$~106

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

% *Date of Decision: 5th May, 2025*

\+ O.M.P. (COMM) 395/2024 & I.A. 39304/2024, 39307/2024

M/S SUPREME INFRASTRUCTURE INDIA LIMITED .....Petitioner

Through: Mr. Ashish Mohan, Senior Advocate with Mr. Subhro Prokas Mukherjee, Mr. Ashok Tripathi, Mr. Avinash Shukla and Ms. Sagrika Tanwar, Advocates.

versus

FREYSSINET MEMARD INDIA PVT. LTD. .....Respondent

Through: Mr. Sidharth Borah, Advocate.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. This petition is filed on behalf of the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act') challenging an arbitral award dated 15.03.2016 passed by the learned Sole Arbitrator.

2. Factual matrix to the extent necessary and as averred in the petition is that Petitioner is a Non-Government Public Company engaged in the business of construction works. On 15.10.2012, Petitioner was awarded work of construction of an additional office complex for the Supreme Court, located adjacent to Pragati Maidan, New Delhi which included RCC Framework with a three-level basement. On 06.02.2013, Petitioner issued a Work Order to the Respondent for design, supply and installation of pre-stressed sil anchors. Petitioner's address mentioned in the Work Order was

'*Supreme City, Hiranandani Complex, Near Chitrath Studio Powai, Mumbai, 400076'*.

3. It is averred that on 24.07.2014, CPWD terminated the contract with the Petitioner. Work Order contains a Dispute Resolution Mechanism providing for amicable negotiations failing which disputes were to be referred to arbitration under the Governing Law of India and seat of arbitration was designated at New Delhi. Invoking the arbitration clause, Respondent purportedly sent a notice to the Petitioner under Section 21 of 1996 Act, which was never served upon the Petitioner and subsequently Respondent unilaterally appointed a Sole Arbitrator. Petitioner was not informed of the appointment the learned Arbitrator and the notice sent by the Arbitrator was never received and as a result, Petitioner was unaware of the commencement or pendency of the arbitral proceedings.

4. It is stated that on 15.03.2016, arbitral proceedings culminated in an *ex parte* arbitral award, however, the signed copy of the award was not served on the Petitioner, as required under Section 31(5) of the 1996 Act. Petitioner urges that in 2019, Respondent filed Execution Petition bearing No. 566/2019 before the Bombay High Court which was withdrawn on 27.10.2021 due to non-payment of stamp duty on the award. The execution petition was refiled after payment of stamp duty as Commercial Execution No. 14691/2022, which was again withdrawn on 17.10.2022 under an erroneous assertion that Petitioner was under liquidation. On or around 10.04.2024, Respondent filed a petition under Section 9 of Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') against the Petitioner before National Company Law Tribunal, Mumbai, pursuant to which NCLT sent a copy of the petition to the Petitioner by e-mail dated 28.06.2024 and it is on this date

as per the Petitioner, it became aware of the arbitral proceedings and the *ex parte* arbitral award.

5. Challenging the impugned award dated 15.03.2016, Mr. Ashish Mohan, learned Senior Counsel for the Petitioner submits that notice under Section 21 of the 1996 Act allegedly sent by the Respondent was not received by the Petitioner. The notice was purportedly sent on two addresses: (a) 903-905, Millennium Plaza, Tower 'B', 9th Floor, Sec-27, Gurgaon, Haryana; and (b) Supreme House, Plot No. 94/c, Pratap Gad. Opp. IIT Main Gate, Powai, Mumbai, 400076, but neither of them was the address mentioned on the Work Order as the address on the Work Order was '*Supreme City, Hiranandani Complex, Near Chitrath Studio Powai, Mumbai, 400076'*. Assuming that Respondent could have sent the notice on the two addresses, which no doubt are also the addresses of the Petitioner, notices were never delivered on these addresses and this is evident from the courier and the speed post vouchers, which are a part of the arbitral record. It is thus argued that in the absence of the notice under Section 21 of 1996 Act, the very commencement of the arbitral proceedings was invalid, thereby vitiating the award.

6. It is further argued that Petitioner did not receive notice of initiation of the arbitral proceedings from the learned Arbitrator and was thus unable to place its response to the claims of the Respondent and that this is sufficient ground to set aside the impugned award. To support this plea, learned Senior Counsel refers to a letter by the Arbitrator dated 03.11.2016 addressed to the Post Master, Defence Colony, stating that communication dated 17.03.2016 sent by her by Speed Post had not been received/returned back till date and asking the concerned Authority to furnish original delivery

receipts.

7. It is further argued that since Petitioner did not receive notice under Section 21 of the 1996 Act and the Respondent on its own appointed the Sole Arbitrator, the appointment is a unilateral appointment and cannot be sustained in law, vitiating the entire arbitral proceedings and consequently the impugned award. It is also urged that even prior to introduction of Section 12(5) of the 1996 Act, Courts have repeatedly held that unilateral appointment is a nullity and this singular factor is sufficient to vitiate the award. In this context, reliance is placed on the judgments of this Court in ***Vineet Dujodwala and Others v. Phoneix ARC Pvt. Ltd. and Another, 2024 SCC OnLine Del 5940*** and ***M/s. ABL Biotechnologies Ltd. & Ors. v. M/s. Technology Development Board & Anr., O.M.P. 607/2010,*** decided on 19.09.2024.

8. The third infirmity highlighted by learned Senior Counsel, which according to him is again sufficient to set aside the award is that, assuming for the sake of argument that Petitioner had received the notice under Section 21 of the 1996 Act and failed to respond to the same, the only course open to the Respondent was to invoke the jurisdiction of the Court for appointment of an Arbitrator. Petitioner's non-response to Respondent's proposal for appointment of a Sole Arbitrator named by it could not be construed as consent. To support this plea, learned Senior Counsel relies on the judgment of the Supreme Court in ***Dharma Prathishthanam v. Madhok Construction (P) Ltd., (2005) 9 SCC 686*** and judgments of this Court in ***Lucent Technologies Inc. v. ICICI Bank Limited and Others, 2009 SCC OnLine Del 3213*** and ***Lt. Col. H.S. Bedi (Retd) & Anr. v. STCI Finance Limited, 2018 SCC OnLine Del 12577.***

9. Responding to the objection of delay in filing the present petition, learned Senior Counsel submits that there is no delay inasmuch as the signed copy of the award has not been received by the Petitioner till date. It is submitted that the form and content of an arbitral award are provided in Section 31 of the 1996 Act. The arbitral award, drawn up in the manner prescribed by Section 31, is required to be signed and dated and as per sub-Section (5), after the arbitral award is made, signed copy has to be delivered to each party and 'party' as defined in Section 2(h) of the 1996 Act means and connotes party to an arbitration agreement. Section 34(3) of the 1996 Act provides that limitation of three months commences from the date of receipt of the arbitral award by the party and therefore, since the signed copy has not been received till date by the Petitioner, limitation has not even commenced. It is urged that Petitioner was not aware of either the arbitral proceedings or the *ex parte* award and learnt of the same for the first time only when it received copy of the petition vide e-mail dated 28.06.2024 from NCLT but this date will not trigger commencement of limitation period as it was unaccompanied by a signed copy of the award.

10. Learned counsel for the Respondent defends the impugned award and submits that no ground has been made out by the Petitioner for setting aside the same. It is submitted that Respondent had sent a notice under Section 21 of the 1996 Act at the addresses known to the Respondent and it is not mandatory that the notice ought to have been sent at the address mentioned in the Work Order. The letter of the Arbitrator heavily relied upon by the Petitioner cannot come to its aid as the letter does not indicate that the notices were not served and merely states that proof of delivery was not received or returned back till date. Petitioner was deliberately avoiding the

arbitral proceedings even after receipt of the notice and there is no merit in its contentions. Insofar as the alleged unilateral appointment is concerned, it is urged that when Petitioner failed to respond to the notice under Section 21 of the 1996 Act, it was presumed that Petitioner had consented to the appointment proposed by the Respondent and waived its right to contest the same.

11. Heard learned Senior counsel for the Petitioner and counsel for the Respondent.

12. Challenge in the present petition is laid to an *ex parte* arbitral award dated 15.03.2016 passed by the learned Arbitrator on multiple grounds. Before proceeding to examine the grounds of challenge, it is imperative to deal with the issue of delay in filing the petition, raised by the Respondent *albeit* subtly. Petitioner claims that the signed copy of the arbitral award has not been received till date and the period of limitation prescribed under Section 34(3) of the 1996 Act having not commenced, petition cannot be held to be barred by limitation. Respondent is unable to traverse this stand of the Petitioner and no material is placed on record to show that signed copy of the award was delivered to the Petitioner at any time prior to the filing of this petition.

13. A plain reading of Section 34(3) of the 1996 Act shows that an application for setting aside an award may not be made after three months have elapsed from the date on which the party making the application has received the arbitral award. In ***Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239,*** the short question before the Supreme Court was as to what would be the effective date on which an award can be said to be received by the party as that would be the date from which

limitation would begin under Sub-Section (3) of Section 34 of the 1996 Act.

Examining the issue, the Supreme Court held as follows:-

> *"**4.** The short question which arises for decision in this appeal is: which is the effective date on which the appellant was delivered with and received the arbitral award as that would be the date wherefrom the limitation within the meaning of sub-section (3) of Section 34 of the Act shall be calculated.*
>
> ***5.** Sub-sections (1) and (3) of Section 34 are relevant for our purpose and are reproduced hereunder:*
>
> > *"34. Application for setting aside arbitral award.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> > * * *
> > *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:*
> >
> > *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*
>
> ***6.** Form and contents of the arbitral award are provided by Section 31 of the Act. The arbitral award drawn up in the manner prescribed by Section 31 of the Act has to be signed and dated. According to sub-section (5), "after the arbitral award is made, a signed copy shall be delivered to each party". The term "party" is defined by clause (h) of Section 2 of the Act as meaning "a party to an arbitration agreement". The definition is to be read as given unless the context otherwise requires. Under sub-section (3) of Section 34 the limitation of 3 months commences from the date on which "the party making that application" had received the arbitral award. We have to see what is the meaning to be assigned to the term "party" and "party making the application" for setting aside the award in the context of the State or a department of the Government, more so a large organisation like the Railways.*
>
> *xxx xxx xxx*
>
> ***8.** The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be*

> *"received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."*

14. In ***Benarsi Krishna Committee and Others v. Karmyogi Shelters Private Limited, (2012) 9 SCC 496,*** the Supreme Court held that 'party to arbitration' proceedings means party to the arbitration agreement and if the copy of the signed award is not delivered to the party, it would not amount to compliance with provisions of Section 31(5) of the 1996 Act, a provision which deals with form and content of the arbitral award.

15. From a reading of the aforementioned judgments, it is clear that delivery of an arbitral award under Section 31(5) is not an empty formality and as it is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings under Section 32 arises and receipt by the party of the award then sets in motion several periods of limitation such as for an application for correction under Section 33(1) and application for setting aside an award under Section 34(3) of the 1996 Act etc. Reading of Section 31(5) of the 1996 Act leaves no trace of doubt that a 'signed copy' of the award must be delivered to the 'party' to the arbitration agreement. In the present case, signed copy of the award has not been received by the Petitioner till date, an uncontroverted fact, and therefore, limitation period prescribed under Section 34(3) has not commenced. In light of this, it is held that the petition is not barred by limitation.

16. Learned Senior Counsel for the Petitioner has established that Petitioner did not receive the notice under Section 21 of the 1996 Act, allegedly sent by the Respondent on 16.01.2015, invoking the arbitration agreement. It is evident that when the Work Order was placed the address given by the Petitioner was '*Supreme City, Hiranandani Complex, Near Chitrath Studio Powai, Mumbai, 400076*' and this is clearly reflected on the Work Order, copy of which is placed on record. This was intended to be the address for all purposes including correspondences between the parties. Admittedly, no notice was sent on this address by the Respondent as it claims to have sent the notices on two other addresses: a) 903-905, Millennium Plaza, Tower 'B', 9th Floor, Sec-27, Gurgaon, Haryana; and (b) Supreme House, Plot No. 94/c, Pratap Gad. Opp. IIT Main Gate, Powai, Mumbai, 400076. As rightly flagged by Mr. Mohan, courier and speed post vouchers, which are part of arbitral record indicate that the addresses on the vouchers were incomplete and there was no possibility of the notices being served on the actual addresses. Even today counsel for Respondent is unable to demonstrate the delivery of the notices under Section 21 of the 1996 Act on these two addresses by any material on record.

17. It is no longer *res integra* that 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, unless otherwise agreed by the parties. In ***Bharat Chugh v. MC Agrawal HUF, 2021 SCC OnLine Del 5373,*** this Court held in view of Section 21 which specifically deals with commencement of arbitral proceedings, if no notice sent by one party is received by the other party, arbitral proceedings cannot be stated to have commenced and obviously, something that has not commenced, cannot

continue. In ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., 2017 SCC OnLine Del 7228,*** this Court emphasised on the importance and mandate of issuing a notice under Section 21 of the 1996 Act. It was held that a plain reading of Section 21 indicates that except where parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. Party to the arbitration agreement against whom a claim is made should know what the claims are and it is possible that in response to the notice, the recipient of the notice may accept some claims either wholly or in part and disputes may get narrowed down. This may help in even resolving the disputes and reference to arbitration could be avoided. The Court has enumerated multiple objectives of a notice under Section 21 in the judgment and I quote the relevant paragraphs hereunder:-

> *"**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."

18. It would be relevant to refer to another judgment of the Division Bench of this Court in ***Shriram Transport Finance Company Limited v. Narender Singh, 2022 SCC OnLine Del 3412,*** in this context, wherein the Court was dealing with an appeal under Section 37(1)(b) of the 1996 Act and agreeing with the principles laid down in ***Alupro Building Systems Pvt. Ltd. (supra),*** it was held that if no notice is received under Section 21 by the recipient, there is no commencement of arbitral proceedings and relevant paragraphs are as follows:-

*"**30.** A plain reading of this section shows that arbitral proceedings commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent concerned. Therefore, the commencement of arbitral proceedings is incumbent on the "receipt of such request or notice". If no notice is received by the respondent concerned, there is no commencement of arbitral proceedings at all. Emphasis here is also made to the fact that the notice should not only be "sent" but also that the notice should be "received" for such request for commencement.*

***31.** Section 21 will have to be read with Section 34 of the Act. Section 34(2)(iii) provides that an award may be set aside, in the event, where the party appointing the arbitrator has not given proper notice of the appointment of an arbitrator or the arbitral proceedings.*

***32.** The judgment in Alupro Building case [Alupro Building Systems (P) Ltd. v. Ozone Overseas (P) Ltd.2017 SCC OnLine Del 7228] has aptly explained the relevance of a notice under Section 21 of the Act. It was held that the Act does not contemplate unilateral appointment of an arbitrator by one of the parties, there has to be a consensus for such appointment and as such, the notice under Section 21 of the Act serves an important purpose of facilitating such a consensus on the appointment of an arbitrator. It was further held in Alupro Building case [Alupro Building Systems (P) Ltd. v. Ozone Overseas (P) Ltd.2017 SCC OnLine Del 7228] that the parties may opt to waive the requirement of notice under Section 21 of the Act. However, in the absence of such a waiver, this provision must be given full effect to.*

***33.** We are in agreement with the principles as expressed in the decision*

of Alupro Building case [Alupro Building Systems (P) Ltd. v. Ozone Overseas (P) Ltd.2017 SCC OnLine Del 7228] , which are enunciated below:

> *(i) The party to the arbitration agreement against whom a claim is made should know what the claims are. The notice under Section 21 of the Act provides an opportunity to such party to point out if some of the claims are time-barred or barred by law or untenable in fact or if there are counterclaims.*
>
> *(ii) Where the parties have agreed on a procedure for appointment, whether or not such procedure has been followed, will not be known to the other party unless such a notice is received.*
>
> *(iii) It is necessary for the party making an appointment to let the other party know in advance the name of the person who it proposes to appoint as an arbitrator. This will ensure that the suitability of the person is known to the opposite party including whether or not the person is qualified or disqualified to act as an arbitrator for the various reasons set forth in the Act. Thus, the notice facilitates the parties in arriving at a consensus for appointing an arbitrator.*
>
> *(iv) Unless such notice of commencement of arbitral proceedings is issued, a party seeking reference of disputes to arbitration upon failure of the other party to adhere to such request will be unable to proceed under Section 11(6) of the Act. Further, the party sending the notice of commencement may be able to proceed under the provisions of sub-section 5 of Section 11 of the Act for the appointment of an arbitrator if such notice does not evoke any response.*

34. *The appellant Company has relied on the letters dated 20-9-2018 and 27-9-2018 to show compliance with Section 21 of the Act. This reliance by the appellant Company is completely misconceived. The letter of 20-9-2018 was a unilateral communication sent by the appellant Company to the respondent. As discussed above, the letter did not set forth any details about who was being appointed as an arbitrator or the procedure being followed. The appellant Company merely stated that they have a right to initiate arbitral proceedings and so they will initiate arbitral proceedings. There was no person named as an arbitrator therein nor was any consensus sought in such appointment. There is no evidence of this letter ever being received by the respondent on record either. As such, the letter dated 20-9-2018 would not qualify as notice under Section 21 of the Act.*

35. *The letter dated 27-9-2018, was never sent to the respondent so there was no question of this letter being received by the respondent. It was only sent to the arbitrator. This letter could not qualify to be the notice of commencement of proceedings either.*

36. *The record also shows that the parties had no agreement for a waiver of the requisite notice under Section 21 of the Act.*

> ***37.*** *Hence, we hold that the arbitral appointment made by the appellant Company was not made in accordance with the provisions of Section 21 of the Act.*"

19. Another important objective of the notice under Section 21 that needs to be underscored is in the context of unilateral appointment of the Arbitrator. This question also came up for consideration before this Court in ***Alupro Building Systems Pvt. Ltd. (supra),*** while dealing with objections under Section 34 of the 1996 Act. One of the issues arising before the Court was whether the non-receipt of notice under Section 21 of the 1996 Act by the Petitioner therein was itself sufficient to invalidate the impugned award and the Court also proceeded to examine a connected issue as to whether the Respondent could have, without invoking the arbitration clause and issuing notice to the Petitioner under Section 21 of the 1996 Act and assuring its delivery, filed claims directly before the Arbitrator appointed unilaterally by the Respondent. The second issue touches upon the next ground raised by the Petitioner herein relating to unilateral appointment of the Arbitrator, to which I shall advert in the later part of the judgment.

20. The Court held that in the absence of an express waiver as agreed between the parties, provisions of Section 21 must be given full effect to as the Legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purpose of limitation, when arbitration proceedings commenced. Court elaborated that the provision talks of 'Respondent' receiving a notice containing a request for the dispute to be referred to arbitration and these words have been carefully chosen and therefore by overlooking this important step and straightaway filing claims before an Arbitrator appointed by the party, the party would violate provisions of Section 21 and frustrate an important element of the

parties consenting to the appointment of an Arbitrator. From a conjoint reading of Section 21 and the aforementioned judgments, the inevitable conclusion, to my mind, is that in the absence of an agreement to the contrary, notice under Section 21, invoking the arbitration clause, preceding the reference of disputes, is mandatory and as held in ***Alupro Building Systems Pvt. Ltd. (supra),*** without such notice, arbitration proceedings that are commenced would be unsustainable in law.

21. Coming to the case in hand, Petitioner has not received the notice under Section 21, purportedly sent by the Respondent and therefore, the arbitral proceedings in question cannot be sustained in law and consequently, the award deserves to be set aside. Be it noted that non-receipt of the notice under Section 21 also impacts another important facet in arbitration regime which is party autonomy in appointing an Arbitrator to adjudicate the disputes as an alternate dispute resolution mechanism. As rightly urged by Mr. Mohan, the Arbitrator was appointed without the consent of the Petitioner and being a unilateral appointment, the same becomes vulnerable. It needs no debate that unilateral appointment of an Arbitrator is untenable in law. ***[Ref. Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760*** and ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 SCC OnLine SC 3219].***

22. It needs to be emphasised that present case relates to a period prior to amendment of Section 12(1) of the 1996 Act since the amendment came into force by Section 8(i) of the Arbitration and Conciliation (Amendment) Act, 2015. However, this would make no difference as even prior to the amendment of 1996 Act, the Supreme Court had clearly held that the very

essence of the arbitral proceedings is consensus *ad idem* and therefore, there was no question of arbitration being conducted by an Arbitrator appointed by one party without the consent of the other. This issue came up before this Court in ***Vineet Dujodwala (supra),*** where the Court was dealing with a petition under Section 34 of the 1996 Act and one of the grounds urged was the unilateral appointment of the Arbitrator. Relying on the earlier judgments of the Supreme Court, Court held that the appointment of the Arbitrator being unilateral, this singular factor, without reference to any other infirmity, was sufficient to vitiate the award and I quote:-

> *"Re. unilateral appointment of the learned Arbitrator*
>
> *20. Perhaps the most damaging defect in the entire process is the fact that the appointment of the learned arbitrator was unilateral. A unilateral appointment, in an arbitral proceeding, is completely impermissible in law.*
>
> *21. This is the position that has existed even prior to the amendment of the 1996 Act. The Supreme Court has, even in its decisions prior to the said amendment, clearly held that the very essence of arbitral proceedings is consensus ad idem and that, therefore, there can be no question of an arbitration by an arbitrator appointed by one of the parties without the consent of the other. One may refer, in this context, to the following passage from Dharma Prathishthanam v. Madhok Construction (P) Ltd.:*
>
> > *"14. In Thawardas Pherumal v. Union of India a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the arbitrator and yet the same was decided howsoever assuming it to be within his jurisdiction and essentially for him to decide the same incidentally. It was held that : (SCR p. 58)*
> >
> > > *"A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by both sides about the terms of reference, or an order of the court under Section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction."*
> >
> > *(emphasis in original)*

> *15. A Constitution Bench held in Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) (P) Ltd. that:*
>
> > *"[A]n agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."*
>
> *16. Again a three-Judge Bench held in Union of India v. A.L. Rallia Ram that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorised."*
>
> *(Italics in original; underscoring supplied)*
>
> *22. Admittedly, the appointment of the arbitrator in the present case was unilateral. That single factor, even without reference to any other infirmity, is sufficient to vitiate the award."*

23. In this context, I may also refer to an order of the same Bench in ***M/s. ABL Biotechnologies Ltd. (supra),*** where the Court reiterated that it was settled by the judgment of the Supreme Court in ***Dharma Prathishthanam (supra),*** which was followed by this Court in ***S.K. Builders v. CLS Construction Pvt. Ltd., 2024 SCC OnLine Del 5498,*** that even in respect of arbitrations which commenced prior to introduction of Section 12(5) of the 1996 Act, Arbitrators could not be unilaterally appointed and any arbitration by a unilaterally appointed Arbitrator would be a nullity *ab initio.* Therefore, even on this score, the impugned award cannot be upheld.

24. There is yet another legal infirmity in the impugned arbitral proceedings and the award. Petitioner strenuously assails the award on the ground that it is an *ex parte* award and no notice was given to the Petitioner of the appointment of the Arbitrator and/or the arbitral proceedings prior to its commencement or during its continuance and Petitioner was unable to defend its case. To support this plea, it is pointed out that the Arbitrator had

written a letter to Post Master, Defence Colony stating that she was unable to confirm whether her communications dated 17.03.2016 had reached the Petitioner on either of the two addresses, which aforementioned, were the addresses not mentioned in the Work Order, as brought out above. The letter reads *'That the said speed posts have not been received/returned back till date. I request you to kindly furnish the original delivery receipts as the same is required in a court case to be filed at Mumbai…'*. From the contents of the letter, it is obvious that even the learned Arbitrator was unsure if the notice was served on the Petitioner. From the arbitral record, it is clear that there is no proof of delivery of the notice to the Petitioner sent by the Arbitrator and even the Respondent is unable to point to any material which shows otherwise. In view of this fact, the *ex parte* arbitral award without notice being delivered to the Petitioner of the constitution of the Arbitral Tribunal or the proceedings before it, cannot be sustained. ***[Ref. Dulal Poddar v. Executive Engineer, Dona Canal Division and Others, (2004) 1 SCC 73; M/s. Lovely Benefit Chitfund & Finance (P) Ltd. v. Puran Dutt Sood and Others, 1983 SCC OnLine Del 22,*** and ***Komal Narula v. DMI Finance Pvt. Ltd. and Another, 2021 SCC OnLine Del 3698]***

25. The matter can be seen from another angle. Assuming for the sake of argument, notice sent by the Respondent invoking arbitration under Section 21 of the 1996 Act was delivered to the Petitioner and it was the Petitioner, which did not respond to the notice. Even in this circumstance, the only option open to the Respondent was to have invoked the jurisdiction of the Court for appointment of an Arbitrator and reference of the disputes. It is settled that if one party to the arbitration agreement does not consent for an appointment of the Arbitrator and/or there is no response from the recipient

of the notice under Section 21 of the 1996 Act, the sender invoking the arbitration agreement can only fall back on the Court appointing the Arbitrator. The underlying principle is 'party autonomy' and 'appointment of an impartial and independent Arbitrator', both of which are the foundations of the arbitration regime. In ***Dharma Prathishthanam (supra),*** the Supreme Court was dealing with the situation where failure of the Appellant to respond to notice invoking arbitration was considered as consent to appointment. The Supreme Court held as follows:-

> ***"7.*** *An arbitrator or an Arbitral Tribunal under the scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorised one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of essence in cases like the present one : firstly, the choice of the tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The law of arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.*
>
> *xxx xxx xxx*
>
> ***12.*** *On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the*

provisions of the Act. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edn., p. 104)—

> *"An arbitrator is neither more nor less than a private judge of a private court (called an Arbitral Tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; ... He is private insofar as (1) he is chosen and paid by the disputants, (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."*

xxx *xxx* *xxx*

***25.** Failure to give consent or to appoint an arbitrator in response to a notice for appointment of an arbitrator given by the other party provides justification to the other party for taking action under sub-section (2) of Section 8 of the Act and then it is the court which assumes jurisdiction to appoint an arbitrator as held by the High Court of Orissa in Niranjan Swain v. State of Orissa [AIR 1980 Ori 142 : 49 Cut LT 319] .*

xxx *xxx* *xxx*

***27.** In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside dehors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.*

xxx *xxx* *xxx*

***31.** Three types of situations may emerge between the parties and then before the court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the*

parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of the law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference — both shall be by the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him. It is the court which only could have compelled the appellant to join in the proceedings."

26. This Court in ***Lt. Col. H.S. Bedi (Retd) (supra),*** while adjudicating a petition under Section 34 of the 1996 Act, relying on the judgment in ***Dharma Prathishthanam (supra),*** held that Arbitrator can only be appointed with the consent of both the parties and any unilateral appointment would be void and that mere inaction by a party called upon by the other one to act, cannot lead to an inference as to implied consent or acquiescence of such party to such appointment of the Arbitrator. Holding that the appointment of the Arbitrator and reference of the disputes to him

was *void ab initio*, the Court set aside the impugned award. Mr. Mohan is thus right in his contention that assuming that Petitioner did not respond to the Section 21 notice after receipt, the only option with the Respondent was to invoke the jurisdiction of the Court under Section 11 for appointment of the Arbitrator and reference of disputes.

27. For all the aforesaid reasons, the impugned arbitral award dated 15.03.2016 passed by the learned Arbitrator cannot be sustained in law and is accordingly set aside. Parties will, however, be at liberty to take recourse to legal proceedings to seek enforcement of their rights in accordance with law.

28. Petition along with pending applications stands disposed of.

JYOTI SINGH, J

MAY 05, 2025/shivam