

ARP

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO. 15413 OF 2026**

AJIT
RAMESH
PATHRIKAR

Digitally signed
by AJIT
RAMESH
PATHRIKAR
Date:
2026.07.14
19:55:50 +0530

Unistar Metals Private Limited

A Company Duly incorporated under
The Companies Act, 1956
having its registered office at
'Vardhan' Suite No.306, 3rd floor,
25A Camac Street, Kolkata,
West Bengal – 700016,
Through its Authorized Representative
Mr. Gaurav Jhawar
Age about - 39 Years,
Occupation - Business

...Applicant

Versus

GE Power Limited

a company duly incorporated under
The Companies Act, 1956
having its registered office at
Regus Magnum Business Centre,
9th Floor, Platina Block – G,
Plot C-59, BKC, Bandra (E),
Mumbai – 400051.

...Respondent

Mr. Pranit Bag (Bar At Law), *Mr. Chetan Arvind Alai, Mr. Rahul Poddar and Mr. Pranit Pawar, for the Applicant.*

Ms. Lizum C. Wangdi *i/b Mr. Aniket Mokashi, for the Respondent.*

CORAM

ARUN R. PEDNEKER, J.

RESERVED ON:

06th JULY 2026

PRONOUNCED ON: 14th JULY 2026

JUDGMENT:-

1. By the present Arbitration Application, the Applicant seeks appointment of Arbitrator on account of certain disputes arising out of an Purchase order dated 25th March 2019 incorporating the General Conditions for dispute resolution through arbitration. Clause 20.2 is the arbitration clause and is quoted below for ready reference:

“20.2 Dispute Resolution. In the event of any dispute arising out of or in connection with this Order, including any question regarding their existence, validity, interpretation, breach, violation or termination, the parties agree to submit such dispute to arbitration. Any arbitration proceeding shall be finally settled under the Rules of Delhi International Arbitration Centre by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be New Delhi and the language shall be English. The arbitration shall be confidential. The competent courts at the place of registered office of the Buyer shall have exclusive jurisdiction in relation to this Order and for implementation of the arbitral awards.”

2. Brief facts as stated in the application leading to the filing of the application are that the Respondent issued a Purchase Order dated 25th March 2019 in favour of the Applicant for the supply of 2,52,926.62 kgs. of ESP Cold Roof materials for a total contract value of Rs.2,15,52,322.35/-. The said Purchase Order incorporated the “G.E. Power Terms of Purchase Rev-A-India,” which includes Clause 20 providing for arbitration as the notice of disputes resolution as noted above. On account of disputes that have arisen between the parties in the supply of goods and fabrication work carried out by the Applicant, the Applicant invoked the arbitration clause by issuing notice under Section 21

of the Arbitration and Conciliation Act, 1996 (“**the Act**”) on 9th September 2024. On 17th October 2024, the Respondent replied to the arbitration notice, refusing to concur in appointment of an arbitrator and raised an objection regarding limitation. On 20th January 2026, the application under Section 11 of the Act was filed before the Delhi High Court. However, it was withdrawn as jurisdictional objection was raised and thereafter the present application is filed before this Court.

3. Mr. Pranit Bag, the learned counsel appearing for the Applicant, submits that in view of the sentence in the arbitration clause 20.2 i.e. *“The competent courts at the place of registered office of the Buyer shall have exclusive jurisdiction in relation to this Order and for implementation of the arbitral awards.”*, the application under Section 11 of the Act is presented before this Court, as the registered office of the Buyer is situated within the jurisdiction of this Court. He thus prays that an arbitrator be appointed in the matter.

4. Per contra, Ms. Lizum Wangdi, the learned counsel appearing for the Respondent has not disputed the submission of the Applicant that the Respondent had contended before the Delhi High Court that the Bombay High Court would have the jurisdiction in the matter and the application was accordingly withdrawn. However, she raises objections to the arbitration application on the following grounds:

(i) The Notice Invoking Arbitration is invalid, and hence, Section 11 is not maintainable

In this regard, it is submitted that the notice invoking arbitration dated 9th September 2024 issued by the Applicant is ex-facie contrary to and in derogation of the procedure expressly agreed between the parties under Clause 20.2 of the Terms of Purchase Order. Consequently, the said notice does not constitute a valid invocation of arbitration in the eyes of law. It is further submitted that Clause 20.2 of the arbitration agreement unequivocally provides that disputes between the parties shall be finally settled under the Rules of the Delhi International Arbitration Centre (“**DIAC**”) by three arbitrators appointed in accordance with the said Rules. The parties, therefore, consciously agreed not only to resolve disputes through arbitration but also prescribed the specific procedure for constitution of the arbitration tribunal. It is further submitted that the settled principle of arbitration law is that party autonomy forms the cornerstone of arbitral proceedings. The procedure agreed by the parties for constitution of the arbitration tribunal is binding upon them and cannot be unilaterally altered by either party. Any departure from such agreed procedure strikes at the very foundation of the arbitration agreement and renders the invocation legally unsustainable. In the instant case, despite the arbitration agreement expressly contemplating adjudication by a three-member arbitral tribunal, the Applicant, by its notice invoking arbitration dated 9th September 2024, purported to invoke arbitration through the appointment/proposal of a sole arbitrator. The said notice completely disregards the contractual mechanism agreed between the parties and seeks to unilaterally substitute the

agreed procedure with an entirely different one. It is further submitted that the Applicant could not have, by way of a unilateral notice, rewritten the arbitration agreement between the parties. Having consciously entered into a contract providing for adjudication by three arbitrators, the applicant was bound to adhere to the agreed procedure. The attempt to invoke arbitration through a mechanism alien to the arbitration agreement is legally impermissible and liable to be rejected. Thus, the invocation of arbitration itself is invalid. The procedure for constitution of the arbitral tribunal is not a mere technicality or an empty formality. A valid invocation of arbitration is a condition precedent to the exercise of jurisdiction under Section 11 of the Act and unless arbitration is invoked in accordance with the arbitration agreement, no cause of action arises for seeking the intervention of this Hon'ble Court under Section 11 of the Act. In this regard, reliance is placed on the judgment of this court in the case of ***Arohi Infrastructure & Ors. Vs. Tata Capital Financial Services Limited***¹, wherein it was held that the arbitration application based on such defective notice was not maintainable.

(ii) Invocation not as per DIAC Rules

It is submitted that the parties have agreed to conduct arbitration as per the DIAC Rules. The said Rules prescribe a comprehensive procedure not only in respect of the conduct of arbitration, but also in respect of the manner in which the arbitration is required to be invoked and the arbitration tribunal is consequently to be constituted. Rule 4 provides for "Request of

1 2015 SCC OnLine Bom 5883

Arbitration”, which is required to be filed before the DIAC. The Applicant has not complied with the aforesaid. It is further submitted that where the arbitral tribunal is to comprise of three arbitrators, the procedure is prescribed under Rule 8.5 of the DIAC Rules, which are not complied by the Applicant. It is further submitted that the DIAC Rules further contemplate a procedure whereby the appointment of the arbitrator is referred to a sub-committee in the event the parties either fail to appoint their respective nominee arbitrators or the nominee arbitrators fail to appoint the presiding arbitrator. The present case could have been referred to the sub-committee had the Applicant adopted the agreed procedure. The DIAC Rules also provide for a challenge under Rule 10 in respect of the appointment made by the Sub-committee. It is further submitted that filing of the present application by the Applicant invoking this Court’s jurisdiction under Section 11 of the Act is premature as the procedure prescribed under the institutional rules has not been exhausted.

(iii) There is no dispute that could be referred to Arbitration

It is submitted that the present controversy between the parties arose on account of Applicant’s failure to honour the terms of the Purchase Order and to conform to the quality and quantity of the goods required to be supplied thereunder (“**subject goods**”) in accordance with the technical specifications of the Purchase Order. In view of such failure, the subject goods supplied by the Applicant were rejected. Therefore, the Respondent never took delivery of any subject goods, and consequently, the Applicant never raised any invoice thereupon. In the absence of any invoice,

there is no obligation to remit any payment to the Applicant. Therefore, there is no dispute that could have arisen between the parties.

5. She submits that the notice of invoking arbitration has, therefore, not been issued in accordance with the DIAC Rules, which stipulate that the parties have to approach the DIAC and relies upon clause Nos. 4, 8.5 and 8.6 of the DIAC Rules, which read as under:

“4. Request for Arbitration

4.1 A party shall file with DIAC a written Request for Arbitration, including in cases where a reference to DIAC has been made by any Court/Authority. The request shall, in so far as applicable, and be accompanied by-

- (a) provisional terms of reference, if any,*
- (b) where reference is received from a Court, referral order of the Court;*
- (c) a request that the dispute be referred to arbitration*
- (d) the full terms of the arbitration clause or the separate arbitration agreement that is invoked*
- (e) where the arbitration clause or the separate arbitration agreement does not provide that arbitration shall be conducted under the aegis of DIAC, a duly executed memorandum of understanding stating that both the parties have agreed to submit the dispute for arbitration before DIAC*;*
- (f) a copy of the contract(s) or other instrument(s) out of or in relation to which the dispute arises;*
- (g) a disclosure of any other arbitration proceedings between the parties where the disputes or differences therein are identical and between the same parties or between the parties having commonality of interest or where such disputes arise out of separate contracts but relate to the same transaction.*
- (h) the full names and contact details, including postal address(es), telephone number(s), and Mobile number(s) facsimile*

number(s) and electronic mail address(es), to the extent known, of the parties to the arbitration and their legal representatives, if any;

(i) a statement briefly describing the nature and circumstances of the dispute and the claims advanced by the Claimant against any other party to the arbitration, each such party being here separately described as the "Respondent" specifying the relief claimed, including the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

(j) a statement of any matters which the parties have previously agreed to as to the conduct of the arbitration or with respect to which the Claimant wishes to make a proposal (such as the number of Arbitrator(s), the applicable rules of law, the language(s) of the arbitration, the seat of arbitration etc.);

(k) in case of arbitration by Sole Arbitrator, unless the parties have agreed otherwise or an Arbitrator has been named by the Court, the request shall contain a list of five Arbitrators from the Panel as suggested Arbitrator to the arbitration. In case of arbitration by a Tribunal of three Arbitrators, the party making the request shall nominate an Arbitrator from the Panel on its behalf. The party shall take the consent of the Arbitrator so nominated and also ensure that such Arbitrator does not suffer from any disqualification as mentioned in Section 12(5) of the Act:

Provided that in case the Panel does not include a person possessing requisite qualification as per the arbitration agreement, the parties may nominate an Arbitrator from outside the Panel;

(l) proof of service of the Request for Arbitration and any documents filed there with on the other parties to the satisfaction of DIAC; and

(m) confirmation that the requisite administrative charges have been paid.

4.2 In case no such request in terms of Rule 4.1 is received, no further action will be taken by the DIAC. A request which is inchoate in the opinion of the DIAC will not be considered as a valid request.

4.3 Party making Request for Arbitration may also file Statement of Claim as referred to in Rule 16.1 along with the request.

4.4 The contents of the Request for Arbitration does not prevent a party from subsequently adding, supplementing or amending its pleadings, the matters referred to arbitration or the reliefs claimed:

Provided that where the request is with the Statement of Claim, such amendment shall only be accompanied considered by the Arbitral Tribunal in accordance with Rule 18.

8.5 Where the agreement provides for the appointment of three Arbitrators, the Claimant shall appoint its Arbitrator at the time of filing the request and the Respondent shall appoint its Arbitrator at the time of filing of its response to the Request for Arbitration, and the two Arbitrators shall within 21 days, appoint the Presiding Arbitrator.

8.6 Where the parties fail to appoint their respective Arbitrators or where the Arbitrators appointed by the parties fail to appoint the Presiding Arbitrator, in terms of Rule 8.5, then within 21 days thereof, the Chairperson/ Sub-Committee shall appoint the Arbitrator/ Presiding Arbitrator as the case may be:

Provided that in a case of an International Arbitration, where the parties belong to different nationalities, the Presiding Arbitrator may be of a nationality other than the nationalities of the parties.”

6. In response to the objections raised, Mr. Bag submits that once the process available under the arbitration clause 20.2 has failed, it is for this Court to appoint the arbitrator. The learned counsel submits that, the jurisdiction to appoint an arbitrator under Section 11 in the instant case is admittedly of this Court. Thus, this Court should appoint an arbitrator and it would be for the arbitrator to follow the DIAC Rules thereafter. He further submits that, at the highest, it can be said from the reading of the agreement that the venue of arbitration would be New Delhi, while the seat would remain at Mumbai. He also relies upon the judgment of the Delhi High Court in the case of *M/s Magnolia Glass Private limited Vs. Pernod Ricard India Private Limited*² that

the DIAC rules are primarily procedural in nature and cannot interfere with the jurisdiction of a referral court in referring the disputes to arbitration and that it is not necessary that the parties have to approach the DIAC for appointment of the arbitrator. He also relies upon the following judgments:

- (i) *Office for Alternative Architecture Vs. Ircon Infrastructure*³.
- (ii) *Arif Azim Company Ltd. Vs. Aptech Ltd*⁴.
- (iii) *Bhagheeratha Engineering Ltd. Vs. State of Kerala*⁵.

7. Having considered the rival submissions, the issue as regards the jurisdiction of this Court to entertain the present application is not contested by the Respondent, since the Respondent had earlier objected to the jurisdiction of the Delhi High Court to deal with Section 11 application. In view of the objection raised, the application filed before the Delhi High Court under Section 11 was withdrawn and filed before this Court. Thus, the issues for determination before this Court are (i) whether the Applicant ought to have approached the DIAC before invoking the arbitration clause; (ii) whether the invocation notice under Section 21 is not in terms of the arbitration clause; (iii) when the arbitration clause contemplates three arbitrators, the notice invoking such arbitration ought to have stated the names of three arbitrators and not by a sole arbitrator, and, whether the notice under Section 21 is defective; and what are the consequences thereof?

3 2025 SCC Online SC 1098

4 (2024) 5 SCC 313

5 2026 SCC OnLine SC 5

8. As regards the invocation of notice under Section 21, without suggesting names of three arbitrators and the notice being not in conformity with the arbitration clause, the law on the object of notice under Section 21 is discussed in the judgment of the Supreme Court, in the case of ***Bhagheeratha Engineering Ltd*** (supra), as under:

*“16. Secondly, the object of Section 21 of A&C Act, is only for the purpose of commencement of arbitral proceedings is also well settled. Section 21 is concerned only with determining the commencement of the dispute for the purpose of reckoning limitation. There is no mandatory prerequisite for issuance of a Section 21 notice prior to the commencement of Arbitration. Issuance of a Section 21 notice may come to the aid of parties and the arbitrator in determining the limitation for the claim. Failure to issue a Section 21 notice would not be fatal to a party in Arbitration if the claim is otherwise valid and the disputes arbitrable. In ***ASF Buildtech Private Limited vs. Shapoorji Pallonji & Company Private Limited***, one of us, J.B. Pardiwala J., felicitously put the principle thus: -*

163. The marginal note appended to Section 21 of the 1996 Act makes it abundantly clear that the notice to be issued thereunder is for the purpose of "commencement of arbitration proceedings". The substantive provision further makes it clear that the date on which a request/notice of invocation for referring a dispute is received by the respondent, would be the date on which the arbitral proceedings in respect of a particular dispute commences. The words "particular dispute" assume significance in the interpretation of this provision and its underlying object. It indicates that the provision is concerned only with determining when arbitration is deemed to have commenced for the specific dispute mentioned in the notice. The language in which the said provision is couched is neither prohibitive or exhaustive insofar as reference of any other disputes which although not specified in the notice of invocation yet, nonetheless falls within the scope of the arbitration agreement. The term "particular dispute", does not mean all disputes, nor does it confine the jurisdiction of the Arbitral Tribunal which is said to be one emanating from the

"arbitration agreement" to only those disputes mentioned in the notice of invocation, as it would tantamount to reading a restriction into the jurisdiction of the Arbitral Tribunal to the bounds of the notice of invocation instead of the arbitration agreement. Thus, there is no inhibition under Section 21 of the 1996 Act for raising any other dispute or claim which is covered under the arbitration agreement in the absence of any such notice. Section 21 is procedural rather than jurisdictional it does not serve to create or validate the arbitration agreement itself, nor is it a precondition for the existence of the Tribunal's jurisdiction, but merely operates as a statutory mechanism to ascertain the date of initiation for reckoning limitation.

165. Section 23 sub-section (1) places an obligation upon the claimant to state the facts supporting his "claim", the points at issue and the relief or remedy sought by way of its statement of claim, before the Arbitral Tribunal. Notably, the legislature, in the first part of the said sub-section, has deliberately and consciously used the term "claim" as opposed to "particular dispute" employed in Section 21 of the 1996 Act. Although, it could be said that the term "particular dispute" under Section 21 connotes a larger umbrella within which the term "claim" under Section 23 would be subsumed, thereby suggesting that there is no scope to deviate from what was sought to be referred by the notice of invocation, we do not think so. We say so because, the requirement for providing the points at issue and the relief or remedy sought that exists in sub-section (1) of Section 23 of the 1996 Act is patently absent in Section 21 of the 1996 Act, which clearly shows that the scope and object of these two provisions are at variance to each other. Further, this sub-section does not stipulate either explicitly or implicitly, that such "claim" must be the same or in tandem with the "particular dispute" in respect of which the notice of invocation was issued under Section 21 of the 1996 Act. This distinction in terminology is neither incidental nor redundant; rather, it reflects a conscious legislative design to demarcate the procedural objective of Section 21 from the substantive function sought or the framing of issues served by Section 23. Unlike Section 23, Section 21 does not require any articulation of the relief its sole purpose is to indicate when arbitration is deemed to have commenced, for the limited purpose of computing the limitation period.

169. Any restriction on the nature or content of claims, counterclaims, or set-offs in arbitration must be sourced solely from the express language of Section 23 and not from Section 21. Section(s) 21 and 23 of the 1996 Act although overlap in some aspects with each other in terms of the claims that would ordinarily be referred to the Tribunal more often than not tend to coincide, yet they are by no means tethered together in such a manner that neither of them can survive without one another. The latter serves only a procedural function and does not condition or limit the Tribunal's jurisdiction to adjudicate claims that may not have been specifically invoked at the threshold stage. To read such a limitation into the statutory scheme would run contrary to both the text and the object of the Act."

(Emphasis supplied)

More recently in Adavya Projects Private Limited v. Vishal Structural Private Limited and others, this Court reiterating the purpose and significance of a notice under Section 21 had the following to observe: -

*"24. At this point, it is important to note this Court's decision in State of Goa v. Praveen Enterprises [State of Goa v. Praveen Enterprises, (2012) 12 SCC 581] wherein it was held that the claims and disputes raised in the notice under Section 21 do not restrict and limit the claims that can be raised before the Arbitral Tribunal. The consequence of not raising a claim in the notice is only that the limitation period for such claim that is raised before the Arbitral Tribunal for the first time will be calculated differently vis-à-vis claims raised in the notice. However, non-inclusion of certain disputes in the Section 21 notice does not preclude a claimant from raising them during the arbitration, as long as they are covered under the arbitration agreement. **Further, merely because a respondent did not issue a notice raising counterclaims, he is not precluded from raising the same before the Arbitral Tribunal, as long as such counterclaims fall within the scope of the arbitration agreement.**"*

[Emphasis supplied]

9. The Supreme Court, while dealing with the question as to whether non-issuance of notice under Section 21 of the Act by the

Applicant would be fatal for it to pursue its claim before the arbitrator, observed that the object of Section 21 of the Act is only for the purpose of commencement of arbitral proceedings and Section 21 concerned only with determining the commencement of the dispute for the purpose of reckoning limitation. Issuance of a Section 21 notice may come to the aid of parties and the arbitrator in determining the limitation for the claim. Failure to issue a Section 21 notice would not be fatal to a party in Arbitration if the claim is otherwise valid and the disputes arbitrable. Any restriction on the nature or content of claims, counterclaims, or set-offs in arbitration must be sourced solely from the express language of Section 23 and not from Section 21.

10. The Supreme Court in the case of *Adavya Projects Private Limited Vs. Vishal Structurals Private Limited And Others*.⁶ has observed as under:

"16. Section 21 falls under Part I, Chapter V of the ACA, which deals with "Conduct of arbitral proceedings". The provision is extracted hereinbelow for reference:

"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."

17. A plain reading of the provision shows that in the absence of an agreement between the parties, arbitral proceedings are deemed to have commenced when the respondent receives a request to refer disputes to arbitration. It is clear that Section 21 does not expressly mandate the claimant to send a notice invoking arbitration to the respondents. However, the provision necessarily mandates such notice as its receipt by the respondent is required to commence arbitral proceedings, unless the parties have mutually agreed on

6 (2025) 9 SCC 686

another date/event for determining when the arbitral proceedings have commenced.

18. This Court has expounded the purpose and object underlying the notice referenced in Section 21 in several judgments, which can be stated as follows.

19. First, the notice is necessary to determine whether claims are within the period of limitation or are time-barred. Section 43(1) ACA stipulates that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Further, Section 43(2) provides that for the purpose of the Limitation Act, an arbitration shall be deemed to have commenced on the date referred to in Section 21. Hence, the date of receipt of the Section 21 notice is used to determine whether a dispute has been raised within the limitation period as specified in the Schedule to the Limitation Act, as held by this Court in Milkfood Ltd. v. GMC Ice Cream (P) Ltd. and State of Goa v. Praveen Enterprises.

20. Second, the date of receipt of notice is also relevant to determine the applicable law to the arbitral proceedings. This can be understood in two senses: (i) When the arbitral proceedings are governed by a law that is different from the proper law of the contract, the governing law applies only after the arbitral proceedings have commenced, as held in Milkfood; and (ii) Section 85(2)(a) ACA provides that the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 will apply to arbitral proceedings that commenced prior to the ACA coming into force, unless otherwise agreed by the parties. Hence, the date of invoking arbitration is necessary to determine which arbitration law applies to the proceedings as per the decisions in Milkfood and Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd. Similarly, the applicability of amendments to the ACA to arbitral proceedings is determined by reference to the date on which such proceedings commenced as per Section 21

21. Third, an application before the High Court or this Court under Section 11(6) ACA for appointment of arbitrator can be filed only after the respondent has failed to act as per the appointment procedure in the arbitration agreement. Hence, invocation of arbitration as provided in Section 21, and the subsequent failure of the respondent to appoint its arbitrator or agree to the appointment of a sole arbitrator as provided in Sections 11(4) and 11(5), are necessary for invoking the court's jurisdiction under Section 11.

This is as per the decision of this Court in BSNL v. Nortel Networks (India) (P) Ltd. Further, the limitation period within which the Section 11 application must be filed is also calculated with reference to the date on which the appointment procedure under the arbitration agreement fails.”

11. The Supreme Court in the case of *Adavya Projects Private Limited* (supra) held that a plain reading of the provision of Section 21 shows that, in the absence of an agreement between the parties, arbitral proceedings are deemed to have commenced when the respondent receives a request to refer disputes to arbitration. The provision necessarily mandates such notice as its receipt by the respondent is required to commence arbitral proceedings, unless the parties have mutually agreed on another date/event for determining when the arbitral proceedings have commenced.

12. The Supreme Court expounded the purpose and object underlying the notice referenced in Section 21 in its judgments, as follows:

(i) That the date of receipt of the Section 21 notice is used to determine whether a dispute has been raised within the limitation period as specified in the Schedule to the Limitation Act,

(ii) That the date of invoking arbitration is necessary to determine which arbitration law applies to the proceedings as per the decision in *Milkfood Ltd. Vs. M/s. GMC (P) Ltd.*⁷ and *Geo-Miller & Co (P) Ltd. Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*⁸, an applicability of amendments to the ACA to arbitral

7 (2004) (7) SCC 288

8 AIR 2019 SC 4244

proceedings is determined by reference to the date on which such proceedings commenced as per Section 21.

(iii) An application under Section 11(6) of the ACA for appointment of arbitrator can be filed only after the respondent has failed to act as per the appointment procedure in the arbitration agreement. Hence, invocation of arbitration as provided in Section 21, and the subsequent failure of the respondent to appoint its arbitrator or agree to the appointment of an arbitrator as provided in Sections 11(4) and 11(5), are necessary for invoking the court's jurisdiction under Section 11.

13. It is clear that by fixing the date of commencement of arbitral proceedings by anchoring the same to a notice invoking arbitration, Section 21 of the ACA fulfils various objects that are time-related. The receipt of such notice is determinative of the limitation period for substantive disputes as well as the Section 11 application, and also the law applicable to the arbitration proceedings.

14. The Supreme Court, in the case of *State of Goa Vs. Praveen Enterprises*⁹, held that the claims and disputes raised in the notice under Section 21 do not restrict and limit the claims that can be raised before the arbitral tribunal. The Supreme Court then proceeded to hold that non-service of the notice under Section 21 and the absence of disputes being raised against respondent nos. 2 and 3 in the appellant's notice dated 17.11.2020 do not

9 2012 (12) SCC 581

automatically bar their impleadment as parties to the arbitration proceedings.

15. The Supreme Court in *Adavya Projects Private Limited* (supra) has further laid down as under:

“46. While we agree with the decision in Alupro Building Systems 26 insofar as holding that the notice under Section 21 is mandatory, unless the contract provides otherwise, we do not agree with the conclusion that non-service of such notice on a party nullifies the Arbitral Tribunal's jurisdiction over him. The purpose of the Section 21 notice is clear - by fixing the date of commencement of arbitration, it enables the calculation of limitation and it is a necessary precondition for filing an application under Section 11 ACA. The other purposes served by such notice - of informing the respondent about the claims, giving the respondent an opportunity to admit and contest claims and raise counterclaims, and to object to proposed arbitrators - are only incidental and secondary. We have already held that the contents of the notice do not restrict the claims, and any objections regarding limitation and maintainability can be raised before the Arbitral Tribunal, and the ACA provides mechanisms for challenging the appointment of arbitrators on various grounds. Hence, while a Section 21 notice may perform these functions, it is not the primary or only mechanism envisaged by the ACA.”

16. The other purposes served by such notice under Section 21 of informing the respondent about the claims, giving the respondent an opportunity to admit and contest claims and raise counter-claims, and to object to proposed arbitrators are only incidental and secondary. The contents of the notice do not restrict the claims, and any objections regarding limitation and maintainability can be raised before the arbitral tribunal, and the ACA provides mechanisms for challenging the appointment of arbitrators on various grounds. Hence, while a Section 21 notice

may perform these functions, it is not the primary or only mechanism envisaged by the ACA.

17. Considering the law laid down in *Adavya Projects Private Limited* (supra), wherein the Supreme Court has observed that other than the calculation of limitation, the only purpose served by notice under Section 21 is of informing the Respondent about the claims, giving the Respondent an opportunity to admit and contest claims and raise counter-claims, and to object to proposed arbitrators are only incidental and secondary and the contents of the notice do not restrict the claims, and any objections regarding limitation and maintainability can be raised before the arbitral tribunal.

18. Considering this observation, the arguments of the Respondent that the notice under Section 21 is not in terms of the arbitration clause, particularly with regard to number of three arbitrators being suggested cannot defeat the notice. The notice under Section 21 invokes the arbitration clause, specifies the disputes, and seeks resolution through arbitration. The name of sole arbitrator is suggested. There is no objection to the notice under Section 21 to the name of sole arbitrator on the ground that the agreement specifies arbitral tribunal should be of three arbitrators. Names of three arbitrators are not suggested by the Respondent. The dispute persists, and the notice under Section 21 has not resulted in the appointment of the arbitral tribunal. On the failure of constitution of the arbitral tribunal, this Court gets jurisdiction to appoint an arbitrator under Section 11(6). The purpose of notice under Section 21 is time-related and if the

arbitral tribunal is not constituted as per the agreed procedure, this Court gets jurisdiction to appoint an 'Arbitral Tribunal' under Section 11(6).

19. This Court finds that Clause 20.2, particularly the second part i.e. *“The competent courts at the place of registered office of the Buyer shall have exclusive jurisdiction in relation to this Order and for implementation of the arbitral awards”* would indicate that the jurisdiction to entertain the Section 11 application of this Court, as the Buyer office is admittedly within the jurisdiction of this Court. The seat of arbitration is within the jurisdiction of this Court. The Applicant is not required to approach the DIAC for appointment of arbitrator in the first instance, before issuance of notice under Section 21. In the instant case, the Respondent party has failed to act in terms of Section 11(6)(a), as they have not responded for appointment of arbitrator by DIAC in response to notice under Section 21.

20. Rule 4.1.1. of DIAC provides proof of service of the request for arbitration and any documents filed therewith on the other parties to the satisfaction of DIAC. Thus, Rule 4.1 provides that a party shall file with DIAC a written request for arbitration, including in cases where a reference to DIAC has been made by any Court/Authority. The request shall, insofar as applicable, be accompanied by proof of service of the request for arbitration and any documents filed there with on the other parties, to the satisfaction of DIAC. Meaning thereby, the request should be accompanied by the notice under Section 21 invoking the arbitration clause, along with a copy of agreement containing and

arbitration clause and the response to the Section 21 notice, if any. In the instant case, this Court finds that the reply filed by the Respondent to the Section 21 notice is that the claim is barred by limitation and there is no question of appointing an arbitrator. No objections are raised as regards non-following of the procedure under the DIAC Rules. Since the invocation has met with resistance to the appointment of arbitrator on account of the claim being barred by limitation, further process of appointment under the DIAC Rules does not arise. The Respondent has not responded for appointment of arbitrator through DIAC. Since the seat of arbitration is within the jurisdiction of this Court, this Court would proceed to appoint an arbitrator in the matter. The parties can apply to the arbitrator regarding the venue and the procedure to be followed in terms of the contract governing the parties and the Arbitration Act. The invocation notice under Section 21 has failed; as such, the Applicant has invoked under Section 11(6) for the appointment of the arbitrator.

21. Accordingly, this Court would allow the present Arbitration Application and pass the following order:

ORDER

(A) **Smt. Anuja Prabhudessai**, Former Judge of this Court is appointed as the sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The contact details of the Arbitrator are as under :-

Address : Office 106 Arcadia Building, NCPA Marg,
Nariman Point, Mumbai – 400021.

Mobile No. : 9823855445

Email ID : justiceanujaprabhudessai@gmail.com

(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Applicant within a period of 1 week from the date of uploading of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this order.

(C) Venue of the arbitration would be governed by the provisions of the agreement executed between the parties or as agreed and the parties are permitted to make submissions before the arbitrator in this regard.

(D) Learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocates for the Applicant to the Respondent.

(E) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by her, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along

with mobile and landline numbers, if any, of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration.

(F) All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

22. All contentions of the parties are expressly kept open to be raised before the Arbitrator.

23. With the above directions, the Arbitration Application stands disposed of accordingly.

(ARUN R. PEDNEKER, J.)