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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 848/2023, I.A. 15490/2023

INDIAN SPINAL INJURIS CENTRE

..... Petitioner

Through: Mr.Sandeep Kapoor, advocate

versus

M/S GALAXY INDIA

..... Respondent

Through: Mr.Anshul Goel, Mr.Sanjeev Kumar
and Mr.Ashok Goel, Advts.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

08.05.2024

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1. By way of the present petition filed under Section 11(6) read with Section 11 (8) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the '*A&C Act*'), the petitioner seeks appointment of Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes *inter se* the parties.
2. Learned counsel for the petitioner submits that an agreement was executed between the parties on 27.12.2018 which contains the arbitration clause. Learned counsel submits that subsequent to that a purchase order dated 27.12.2018 was issued. Learned counsel submits that thereafter, the dispute arose between the parties, and a notice dated 02.02.2022 invoking arbitration was issued to the respondent. Learned counsel submits that since the arbitration clause was there and there is an arbitrable dispute, the matter may be referred for arbitration. Learned counsel has relied upon *Duro Felguera, S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729, and submits that



there is a limited scope of jurisdiction for the court at this stage.

3. Learned counsel for the respondent at the outset has submitted that the notice under Section 21 of the Arbitration and Conciliation Act, 1996 has not been served upon the respondent. Learned counsel submits that apparently, the notice has been sent at the address T-5, Mangol Puri Industrial Area, Phase I, New Delhi whereas the complete address of the respondent is T-5/237, Mangol Puri, Industrial Area, Phase-I, New Delhi-110083 as reflected in the agreement between the parties. Learned counsel submits that in the absence of notice under Section 21 of the Arbitration and Conciliation Act, 1996, the petition cannot be entertained. Learned counsel also submits that the present petition is hopelessly barred by limitation.
4. It is a settled proposition that service of notice under Section 21 of the Arbitration and Conciliation Act, 1996 is a pre-requisite and pre-essential for the commencement of the proceedings. Section 21 of the Arbitration and Conciliation Act, 1996 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.”*
5. The Coordinate bench of this court in ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***, (2017) SCC OnLine Del 7228; which was followed in ***Amit Guglani & Anr. v. L and T Housing Finance Ltd. Through Managing Director & Anr.***; 2023:DHC 5979. The ratio of these judgments makes it clear that merely sending the



notice under Section 21 of the Arbitration and Conciliation Act, 1996 is not sufficient. The receipt of the notice is the prerequisite for the commencement of arbitration proceedings.

6. I may refer to the judgment of the co-ordinate bench of this Court in ***Alupro Building Systems Pvt. Ltd. (supra)***, wherein it was inter alia held as under:

“Is the notice under Section 21 mandatory?”

23. *While the above ground is by itself sufficient to invalidate the impugned Award, the Court proposes to also examine the next ground whether the Respondent could have, without invoking the arbitration clause and issuing a notice to the Petitioner under Section 21 of the Act filed claims directly before an Arbitrator appointed unilaterally by it?*

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 as 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.”

7. Considering the above dictum laid down by the coordinate bench of this court and the facts of the present case at hand, I do not find any reason to dissent from the same. I consider that in the present case, the



notice has not been sent at the complete address which results in incomplete service of the notice under section 21 of the A&C act which is a mandatory pre-requisite. Therefore, the present petition is liable to be dismissed.

8. Hence, the petition along with the pending application is dismissed.

DINESH KUMAR SHARMA, J

MAY 8, 2024/rb/ht