IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 425 OF 2019

Malvika Rajnikant Mehta & ors. ...Applicants

Versus

JESS Construction ...Respondent

Mr. Tejas Bhide, for the Applicants.
Mr. Gourav Srivastav, a/w Smeet Savla, i/b S. K. Srivastav & Co., for the Respondents.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 11th APRIL, 2022
PRONOUNCED ON: 28th APRIL, 2022

ORDER:-

1. This is an application under Section 11(5) read with Section 15 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") to appoint an Arbitrator, either nominated by the applicants or any other suitable person, as the sole Arbitrator to resolve all the disputes between the applicants and respondent arising out of the Conveyance Deed dated 31st December, 2012.

2. Shorn of superfluities, the background facts can be stated as under:

(a) Mr. Rajnikant Dhirajlal Mehta, the predecessor in title of applicant no.1 and applicant nos.2 and 3 were the

owners of the property situated at Oghadbhai Chawl, bearing Survey No.76 Hissa No.6 City Survey No.4296 to 4316 of village Kirol, Ghatkopar (East), ("the subject property"). On 31st December, 2012, the said Rajnikant and applicant nos.2 and 3 executed a Deed of Conveyance in favour of the respondent. The Deed of Conveyance, *inter alia,* contained respondent's obligation to construct a new building on the suit premises and hand over the premises admeasuring 1275 sq. ft. carpet area, along with two car parking spaces (one stilt and one open) within a period of 42 months. In the event of default, the respondent had agreed to pay interest and liquidated damages at the end of every month after the expiry of the aforesaid period of 42 months. The said term was subsequently modified to provide that the new constructed premises would be delivered to the applicants within 34 months. The Conveyance Deed provided for a mechanism for resolution of dispute between the parties through arbitration to be presided over by Mr. Kirti K. Shah, an Architect, as the sole Arbitrator.

(b) Asserting that the respondent failed to perform its part of the contract, the petitioners claimed to have invoked the arbitration by lodging a statement of claim with the named

Arbitrator Mr. Kirti K. Shah, on 8th June, 2018. The respondent took a stand that the Arbitrator was ineligible for being appointed as an Arbitrator in the light of the provisions contained in Section 12(5) read with Seventh Schedule of the Act, 1996. Subsequently, the respondent filed an application before the arbitral Tribunal calling upon the sole Arbitrator Mr. Kirti K. Shah to recuse himself, alleging that on account of the continual professional and familial relationship between the said Arbitrator and Mr. Ramakant Rajnikant Mehta, the arbitrator had incurred disqualification. Vide communication dated 2nd November, 2018 Mr. Kirti K. Shah recused himself from the arbitration.

(c) As the mandate of the Arbitrator stood terminated, the applicants called upon the respondent vide notice dated 18th January, 2019 to convey consent for appointment of any of the three persons named therein as the sole Arbitrator. Instead, the respondent, by reply dated 12th February, 2019, suggested names of three other persons. The applicants conveyed their consent to the appointment of Mr. Shailesh Shah, Senior Counsel, as the sole Arbitrator. After a preliminary meeting held on 8th April, 2019, Mr. Shailesh Shah informed the parties

that it would not be possible for him to act as an Arbitrator, vide communication dated 18th April, 2019.

(d) In the meanwhile, vide notice dated 24th April, 2019, the respondent raised certain claims against the applicants in respect of the same transaction and invoked the arbitration and suggested the name of a former Judge of this Court as the sole Arbitrator. The applicants conveyed their regret. By another communication dated 8th July, 2019, the applicants called upon the respondent to have a joint adjudication of the claim of the applicants and respondent and suggested the name of an Arbitrator. In response, the respondent suggested names of two other Arbitrators. The applicants declined to accept the nomination of the Arbitrator, as proposed by the respondent, and instead suggested the name of another Advocate practicing in this Court.

(e) The applicants have thus approached the Court with a case that multiple efforts between the applicants and respondent to appoint the sole Arbitrator, by consensus, to arbitrate the dispute between the applicants and the respondent, have failed. Therefore, an Arbitrator be appointed by invoking the power under Section 11 of the Act, 1996.

(f) The respondent has resisted the application. First and foremost, according to the respondent, the application is not tenable as the applicants have not invoked the arbitration agreement contained in the Deed of Conveyance by issuing a notice as contemplated by Section 21 of the Act, 1996, before filing the statement of claim before the named Arbitrator. As the notice under Section 21 of the Act, 1996 is mandatory, the arbitration cannot be said to have been lawfully invoked and, resultantly, the Court would not get jurisdiction to appoint an Arbitrator under Section 11 of the Act, 1996. Secondly, on the own showing of the applicants, the cause of action arose on 31st October, 2015, upon expiry of the period of 34 months from the execution of the conveyance deed. However, the applicants called upon the respondent to give consent to the appointment of the Arbitrator by notice dated 18th January, 2019, for the first time. Thus, the underlying substantive claim is *ex facie* barred by limitation. Thirdly, Mr. Ashish Chandrakant Mehta instituted a suit being Suit No.986 of 2016 before this Court seeking a declaration that he has 1/5th undivided interest in the subject premises and, thus, the application for appointment of an Arbitrator in respect of the subject matter of the said suit does not deserve countenance. On these, amongst other, grounds the respondent prayed for dismissal of the application.

3. At this juncture, it may be advantageous to note uncontroverted facts. One, there is no dispute about the execution of Deed of Conveyance. Two, the parties are *ad idem* on the point that the Deed of Conveyance contains an arbitration agreement. Three, it is indisputable that in the said arbitration clause the parties had named Mr. Kirti K. Shah as the sole Arbitrator. Four, as emerged from the narration of facts, there is hardly any dispute over the fact that disputes have arisen between the parties in respect of the transaction evidenced by the Deed of Conveyance as the respondent has also subsequently invoked arbitration.

4. In the wake of the aforesaid facts and pleadings, I have heard Mr. Bhide, the learned Counsel for the applicants and Mr. Savla, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsels for the parties, I have perused the material on record.

5. Mr. Savla, the learned Counsel for the respondent took twin exceptions to the tenability of the application. First, the provisions contained in Section 21 of the Act, 1996 are mandatory and in the absence of a proper notice invoking the arbitration, the entire exercise is vitiated. Second, the substantive claim is *ex facie* barred by limitation and the issue

of limitation, being one of admissibility, the Court would be justified in interdicting the arbitral proceedings at the stage of reference itself.

6. Elaborating the first challenge, Mr. Savla, invited the attention of the Court to the communication dated 7th June, 2018, addressed by the applicants to Mr. Kirti K. Shah, whereby the applicants directly laid the statement of claim before the named Arbitrator. It was urged that this endeavour of the applicants to straightaway lodge a statement of claim before the named Arbitrator without giving a notice of invocation is not in consonance with the provisions of the Act, 1996, especially, Section 21. Since arbitration cannot be said to have been lawfully invoked the application under Section 11 deserves to be dismissed, urged Mr. Savla.

7. Mr. Bhide, the learned Counsel for the applicants, joined the issue by canvasing a submission that the challenge is not well-grounded, either in facts or in law. An endeavour was made to demonstrate that simultaneously with laying the statement of claim before the named Arbitrator, the applicant had forwarded a copy of the said communication dated 7th June, 2018, to the respondent, wherein it was specifically mentioned that the applicants had invoked the arbitration and initiated the

arbitration process. Mr. Bhide laid emphasis on the fact that the parties had named the sole Arbitrator and, in that view of the matter, there being a consensus on the appointment of an Arbitrator, the challenge to the invocation of the arbitration by resorting to Section 21 of the Act, 1996 is legally untenable.

8. Mr. Bhide, would urge that Section 21 itself provides that "Unless otherwise agreed by the parties", the arbitral proceedings shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent. Since the parties had agreed otherwise and the communication dated 7th June, 2018 was also addressed to the respondent with a clear assertion that the applicants had invoked the arbitration, according to Mr. Bhide, it cannot be said that the arbitration was not lawfully invoked.

9. The second limb of the challenge was based on the substantive claim being *ex facie* barred by limitation. As indicated above, the respondent claimed that the cause of action arose on 31st October, 2015, with the expiry of 34 months from the date of execution of Deed of Conveyance, and the applicants can be said to have invoked the arbitration properly vide notice dated 18th January, 2019 only, the claim was hopelessly barred by limitation.

10. Mr. Bhide controverted the submission on behalf of the respondent by asserting that the invocation of the arbitration by the applicants by lodging the statement of claim on 7th June, 2018 was well within the period of limitation, even if the respondent's claim that the cause of action arose on 31st October, 2015 is taken at par. Mr. Bhide would further urge that the question as to whether the substantive claim is barred by limitation cannot be legitimately inquired into by this Court while exercising jurisdiction under Section 11 of the Act and the proper forum for determination thereof was the arbitral tribunal.

11. The aforesaid submissions now fall for consideration.

12. To being with, it is necessary to keep in view the scope of inquiry under Section 11 of the Act, 1996. With the legislative change, brought about by the Arbitration and Conciliation (Amendment) Act, 2015, the scope of inquiry under Section 11 of the Act is restricted to the examination of existence of an arbitration agreement. This is in consonance with, and furtherance of, the legislative policy to minimize the judicial intervention at the appointment stage and respect the party autonomy in the matter of resolution of the dispute through arbitration.

13. Thus, in the case ***Duro Felguera S.A. v. Gangavaram Port Limited***[1] with reference to the legislative change brought about by the Amendment Act, 2015, it was tersely observed that the wide scope of inquiry, at the stage of Section 11, as enunciated in the cases of ***SBP & Co. v. Patel Engineering Ltd.***[2], and ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd,***[3] continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists-nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the Arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected. This was reiterated in ***Mayawati Trading (P) Ltd. vs. Pradyuat Deb Burman.***[4]

14. In the case of ***Vidya Drolia vs. Durga Trading Corp.***[5] (supra), it was further enunciated that, "Mayawati Trading (P) Ltd. in our humble opinion, rightly held that ***Patel Engineering Ltd.*** (supra) has been legislatively overruled and hence would

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1 (2017) 9 SCC 729.
2 (2005) 8 SCC 618.
3 (2009) 1 SCC 267.
4 (2019) 8 SCC 714.
5 (2021) 2 SCC 1.

not apply even post omission of sub-section (6-A) to Section 11 of the Act, 1996".

15. The aforesaid limited nature of the jurisdiction under Section 11 of the Act, 1996 was again reiterated by the Supreme Court in the case of ***Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited***[6] on which a strong reliance was placed by Mr. Savla, to bolster up his submissions. In paragraph 47, the Supreme Court culled out the position in law as under:

> "**47**. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration. Otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."
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> (emphasis supplied)

16. Reverting to the facts of the case, as indicated above, there is no dispute about either existence of the main contract evidenced by the Deed of Conveyance or the existence of arbitration agreement therein. Nor the fact that disputes have arisen between the parties is contestable. With this clarity, the challenges mounted on behalf of the respondent deserve to be considered.

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6 (2021) 5 Supreme Court Cases 738.

17. In the case of ***Nortel Networks*** (supra) the Supreme Court was confronted with two questions.

(i) What is the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996; and

(ii) Whether the Court may refuse to make the reference under Section 11 where the claims are *ex facie* time-barred?

18. The second question, with which we are primarily concerned in this matter, was answered by the Supreme Court in the following terms:

> "**53.2** In rare and exceptional cases, where the claims are *ex facie* time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference."

19. Banking upon the aforesaid exposition and distinction drawn by the Supreme Court between jurisdictional and admissibility issues, Mr. Savla would urge that the case at hand clearly falls in the category of rare and exceptional cases where the claim is manifestly barred by limitation, and the absence of notice of invocation under Section 21 of the Act also falls within the ambit of admissibility issues and, therefore, the reference to arbitration would be legally impermissible.

20. In the case of ***Nortel Networks*** (supra) the Supreme Court expounded the distinction between the jurisdictional and admissibility issues in the following words:

> "**38**. Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of 'jurisdiction' pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.
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> **39**. Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some pre-condition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.
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> **40**. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre-condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.
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> .....
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> **44**. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties."

21. The aforesaid pronouncement, I am afraid, does not assist the cause of the submission sought to be advanced on behalf of the respondent. The Supreme Court has enunciated in clear and explicit terms that the issue of limitation, which is invariably a mixed question of facts and law, is required to be decided by the arbitral Tribunal, even though the issue falls in the realm of admissibility issues. It is only in those cases where

the Court can, in a proceedings under Section 11, record without any risk of controvertion that the substantive claim is hopelessly barred by limitation, the Court would be justified in declining to exercise the jurisdiction under Section 11 to appoint an Arbitrator with a view to ensure that a non-existent dispute is not referred to arbitration. To put it in other words, refusal to refer to arbitration would be justifiable only in those cases where the purported dispute is nothing but a deadwood. It would be impermissible to read the judgment in the case of ***Nortel Networks*** (supra) in such a fashion as to restore the position which prevailed prior to the Amendment Act, 2015.

22. On the aforesaid touchstone, it would be difficult to draw an inference that the substantive claim is *ex facie* barred by the law of limitation. Even if case of the respondent is taken at par, the lodging of the statement of claim on 7th June, 2018, before the named Arbitrator, whereby the applicants claimed to have invoked the arbitration, *prima facie,* appears within the period of limitation. Needless to record that these *prima facie* observations are meant to deal with the challenge on behalf of the respondent, at this stage, and do not foreclose the consideration of the issue of limitation by the arbitral Tribunal,

in the event this Court comes to the conclusion that appointment of Arbitrator is required to be made.

23. Mr. Savla strenuously urged that the non-compliance of Section 21 of the Act, 1996 is fatal. The requirement of notice under Section 21 has been held mandatory. In the absence thereof, the arbitration cannot be said to be lawfully invoked. To bolster up this submission, Mr. Savla placed reliance upon the judgments in the cases of ***M/s. Anacon Process Control Pvt. Ltd. vs. Gammon India Limited***[7], ***Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.***[8] and ***Mulchand P. Jain vs. Indus Ind Bank Ltd.***[9]

24. In the case of ***Anacon Process*** (supra) a learned Single Judge of this Court in the context of an order passed by the City Civil Court referring the parties to arbitration under Section 8 of the Act, 1996, observed that neither the order dated 9th December, 2014, referring the parties to arbitration nor the notice of motion filed by the respondent seeking reference to arbitration would amount to invocation of arbitration under Section 21 of the Act, 1996. The observations of the learned

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7 2016 SCC OnLine Bom 10076.

8 2017 SCC OnLine Del. 7228.

9 2010 SCC OnLine Mad.3542.

Single Judge in paragraph 20 and 21 are material and, thus, extracted below:

> "**20**. It is also trite that if notice invoking arbitration is itself not in accordance with the arbitration agreement and is threfore defective, an Application under Section 11 of the act filed on the basis of such defective notice which is mandatory before filing Application under Section 11 is not maintainable. In *Arohi Infrastructure Pvt. Ltd vs. Tata Capital Financial Services Ltd (Arbitration Application (L) No.1360 of 2015),* this Court has held as under:
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> > "**49**. In my view, Mr. Khandeparkar, learned Counsel appearing for the respondent is right in his submission that the application even otherwise was not maintainable on the ground that the notice dated 16th June, 2015 issued by the applicants was a defective notice. In any view, since the right to appoint an arbitration solely vested in the respondent, the applicants at the first instance could not have suggested any names of proposed arbitrators in the said notice. The said notice itself was not in accordance with the arbitration agreement and was defective. The present arbitration application based on such defective notice which notice was mandatory before filing the application under Section 11, the present arbitration application is not maintainable even on that ground. There was thus no default on the part of the respondent in appointing any arbitrator. In my view, the arbitration application is totally devoid of merits and is accordingly dismissed. No order as to costs." [emphasis supplied].
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> **21**. In the circumstances, in the present case the Applicant has admittedly not issued any notice invoking the arbitration. The Applicant has taken an incorrect stand that pursuant to the order dated 9th December, 2014 of the City Civil Court, it is the Respondent who ought to have constituted the Arbitral Tribunal and having failed to do so, has forfeited its right to appoint an Arbitrator. The Applicant has therefore not followed the prescribed procedure i.e. invoking the arbitration clause under Section 21 of the Act and has filed the present application without following the agreed procedure. In view thereof, the Application under Section 11 of the Act is not maintainable. The Applicant has sought to contend that in the case of *Bharat Sewa Sansthan v. U.P. Electronics Corporation Limited (AIR 2007 SC 2961),* the Hon'ble Supreme Court has, whilst disposing of a Notice of Motion under Section 8 of the Act, approved the action of the High Court namely to

> direct the parties to appear before the Arbitrator. However, on a reading of the judgment it is noted that the parties in the said decision have not raised such an issue before the Hon'ble Supreme Court and thus, such a ratio cannot be attributed or read into the said judgment. The above Arbitration Application is therefore dismissed as not maintainable."

25. In the case of ***Alupro Building Systems*** (supra), a learned Single Judge of the Delhi High Court, was confronted with a situation like the case at hand wherein the petitioner had filed the claims directly before an Arbitrator appointed unilaterally. The learned Single Judge held that the provisions contained in Section 21 were mandatory and filing of the claims before the Arbitrator without notice invoking the arbitration under Section 21 was in breach of the statutory scheme. The observations in paragraphs 24 to 30 are material and hence extracted below:

> "**24.** Section 21 of the Act reads as under:
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> > "21. Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
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> **25**. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims

are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

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.
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> **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."

26. The Delhi High Court in support of the aforesaid conclusion placed reliance upon its earlier judgment in the case of ***Oval Investment Pvt. Ltd. vs Indiabulls Financial Services Limited***[10], and extracted the following observations in the said judgment:

> "**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:
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> > "**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

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10 165 (2009) DLT 652 (SB).

> 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."

27. Placing heavy reliance upon the aforesaid observations, Mr. Savla would urge that each of the four sets of reasons ascribed by the Delhi High Court apply to the facts of the case at hand. The lodging of the claim by the applicants directly before the named Arbitrator deprived the respondent of the opportunity to know what the claim was, to point out that some of the claims were time-barred or barred by any law, and also to indicate that the named Arbitrator had incurred disqualification.

28. In the case of ***Mulchand P. Jain*** (supra), a learned Single Judge of Madras High Court was persuaded to set aside the

arbitration award as the arbitration was not invoked by issue of notice under Section 21 of the Act, 1996.

29. Section 21 of the Act, 1996 reads as under:

> "21. **Commencement of arbitral proceedings**.- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

30. Section 21, evidently begins with an exclusionary clause, "Unless otherwise agreed by the parties". This implies that the parties can by agreement provide that the arbitral proceedings shall commence otherwise than a request made by one of the parties to refer the dispute to arbitration having been received by the other party. The requirement of notice under Section 21 of the Act, 1996 can be waived. Secondly, the notice under Section 21 serves the purpose of fixing the date on which the arbitration shall be deemed to have commenced. Section 43(2) of the Act, 1996 provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in Section 21.

31. Admittedly, the applicants do not claim that they had issued a notice before lodging the statement of claim with the named Arbitrator. The submission on behalf of the applicants that the parties had named the Arbitrator for resolution of the

disputes cannot be stretched to the extent the applicants desire. The mere fact that the parties have named the Arbitrator would not imply that the parties have agreed to waive the requirement of notice contemplated under Section 21 of the Act. The notice under Section 21, as we have seen above, serves definite purposes. One, it puts the adversary on notice as to the nature of the claim, even when the Arbitrator is named by the parties. Two, it provides an opportunity to the adversary to contest the admissibility of the claims on the threshold. Three, it allows adversary to raise the issue of the impartiality of the Arbitrator and the consequent disqualification. Four, the date of the receipt of the notice has a bearing upon the date of the commencement of the arbitration. Therefore, an inference that the parties had waived the notice cannot be drawn merely for the reason that the parties had named an Arbitrator.

32. The applicants however assert that in the case at hand the communication dated 7th June, 2018 to the named Arbitrator itself constitutes invocation. The issue that corps up for consideration, in the facts of the instant case, revolves around the construction of the communication dated 7th June, 2018 addressed by the applicants to the named Arbitrator. Indeed,

the parties are at issue as to whether the said communication was also served on the respondent.

33. In the aforesaid view of the matter, I am of the considered view that whether the communication dated 7th June, 2018 to the named Arbitrator constituted a notice to the respondent of invocation of the arbitration is a matter which is in the corridor of controversy. As observed above, the parties are at issue over the fact as to whether a copy of the said communication was simultaneously addressed to and received by the respondent. Thus, consistent with the legislative policy of minimal interference at the stage of reference to the arbitration, in my view, this question as to whether the communication to the named Arbitrator dated 7th June, 2018, constitutes lawful invocation of the arbitration under Section 21 of the Act, 1996 can be legitimately left to be examined by the Arbitrator. The language of Section 16(1) of the Act, 1996 is elastic enough to subsume in its fold determination of the question as to whether arbitration is lawfully invoked under Section 21 of Act, 1996.

34. I am persuaded to take the aforesaid view also by the turn of events, in the case at hand. Indisputably, there was a lengthy exchange of correspondence between the applicants and respondent with a view to appoint an Arbitrator. Suggestions

were met by counter suggestions. The applicant and respondent could not agree on an Arbitrator, despite multiple efforts. This may not by itself furnish a justifiable ground to dispense with the invocation of arbitration under Section 21 of the Act, 1996. However, there is a peculiar fact which alters the very complexion of the controversy. Indubitably, the respondent also invoked arbitration vide notice dated 24th April, 2019. The respondent laid a claim of about Rs.200 Crores. Invoking the arbitration, the respondent suggested the name of a retired Judge of this Court as the sole Arbitrator to adjudicate the disputes which have arisen out of the Deed of Conveyance. This invocation of arbitration by the respondent underscores the existence of arbitration agreement, disputes between the parties and even the arbitrability of those disputes. The parties are thus at issue over the appointment of Arbitrator only and nothing else.

35. In this view of the matter, the position of the parties as applicants and respondent, in this application, pales in significance. Section 23 of the Act, 1996 envisages filing of a counter claim as well, in addition to the statement of defence. Thus, all claims and counter-claims can be lawfully determined

by the Arbitrator as both the parties in the case at hand claim to have invoked the arbitration.

36. The conspectus of aforesaid consideration is that in the peculiar facts of the case it would be expedient to appoint an Arbitrator. The parties will be at liberty to raise all the contentions as permissible in law before the Arbitrator, including those envisaged by Section 16 of the Act, 1996.

37. Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) Justice M. S. Sanklecha, a former Judge of this Court, is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any, and/or all the disputes which arise out of the Deed of Conveyance dated 31st December, 2012, between the parties.

(iii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) read with Section 12(1) of the Act, 1996 within two weeks with the Prothonotary and Senior Master and provide copies to the parties.

(iv) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(v) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

[N. J. JAMADAR, J.]