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

+ **ARB.P. 1387/2024**

SHES AIR AND AUTOMATION

.....Petitioner

Through: Mr. Akhil Solanki, Advocate

versus

AIRPORT AUTHORITY OF INDIA & ANR.Respondents

Through: Ms. Neha Bhatnagar, Mr. Bishal Majumder, Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

28.02.2025

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1. This Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator in terms of the Work Order dated 18.05.2017 awarded to the Petitioner by the Respondent herien.

2. It is stated that under the said work order, the Petitioner herein was to replace two 350TR centrifugal Central AC Plants with New 350 TR water cooled screw type chiller AC plant at AAI operation offices New Delhi. It is stated that the Petitioner successfully installed the systems. However, disputes have arisen between the parties. It is stated that the Petitioner has been repeatedly sending demand notices to the Respondent and the last such demand notice was sent on 22.02.2024 raising a demand of Rs.45,98,514/-. It is stated that since no reply has been received from the Respondent, the Petitioner has approached this Court seeking appointment of an Arbitrator



3. Notice in the Petition was issued on 11.09.2024. Reply has been filed.
4. The principal objection raised by the Respondent is that the Petitioner has not followed the mandate of Section 21 of the Arbitration and Conciliation Act, 1996 inasmuch as the Petitioner has not sent a Notice invoking Arbitration to the Respondent before approaching this Court. She, therefore, states that the present Petition cannot be entertained. She relies on the Judgment of the co-ordinate Bench of this Court in Kotak Mahindra Prime Ltd. v. Manav Sethi, **2024 SCC OnLine Del 4819**, has held as under:

“6. It is clear, therefore, that no notice under Section 21 of the 1996 Act has been issued by the petitioner to the respondent, at any stage. Section 21 envisages the notice as being one of request by one party to the other, requesting the other party to refer the disputes to arbitration. A letter unilaterally addressed to the arbitrator appointing him as an arbitrator is not a notice under Section 21 by any stretch of imagination, the arbitrator does not acquire any jurisdiction or authority, on the basis of such a unilateral notice of appointment, to arbitrate. The only situation in which a Section 21 notice can be dispensed with, is if there is consensus ad idem between the parties to dispense with the said requirement. There is no such consensus between the parties in the said case.

7. Ms. Anu Monga, learned counsel for the respondent, submits that a Coordinate Bench of this Court has already held, in Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.⁵ that, as Section 21 envisages commencement of arbitral proceedings from the date of issuance of notice under that Section, arbitral proceedings cannot be said to commence till such notice is issued.

8. The issue is not res integra. BSNL v. Nortel



Networks (India) Private Limited⁶ elucidates the principle in clear and unmistakable terms:

“An application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.”

9. Q.E.D., as one may say.

10. Paras 23 to 30 of Alupro Building Systems says the same thing, while also attempting to rationalize the provision:

“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 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.”

(Emphasis supplied)

11. In ArifAzim Co. Ltd. v. Aptech Ltd.⁷, the Supreme Court again declares:

“52. It has been held in a catena of decisions of this Court that the limitation period for making an application seeking appointment of arbitrator must not be conflated or confused with the limitation period for raising the substantive claims which are sought to be referred to an



arbitral tribunal. The limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties”
(Emphasis supplied)

12. Mr. Balwinder Singh, learned counsel for the petitioner, relies on the judgment of a learned Single Judge of the High Court of Bombay in *Kirloskar Pneumatic Company Ltd. v. Kataria Sales Corporation*⁸ which, according to him, holds that, where arbitral proceedings have earlier commenced and concluded, albeit consequent on a unilateral appointment of the arbitrator, the subsequent request for referring the dispute to arbitration bilaterally is not required to be preceded by a Section 21 notice.

13. On a bare reading of the judgment of the High Court of Bombay, it is clear that the reliance placed by the petitioner is misconceived. *Kirloskar Pneumatic Co.* a case in which the unilateral invocation of arbitration was preceded by a notice issued by the petitioner to the respondent to refer the disputes to arbitration. Para 13 of the judgment specifically says so:

“13. The argument of Mr. Dalal, will have to be appreciated in the aforesaid statutory scheme, as it is his contention that when an unilateral appointment of an arbitrator was frowned upon and resultantly, the award passed by such an arbitrator, who was *de jure* ineligible to act is set aside, once again the arbitration, will have to be invoked by issuing a notice under Section 21.



The above argument on its face is fallacious, since the petitioner has already forwarded a request to the respondent for referring the dispute, that had arisen between them to arbitration and the arbitral proceedings in respect of that dispute has commenced. Merely because the award passed by an ineligible arbitrator is set aside, is not sufficient enough to give new contour to the dispute, as the dispute between the parties still remain the same but now what is sought by the petitioner today, is appointment of a competent arbitrator to arbitrate the dispute and the petitioner expect the arbitrator to be eligible to act as such i.e he shall be a neutral and independent person and his appointment is not in teeth of Section 12 of the Act of 1996 or schedule V and VII of the Act.”(Emphasis supplied)

14. The High Court of Bombay, therefore, was persuaded by the fact that, prior to the illegal unilateral appointment of the Arbitrator, the requisite Section 21 notice had been issued in the first place. As such the judgment of the High Court of Bombay does not support the contention of the petitioner that the present petition would be maintainable even without a prior Section 21 notice.

15. In any event, once the Supreme Court has spoken on the issue in Nortel Networks and Arif Azim Co. and this Court has also held likewise in Alupro Building Systems, there can be no dispute about the fact that a Section 11(6) petition is not maintainable unless it is preceded in the first instance by a Section 21 notice, followed by failure, on the part of the opposite party, to agree to the appointment of the suggested arbitrator.”



5. Confronted with this, learned Counsel for the Petitioner seeks permission to withdraw the present Petition with liberty to approach this Court by filing a fresh Petition, if necessary, after invoking arbitration by sending a Notice under Section 21 of the Arbitration Act to the Respondent.
6. Leave and liberty, as sought for, is granted.
7. The Petition is disposed of as withdrawn, along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 28, 2025

Rahul