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

% *Date of Decision:22nd August, 2023*

\+ ARB.P. 1317/2022 and I.A. No. 19286/2022

AMIT GUGLANI & ANR. ..... Petitioners
Through: Mr. Manohar Lal and Mr. Chaitanya Rohilla, Advocates.

versus

L AND T HOUSING FINANCE LTD. THROUGH-MANAGING DIRECTOR & ANR. ..... Respondents
Through: Ms. Taru Saxena, Advocate for R-1.
Ms. Manmeet Kaur, Mr. Gurtejpal Singh, Ms. Suditi Batra and Ms. Gaurangi Khanna, Advocates for R-2.

**CORAM:**
**HON'BLE MS. JUSTICE JYOTI SINGH**

**JUDGEMENT**

**JYOTI SINGH, J.**

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of a sole Arbitrator in accordance with Clause 27 of the Tripartite Agreement dated 24.10.2018.

2. Facts to the extent necessary and captured in the petition are that Respondent No.1/L&T Housing Finance Ltd./Lender is a company registered under the Companies Act, 1956 and is in the business of advancing finance in different categories such as home loans, auto loans, micro loans. Under the Scheme of Amalgamation by way of merger by absorption approved by NCLT, Mumbai and NCLT,

Kolkata, Respondent No.1 has merged with L&T Finance Ltd. w.e.f. 12.04.2021. Respondent No.2/Raheja Developers Ltd./Developer is also a company incorporated under the Companies Act, 1956 and is in the business of real estate and construction.

3. Respondent No.2 is constructing a residential real estate project being 'Raheja Vanya' project situated at Sector-99A, Gurgaon and had started booking and inviting applications for allotment by sale of residential units/flats in the project with various payment options. Petitioners approached Respondent No.2 for booking of a unit and were offered the construction linked option, after which Petitioners approached Respondent No.1 for loan of Rs.67 lakhs towards payment of sale/purchase consideration in respect of residential unit/flat bearing No.B-052. Loan was availed under a special scheme and the terms and conditions of the loan were incorporated as a part of the Tripartite Agreement dated 24.10.2018, executed at Delhi between the Petitioners, Respondent No.1 and Respondent No.2.

4. It is stated that Petitioners agreed to secure the finance by mortgaging all rights, title and benefits accruing from the unit with Respondent No.1 during the currency and term of the loan advanced by Respondent No.1. Respondent No.2 agreed and confirmed that it shall not create third party rights in the mortgaged unit, without prior written consent/permission of Respondent No.1. A separate Home Loan Agreement (hereinafter referred to as the 'Loan Agreement') was entered into and executed between the Petitioner and Respondent No.1 on 17.01.2019.

5. Based on the Tripartite Agreement dated 24.10.2018, Respondent No.1 sanctioned and disbursed the loan to the Petitioners vide letter dated 17.01.2019 as per the Loan Agreement bearing No.

H17500161118071816, with the following terms :-

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|---|---|---|
| *01.* | *Disbursement date* | *18.01.2019* |
| *02.* | *Amount sanctioned* | *Rs. 67,00,000.00/-* |
| *03.* | *Amount disbursed* | *Rs. 28,70,573.00/-* |
| *04.* | *Interest rate type* | *Floating* |
| ***05.*** | ***BPLR** (Basic Prime Lending Rate)* | ***17.75% per annum*** |
| *06.* | *Effective interest rate* | *9.25% per annum (BPLR – margin of 8.50%)* |
| *07.* | *Loan tenure (months)* | *312* |
| *08.* | *Repayment option* | *Equated monthly instalments* |
| *09.* | *Mode of repayment* | *ECS – for the entire tenure of the loan. Security cheque – three (3 x EMI) + 1 Cheque (Crossed with not exceeding Rs.67,00,000)* |
| *10.* | *Instalment period (months)* | *312* |
| *11.* | *Subvention period (months)* | *40* |
| *12.* | *Balance tenure (months)* | *299* |

6. It was agreed between the Petitioners and Respondent No.2 that pre-EMIs shall be paid by Respondent No.2 for a maximum period of 48 months and Respondent No.1 shall deduct the pre-EMIs for the

term of this subvention, upfront from first disbursement. Respondent No.2 was to pay the pre-EMIs till 06.06.2022 and first EMI of Rs.22,883/- was payable by the Petitioners w.e.f. 07.06.2022. However, subsequently Petitioners received a letter dated 06.09.2019 from Respondent No.1 stating that the Basic Prime Lending Rate (BPLR) of Petitioners' home loan was erroneously mentioned in the sanction letter as 17.75% and the current BPLR was 18.10%. Relevant part of the letter is as follows:-

> *"This is with reference to your loan bearing number H17500161118071816, we would like to inform you that the BPLR (basic prime lending rate) of your home loan* ***was erroneously mentioned*** *in the sanction letter shared at the time of disbursal. Kindly note that your current BPLR is 18.10%."*

7. Petitioners immediately protested against the increase of BPLR by an e-mail dated 04.11.2019, but by e-mail dated 09.11.2019, Respondent No.1 informed the Petitioners that the rectification was correct. Petitioners again wrote to Respondent No.1 vide e-mail dated 26.11.2019 that unilateral modification was impermissible and was contrary to the terms of the Tripartite Agreement dated 24.10.2018. This was followed by e-mails dated 20.02.2020 and 22.07.2022, objecting to the increase in BPLR. No reason was given by Respondent No.1 for the illegal increase, despite knowing that in a finance/loan, the rate of interest was directly related to BPLR i.e. any increase in BPLR will increase the rate of interest to be paid by the Petitioners.

8. Instead of addressing the issues raised by the Petitioners, Respondent No.1 sent a legal notice dated 15.07.2022 demanding payment of Rs.23,084/- towards the EMI within 15 days from the receipt of notice, which triggered a complaint from the Petitioners

with Ombudsman seeking compensation of Rs.10 lakhs for mental agony suffered. On 04.08.2022, Petitioners again wrote to the Grievance Redressal Officer but there was no resolution/reconciliation of the disputes. Petitioners thereafter received a notice dated 13.10.2022 under Section 13(2) of SARFAESI Act from Respondent No.1 stating that owing to defaults in the payment of loan instalments, the loan account of the Petitioners had been classified as Non-Performing Asset on 04.09.2022 and the entire liability of Rs.30,01,820.45/- as on 10.10.2022 with interest and other charges was fixed on the Petitioners. 60 days' time was given to the Petitioners to pay the allegedly outstanding amounts. Petitioner No.1 also received summons dated 16.09.2022 from MM, 12th Court, Calcutta under Section 25 of Payment and Settlement Systems Act, 2007.

9. Petitioners state that since the disputes were not being resolved, they invoked Arbitration Clause 27 of the Tripartite Agreement dated 24.10.2018 and have approached this Court since the Arbitration Clause envisages unilateral appointment of a sole Arbitrator by lender/Respondent No.1, which cannot be sustained in law, being in violation of Section 12(5) of the Act and the judgment of the Supreme Court in ***Perkins Eastman Architects DPC And Another v. HSCC (India) Limited, (2020) 20 SCC 760***.

10. At the outset, two preliminary objections were raised by Respondent No.1. First objection was that the dispute with respect to which reference is sought to arbitration, is with respect to Loan Agreement i.e. rectifying BPLR from 17.75% to 18.10%, as averred in paragraphs 10 to 16 of the petition as also complaint to customer care and Banking Ombudsman as well as the correspondences exchanged between the parties. Secondly, loan was sanctioned and disbursed

under the Loan Agreement and not under the Tripartite Agreement and the Loan Agreement contains separate Arbitration Clause No.12.3, where the exclusive jurisdiction is with the Courts at Kolkata. Thus this Court has no territorial jurisdiction to entertain the present petition.

11. Petitioners have wrongfully invoked Clause 27 of the Tripartite Agreement dated 24.10.2018, which is absolutely irrelevant to the disputes raised and has been fraudulently relied upon to create territorial jurisdiction of this Court. Pertinently, while invoking the Tripartite Agreement, no relief has been sought against Respondent No.2, which clearly shows that no disputes have arisen under the Tripartite agreement. The rate of interest, tenure of instalments, BPLR, etc. are all disputes which only concern and relate to the Loan Agreements.

12. The second objection taken by Respondent No.1 is that mandatory notice of invocation under Section 21 of the Act has not been given by the Petitioners. Under an erroneous understanding of law, an application being I.A. No.19286/2022 has been filed by the Petitioners seeking exemption from serving an invocation notice under Section 21 of the Act on the ground that Clause 27 of the Tripartite Agreement envisages unilateral appointment which is hit by Section 12(5) of the Act and is contrary to the judgment of the Supreme Court in ***Perkins Eastman Architects DPC And Another (supra).*** Present petition cannot be entertained in the absence of issuance of notice invoking arbitration under Section 21, in view of the judgments of this Court in ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., (2017) SCC OnLine Del 7228; Shriram Transport Finance Company Limited v. Narender Singh, 2022 SCC OnLine Del 3412;***

***Haldiram Manufacturing Co. Ltd. v. SRF International, 2007 SCC OnLine Del 457*** and ***Extramarks Education India Private Limited v. Shri Ram School and Another, 2022 SCC OnLine Del 3123.***

13. Petitioners have no cause of action since the action of Respondent No.1 impugned herein is neither illegal nor arbitrary. At the time of sanctioning the loan, BPLR for the home loan in question was erroneously mentioned in the sanction letter as 17.75% due to some technical error. Since the correct BPLR was 18.10%, the error was sought to be corrected and immediately a letter dated 06.09.2019 was sent to the Petitioners communicating the error and rectifying the BPLR. It is wrong for the Petitioners to contend that rate of interest or EMI will be impacted due to change in BPLR or that there is a unilateral modification of the contract.

14. Learned counsel for the Petitioners refuted the preliminary objections. With respect to invocation of the Arbitration Clause 27 of the Tripartite Agreement, it was argued that as per the subvention scheme under the Tripartite Agreement, both Respondent No.2 and Petitioners are liable to pay pre-EMIs and EMIs, respectively to Respondent No.1. The unit booked by the Petitioners is mortgaged with Respondent No.1, under a special scheme involving both the Developer and lender and while the rights, title and other benefits attached to the unit were mortgaged to the lender, Respondent No.2 has undertaken not to create any third party rights without prior permission of the lender.

15. It was submitted that from the Tripartite Agreement, it is evident that pre-EMIs were to be subvented by Respondent No.2 for a maximum period of 48 months or from 07.10.2017 to 06.06.2022, whichever was earlier and Respondent No.1 was to deduct the pre-

EMIs for the term of the subvention, upfront from first disbursement. It was made clear under the Tripartite Agreement that rate of interest applicable to the loan will be linked to lender's BPLR and any increase in the rate shall be borne by Respondent No.2 during pendency of the scheme and will be paid upfront on the date of change of the interest for the balance subvention period of the loan. These and several other covenants/terms in the Tripartite Agreement show that Loan Agreement is inseparable from the Tripartite Agreement and Petitioner has rightly invoked Clause 27 under the Tripartite Agreement. Outcome of the dispute pertaining to the increase in BPLR will have a direct impact on the pre-EMIs also under the subvention which were payable by Respondent No.2.

16. It was further urged that there is no merit in the objection of Respondent No.1 that in the absence of mandatory notice under Section 21 of the Act, the petition deserves to be dismissed. Arbitration Clause 27 provides for unilateral appointment of a sole Arbitrator by the lender/Respondent No.1 and being in violation of Section 12(5) of the Act and judgments in this regard, no purpose would have been achieved by sending a notice under Section 21 of the Act as the authority under the said clause suffers from a disability to appoint the Arbitrator. Even assuming that a notice was mandatory, Petitioners had vide an e-mail dated 13.09.2022 intimated to Respondent No.2 that a third party in authority is required to help address the concerns.

17. Learned counsel had placed heavy reliance on the judgment of this Court in ***Haldiram Manufacturing Co. Ltd. (supra).*** It was urged that in the said judgment, Court had no doubt observed that prior invocation notice is required before invoking the jurisdiction of

the Court under Section 11(5) of the Act, however, it was further held that where there is no specific procedure prescribed under the Arbitration Clause, it cannot be said that there is violation of the pre-requisite of sending an invocation notice before Section 11 of the Act is invoked. Reliance was also placed on the judgment in ***Brilltech Engineers Private Limited v. Shapoorji Pallonji and Company Private Limited, 2022 SCC OnLine Del 4422,*** where this Court reiterated the view taken in ***Haldiram Manufacturing Co. Ltd. (supra)*** and further held that notice of the petition under Section 11 of the Act, when served upon the Respondent, itself constitutes notice invoking arbitration and if parties have to agree there is nothing preventing them, even after filing of the petition to agree upon the Arbitrator. For the same proposition, learned counsel also relied upon the judgment of the Calcutta High Court in ***Universal Consortium of Engineers Pvt. Ltd. v. Kanak Mitra and Another, 2021 SCC OnLine Cal 1425.***

18. Learned counsel for the Petitioners distinguished the judgments relied upon by Respondent No.1 in ***Alupro Building Systems Pvt. Ltd. (supra),*** by urging that in both the judgments in ***Universal Consortium of Engineers Pvt. Ltd. (supra)*** and ***Brilltech Engineers Private Limited (supra),*** Court has extensively dealt with the judgment in ***Alupro Building Systems Pvt. Ltd. (supra)*** and disagreed with the view taken. Judgment in ***Shriram Transport Finance Company Limited (supra)*** was sought to be distinguished on facts that the unilateral communication was sent only to the proposed Arbitrator and not to the party to the agreement.

19. Learned counsel appearing on behalf of Respondent No.2 argued to the limited extent that the Developer has nothing to do with

the dispute relating to the Loan Agreement as he was not a party to the said agreement and arbitration clause in the Tripartite Agreement cannot be invoked for reference of disputes arising out of the loan advanced to the Petitioner.

20. I have heard the learned counsels for the parties and examined their contentions.

21. The first issue that this Court is required to examine is whether the dispute arising under the Loan Agreement is integrally connected with the Tripartite Agreement. Necessity of resolving this conundrum arises on account of the preliminary objection taken by Respondent No.1 that under the Loan Agreement, the exclusive jurisdiction to decide the disputes lies with the Courts at Kolkata. Therefore, if the Court comes to a conclusion that the Petitioners cannot invoke the Arbitration Clause under the Tripartite Agreement, this Court will lack the territorial jurisdiction to entertain this petition.

22. At the outset, it needs a mention that the date of Tripartite Agreement varies in the petition and in the response filed by Respondent No. 1. Photocopy of the Agreement is on record which reflects that the same was executed on 25.10.2018, which is the date referred to hereinafter.

23. The Tripartite Agreement, which is the main agreement between the parties, was entered into between the Petitioners and both the Respondents. Engaged in the business of real estate, Respondent No.2 offered a residential unit to the Petitioners in its 'Raheja Vanya' Project in Sector-99A, Gurugram on a "construction linked option", which was one of the payment options available under the project. For the purpose of investing in the unit, Petitioners approached Respondent No.1, which is a finance company, for loan of

Rs.67,00,000/- towards payment of sale/purchase consideration. The Tripartite Agreement records that the loan was availed under a special scheme with the developer and lender and its terms and conditions were made part of the agreement. Under the subvention scheme, Petitioners agreed to secure Respondent No.1 by mortgaging all rights, title and benefits accruing from the unit in its favour and Respondent No.2 in turn, undertook not to create third party rights or security interest without prior written consent/permission of lender. Both the borrower and developer have undertaken that the pre-EMIs shall be subvented by the developer for maximum period of 48 months or from 07.10.2017 to 06.06.2022, whichever was earlier and lender was to deduct the pre-EMIs for the term of subvention, upfront from first disbursement. All terms and conditions pertaining to the loan including the period of pre-EMIs/EMIs, date of commencement of EMIs, payment of interest, BPLR etc. form part of the Tripartite Agreement.

24. Significantly, the agreement also records that till the commencement of the EMIs payable by the Petitioners, Respondent No.2 shall pay the pre-EMIs, calculated at the rate of interest mentioned in the Loan Agreement executed between the borrower and lender or such rate as may be communicated, to the developer/ borrower from time to time. Paragraph 7 of the Tripartite Agreement provides that the interest rate applicable to the loan will be linked to lender's BPLR and any increase in the rate shall be borne by the developer during pendency of the scheme and will be paid upfront on the date of change of interest for the balance subvention period of the said loan. In fact substantial part of the agreement deals with the terms of repayment of loan *albeit* there is a separate Loan Agreement.

25. From the covenants of the Tripartite Agreement, it is clear that it is this agreement which is the main or umbrella agreement between the parties and the Loan Agreement is connected with this agreement inextricably. It is also clear that the two agreements do not operate independent of each other and the payment of pre-EMIs/EMIs and the liabilities of the Petitioners and Respondent No.2 stipulated under the Tripartite Agreement are referrable to the Loan Agreement. The heart of the dispute in the present petition is the increase in BPLR from 17.75% to 18.10%. From a reading of the Tripartite Agreement, it is evident that it was agreed between the parties that the interest rate applicable to the loan will be linked to lender's BPLR and since Respondent No.2 was required to pay the pre-EMIs during the subvention period, in my view, the two issues cannot be delinked and more so because Respondent No.1 has sought to rectify and increase the BPLR from the date of sanction of the loan, which impacts the pre-EMIs payable by Respondent No.2 and consequentially the mortgage of the unit in question.

26. Court has perused the Loan Agreement also and a holistic and conjoint reading of the Tripartite and Loan Agreements respectively shows that at the time of entering the Tripartite Agreement, there was consensus *ad idem* on the terms and conditions contained therein which comprehensively, in my view, encompass the conditions of payment of loan under the Loan Agreement, including EMIs and interest rates etc. and there is an overlap. Non-payment of increased BPLR may amount to breach of the Tripartite Agreement whereunder the unit of the Petitioners has been mortgaged in favour of the lender and thus both the Agreements are inseparable and interconnected.

27. Having come to a conclusion that the two agreements are

inseparable and the dispute raised in the present petition can be only resolved by reading the covenants of both the agreements, the next question that falls for consideration is which of the two Arbitration Clauses can be invoked. It is an undisputed fact that the Tripartite Agreement contains an Arbitration Clause 27 where the venue of Arbitration is New Delhi while the Loan Agreement contains Arbitration Clause 12.3 which gives exclusive jurisdiction to the Courts at Kolkata.

28. A similar question arose before the Supreme Court in ***Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Others, (1999) 5 SCC 651,*** where the Supreme Court was deciding whether disputes and differences arising under the Interior Design Agreement were integrally connected with those arising under the main agreement pertaining to sale of flats. Having come to a finding that the disputes arising under the main agreement were connected with the disputes arising from the Interior Design Agreement, the Supreme Court held that the Arbitration Clause in the main agreement would govern the parties. Relevant paragraph is as follows:-

> *"30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a*

*named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, — (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) — it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in* ***Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. [(1977) 4 SCC 367 : AIR 1977 SC 2122]*** *There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents."*

29. The issue again came up for consideration before the Supreme Court in ***Balasore Alloys Limited v. Medima LLC, (2020) 9 SCC 136,*** in respect of appointment of an Arbitrator. The Applicant before the Supreme Court invoked the Arbitration Clause in the purchase orders. In the said case, parties had also entered into other agreements with

respect to the same transaction which had separate Arbitration Clauses. Relying upon the judgment in ***Olympus Superstructures Pvt. Ltd. (supra),*** the Supreme Court held as follows:-

> *"12. Having taken note of the arbitration clause existing in two different set of documents between the same parties relating to the same transaction; in order to harmonise or reconcile and arrive at a conclusion as to which of the clauses would be relevant in the instant facts; it would be necessary for us to refer to the manner in which the arbitration clause was invoked and the nature of the dispute that was sought by the parties to be resolved through arbitration. In that regard a perusal of the documents will reveal that in the case on hand the applicant had not initiated the process of invoking the arbitration clause. On the other hand a notice dated 13-3-2020 (Annexure A-41) was issued on behalf of the respondent by its attorney to the applicant referring to the breach of the agreement dated 31-3-2018 (umbrella agreement/pricing agreement) and as per the procedure provided under Clause 23 of the said agreement an opportunity was provided to amicably resolve the matter; failing which it was indicated that the respondent would approach the International Chamber of Commerce ("ICC") in 30 days. It is in reply to the said notice dated 13-3-2020 issued by the respondent on 13-4-2020, the applicant herein disputed the claim put forth by the respondent under the agreement dated 31-3-2018 referring to it as the pricing agreement. Further, the applicant thereafter referred to the nature of their claim and thereon proceeded to indicate that the constitution of the Arbitral Tribunal and conduct of arbitration proceeding shall be in accordance with Clause 7 of the contract terms forming part of and governing all individual contracts.*
>
> *13. In the above backdrop, when both, the purchase order as also the pricing agreement subsists and both the said documents contain the arbitration clauses which are not similar to one another, in order to determine the nature of the arbitral proceedings the said two documents will have to be read in harmony or reconciled so as to take note of the nature of the dispute that had arisen between the parties which would require resolution through arbitration and thereafter arrive at the conclusion as to whether the instant application filed under Section 11 of the 1996 Act would be sustainable so as to appoint an arbitrator by invoking Clause 7 of the purchase order; more particularly in a situation where the Arbitral Tribunal has already been constituted in terms of Clause 23 of the agreement dated 31-3-2018."*

30. From a reading of the aforementioned judgments of the Supreme Court, it clearly emerges that where there are two

agreements which are connected and interlinked and both contain Arbitration Clauses, which are not similar to one another, in order to determine the nature of the arbitral proceedings, the two documents have to be read in harmony or reconciled and parties should get the disputes resolved under the main or umbrella agreement. Applying these principles, this Court finds merit in the contention of the Petitioners that reference to arbitration has to be made by invoking the Arbitration Clause in the Tripartite Agreement which reads as follows:-

> *"27. If any dispute, difference, claim or controversy (the "Dispute") arises between the Parties about the validity, interpretation, implementation, or alleged breach of any provision of this Agreement, then the Parties shall negotiate in good faith to endeavor to resolve the matter. However, if the Dispute has not been resolved by the Parties within thirty (30) days after the date of receipt of written notice of the Dispute by either Party from the Party raising the Dispute, then Dispute shall be referred to a sole arbitrator appointed by the Lender. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 as updated. The venue of arbitration shall be at New Delhi. The award of arbitrator shall be final and binding on the Parties."*

31. It is also luminously clear from a reading of the Arbitration Clause that it provides that the venue of the arbitration shall be at New Delhi and in this light the objection of Respondent No.1 that this Court lacks territorial jurisdiction predicating its case on the Loan Agreement, merits rejection.

32. The next and the only other objection of Respondent No.1 is that mandatory notice invoking arbitration under Section 21 of the Act was not given by the Petitioners and hence the petition deserves to be dismissed. Petitioners have countered the argument by making two-fold submissions, one being alternative to the other. The first submission is that in view of Section 12(5) and the judgment in

***Perkins Eastman Architects DPC And Another (supra),*** there was no purpose in sending a notice to Respondent No.1 for appointment, as unilateral appointment cannot be made. The alternative submission, which though not pleaded but raised during the course of hearing, was that even assuming that the notice was required to be given, Petitioners have by their e-mail dated 13.09.2022 intimated Respondent No.2 that the matter could be only resolved by a third party and this e-mail should be construed as an invocation notice.

33. Having given my thoughtful consideration to both the limbs of submissions of the Petitioners, this Court is unable to agree with the Petitioners, on both aspects. Section 11(6) of the Act comes into play when the contingencies stipulated therein occur which includes failure of a party to act as required under the procedure agreed by the parties. Therefore, by a plain reading of the statutory provision, it is only when the agreed procedure does not lead to appointment of Arbitrator, on account of failure on the part of either party, that jurisdiction of a Court can be invoked under Section 11(6) of the Act. Therefore, invocation of the Court's jurisdiction under Section 11(6) presupposes initiation of procedure agreed upon by the parties under the Arbitration Clause.

34. Section 21 comes into play as a part of this procedure. A reading of the Section makes it clear that the crucial words in the provision are *"the date on which a request for that dispute to be referred to arbitration"* and thus, there is little room for doubt that for commencement of arbitral proceedings, either party has to make a request to the other party for reference of the dispute to Arbitration. In this context, I may refer to the judgment of this Court in ***Alupro Building Systems Pvt. Ltd. (supra),*** relevant paragraphs of which are

as under:-

> *"**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."*

35. This view has been reiterated by this Court in several judgments and in order to avoid prolixity, I may only refer to ***Rahul Jain and Others v. Atul Jain and Others, 2022 SCC OnLine Del 3860*** and ***Anil Goel v. Satish Goel, 2022 SCC OnLine Del 3774.*** Useful it would be also to refer to a few passages from another judgment of this Court in ***Bharat Chugh v. MC Agrawal HUF, 2021 SCC OnLine Del 5373*** as follows:-

> ***"27.*** *To my mind, the issue is elementary. Section 21 of the 1996 Act is a provision which specifically deals with commencement of arbitral proceedings. That which does not commence, obviously, cannot continue. When the statutory scheme envisages commencement of proceedings in a particular fashion, they have to commenced in that fashion or not at all. One may rely, for this purpose, on the line of authorities starting with Taylor v. Taylor and proceeding through Nazir Ahmed v. King Emperor to State of Uttar Pradesh v. Singhara Singh and Municipal Corporation of Greater Mumbai v. Abhilash Lal.*
>
> ***28.*** *Section 21 clearly states that arbitral proceedings, in respect of a dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the opposite party. Admittedly, there is no such communication, from the respondent to the petitioner, envisaging reference of the disputes between them to arbitration. Mr. Agarwal has drawn my attention to a communication dated 17th June, 2020, addressed by him to the petitioner. The communication set outs, in graphic detail, the specifics of the dispute between the petitioner and the respondent. Thereafter, the communication concludes with the following passages:*
>
> > *"We therefore, hereby call upon you to return back all the shares given by our client vide agreement dated 25.01.2020 except 1750 shares of Cipla Ltd. and 260 Shares of Ultra Tech Cement Ltd. (the shares returnable on Feb 20 and March 2020) and also make the payment of interest and dividend payable by you on the said shares and also give/transfer the right shares as per agreement dated 25.01.2020, within a period of 7 clays of the receipt of this notice. Kindly note that in case you fail to do so, our client shall take appropriate action both under the criminal, and also the civil law, by filing an FIR against you and also by taking appropriate steps under civil law for recovery of equity shares and amount of interest at your cost risk and liability."*

> ***29.*** *Mr. Agarwal submits that, even if the aforesaid communication dated 17th June, 2020 did not specifically envisage reference of the dispute to arbitration, it, nonetheless, put the petitioner on notice that the respondent, in the event of default on the part of the petitioner in complying with the demands of the respondent, intended "to take appropriate action both under the criminal, and also the civil law .... by taking appropriate steps under civil law for recovery of equity shares and amount of interest." This, according to Mr. Agarwal, would suffice as a notice invoking arbitration, as arbitration is also a civil law remedy. For this purpose, Mr. Agarwal also placed reliance on certain passages from the judgment of a Coordinate Bench of this Court in De Lage.*
>
> ***30.*** *As against this, Mr. Singh points out that the notice dated 17th June, 2020 was prior to the supplementary agreement dated 26th June, 2020, whereunder the arbitral proceedings have been initiated. Accordingly, he submits that it cannot be treated as a notice invoking arbitration.*
>
> ***31.*** *A notice invoking arbitration, to my mind, must necessarily do that. It has to invoke arbitration. At the very least, it has to refer to the clause in the contract which envisages reference of the dispute to arbitration. Merely sending a notice, setting out the disputes between the parties and informing the addressee that civil and criminal legal remedies would be availed in the event of failure, cannot, in my view, constitute a notice invoking arbitration.*
>
> ***xxxx xxxx xxxx***
>
> ***35.*** *Alupro Building System is an authority for the proposition that a Section 21 notice is indispensable before an arbitral proceeding is initiated. The law in that regard has been elucidated with commendable clarity in the said decision, and it hardly lies on me to reinvent the wheel. I express my respectful agreement with the decision in Alupro Building System which, according to me, covers the case in favour of the petitioner and against the respondent on this issue."*

36. The judgment will be incomplete without reference to a recent judgment of the Division Bench of this Court in ***Shriram Transport Finance Company Limited (supra).*** The Court was dealing with an appeal under Section 37(1)(b) of the Act against an order of the learned District Judge where the arbitral award had been set aside under Section 34 and one of the grounds for setting aside was non-

compliance of Section 21 of the Act. The Division Bench expressed agreement with the principles laid down in ***Alupro Building Systems Pvt. Ltd. (supra),*** and observed that the judgment aptly explained the relevance of notice under Section 21 of the Act. Having so observed, on a finding of fact that notice of invocation was not sent to the party Respondent but only to the Arbitrator, the Division Bench held that the letter purporting to be an invocation notice did not qualify as a notice of the commencement of the proceedings and there being no agreement for a waiver of the requisite notice under Section 21, the arbitral appointment was not in accordance with the provisions of Section 21. Relevant paragraphs are as follows:-

> *"28. From a perusal of the arbitral award, it is also apparent that the letter dated 27-9-2018 was sent by the appellant Company to the arbitrator, by hand, through one Mr Tekchand Sharma, Attorney for the appellant Company.*
>
> *29. In order to deal with the objection of the appellant Company, the notice under Section 21 of the Act was sent, we would need to refer to the said provision. Section 21 of the Act, which sets forth the date of commencement of arbitral proceedings, reads as follows :*
>
> > *"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. 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."*

37. With this wealth of judicial precedents, it cannot be argued by Petitioners that notice under Section 21 of the Act is not mandatory. The argument of the Petitioners that since the Arbitration Clause envisages unilateral appointment, the exercise of sending an invocation notice was futile *albeit* ingenious but cannot be sustained in law. Even in ***Alupro Building Systems Pvt. Ltd. (supra),*** the Arbitration Clause between the parties envisaged unilateral appointment by the supplier and taking cognizance of the said Clause, the Court laid down that it was a mandate of law to send a notice under Section 21 and the trigger for the Court's jurisdiction under Section 11 of the Act is failure of one party to respond to a notice sent by other party under Section 21 seeking reference of disputes to arbitration.

38. The last plank of the argument of the Petitioners was that the e-mail sent by the Petitioners to Respondent No.2 be construed as an invocation notice under Section 21. Before addressing this issue, it is relevant to extract the e-mail hereunder:

**amit guglani** <guglani14@yahoo.com>

To:GRO-Housing

Tue, 13 Sept at 11:26 am

Dear Grievance Officer,

Thanks for your response.

- Basis your first response I have raised some concerns in a pointwise method - like no response, no reference - refer to the earlier mail. But have not received any input regarding the same.

- Below mail is largely a repetition of the earlier mail. I would not like to reiterate or repeat my mail.

From my point of view the response / resolution is highly dissatisfactory & the concerns as well as dispute status is unchanged.

We need a third party in authority to help address the concerns.....

Regards,

Amit Guglani

39. Having closely scrutinized the aforesaid e-mail, this Court cannot agree with the Petitioners that this notice can be construed as an invocation notice under Section 21 of the Act. As held in ***Bharat Chugh (supra),*** notice invoking arbitration must invoke arbitration and at the very least, refer to the clause in the contract which envisages reference of the dispute to arbitration. The Court further observed that even sending a notice, setting out the disputes between the parties and informing that civil or criminal legal remedies would be availed in the event of failure, cannot constitute a notice invoking

arbitration. In this context, I may also refer to two passages from the judgment of the Bombay High Court in ***D.P. Construction v. Vishvaraj Environment Pvt. Ltd., 2022 SCC OnLine Bom 1410,*** as under:-

> "***26.*** *Considering the position of law as clarified by this Court in the case of Malvika Rajnikant Mehta v. JESS Construction (supra) and the Delhi High Court in the case of Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd. (supra) pertaining to the purposes that a notice invoking arbitration under section 21 of the said Act serves, with which this Court is in agreement, the notice invoking arbitration ought to be absolutely clear with reference to the arbitration clause and with clear intent of calling upon the rival party to proceed for appointment of an Arbitrator and referring the disputes to arbitration. The words in section 21 of the said Act, as regards commencement of arbitral proceedings specifically refer to a request for the dispute to be referred to arbitration. Hence, unless there is a request by a party that the dispute is to be referred to arbitration, merely stating the claims and disputes in the notice would not suffice. In the present case, even in the reply sent by the non-applicant, there is no reference to the arbitration clause or any intent on the part of the non-applicant to refer the dispute to arbitration, despite claiming huge amount from the applicant. This clearly indicates that in the present case, arbitration itself was not invoked by either party as per the agreed procedure under section 11(2) of the said Act read with section 21 thereof.*
>
> ***27.*** *In absence of the agreed procedure being triggered by either party for reference of the dispute to arbitration, the question of failure thereof would not arise and hence, the precondition for invoking section 11(6) of the said Act for approaching this Court was not satisfied. This aspect goes to the very root of the matter and hits at the very jurisdiction of this Court to entertain the application for appointment of Arbitrator, filed by the applicant under section 11(6) of the said Act. The non-applicant is justified in contending that therefore, the present application deserves to be rejected only on the said limited ground. The learned counsel for the applicant is not justified in contending that the legal notice dated 07/10/2020, can be constructively read as a notice invoking arbitration under section 21 of the said Act and that the preliminary objection is hyper-technical in nature. This is for the reason that there are legal consequences to invoking of arbitration as contemplated under section 21 of the said Act, including the aspect of limitation, and other such purposes which have been enumerated in the above quoted judgments of this Court and the Delhi High Court. Therefore, merely because there is an arbitration clause, it cannot be said that*

*this Court ought to exercise jurisdiction under section 11(6) of the said Act."*

40. In view of the aforesaid, this Court finds merit in the objection raised on behalf of Respondent No.1 that in the absence of a notice invoking arbitration under Section 21 in the manner envisaged under the Act, this Court cannot exercise jurisdiction under Section 11(6) of the Act. The judgment in ***Haldiram Manufacturing Co. Ltd. (supra)*** relied upon by the Petitioners does not support their case wherein the Court held that in the absence of any procedure prescribed under the Arbitration Clause, it cannot be said that there is violation of the pre-requisites provided in Section 11 of the Act. Quite different from the facts of that case, in the present case, the Arbitration Clause 27 clearly provides a procedure for referring the disputes to Arbitration, similar to the arbitration agreements involved in the judgements referred to above. As far as reliance on ***Brilltech Engineers Private Limited (supra)*** is concerned, this judgment also does not aid the Petitioners. The Court observed that even if for the sake of arguments, it is accepted that the demand notice failed to meet the requisite requirements of Section 21, it cannot be overlooked that in a Section 9 petition, Respondent had agreed to refer the disputes to Arbitration and therefore, the petition under Section 9 of the Act and the willingness of the Respondent to resort to Arbitration for resolution of disputes was sufficient compliance of Section 21. This judgment nowhere reflects that the Court was of the view that Section 21 notice can be dispensed with. Reading of the judgment by the Calcutta High Court in ***Universal Consortium of Engineers Pvt. Ltd. (supra)***, shows that the learned Judge was of the view that an invocation notice under Section 21 is not mandatory. With all due regard, this Court is not

persuaded to agree that notice under Section 21 can be dispensed with as a pre-requisite, while invoking jurisdiction of the Court under Section 11(6) of the Act, in view of the judgements of this Court, both of the Division Bench and the co-ordinate Benches.

41. For all the aforesaid reasons, first objection is decided in favour of the Petitioners that the arbitration clause in the Tripartite Agreement can be invoked by the Petitioners for reference of the disputes to arbitration. However, on the second objection raised by Respondent No.1, Petitioners cannot succeed.

42. Accordingly, the petition is dismissed along with pending application with a caveat that this Court has not expressed any opinion on the merits of the disputes between the parties.

43. It is made clear that dismissal of this petition would not preclude the Petitioners from invoking Arbitration Clause 27 in the Tripartite Agreement for reference of disputes to arbitration, in accordance with law.

**JYOTI SINGH, J**

**AUGUST 22, 2023/kks/shivam**