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

\+ ARB.P. 946/2024 and I.A. No.32486/2024

M/S KOTAK MAHINDRA PRIME LTD .....Petitioner

Through: Mr. Balvinder Singh and Mr. Janender K. Chumbak, Advocates

versus

MANAV SETHI & ANR. .....Respondent

Through: Ms. Anu Monga, Mr. Rahul Goel, Mr. Shobhit Sharma and Ms. Astha Baderiya, Advocates

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

**JUDGMENT (ORAL)**

**% 15.07.2024**

**1.** This petition, purportedly under 11(6)[1] of the Arbitration and Conciliation Act, 1996[2] seeks appointment of an Arbitrator to arbitrate on the disputes between the parties.

**2.** This petition, in my view, is not maintainable at this stage, as no statutory notice under Section 21[3] of the 1996 Act has been issued by the petitioner to the respondent.

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[1] (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[2] "the 1996 Act", hereafter

[3] **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

**3.** Section 21 of the 1996 Act specifically envisages commencement of arbitral proceedings from the date on which a notice under Section 21 is issued by one party to the other, unless the parties agree otherwise. There is, admittedly, no agreement *ad idem* between the parties for the arbitration proceedings to commence without the notice being issued under Section 21 of the 1996 Act in the first instance.

**4.** Mr. Balwinder Singh, learned counsel for the petitioner, submits that, in the present case, no notice under Section 21 is necessary, given the trajectory of the litigation thus far, which he then proceeds to recite. The petitioner had initially, *vide* letter dated 15 November 2016, addressed to one Mr. B.L. Garg, a retired Additional District & Sessions Judge, appointed him as a Sole Arbitrator to arbitrate on the dispute. Mr. Garg proceeded to pass an award on merits on 15 June 2018. The petitioner moved the learned District & Sessions Judge (Commercial Court)[4] for enforcement of the award. On 15 March 2024, the petitioner itself withdrew the Execution Petition conceding that the award was not executable as the arbitrator had been appointed unilaterally, which is impermissible in law.

**5.** It is in these circumstances that the petitioner has now moved the present petition requesting the Court to appoint an arbitrator to arbitrate on the dispute.

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referred to arbitration is received by the respondent.

[4] "the learned Commercial Court", hereinafter

**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 Limited***[6] 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."

[5] **2017 SCC Online Del 7228**
[6] **(2021) 5 SCC 738**

**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?
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> 24. Section 21 of the Act reads as under:
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> > "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."
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> 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.
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> 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."
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> (Emphasis supplied)

**11.** In ***Arif Azim 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*."
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> (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

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[7] **(2024) 5 SCC 313**

[8] **2024 SCC OnLine Bom 941**

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 resµltantly, 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.
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> 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."
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> (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.

**16.** No Section 21 notice having been ever issued in the present case, the petition is not maintainable.

**17.** The petition is accordingly dismissed with liberty to the petitioner, if so advised, to proceed in accordance with law and in the light of the provisions of the 1996 Act.

**18.** No costs.

**C.HARI SHANKAR, J**

**JULY 15, 2024/yg**

*Click here to check corrigendum, if any*