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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **O.M.P. 3/2015**

Reserved on: December 20, 2016
Date of decision: February 28, 2017

ALUPRO BUILDING SYSTEMS PVT LTD ..... Petitioner
Through: Ms. Ekta Mehta with Mr. Shrayans Singhvi and Ms. Divia Rajkhowa, Advocates.

versus

OZONE OVERSEAS PVT LTD ..... Respondent
Through: Mr. T.A. Francis with Mr. Mahesh Katyayan, Advocates.

CORAM: JUSTICE S.MURALIDHAR

J U D G M E N T

% 28.02.2017

1. The Petitioner, Alupro Building Systems Private Limited, has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged the impugned Award dated 14th November 2014 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent, Ozone Overseas Private Limited, arising out of the four Purchase Orders ('POs') for the supply of materials for the execution of various works awarded by the Delhi Metro Rail Project to the Petitioner.

Background facts

2. The facts are that the Petitioner, a company based in Bangalore, had placed four separate POs dated 4th October 2010, 10th November 2010, 7th December 2010 and 22nd February 2011 on the Respondent for the supply of material specifically described therein. The full payments in respect of each of the POs were made in advance by the Petitioner to the

Respondent.

3. The case of the Petitioner is that sometime in February 2013, it received a notice from one Mohd. Arif describing himself as a sole Arbitrator having been appointed as such by the Respondent. The Petitioner was called upon to appear before the Arbitrator in respect of a statement of claim that was filed before the Arbitrator by the Respondent for the alleged recovery of price of goods sold to the Petitioner. Upon making enquiries from the Arbitrator, the Petitioner learnt that the arbitration proceedings had been initiated by the Respondent in December 2012 by filing a statement of claim before the Arbitrator. An order was passed by the Arbitrator on 29th January 2013 setting the Petitioner *ex parte*.

4. The case of the Petitioner, *inter alia*, is that the unilateral appointment of the Arbitrator by the Respondent is bad in law. It is further contended that without issuing notice under Section 21 of the Act invoking the arbitration clause, the Respondent could not have proceeded to arbitration.

5. Before the Arbitrator, the Petitioner appeared on 3rd April 2013 and raised a preliminary objection *inter alia* that there was no arbitration agreement between the parties; the unilateral appointment of the arbitrator was contrary to the Act, and the arbitral proceedings were without jurisdiction. By an order dated 7th May 2013, the Arbitrator rejected the above preliminary objection. Thereafter, the Petitioner continued to participate in the arbitral proceeding and denied the claim of the Respondent.

6. By the impugned Award dated 14th November 2014, the claims of the

Respondent were allowed in the aggregate amount of Rs. 7,95,173.83 together with Rs. 33,000 towards Arbitrator's fees and *pendente lite* and future interest @ 12% per annum from 26th December, 2012 till its realization.

Submissions of counsel for the Petitioner

7. Ms. Ekta Kapil, learned counsel for the Petitioner, submitted as under:

(i) There was no arbitration agreement between the parties as contemplated under Section 7 of the Act. It is pointed out that none of the POs issued by the Petitioner contained any arbitration clause. They merely stated that "disputes, if any, will be subject to jurisdiction of the Courts in Bangalore, India."

(ii) The invoices raised by the Respondent, pursuant to the POs, and which purportedly contained an arbitration clause, did not constitute themselves constitute an agreement a sale. Reliance is placed on the decisions in ***Taipack Limited & Ors. v. Ram Kishore Nagar Mal 2007 (3) Arb.LR 402 (Del)*** and ***NSK India Sales Company Private Limited v. Proactive Universal Trading Company Pvt. Ltd. AIR 2016 Mad 19***.

(iii) The Respondent straightway filed its claim before the Arbitrator on 26th December 2012 and the Arbitrator promptly issued notice to the Petitioner. The letter dated 13th December 2012 claimed by the Respondent to have been sent to the Petitioner seeking reference of disputes to the arbitration was never received by the Petitioner. Therefore, the arbitration proceedings did not commence as contemplated in Section 21 of the Act. Consequently, the proceedings held by the Arbitrator were a nullity and the

Award itself was void. Reliance is placed on the decision in ***Oval Investments Pvt. Ltd. v. Indiabulls Financial Services Limited & Ors. 165 (2009) DLT 652 (SB), Oval Investments Private Limited v. Indiabulls Financial Services Limited 165 (2009) DLT 230 (DB), Indus Ind. Bank Limited v. Mulchand B. Jain & Ors. 2013 (2) CTC 533*** and ***ONGC v. Saw Pipes AIR 2003 SC 2629.*** Reliance is also placed on Article 3 of the UNCITRAL Rules which formed the basis for Section 21 of the Act. It is submitted that the legislative intent was that arbitration proceedings commence only when a request for arbitration is sent by one party to the other. The filing of statement of claim was only a subsequent step in terms of Section 23 of the Act.

(iv) On merits it is submitted that the impugned Award is against the public policy of India. In this context it is submitted that under Sections 12 (1) and 12 (2) of the Act, the Arbitrator failed to disclose that he was adjudicating other disputes of the Respondent as Arbitrator which were being heard contemporaneously. The Respondent had appointed the very same person as its Arbitrator in their claims against other parties. Two such cases were claims by the Respondent against Aksheat Engineering & Construction Service Private Limited and Aqua Marketing which fact is not disputed by the Respondent. Reliance is placed on the decision of this Court in ***Shakti Bhog Foods Limited v. Kola Shipping Limited & Anr. 193 (2012) DLT 421***.

(v) The Arbitrator lacked jurisdiction to conduct the proceedings as there was no valid reference of the disputes to arbitration. Reliance is placed on the decisions in ***ONGC v. Western Geco International***

Limited (2014) 9 SCC 263 and ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***.

(vi) The Award reveals a lack of judicial approach by the Arbitrator. He had not acted in a *bonafide* manner. The Arbitrator did not frame any issue pertaining to the POs issued by the Petitioner which was relevant and necessary for a proper adjudication of the disputes. Further, the Arbitrator disallowed questions in the cross-examination of the Respondent and allowed questions objected to by the Petitioner during cross-examination.

(vii) The original invoices upon which the claim was based were not filed by the Respondent. There was a violation of the principles of natural justice in terms of Section 18 of the Act. No proper notice was issued for the appointment of arbitrator and of the commencement of the arbitral proceedings.

(viii) The Arbitrator ignored and declined to consider various *emails* exchanged between the parties which showed that full payments were made by the Petitioner to the Respondent even before the commencement of the supplies of goods. The finding of the Arbitrator that acceptance of the POs by the Respondent was not absolute or unqualified was perverse and contrary to the record. Further, the credit note relied upon by the Arbitrator was inadmissible as it was not placed on record by the Respondent.

(ix) The invoice Nos. 16400 and 16403 did not match the POs and there was no confirmation of the balances of the account by the Petitioner. Section 41 of the Sale of Goods Act had not been considered by the Arbitrator. Thus, the Respondent failed to

discharge the burden of proving its claims.

Submissions of counsel for the Respondent

8. Mr. T.A. Francis, learned counsel appearing for the Respondent, on the other hand, submitted that the arbitration clause in the invoices was binding on the parties. The supplies were in terms of invoices that clearly stated that the disputes arising therefrom would be referred to an arbitrator appointed by the Respondent. While receiving supplies under those invoices, the Petitioner did not raise any protest. Mr. Francis drew the Court's attention to the signature on behalf of the Petitioner on the invoices acknowledging receipt of the goods. He submitted that this amounted to an acceptance of the terms of the invoices.

9. Mr. Francis further pointed out that one of the specific issues framed by the learned Arbitrator was whether the Petitioner had received goods against invoice Nos. 15880, 16400 and 16403. After comparing the statement of account of both the parties as well as depositions of the witnesses, the Arbitrator answered the issue in favour of the Respondent. There was a factual finding that the goods under Invoice No. 15880 had been received and the quantity was found ok.

10. Mr Francis submitted that the Petitioner, on the other hand, could have resorted to Section 7 (2) of the Contract Act and could have insisted that the POs should have been accepted in the manner prescribed. Since the Petitioner failed to do so and in fact accepted the goods on the terms and conditions mentioned in the invoices, it could not be said that the terms and conditions of the invoices were not binding on the Petitioner.

11. Mr Francis also referred to the deposition of the Petitioner's witness, Gayatri Kapur who on the one hand claimed that there was no invoice of

the Respondent, and on the other claimed that goods against invoice Nos. 16400 and 16403 were never received and that invoice No. 15880 was at a rate higher than the POs. On one occasion defective goods were replaced by new goods and for the returned goods credit of Rs 1,79,313.76 was given.

12. As regards failure by the Arbitrator to disclose the fact that he was an Arbitrator in other claims filed by the Respondent, Mr Francis submitted that this did not attract Section 12 (1) and 12 (2) of the Act.

13. In support of his plea that Section 21 of the Act was not mandatory for the commencement of arbitral proceedings, Mr Francis relied on the decisions in ***State of Goa v. Praveen Enterprises AIR 2011 SC 3814*** and ***Voltas Limited v. Rolta India Limited AIR 2014 SC 1772.*** On merits, he submitted that the Arbitrator returned a factual finding consistent with the records as well as the evidence. It was also in conformity with the legal requirement of Section 28 (2) read with Section 28 (3) of the Act.

Jurisdiction of the Arbitrator

14. The Court first proposes to examine whether there was any legal bar to the Arbitrator entering upon reference and adjudicating the disputes between the parties.

15. The Respondent seeks to rely on the clauses in the invoices raised by it, giving it a right to appoint an Arbitrator. Invoice No. 15880 dated 25th February 2011 sets out at the bottom the 'terms'. Clauses 6 and 7 read as under:

> "6. Any dispute regarding the instant invoice would be referred to the sole Arbitrator appointed by supplier i.e. Ozone Overseas Ltd in accordance with Arbitration & Conciliation Act.

7. Jurisdiction Delhi courts only."

16. This invoice contains the signature of 'Sanjeev' who made an endorsement which reads: "quantity ok".

17. Turning to the invoice No. 16403, it too contains the signature of Mr. Sanjeev and the endorsement: 'quantity ok'. Invoice No. 16400 dated 28th March 2011 bears a similar signature. The endorsement reads: "quantity ok - but not received at the site". The next invoice No. 14937 dated 5th January, 2011 contains an endorsement of Sanjeev stating 'quantity ok'. The Respondent has placed on record copies of gate passes and the other challans bearing the signature purportedly of an authorised representative of the Petitioner. The payments were also made by the Petitioner on such invoices.

18. At this stage, it must be noticed that the POs admittedly did not contain any arbitration clause. They only state that disputes arising therefrom would be subject to the jurisdiction of the courts at Bangalore. The question then arises whether the mere acceptance of supplies by the Petitioner on the basis of invoices containing an arbitration clause would amount to acceptance by the Petitioner of such arbitration clause?

19.1 In ***Taipack Limited & Ors. v. Ram Kishore Nagar Mal*** (*supra*), the facts were that the Petitioner therein had placed an order on the Respondent therein for the supply of BOPP films. On the rear of the said PO dated 13th February 1997, it was mentioned that in Clause 10 "any terms stipulated in seller's confirmation or any other documents in addition or contradiction to what is mentioned in this order will not be acceptable to us unless specifically agreed to in writing". Clause 11 stated that any dispute arising out of the contract would be subject to the

jurisdiction of Courts in Delhi "and the supplier expressly agrees to submit to such jurisdiction." Condition No. 4 read as under:

> "In case of any dispute the judgment of the Tribunal or any other authority appointed by the Paper Merchants Association (Regd.) Delhi will be final and binding."

19.2 The Respondent issued demand notices which were denied by the Petitioner. On 20th January 2001 the Petitioner received a notice of the claim filed by the Respondent before the Arbitrator appointed by the Paper Merchants Association. The objection by the Petitioner to the jurisdiction of the Arbitrator was negatived and the Respondent's claim was allowed. This Court held that there was in fact no arbitration clause contained in a document signed by the parties as contemplated under Section 7 (4) (a) of the Act. It held in para 16 as under:

> "16. In the present case, there is no arbitration agreement which could be said to be 'contained in a document signed by the parties.'[See Section 7 (4) (a) of the Act]. Therefore, one has to ascertain whether there is an arbitration agreement which could be said to be contained in 'exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement'. An "arbitration agreement" is a species of the genus, that is "agreement". There has to be, first and foremost an agreement. For the existence of an agreement there has to be "consensus ad idem" between the parties, i.e., there should be agreement to the same thing in the same sense."

19.3 The Court in ***Taipack Limited & Ors. v. Ram Kishore Nagar Mal*** (*supra*) concluded that when the Respondent supplied the goods in compliance of the PO, it accepted the terms and conditions stipulated therein. The mere printing of Condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the Respondent to the Petitioner. It was observed that "the making of the payment by the Petitioner for the supplies effected by the Respondent cannot be

considered to be a step taken by the Petitioner to indicate its acceptance of the conditions mentioned by the Respondent on the reverse of the invoice." Further, the signature of the Petitioner's agent on the Respondent's copy of the invoice cannot "tantamount to acceptance of the Respondent's so-called offer for arbitration." Further, the Condition No. 4 of the invoice did not use the expression 'arbitration' or 'arbitrator'. It did not make a reference to the 'Constitution and Regulations' of the Paper Merchants Association (Regd.), Delhi. There was also no document from which it could be inferred that the Petitioner had consented to the conditions on the reverse of the invoice. In the circumstances, the Court found that there was no arbitration agreement between the parties and that the arbitrator appointed by the Paper Merchants Association (Regd.) had no jurisdiction to adjudicate the disputes between them.

20. The Court finds that the facts of the case at hand are more or less similar to the facts of the above decision in ***Taipack Limited & Ors. v. Ram Kishore Nagar Mal*** (*supra*). Here also, the Respondent seeks to rely upon the endorsement on each of the invoices. That endorsement is only for the quantities as indicated in the invoices having been received. There is no deemed acceptance of the conditions appended to the invoices. The mere endorsement of Mr. Sanjeev that the quantity is ok cannot lead to an inference that the Petitioner agreed to the arbitration clause printed o the invoice.

21.1 Turing next to the decision in ***NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited*** (*supra*), there the Respondent placed orders on the Petitioner through POs. Pursuant thereto, supplies were made under the invoices raised by the Petitioner. The invoices were governed by the terms and conditions as

set out in the General Terms of Business (GTB). The GTB contained an arbitration clause in terms of which each party could appoint an independent arbitrator. The arbitration was to be held at Chennai in accordance with the Act.

21.2 Notice was sent by the Petitioner to the Respondent proposing its nominee arbitrator and calling upon the Respondent to do likewise. However, the Respondent contended that there was no valid arbitration agreement between the parties. Thereafter, the Petitioner filed an application under Section 11 of the Act. Reliance was placed on the Section 7 of the Act. It was contended that an inference could be drawn from the documents exchanged between the parties regarding the existence of an arbitration agreement.

21.3 The Madras High Court in ***NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited*** (*supra*) did not accept the plea of the Petitioner. It was observed in para 18 of the judgment, as under:

> "18. In the sequence of documents issued, it is the respondent who first issued the purchase order. This does not contain an Arbitration Clause. The document of delivery of goods also does not contain an arbitration clause. It is stated to be signed by the 'gate keeper' of the respondent. It is only the invoice issued to the petitioner which contains the arbitration clause and it is stated to have been simultaneously issued in view of the factum of the same being interlinked to the goods received. This document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of the respondent. There is in fact thus no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. In fact, the very fact that the respondent has not signed this document would show the unwillingness of the respondent to accept the arbitration as a mode of resolution of dispute, to which the petitioner had

never protested."

21.4 The Madras High Court in the above decision further observed that the Petitioner could not confuse the above issue with the one about the validity of the transaction for the purpose of Sale of Goods Act, 1930 wherein goods were retained by the Respondent, without returning them and not paying for them. While it might be that the sale was complete subject to any objection which may be raised by the Respondent, the question of the existence of a valid arbitration clause was different.

22. In light of the legal position explained in the above decisions, the Court concludes that in the present case, there was no arbitration agreement between the parties which could be validly invoked by the Respondent. Consequently, the Arbitrator lacked jurisdiction to enter upon reference and proceed with the arbitration. The impugned Award must, therefore, be declared to be null and void.

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 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.

31.1 The decisions cited at the bar on this aspect may now be examined. In ***Bombay Gas Co. Ltd. v. Parameshwar Mittal AIR 1998 Bom 118***, the facts were that the agreement entered into between the parties contained an arbitration clause. When the Respondent filed a suit for declaration and injunctions, the Petitioner filed a Notice of Motion for stay of the suit under Section 34 of the Indian Arbitration Act, 1940 ('1940 Act'). During the pendency of the said proceedings, the Arbitration and Conciliation Ordinance, 1996 (which later became the Act) came into force.

31.2 The Respondent there contended that proceedings that had commenced under the 1940 Act were saved under the Ordinance and therefore would continue under the 1940 Act. It was further contended that in a petition under Section 37 (3) of the 1940 Act (corresponding to Section 21 of the Act), the arbitration proceedings would be deemed to have commenced when one party to the arbitration agreement served on the other party a notice seeking the appointment of an arbitrator.

However, in fact, no notice had been issued under Section 37 (3) of the 1940 Act. The Petitioner in that case contended that the filing of an application under Section 34 of the 1940 Act was sufficient notice for the purposes of Section 37 (3) of the 1940.

31.3 Negativing the plea, the Court held that:

> "mere filing of an application under Section 34 cannot amount to commencement of arbitral proceedings. In my opinion, unless there is notice given by the party to other side for referring the dispute to arbitration, arbitral proceedings cannot be said to be commenced within the meaning of Section 21 of the Act. Section 85 clearly provides that unless arbitral proceedings have commenced before the commencement of the Act, the provisions of the new Act would apply and not the old Act."

32.1 In ***Oval Investment Pvt. Ltd & Ors.. v. Indiabulls Financial Services Limited & Ors.*** (*supra*), the Plaintiffs filed a suit for a declaration and perpetual injunction. The Plaintiffs had borrowed loans from Defendant No. 1. Each of the Agreements under which the loan was borrowed contained an identical clause as regards jurisdiction and arbitration. The disputes between the parties had to be referred to a sole arbitrator in Delhi in accordance with the Act.

32.2 The Plaintiffs stated that they came to know through other parties, who were arrayed as Defendant Nos. 2 to 19 in the suit, that Defendant No. 1 had invoked the arbitration clause and initiated proceedings by appointing a sole Arbitrator. The Plaintiffs claimed to have never themselves received any such notice. Pursuant thereto, the sole Arbitrator issued notice to both the Plaintiffs as well as Defendants.

32.3 Subsequently, the Plaintiffs received a letter from counsel for Defendant No. 1 informing them that in an application under Section 17 of the Act, the Arbitrator had passed the interim Award against the

Plaintiffs. According to the Plaintiffs, the very invocation of the arbitration clause was fraudulent since no such notice was dispatched to any of the Plaintiffs much less received by them. It was submitted that the mandatory statutory condition precedent to the commencement of the arbitral proceedings in terms of Section 21 of the Act was not fulfilled.

32.4 One of the prayers in the suit was for a declaration that invocation of the arbitration clause by Defendant No. 1 was invalid and liable to be struck down. The suit was resisted by Defendant No. 1 by pointing out that as long as the existence of the arbitration clause was not denied by the Plaintiff, all questions pertaining to the validity of the arbitral proceedings, including non-compliance with the procedure for invocation of the arbitration clause, ought to be raised before and examined by the sole Arbitrator.

32.5 The Court ***Oval Investment Pvt. Ltd. & Ors. v. Indiabulls Financial Services Limited & Ors.*** (*supra*) referred to the provisions of the 1940 Act and the corresponding provisions of the Act and observed as under:

> "25. Under Section 33 of the 1940 Act, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the Act not only preserves this power of the arbitrator but in fact expands it. The wording of Section 16 (1) indicates that the arbitrator could rule on his own jurisdiction 'including ruling on any objections with respect to the existence or validity of the arbitration agreement." The word "including" shows that the scope of the examination of the questions concerning the jurisdiction of the arbitral tribunal is not limited to the existence of the arbitration agreement itself. Therefore, it is inconceivable that where there is a violation of mandatory requirement like Section 21 of the Act, the arbitrator cannot examine that question as well. If the existence of the arbitration agreement is a *sine qua non* for commencement of arbitration proceedings and if such a question is to be examined only by the arbitrator, it is difficult to accept the proposition that the question whether a valid notice under Section 21 has been received by the Respondent in a claim petition cannot

be gone into by the Arbitrator. The question really is not so much whether the requirement under Section 21 of the Act is mandatory or not. This Court is of the view that such a requirement is indeed mandatory for without the notice of invocation being received by the Respondent no arbitral proceedings can commence. The question really, therefore, is whether the arbitrator has the power to decide where this procedure under Section 21 of the Act has been complied with. In the considered view of the Court, given the scheme of the Act and the minimal scope of the interference by the civil courts, it must be held that this question can and should be examined by the arbitrator himself."

32.6 It was further observed that "the requirement of receipt of notice by the Respondent in terms of Section 21 of the Act is a condition precedent to the commencement of arbitral proceedings." The Court was also of the view that "in light of the scheme of the Act as discussed hereinabove, the question whether the mandatory requirement of receipt of the notice by the Respondent in terms of the Section 21 of the Act has been complied with is also to be examined by the Arbitrator under Section 16 of the 1996 Act."

32.7 In that view of the matter, the plaint was rejected under Order VII Rule 11 of the CPC. The above issue was taken in appeal before the Division Bench of this Court which affirmed the order and in particular the above conclusion of the learned Single Judge.

33.1 In ***Indus Ind Bank Limited v. Mulchand B. Jain*** (*supra*), the facts were that there was a Hire Purchase Agreement which contained an arbitration clause. This was purportedly invoked by the Appellant and a sole Arbitrator was appointed. Notices sent by the Arbitrator to Respondent Nos. 1 and 3 were returned unserved. Thereafter, substituted service was resorted to and an *ex parte* Award was passed.

33.2 When the Award was challenged, the learned Single Judge called for

the records. It was found that there was no material on record to show that notice was served on the Respondents by the Appellant prior to the commencement of the arbitration proceedings. Accordingly, the Award was set aside.

33.3 In the appeal filed against the said judgment, it was contended that the matter would have to be sent back to the Arbitrator. While rejecting the said plea, the Division Bench of the Madras High Court observed as under:

> "A perusal of Section 21 of the Act would go to show that the proceedings would commence on the date on which a request for the dispute to be referred to arbitration, is received by the concerned Respondent. Therefore, the commencement of arbitral proceedings is incumbent on the receipt of the notice to be sent in accordance with Section 21 of the Act, which means in other words, if no notice is received by the concerned Respondent, then there is no commencement of arbitral proceedings at all. The provision is very clear to the effect that it does not even say that it should be served, but it specifically says that such notice will have to be received. Section 21 will have to be read with Section 34 of the Act. Section 34 (2) (iii) provides for a ground for setting aside an award, in a case where the applicant was not given proper notice of the appointment of an arbitrator or the arbitral proceedings. In this case, the factual position is that the first Respondent was not given proper notice of an appointment of an Arbitrator. Here again, we have to consider the specific language used under Section 34 (2) (iii) of the Act, which clearly mandates that the Applicant will have to be given a proper notice. Therefore, proper notice is the notice, which has to be served and received by a person concerned. We are of the view that Section 34 (2) (iii) has to be read with Section 21 of the Act. On a conjoint reading of Section 21 read with Section 34 (2) (iii), we have no doubt that the arbitral proceedings have not been commenced insofar as the first Respondent is concerned."

34.1 Now turning to the decisions relied upon by Mr Francis, learned counsel for the Respondent, in ***State of Goa v. Praveen Enterprises*** (*supra*) the issue before the Supreme Court concerned the filing of

counter-claims. While interpreting Sections 21 and 43 of the Act, the following observations were made in paras 15 to 17:

> "15. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of `institution' for arbitration proceedings. Section 21 of the Act supplies the omission. But for section 21, there would be considerable confusion as to what would be the date of `institution' in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under section 11 of the Act. In view of section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "the request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore the purpose of section 21 of the Act is to determine the date of commencement of the arbitration proceedings, **relevant mainly** for deciding whether the claims of the claimant are barred by limitation or not.
>
> 16. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding claims `A' and `B' and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said claims `A' and `B'. Subsequently if the claimant amends the claim statement by adding claim `C' [which is permitted under section 23(3) of the Act] the additional claim `C' would not be preceded by a notice seeking arbitration. The date of amendment by which the claim `C' was introduced, will become the relevant date for determining the limitation in regard to the said claim `C', whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in

regard to Claims `A' and `B'. Be that as it may.

> 17. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter claim. **As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of "institution" in so far as counter claim is concerned. There is, therefore, no need to provide a date of `commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims**. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim." (emphasis supplied)

34.2 A careful perusal of the above observations shows that the ratio of the above decision is that Section 21 of the Act is not relevant for deciding whether the counter-claims are barred by limitation. The crucial sentence is in para 17 which states "Section 21 of the Act is, therefore, not relevant for counter-claims." The Supreme Court was not deciding whether the arbitration proceedings could be said to have commenced notwithstanding the failure by the claimant to serve on the Respondent notice invoking the arbitration clause prior to the commencement of arbitration proceedings. In the considered view of the Court, therefore, the above decision is of no assistance to the Respondent.

35. In ***Voltas Limited v. Rolta India Limited*** (*supra*), the question again

concerned limitation for the purpose of the counter-claims. Reliance was placed on the decision in ***State of Goa v. Praveen Enterprises*** (*supra*). Consequently, the said decision, too, is of no assistance to the Respondent.

36. For the aforesaid reason, the Court is of the view that the present arbitration proceedings, being held without a notice by the Respondent under Section 21 invoking the arbitration clause being received by the Petitioner, are invalid. The only exception to this would have been an agreement to the contrary between the parties. There is no such agreement by which the Petitioner could be said to have waived the requirement of notice under Section 21 of the Act. The impugned Award in the present case is therefore opposed to the fundamental policy of Indian law since the mandatory requirement of the Act has not been complied with. The ground under Section 34 (2) (b) (ii) of the Act is attracted. Therefore, the impugned Award is liable to be set aside on this ground as well.

Failure by the Arbitrator to make the requisite disclosure

37. The third ground on which the impugned Award has been assailed is the failure by the Arbitrator to disclose that he was an arbitrator in certain claims involving the Respondent.

38. Under Section 12 (2) of the Act as stood prior to the amendment with effect from 23rd October 2015, there is a requirement for the arbitrator throughout the proceedings to disclose circumstances which may give rise to a reasonable apprehension of the lack of impartiality of the arbitrator. The law in this regard is well-settled. It has been discussed *in extenso* in a recent decision dated 6th December 2016 passed by this Court in O.M.P. No. 199 of 2008 (***M/s. Lanco Rani JV v. National***

Highways Authority of India). Paras 38 to 45 hereunder are a verbatim extract from the said decision.

39. The Supreme Court in ***A.K. Kraipak v. Union of India (1970) 1 SCR 457***, held that the principles of natural justice would apply to administrative proceedings as well. It explained as under:

> "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (1) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon there- after a third rule was envisaged and that is that quasi- judicial enquiries must be held in good faith, without bias and not arbitrarily [(1) [1967] 2 S.C.R. 625] or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi- judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have a more far reaching effect than a decision in a quasi-judicial enquiry."

40. Recently, in ***Union of India v. U.P. State Bridge Corporation Ltd. 2014 (3) Arb LR 538 (SC)***, the Supreme Court explained that the English Arbitration Act, 1996 (EAA) was enacted on the lines of the UNCITRAL Model Law, i.e. in the same year as the Act became applicable in India.

Commenting upon the structure of the EAA, Mustill and Boyd in their "Commercial Arbitration, 2001 Companion Volume to the Second Edition" noted that it was founded on four pillars, and the first of these pillars comprised 'three general principles' on which the entire edifice of the said legislation was said to be structured. In ***Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co. (2004) EWCA Civ 314*** it was explained, thus, in relation to the EAA:

> "...Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness'. Section 1 of the Act sets forth the three main principles of arbitration law, viz. – (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles."

41. The emphasis therefore is on "a fair trial by an impartial Tribunal". This forms the basis of Section 12 of the Act. Incidentally, there have been some significant changes to Section 12 with effect from 23rd October, 2015 which have further strengthened the requirements of disclosures by arbitrators to obviate any likelihood of bias. However, as far as the present case is concerned, when the AT was seized of the matter, Section 12 of the Act as it stood prior to the above amendment was relevant and it reads as under:

> "12. Grounds for challenge.—
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.
>
> (2) An arbitrator, from the time of his appointment and throughout

the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

42. Section 12(2) of the Act requires an Arbitrator from the time of his appointment and throughout the arbitral proceedings, to mandatorily disclose to the parties, "without delay" and "in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him." The circumstances under sub-section (1) of Section 12 of the Act as it stood prior to 23rd October, 2015 were "any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."

43. At this point, it is necessary to recapitulate the distinction between 'actual bias' and 'apparent bias'. In ***Director General of Fair Trading v. The Proprietary Association of Great Britain*** (decision dated 21st December 2000 of the Court of Appeal (Civil Division) in case No. C/2000/3582), this distinction has been succinctly explained by the Court of Appeals as under:

"38. The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation:

(1) where a Judge has been influenced by partiality or prejudice in reaching his decision and

(2) where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party.

'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased."

44. Referring to the decision in ***Rex v. Sussex Justices, ex. P. McCarthy (1924) 1 K.B. 256***, the Court of Appeals in ***Director General of Fair Trading v. The Proprietary Association of Great Britain*** (*supra*) discussed the leading judgment of Lord Hewart C.J. The facts of that case were that one of the Clerks to the Justices was a member of a firm of solicitors acting in a civil claim against the Defendant arising out of an accident that had given rise to the prosecution. The Clerk retired with the Justices who returned to convict the Defendant. On learning that the Clerk was a member of the firm of solicitors acting against the Defendant, the Defendant applied to have the conviction quashed. Lord Hewart CJ, who was satisfied that the conviction must be quashed reasoned that "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

45. Explaining the above opinion of Lord Hewart CJ, the Court of Appeals in ***Director General of Fair Trading v. The Proprietary Association of Great Britain*** (*supra*) observed as under:

"42. Had Lord Hewart asked the question 'was there any likelihood that the Clerk's connection with the case influenced the verdict?' he would have answered in the negative on the basis that he accepted the evidence that the Clerk had not intervened in the Justices' discussion. Had he asked the question 'would a reasonable onlooker aware of all the material facts, including the fact that the Clerk did not speak to the Justices after retiring, have concluded that the Clerk's connection with the case might have influenced the

verdict?' he would equally have answered in the negative. His decision was reached on the premise that what actually transpired between the Clerk and the Justices behind closed doors was not relevant. The fact that the Clerk had retired with the Justices gave an appearance of the possibility of injustice, and that was enough to lead to the quashing of the verdict."

46. The two alternative tests applied by the Courts in considering whether a decision was vitiated on account of bias or not, are as under:

> "(1) Did it appear to the Court that there was a real danger that the Judge had been biased?
>
> (2) Would an objective onlooker with knowledge of the material facts have a reasonable suspicion that the Judge might have been biased?"

47. Turning to the case on hand, there is no denial that at the time he entered upon reference, the Arbitrator was adjudicating at least one of the claims of the Respondents in other arbitration proceedings. Admittedly, he did not disclose this fact at any time at the commencement of or during the arbitration proceedings. This fact was discovered later by the Petitioner. The averment on this aspect in the present petition has not been denied by the Respondent. In the circumstances, the Court is of the view that this is yet another ground on which the impugned Award is liable to be set aside as it is opposed to the fundamental policy of Indian law. It attracts the ground under Section 14 (1) read with Section 15 (1), viz. the Arbitrator being rendered *de jure* incapable of acting as such. It also attracts Section 34 (2) (b) (ii) of the Act.

Conclusion

48. In view of the fact that the Court has found the impugned Award to be invalid on the three grounds as elaborated hereinbefore, the Court does not consider it necessary to examine the other grounds of challenge.

49. The impugned Award dated 14th November 2014 is, accordingly, set aside. The petition is allowed with costs of Rs. 20,000 which will be paid by the Respondent to the Petitioner within four weeks from today.

S.MURALIDHAR, J

FEBRUARY 28, 2017
Rm