorney dated August 14, 2013 in supercession of the earlier General Power of Attorney, in favour of Pappu Masiha and Ram Saran Maurya through the petitioner No. 2.

20. According to him, the petitioner No. 1 has no *locus standi* to invoke arbitration proceedings against the respondents or even be party to the same. It is only respondent No. 2 who could do so. However,

since the petitioner No. 2 is an impleaded party in the present petition and it has not complied with the mandatory provisions of Section 21 of the Arbitration and Conciliation Act, 1996, any arbitral proceedings would be void *ab-initio*.

21. He has also contested the reliance placed by Mr. Bahadur on the Agreement dated January 12, 2013, by stating that no copy of the said agreement was served to the respondents or even placed before this Court. In any case, the respondents are not a party to the said Agreement. Further, as the petitioner No.2 is 100% holding company of the petitioner No. 1, the contention raised by the petitioners that the ownership of the 12.5 acres of land remains with the petitioner No. 1 and the respondents are co-licensees, and therefore the petitioner No. 1 remains a composite and essential part of the project is of no avail in the eye of the law.

22. That apart, he submitted that the respondents in their reply to the notice invoking arbitration, evidently denied the contents of the said notice, but with an intention to amicably resolve the issues and complete the project, consented to the appointment of a sole arbitrator. However, the *mala fide* intentions of the petitioners surfaced subsequently and the respondents fear that they might be subjected to harassment by two separate legal entities.

23. Mr. Vatsa has also contested the invocation of the Doctrine of Group of Companies by Mr. Bahadur, stating that the Doctrine only uses certain contexts to deem non-signatories as parties to arbitration proceedings. It does not lay out clear-cut situations where joinder of non-signatories to an arbitration agreement traditionally appear to be a

foregone conclusion, like in relations emphasizing agency, alter-ego, transfers, assignment or third party beneficiaries. He submitted that rather, when an arbitration agreement exists only between signatories, the doctrine encourages the concerned judicial authority to investigate into the complex commercial relations surrounding that agreement or commonality of subject matter, so as to determine whether the signatories' corporate structure or commercial deliverables are so interlinked with other third parties, that a resultant joinder would appear only logical. He has further stated that the law on arbitration and consequent judicial decisions are replete with emphasis on principles that prioritise party autonomy and express written consent as necessary prerequisites for the existence of a valid arbitration agreement. To supplement his contention, he has referred to the judgment of the Supreme Court in the case of **Cox and Kings Limited v. SAP India Pvt. Ltd. and Anr., Arbitration Petition (Civil) No. 38 of 2020**, wherein the Apex Court, had referred the issue regarding the Doctrine of Group of Companies to a larger bench for further elaboration.

24. He has sought dismissal of the present petition.

25. Mr. Bahadur has contested the reliance placed by Mr. Vatsa on **Alupro Building System Pvt. Ltd. (supra)**, by stating that was a case wherein one party had unilaterally appointed an Arbitrator, without there being any valid arbitration clause, or notice invoking arbitration. The appointment of the Arbitrator was without recourse to proceedings under Section 11 of the Arbitration and Conciliation Act, 1996. He has submitted that in any case, in paragraphs 24 to 28 of the said judgment,

this Court has held that the purpose of invocation notice is for the parties to receive notice as to know what the claim is, to point out if any of the claims are time barred, to determine if the arbitrator is to be appointed mutually or unilaterally and to make sure whether the arbitrator proposed to be appointed is disqualified for various reasons. In the present case, the invocation notice, followed by detailed pleadings and proceedings in the present petition, more than fulfils the purpose of invocation, as held in the said judgment.

26. As regards the reliance placed by Mr. Vatsa on **Rajesh Batra** (*supra*), Mr. Bahadur has submitted that the said judgment is completely distinguishable on facts, as the challenge therein was to an Arbitral Award passed by an arbitrator who had been appointed unilaterally by one of the parties, despite the fact that at the arbitration agreement required the Arbitrator to be appointed by mutual consent. He seeks the prayers in the petition.

27. Having heard the learned counsel for the parties, at the outset I may state here that this petition has been filed by the petitioner No.1 seeking appointment of an Arbitrator on the basis of Development Agreement dated February 24, 2007 executed between the petitioner No.1 and the respondents. The petitioner No. 2 was subsequently impleaded as a party herein, pursuant to a no-objection given by the counsel for the respondents.

28. The case of the petitioner No.1 in the petition is that it had on February 24, 2007 entered into a Development Agreement with the respondents who owned 1/3rd share of land ad-measuring 64 Kanals. According to the petitioners, *vide* the said agreement, petitioner No.1

was entitled to 65% share of the total built up area as well as the land underneath. Consequently, respondents were to get 35% share of the total built-up area in view of their contribution of land.

29. It is the case of the petitioner No.1 that an amount of ₹1,33,33,332/- was given as security deposit to the respondents, out of which, 50% was refundable/adjustable and the remaining 50%, i.e., ₹66,66,666 was non-refundable.

30. The respondents executed a General Power of Attorney in favour of petitioner No.1 on February 24, 2007. It is also the case of the petitioner No.1 that on August 14, 2013, it had transferred its development rights under the Development Agreement executed with the respondents in favour of the petitioner No.2 and pursuant thereto on August 14, 2013, a second General Power of Attorney was issued by the respondents in favour of petitioner No.2, in suppression of the earlier General Power of Attorney.

31. The plea of Mr. Vatsa primarily is that petitioner No.2 having transferred all its rights and obligations under the Development Agreement dated February 24, 2007 to petitioner No. 2, the petitioner No.1 has stepped into the shoes of petitioner No.2. Admittedly, petitioner No.2 has not invoked the arbitration clause under the Development Agreement between the petitioner and No.1 and the respondents, and as such this petition is not maintainable and needs to be dismissed.

32. The answer of Mr. Bahadur on this plea of Mr. Vatsa primarily is that the petitioner No.1 being the land owner, the license is issued by the local authority in favour of the land owners only, i.e., petitioner

No.1 and the respondents, irrespective of the fact that only development is being carried out by the third party, i.e., petitioner No.2. His plea is also that the petitioner No.1 has independent claims against the respondents in the manner depicted in paragraph 5 above. He also relied upon the reply given by the respondents to the notice invoking arbitration by the petitioner No.1, wherein the respondents have agreed for appointment of an Arbitrator as the respondents have several claims against both the petitioner Nos. 1 and 2, under the Development Agreement and General Power of Attorney both dated February 24, 2007 and also the General Power of Attorney dated August 14, 2013, and as such the respondents cannot contest the appointment of an Arbitrator. To this, the submission of Mr. Vatsa was primarily that the respondents have accepted the letter dated January 18, 2013 whereby they were informed by the petitioner No.2 that the petitioner No.1 had collaborated with petitioner No.2 and assigned all their rights and obligations under the agreement to the petitioner No.2 with an intent that the Agreement henceforth is exclusively with petitioner No.2. He stated, the respondents have not consented to the fact of being in contract with two separate legal entities. It was in this background that the fresh General Power of Attorney was executed by the respondents in favour of petitioner No.2 on August 14, 2013. In fact, Mr. Vatsa stated that the petitioners have not annexed the agreement dated June 12, 2013 with this petition nor have they served the same on the respondents.

33. I agree with the submission of Mr. Vatsa that in the absence of the agreement dated June 12, 2013 being on record, this Court would

be unable to consider / analyse the rights and obligations which have been transferred by the petitioner No.1 to petitioner No.2 and determine whether any right continues to exist in favour of the petitioner No. 1 to raise claims against the respondents or is it only the petitioner No.2 which can raise such claims.

34. If this issue is seen from the aforesaid perspective, then the plea which has been taken by Mr. Vatsa that the petitioner No.2 not having invoked the arbitration clause in compliance with Section 21 of the Arbitration and Conciliation Act, 1996, the matter cannot be referred to arbitration, is appealing. I may note that in this regard, a Coordinate Bench of this Court *M/s. Oval Investment Pvt. Ltd. v. M/s. Indiabulls Financial Services Ltd. and Ors., CS (OS) 1417/2009* has held as under:

“Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding”

A Regular First Appeal filed against the said Judgment was dismissed by the Division Bench in RFA (OS) 68/2009. In fact, in *Alupro Building Systems Pvt. Ltd. (supra)*, this Court following the Judgment in *M/s. Oval Investment Pvt. Ltd. (supra)* held as under:

“24. Section 21 of the Act reads as under:

“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.”

25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for

the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11 (6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43 (1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the 'Respondent' receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus

frustrating an important element of the parties consenting to the appointment of an arbitrator.

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.”*

The Judgment in ***Alupro Building Systems Pvt. Ltd. (supra)*** has been followed by this Court in a recent decision in the case of ***Dheeraj Rastogi v. Dnata International Pvt. Ltd, Arb. P. 408/2020.***

35. In view of the position of law the plea of Mr. Bahadur that the purpose of invocation is for the parties to receive notice as to know what the claim is; to point out if any of the claims are time barred, to determine if the arbitrator is to be appointed mutually or unilaterally; and to make sure whether the arbitrator proposed to be appointed is disqualified for any reason is one aspect of notice under Section 21 of the Act. There is another aspect as is contemplated in Section 21 of the Act that “a request for that dispute is to be referred to arbitration is received by the respondent”. So it follows, till such time a notice is sent and received, the process of arbitration cannot commence as is

clear from Section 21 which relates commencement of arbitral proceedings. In the absence of such a notice, the requirement contemplated under Section 11 (4) could not said to have been fulfilled for this Court to exercise the power under Section 11 (6) of the Act. So, it must be reiterated as held, in the above Judgments the notice under Section 21 is mandatory and this requirement cannot be overlooked and any proceeding initiated, without fulfilling the pre-requisites, shall be unsustainable.

36. So it follows, in the absence of the Agreement dated June 12, 2013 being on record and in view of the allocation letter dated January 18, 2013 sent by petitioner No.2 to the respondents, it must be presumed that the respondent No.1 has transferred its rights and liabilities under the Development Agreement in favour of the petitioner No.2. Then it is only petitioner No.2 who could have invoked arbitration, and not the petitioner No.1. In view of my above conclusion, even the attempt of Mr. Bahadur to invoke the Doctrine of Group of Companies shall not hold good.

37. In view of my above discussion, the present petition is liable to be dismissed. Liberty is with the petitioners to proceed in accordance with law, if so advised. There shall be no order as to costs.

V. KAMESWAR RAO, J

NOVEMBER 11, 2022/aky/jg