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

% **Reserved on : 8th December 2022**
Pronounced on: 18th January 2023

\+ O.M.P. (COMM) 370/2022 & I.A.14987/2022 *(Additional Documents)*

MONIKA OLI ..... Petitioner
Through: Mr.Jayant Mehta, Senior Advocate with Mr. Karan Lahiri, Mr.Akshat Gupta, Mr.Pranav Jain, Ms.Sakshi Tikmany, Ms.Sayani Dey and Mr.Raghav Bhatia, Advocates

versus

M/S CL EDUCATE LTD. ..... Respondent
Through: Mr.Dhruv Mehta, Senior Advocate with Mr.Rajat Arora, Ms.Mariya Shahab and Mr.Shyam Agarwal, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') raises some important questions of law *inter alia* pertaining to the interpretation of Section 21 of the Arbitration Act. By way of the instant petition, the Petitioner seeks indulgence of this Court to set aside the

impugned arbitral award dated 16th March 2015 passed by the learned sole arbitrator, Mr. Divya Darshan Sharma in the case titled as '*CL Educate Ltd. vs. Monika Oli'*.

FACTUAL MATRIX

2. The facts necessary for the disposal of the present petition are that an Employment Agreement was entered into between the Petitioner and M/s Comprehensive Education and IT Training Institute (hereinafter referred to as '**CEITI**'), a Dubai based entity which was authorized to run Career Launcher test-prep courses in the United Arab Emirates (hereinafter referred to as '**UAE'**). M/s CL Educate Ltd. (hereinafter referred to as the '**Respondent'**), is a company registered under the Companies Act, 1956. By way of the Employment Agreement, the Petitioner was appointed as the Principal Consultant for its Dubai office and she was entrusted with the responsibility for enrollment and collection of fees from students for the test-prep courses in Dubai. She was also required to bear the costs in relation to rent, marketing and sales, course material, salary for faculty, among other things.

3. For the 1st year, as per **Clause 2** of the Employment Agreement, the Petitioner was entitled to 75% of the net collections arising out of IITJEE, AIEEE, CBSE XII Program, IIT Foundation IX and X, and 85% of the net collections for all other programs. It was also agreed by the parties that the collections made by the Petitioner would be deposited in Career Launcher's account and on a monthly basis, the Petitioner's share would be transferred to her account. From the next year onwards, it was agreed between the parties that the percentage of net collections falling to

the share of the Petitioner would be mutually discussed. It was further stipulated that from the 2nd year, all collections would accrue to the Petitioner as her top-line and only remit either 25%/15% (depending on the product) to Career Launcher.

4. On 6th November 2013, the Petitioner received a legal notice on behalf of the Respondent seeking payment of various amounts, including AED 6,25,775/- on account of alleged short deposit of fee collected by the Petitioner and AED 13,92,000/- on account of fee allegedly collected by the Petitioner against the installment due on 31st January 2013 which was not deposited in the account of the Respondent. On 16th November 2013, the Petitioner responded to the above legal notice dated 6th November 2013, denying the claims of the Respondent and alleging that the Respondent has issued the legal notice in order to set up a false case against the Petitioner as she had on previous occasion raised requests with the Respondent to settle the accounts between the parties.

5. The Respondent invoked **Clause 10** which contained the arbitration clause and provided that any dispute arising between the parties would be referred to a sole arbitrator appointed by the Managing Director of Career Launcher India Ltd., having its jurisdiction/place at New Delhi. A sole arbitrator was appointed and the Petitioner was proceeded *ex parte*. The arbitral tribunal passed the impugned arbitral award by which the claims raised by the Respondent were allowed against the Petitioner.

6. Aggrieved with the passing of the impugned arbitral award, the Petitioner has approached this Court under Section 34 of the Arbitration Act.

SUBMISSIONS

(on behalf of the petitioner)

7. Mr. Jayant Mehta, learned senior counsel appearing on behalf of petitioner, in support of the instant petition has strenuously argued that the impugned arbitral award is wholly illegal as the Petitioner has never received the mandatory notice under Section 21 of the Arbitration Act by which the arbitration proceedings are to be commenced. It is further submitted that the Petitioner has never received any communication whatsoever *inter alia* stating the name or the information *qua* the appointment of the Arbitrator, to adjudicate the dispute which has arisen between the parties.

8. Mr. Mehta, learned senior counsel appearing on behalf of petitioner submitted that though the Arbitrator has given his consent vide notice dated 10th March 2014 and directed the parties to appear before him on 2nd May 2014, but the Petitioner has never received any communication indicating the consent from the Arbitrator. It is further submitted that the Petitioner also never received any communication directing her to appear on 2nd May 2014. It is also argued that the Petitioner did not receive any communication whatsoever from the arbitrator notifying the first hearing of the arbitration. It is vehemently submitted that the Petitioner has for the very first time received an email on 5th June 2014 from the arbitrator

stating that the proceeding could not take place on 2nd May 2014, and the next date of hearing was shifted to 9th July 2014.

9. Learned senior counsel appearing on behalf of petitioner submitted that the claim petition filed by the Respondent before the Arbitrator on 9th July 2014 was also never served upon the Petitioner which is a serious error that goes to the root of the matter. It is also submitted that though the Respondent was directed by the Arbitrator on 23rd September 2014 to re-send a copy of the notice dated 10th March 2014 to the Petitioner and to place on record a copy of the dispatch proof as well as the delivery report, but no such courier was ever received by the Petitioner to this effect. It is further submitted that the Petitioner gained knowledge of the impugned Award on 23rd May 2022 when the Petitioner received a notice dated 19th May 2022 from a Dubai Court.

10. Learned senior counsel appearing on behalf of petitioner further submitted that in the execution proceedings in UAE, the Respondent herein has taken a stand that the impugned arbitral award was sent by the learned Arbitrator to the Petitioner through courier on 18th March 2015 and a courier receipt has also been provided as a proof of delivery. However, it is submitted by the learned senior counsel that this does not evidence receipt by the Petitioner of the impugned arbitral award. It is further submitted that the Petitioner has filed an appeal against the notice dated 19th May 2022 issued by a Dubai Court which is pending before the Appellate Court in Dubai. It is further submitted that in the reply filed by the Respondent herein to that appeal, the Respondent has miserably failed to place on record any evidence to establish that the notice dated 10th

March 2014 issued by the Arbitrator giving his consent to act as the Arbitrator was ever dispatched or delivered to the Petitioner by any mode.

11. Learned senior counsel appearing on behalf of petitioner further vehemently argued that the Arbitrator ought to have addressed a communication subsequent to his appointment, notifying the first date of hearing, and thereafter communicating every order passed. It is submitted that vague and isolated emails sent to the Petitioner by the Arbitrator cannot constitute proper notice. It is accordingly, submitted that grave prejudice has been caused to the Petitioner in being impeded to meet her defence before the Arbitral Tribunal. It is also argued that the Petitioner has received only two correspondences, ***first***, legal notice dated 6th November 2013 issued by the Respondent to the Petitioner and ***second***, email dated 5th June 2014 sent by the Arbitrator to the Petitioner. Learned senior counsel has categorically denied the receipt of the following correspondences which has been mentioned in the impugned arbitral award:

1. Letter dated January 2014 pertaining to appointment of the Arbitrator.
2. Arbitration commencement Notice dated 10th March 2014 issued by the Arbitrator to the Petitioner and the Respondent.
3. Pleadings or Statement of Claim filed by the Respondent herein.
4. Order dated 1st November 2014 passed by the Arbitrator vide which the Petitioner herein was proceeded *ex parte.*

12. Another main ground taken by Mr. Mehta, learned senior counsel appearing on behalf of petitioner, is that the Employment Agreement was

executed between the Petitioner and CEITI, which is a separate and distinct legal entity, based in Dubai; and not between the Petitioner and the Respondent herein. It is submitted that as the arbitration proceedings were alleged to have been initiated by the Respondent relying on the said Employment Agreement and accordingly, the invocation of the arbitration proceedings is bad in law as there is no privity of contract between the Petitioner and the Respondent. It is also submitted that such an infirmity goes to the root of the matter rendering the impugned arbitral award as null and void.

13. Learned senior counsel appearing on behalf of petitioner has also pleaded that a bare perusal of the impugned arbitral award would show that it has been passed by treating the Indian Law as the substantive law of the contract whereas, the substantive law of the contract was the UAE Federal Labour Law. It is further submitted that the parties had agreed for the substantive law of the contract to be the UAE Federal Labour Law and according to which, employment and labour disputes are not capable of resolution by arbitration, i.e., they are non-arbitrable disputes. It is accordingly submitted that the impugned arbitral award is completely perverse and in conflict with the public policy of India and hence, is liable to be set aside under Section 34(2)(b)(ii) of the Arbitration Act.

14. Learned senior counsel appearing on behalf of petitioner submitted that the Arbitrator has erred in interpreting the provisions of the Employment Agreement as he has awarded the entire claim amount demanded by the Respondent herein. It is submitted that as per the provisions of the Employment Agreement, from the 2nd year onwards, all

collections would have accrued to the Petitioner as her top-line which means that the Petitioner would retain the collections and would only remit either 25%/15% (depending on the product) to Career Launcher and hence, the approach taken by the Arbitrator does not stand to reason in view of the specific provisions of the Employment Agreement. It is further submitted that the Arbitrator has returned an erroneous finding that the Employment Agreement stood automatically renewed in view of the specific conditions in the Employment Agreement inasmuch as the conditions requisite for the automatic renewal were never satisfied. It is submitted that for automatic renewal, two conditions should have been satisfied, which in the present facts and circumstances have not been satisfied, ***first***, the Petitioner should continue the employment after expiry of the Employment Agreement and ***second***, neither party has given a notice declining renewal at least 30 days prior to the expiry date. It is also argued that the Arbitrator has awarded an exorbitant interest of 18% per annum, without there being any provision in the contract for award of interest, let alone such a high quantum of interest. This is contrary to the basic notions of justice and thus, the Arbitral Award is liable to be set aside under Section 34(2)(b)(ii) of the Arbitration Act.

15. He has relied upon the following judicial pronouncements to substantiate the submissions made in support of the instant petition:

a) ***Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*, (2017) SCC OnLine Del 7228.**
b) ***Sachin Gupta vs. K.S. Metal Forge Pvt. Ltd.*, (2013) 10 SCC 540.**

c) ***Suvidha Infracon Pvt. Ltd vs. Intec Capital Ltd.,*** **(2018) SCC OnLine Del 11498.**

d) ***Union of India vs. Tecco Trichy Engineers & Contractors,*** **(2005) 4 SCC.**

e) ***Benarsi Krishna Committee vs. Karmyogi Shelters Pvt. Ltd.,*** **(2012) 9 SCC 496.**

f) ***State of Maharashtra vs. Ark Builders,*** **(2011) 4 SCC 616.**

(on behalf of the respondent)

16. *Per Contra,* Mr. Dhruv Mehta, learned senior counsel appearing on behalf of respondent has taken a preliminary objection to the maintainability of the present petition and has submitted that the instant petition is clearly barred by limitation, as it has been filed after the expiry of eight years from the date of receipt of the award by the Petitioner. It is further submitted that the Petitioner has taken a frivolous plea that the impugned award dated 16th March 2015 came to the knowledge of the Petitioner only on 23rd May 2022 inasmuch as the impugned award was delivered to the Petitioner on 23rd March 2015 by the Arbitrator which is also evident from the additional documents filed by the Petitioner itself.

17. Learned senior counsel appearing on behalf of respondent submitted that provisions of the Limitation Act, 1963 are not applicable for the purpose of Section 34 of the Arbitration Act as the Arbitration Act is a complete code in itself. Learned senior counsel has further relied on Section 34(3) of the Arbitration Act to contend that the arbitral award can be challenged within a period of three months of the receipt of the Award,

which can be extended only for a further period of 30 days on showing sufficient cause. It is also submitted that as per various authoritative judicial pronouncements by the Hon'ble Supreme Court, the time-line provided under Section 34(3) of the Arbitration Act is mandatory and inflexible and hence, this Court does not have any power to condone any delay exceeding 30 days.

18. Learned senior counsel appearing on behalf of respondent has relied on para 8.16 of the Petition as well as page nos. 136 and 137 of the additional documents filed by the Petitioner to contend that the Petitioner had full knowledge of the arbitral award and had also received a copy of the impugned arbitral award on 23rd March 2015 as the tracking report of the parcel No. DHL-1491930425 (a parcel containing arbitral award sent by the Arbitrator to the Petitioner by Express India) clearly shows that the impugned arbitral award was delivered to Mr. Shrey Baxi, who is a partner/employee of the Petitioner herein. It is submitted that the parcel was accepted by Mr. Shrey Baxi on behalf of the Petitioner as he has a full-time association with the entity namely the Knowledge Planet UAE (an entity run by the Petitioner). Learned senior counsel has placed reliance on Section 3 of the Arbitration Act to contend that any written communication if delivered at the place of business is deemed to have been received on the day it is so delivered. It is accordingly, submitted that the contention of the Petitioner that the knowledge of the impugned arbitral award came to the notice of the Petitioner on 23rd May 2022 is totally false and contrary to the record as Section 34(3) of the Act is not

dependent on the knowledge but on the receipt of the award sent by the Arbitrator.

19. It is further submitted that the Petitioner in her reply to the legal notice issued by the Respondent's Advocate has signed as Chief Mentor of the Knowledge Planet and the address of the Petitioner is undisputed and has not been denied in any of the pleadings or otherwise. It is accordingly submitted that the award has been delivered at the undisputed address of the Petitioner in Dubai and hence, the requirements of Section 31(5) of the Arbitration Act has been complied with. Learned senior counsel has submitted that the impugned arbitral award is not a result of some overnight proceeding but has been passed after giving several opportunities to the Petitioner to appear and answer the claims of the Respondent which is evident *inter alia* from the following correspondences:

a) Issuance of legal notice dated 6th November 2013 by the Respondent to the Petitioner to initiate legal proceeding by stating to refer the dispute for Arbitration.
b) Reply to the above legal notice by the petitioner on 16th November 2013.
c) Email dated 5th June 2014 from the Arbitrator to both the parties clearly mentioned the pendency of Arbitral proceeding.
d) Arbitrator in para 2,3, and 4 of the Award stated that he gave consent vide notice dated 10th March 2014 and accordingly, parties were directed to appear before the Tribunal on 2nd May 2014.
e) Arbitrator in para 5, 6, and 7 of the Award mentioned that on 23rd September 2014 Respondent herein was directed to re-send the

copy of the notice dated 10th March 2014 along with the order dated 23rd September 2014 to the Petitioner and the courier receipt of same was filed on 1st November 2014.

20. Learned senior counsel appearing on behalf of respondent has further submitted that the notice under Section 21 of the Arbitration Act was duly issued by the Respondent to the Petitioner by way of a legal notice dated 6th November 2013, which clearly indicated the intention of the Respondent to initiate the arbitral proceedings in case of continuous breach of the Employment Agreement . It is submitted that the Petitioner has even replied to this legal notice. It is further submitted that the notice appointing the Arbitrator was also sent to the Petitioner in January 2014, stating that as disputes have arisen between the parties on account of alleged violation of the terms and conditions of the Employment Agreement by the Petitioner, the Respondent was appointing a sole Arbitrator to adjudicate the disputes. It is also submitted that the statement of claim filed by the Respondent herein was also sent to the Petitioner and the receipt of the same is also filed in the additional documents filed by the Petitioner.

21. Learned senior counsel appearing on behalf of respondent also submitted that the curial law applicable to the Employment Agreement was Indian law and thus all the requirements of the delivery of service as required under the Indian laws stands satisfied as the communications made to the Petitioner were duly received by the Petitioner. It is further submitted that the ground taken by the Petitioner that there existed no arbitration agreement between the Petitioner and the Respondent is

misconceived and in the nature of an argument of last resort. It is submitted that at no point of time, either at the time of exchange of emails or otherwise, the Petitioner has denied the existence of the arbitration agreement or even otherwise, a simple perusal of the Employment Agreement clearly shows that there exists a valid arbitration agreement between the Petitioner and the Respondent.

22. Learned senior counsel appearing on behalf of respondent has taken a vehement plea that the right of the Petitioner to raise the issue of non-compliance of Section 21 stands waived in accordance with Section 4 of the Arbitration Act as she has failed to participate in the arbitral proceedings despite being aware of the continuation of the arbitral proceedings. Even otherwise, it is submitted that the Section 21 of the Arbitration Act is a derogable provision which is apparent from the fact that it starts with the words "*Unless otherwise agreed by the parties…"*

23. It is further argued that the Employment Agreement clearly provided for the resolution of the disputes arising between the parties as per Indian law, as the seat of the arbitration proceedings was envisaged to be at New Delhi. It is accordingly, submitted that the disputed adjudicated between the parties were clearly arbitrable. It is also submitted that it is no longer *res integra* that the Courts under Section 34 of the Arbitration Act would not sit in Appeal over the findings recorded by the Arbitrator thereby, reviewing the interpretation of the contract as well as the factual findings arrived by the Arbitrator. It is submitted that the Writ of execution has already been granted by the First Court of Dubai and the petitioner has filed an Appeal in the Court of Appeal in

Dubai challenging the execution proceedings and hence, the sole purpose of filing the present petition is to halt and create obstructions in the execution proceedings presently going on in Dubai Courts, for the execution of the impugned arbitral award.

24. He has relied on the following judicial pronouncements to substantiate his argument that the present petition is liable to be dismissed:

a) ***Mahindra and Mahindra Financial Service Limited v. Maheshbhai Tinabhai Rathod and Others,*** **(2022) 4 SCC 162.**
b) ***P. Radha Bai v. P. Ashok Kumar,*** **(2019) 13 SCC 445.**
c) ***Manohar Lal & Co. v. Axis Bank Ltd.*** **2018 SCC Online Cal 15745.**
d) ***Rlj Ferro Alloys Pvt. Ltd. & Ors v. M/s. Reliance Capital Limited,*** **2014 SCC Online Cal 18421.**
e) ***Shri Lachoo Mal vs Shri Radhey Shyam*** **(1971) 1 SCC 619.**
f) ***Prasun Roy vs Calcutta MDA*** **(1987) 4 SCC 217.**

(Rebuttal on behalf of petitioner)

25. In the ***rejoinder***, the learned senior counsel for the petitioner submitted that the legal notice dated 6th November 2013 can in no case amount to a notice under Section 21 of the Arbitration Act. It is submitted that under Section 21, an arbitration proceeding commences *"on the date on which a request for that dispute to be referred to arbitration is received by the Respondent"* but the notice dated 6th November 2013 neither contains any request to refer disputes to arbitration nor proposes

any Arbitrator to be appointed, and merely mentions that such reference would occur in the future if the Respondent's demands are not met. It is further submitted that this notice itself has been described by the Respondent as a 'legal demand notice' which cannot satisfy the essentials of Section 21 of the Arbitration Act.

26. Learned senior counsel also submitted that the tracking report clearly shows that the impugned arbitral award was not delivered to Monika Oli but to one Mr. Shrey Baxi. It is categorically denied by the learned senior counsel that Mr. Baxi is a partner/employee of Monika Oli and that he accepted the impugned award on behalf of the Petitioner. It is further submitted that Knowledge Planet LLC is a company registered in Dubai in which the Petitioner is a minority shareholder and Mr. Baxi is an employee and hence, he could not have accepted any service on behalf of the Petitioner.

27. Learned senior counsel has also taken a vehement plea that issuance of notice under Section 21 of the Arbitration Act is mandatory and its non-issuance renders the entire arbitral proceedings as *non-est* and *void ab initio*. It is further submitted that Section 4 of the Arbitration Act cannot be invoked to waive the requirement of Section 21 of the Arbitration Act as the compliance with the latter is a matter of mandatory statutory requirement. Even otherwise, it is submitted that Section 4 of the Act applies only in those cases where the party '*proceeds with arbitration without stating his objection*'. In the instant case, it is submitted that the Petitioner was proceeded *ex-parte* and as such, there arises no question of the Petitioner having proceeded with the arbitration.

In other words, a party cannot be said to be one who "*proceeds with*" an arbitration if, as in the present case, the party has not participated *inter alia* due to lack of proper notice of the proceedings.

28. It is further argued that delivery of signed arbitral award is not governed by Section 3 of the Arbitration Act but is governed by Section 31(5) of the Arbitration Act and hence, the arbitral award must have been delivered to the individual who was a party to the arbitration proceedings or the responsible officer of an entity which is a party handling the arbitral dispute. It is accordingly, submitted that delivery of arbitral award being not a mere formality, was not satisfied in the present facts and circumstances of the case.

FINDINGS AND ANALYSIS

29. Heard learned senior counsel appearing for the parties at length and also perused the record of the instant petition. This Court has carefully perused the impugned arbitral award, and has given thoughtful consideration to the submissions advanced on behalf of the parties.

30. The primary question which requires consideration is:

I. Whether the present petition under Section 34 of the Arbitration Act is barred by limitation?

(i) Whether the delivery of the impugned arbitral award to one Mr. Shrey Baxi can be taken as receipt of the award to the Petitioner in view of the provisions of the Arbitration Act?

(ii) Whether the various correspondences between the Petitioner, Respondent and the Arbitrator constitute as a valid notice under Section 21 of the Arbitration Act?

31. It is necessary to reproduce Section 34(3) of the Arbitration Act, which reads as under:-

> "*34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).*
> *(2) XXXX*
> *(2-A) XXXX*
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application* ***had received the arbitral award*** *or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
> *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

32. In the present case, it is not disputed that the impugned arbitral award was passed on 16th March 2015. But the Petitioner has vehemently disputed the receipt of the arbitral award on 23rd March 2015 which is alleged to have been sent by the learned Arbitrator. The Arbitration Act in Para 4(v) of the Statement of Objects and Reasons states one of the most important objectives which is the need "to minimize the supervisory role of courts in the arbitral process". Section 5 of the Arbitration Act is in the nature of injunction to the Courts and clearly defines the scope of

judicial intervention in an Arbitration proceeding. Section 5 of the Arbitration Act is reproduced below:

> *"5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

33. The Hon'ble Supreme Court in ***Mahindra & Mahindra Financial Services Ltd. vs. Maheshbhai Tinabhai Rathod & Ors.,*** **(2022) 4 SCC 162,** has given the following interpretation to Section 34(3) of the Arbitration Act:-

> *"**9.** The scope available for condonation of delay being self-contained in the proviso to Section 34(3) and Section 5 of the Limitation Act not being applicable has been taken note by this Court in its earlier decisions, which we may note. In Union of India v. Popular Construction Co. [Union of India v. Popular Construction Co., (2001) 8 SCC 470] it has been held as hereunder : (SCC pp. 474-76, paras 12, 14 & 16)*
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> > *"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.*
> >
> > ***
> >
> > *14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed*

under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process" [Para 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.] . This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

> *'**5. Extent of judicial intervention**.— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'*
>
> ***

16. Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that

> *'**36. Enforcement**.—Where the time for making an application to set aside the arbitral award under Section 34 has expired ... the award shall be enforced under the Civil Procedure Code, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.'*

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to

"proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow" (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

9.1. *Further, in State of H.P. v. Himachal Techno Engineers [State of H.P. v. Himachal Techno Engineers, (2010) 12 SCC 210 : (2010) 4 SCC (Civ) 605] it was noted and held as hereunder : (SCC pp. 211-12, paras 2 & 5)*

"2. A petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act" for short) was filed by the appellant on 11-3-2008, challenging the arbitral award. The petition was accompanied by an application under sub-section (3) of Section 34 of the Act, for condonation of delay of 28 days in filing the petition. The respondent resisted the application contending that the petition under Section 34 was filed beyond the period of 3 months plus 30 days and therefore, was liable to be rejected.

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5. Having regard to the proviso to Section 34(3) of the Act, the provisions of Section 5 of the Limitation Act, 1963 will not apply in regard to petitions under Section 34 of the Act. While Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words 'may entertain the application within a further period of thirty days, but not thereafter'. Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty

days, provided sufficient cause is shown. Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned."

9.2. *The same view was taken by this Court in P. Radha Bai v. P. Ashok Kumar [P. Radha Bai v. P. Ashok Kumar, (2019) 13 SCC 445 : (2018) 5 SCC (Civ) 773] wherein this Court held as follows : (SCC pp. 457-58, para 33)*

"33.2. The proviso to Section 34(3) enables a court to entertain an application to challenge an award after the three months' period is expired, but only within an additional period of thirty dates, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days' period is the outer boundary for challenging an award. If Section 17 were to be applied, the outer boundary for challenging an award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34(3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. [State of H.P. v. Himachal Techno Engineers [State of H.P. v. Himachal Techno Engineers, (2010) 12 SCC 210 : (2010) 4 SCC (Civ) 605] , Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd. [Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd., (2012) 2 SCC 624 : (2012) 1 SCC (Civ) 831] and Anilkumar Jinabhai Patel v. Pravinchandra Jinabhai Patel [Anilkumar Jinabhai Patel v. Pravinchandra Jinabhai Patel, (2018) 15 SCC 178 : (2019) 1 SCC (Civ) 141]]."

9.3. *The observations of this Court in different decisions relating to non-applicability of Section 5 of the Limitation Act in condoning the delay and extending the limitation prescribed under Section 34(3) of the 1996 Act was taken note of by a Bench of three Hon'ble Judges of this Court with approval, in Chintels (India) Ltd. v. Bhayana Builders (P)*

Ltd. [Chintels (India) Ltd. v. Bhayana Builders (P) Ltd., (2021) 4 SCC 602]."

34. Therefore, one thing is clear that this Court does not have the power to condone any delay which exceeds the statutory time limit prescribed under Section 34(3) of the Arbitration Act. As a necessary corollary, next important question that arises for consideration is that whether the delivery of the arbitral award to one Mr. Shrey Baxi constitutes as a delivery to the Petitioner, so as to bring in the bar envisaged under Section 34(3) of the Arbitration Act?

35. At this stage, it is pertinent to refer to Sections 2(h) and 31(5) of the Arbitration Act. These Sections read as under:

"2. Definitions.—(1) In this Part, unless the context otherwise
requires,—
(h) "party" means a ***party to an arbitration agreement.***

31. Form and contents of arbitral award.—(1) An arbitral award shall made in writing and shall be signed by the members of the arbitral tribunal.
(2) xxxx
(3) xxxx
(4) xxxx
(5) After the arbitral award is made, a signed copy shall be delivered to each party."

36. In ***Union of India vs. Tecco Trichy Engineers & Contractors,*** **(2005) 4 SCC 239**, the question which arose before the Hon'ble Supreme Court was that whether delivery of the impugned arbitral award to the General Manager of Railways will constitute as valid delivery in terms of Section 31(5) of the Arbitration Act, when the party before the Arbitrator

was the Chief Engineer? The Hon'ble Supreme Court while answering the question in the negative laid down the following proposition of law:

> ***"6.*** *Form and contents of the arbitral award are provided by Section 31 of the Act. The arbitral award drawn up in the manner prescribed by Section 31 of the Act has to be signed and dated. According to sub-section (5), "after the arbitral award is made, a signed copy shall be delivered to each party".* ***The term "party" is defined by clause (h) of Section 2 of the Act as meaning "a party to an arbitration agreement". The definition is to be read as given unless the context otherwise requires.*** *Under sub-section (3) of Section 34 the limitation of 3 months commences from the date on which "the party making that application" had received the arbitral award. We have to see what is the meaning to be assigned to the term "party" and "party making the application" for setting aside the award in the context of the State or a department of the Government, more so a large organisation like the Railways.*
>
> ***7.*** *It is well known that the Ministry of Railways has a very large area of operation covering several divisions, having different divisional heads and various departments within the division, having their own departmental heads. The General Manager of the Railways is at the very apex of the division with the responsibility of taking strategic decisions, laying down policies of the organisation, giving administrative instructions and issuing guidelines in the organisation. He is from elite managerial cadre which runs the entire organisation of his division with different departments, having different departmental heads. The day-to-day management and operations of different departments rests with different departmental heads. The departmental head is directly connected and concerned with the departmental functioning and is alone expected to know the progress of the matter pending before the Arbitral Tribunal concerning his department. He is the person who knows exactly where the shoe pinches, whether the arbitral award is adverse to the department's interest. The departmental*

head would naturally be in a position to know whether the arbitrator has committed a mistake in understanding the department's line of submissions and the grounds available to challenge the award. He is aware of the factual aspect of the case and also the factual and legal aspects of the questions involved in the arbitration proceedings. It is also a known fact and the Court can take judicial notice of it that there are several arbitration proceedings pending consideration concerning affairs of the Railways before arbitration. The General Manager, with executive workload of the entire division cannot be expected to know all the niceties of the case pending before the Arbitral Tribunal or for that matter the arbitral award itself and to take a decision as to whether the arbitral award deserves challenge, without proper assistance of the departmental head. The General Manager, being the head of the division, at best is only expected to take final decision whether the arbitral award is to be challenged or not on the basis of the advice and the material placed before him by the person concerned with arbitration proceedings. Taking a final decision would be possible only if the subject-matter of challenge, namely, the arbitral award is known to the departmental head, who is directly concerned with the subject-matter as well as arbitral proceedings. In large organisations like the Railways, "party" as referred to in Section 2(h) read with Section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the arbitrator.

8. *The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for*

> *correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.*
>
> ***9.*** *In the context of a huge organisation like the Railways, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34."*

37. Though, the aforesaid decision of the Hon'ble Supreme Court dealt with the meaning of *'party'* in the context of a larger organization, but the general principles laid down cannot be ignored and are of a vital importance in the facts and circumstances of the present case.

38. In ***Benarsi Krishna Committee & Ors. Vs. Karmyogi Shelters Pvt. Ltd.*****, (2012) 9 SCC 496**, the Hon'ble Supreme Court was confronted with a question as to whether delivery of an arbitral award on agent or advocate of a party would constitute as a proper delivery in terms of Sections 31(5) and 34(3)? The Hon'ble Supreme Court while answering the question in the negative laid down the following proposition of law:

> *"**15.** Having taken note of the submissions advanced on behalf of the respective parties and having particular regard to the expression "party" as defined in Section 2(1)(h) of the 1996 Act read with the provisions of Sections 31(5) and*

34(3) of the 1996 Act, we are not inclined to interfere with the decision [Karmyogi Shelters (P) Ltd. v. Benarsi Krishna Committee, AIR 2010 Del 156] of the Division Bench of the Delhi High Court impugned in these proceedings. The expression "party" has been amply dealt with in Tecco Trichy Engineers case [(2005) 4 SCC 239] and also in ARK Builders (P) Ltd. case [(2011) 4 SCC 616 : (2011) 2 SCC (Civ) 413] , referred to hereinabove. It is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. The expression "party", as defined in Section 2(1)(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or advocate empowered to act on the basis of a vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the arbitral award on the party himself and not on his advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.

16. *The view taken in Pushpa Devi Bhagat case [(2006) 5 SCC 566] is in relation to the authority given to an advocate to act on behalf of a party to a proceeding in the proceedings itself, which cannot stand satisfied where a provision such as Section 31(5) of the 1996 Act is concerned. The said provision clearly indicates that a signed copy of the award has to be delivered to the party.* ***Accordingly, when a copy of the signed award is not delivered to the party himself, it would not amount to compliance with the provisions of Section 31(5) of the Act****. The other decision cited by Mr Ranjit Kumar in Nilkantha Sidramappa Ningashetti case [AIR 1962 SC 666 : (1962) 2 SCR 551] was rendered under the provisions of the Arbitration Act, 1940, which did not have a provision similar to the provisions of*

Section 31(5) of the 1996 Act. The said decision would, therefore, not be applicable to the facts of this case also."

39. Therefore, the proposition laid down in ***Tecco Trichy Engineers & Contractors*** (***supra***) in the context of large bodies was even extended to '*agents'* or '*advocates'* of parties.

40. In ***State of Maharashtra v. ARK Builders (P) Ltd.*****, (2011) 4 SCC 616**, the Hon'ble Supreme Court was dealing with the question as to whether the period of limitation for making an application under Section 34 is to be reckoned from the date on which a copy of the award is received by the objector by any means and from any source, or it would start running from the date a signed copy of the award is delivered to him by the arbitrator? The Hon'ble Supreme Court laid down the following principles of law:

*"**13.** Section 34 of the Act then provides for filing an application for setting aside an arbitral award, and sub-section (3) of that section lays down the period of limitation for making the application in the following terms:*

*"**34.Application for setting aside arbitral award**.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

*(2)****

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may

entertain the application within a further period of thirty days, but not thereafter.

*(4)***"*

The expression "party making that application had received the arbitral award" (emphasis supplied) cannot be read in isolation and it must be understood in light of what is said earlier in Section 31(5) that requires a signed copy of the award to be delivered to each party. Reading the two provisions together it is quite clear that the limitation prescribed under Section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting it aside.

14. *We are supported in our view by the decision of this Court in Union of India v. Tecco Trichy Engineers & Contractors [(2005) 4 SCC 239] ; in SCC para 8 of the decision it was held and observed as follows: (SCC p. 243)*

"8. The delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be 'received' by the party. This delivery by the Arbitral Tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings."

(emphasis added)

> ***15.*** *The highlighted portion of the judgment extracted above, leaves no room for doubt that the period of limitation prescribed under Section 34(3) of the Act would start running only from the date a signed copy of the award is delivered to/received by the party making the application for setting it aside under Section 34(1) of the Act.* ***The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.****"*

41. Therefore, the principle of law which was laid down by this decision is that the signed arbitral award must have been delivered to the party to the arbitration, in the manner which is prescribed under the Arbitration Act. This Court has gone through the Employment Agreement dated 15th February 2010 and it is clear that the Employment Agreement was executed by Ms. Monika Oli individually and not in the capacity of her being a shareholder of Knowledge Planet LLC. This Court has also gone through the DHL Express Shipments which notes that the arbitral award has been delivered to one Mr. Shrey Baxi. The Respondent has vehemently pleaded that delivery to Mr. Baxi constitutes as delivery to the Petitioner as the Petitioner has admitted to be a minority shareholder in Knowledge Planet LLC and Mr. Baxi as an employee of Knowledge Planet LLC. The Petitioner on the other hand has taken a stand that Mr. Baxi has not accepted the delivery on behalf of the Petitioner and hence, does not constitute as a valid delivery envisaged under Section 34(3) read

with Section 31(5) of the Arbitration Act. In the opinion of this Court, no valid delivery of arbitral award has been affected in the facts and circumstances of the case. The decision of the Calcutta High Court in ***Manohar Lal & Co. vs. Axis Bank Ltd.*, (2018) SCC OnLine Cal 15745,** is not of any help to the Respondent as in that case the award was delivered to the wife of the Petitioner therein who received it on behalf of her husband, and was delivered at the appropriate address of the Petitioner therein. The principles *qua* delivery of arbitral award can be summarized as follows:

a) **The word 'party' in Section 34(3) means party to the arbitration proceedings and does not include an agent of the party as well.**

b) **The delivery to be effective and in consonance with the legislative scheme of Arbitration Act must be made to a person who has direct knowledge of the arbitral proceedings and who would be the best person to understand and appreciate the arbitral award being connected with the dispute at hand.**

42. Learned senior counsel for the Petitioner has taken a plea that Section 3 of the Arbitration Act is not applicable to the facts and circumstances of the present case. This Court is unable to agree with this submission advanced by the learned senior counsel. At the outset, it is necessary to reproduce Section 3:-

> *"3. Receipt of written communications.—(1) Unless otherwise agreed by the parties,—*

> *(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and*
> *(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.*
> *(2) The communication is deemed to have been received on the day it is so delivered.*
> *(3) This section does not apply to written communications in respect of proceedings of any judicial authority.*

43. The ***UNCITRAL Model Law on the International Commercial Arbitration: A Commentary*** on Article 31 clearly negates the submissions advanced by the learned senior counsel for the Petitioner in the following words:

> *"Paragraph 4 does not itself specify further formalities for the 'delivery' of signed copies of the award. Moreover, it is silent as to which person or entity is burdened with the obligation of delivering it to the parties. Given the centrality of notification in the beginning and end of the arbitral process and the vast range of practices across jurisdictions, article 3(1)(a) of the Model Law provides sensible guidance, unless the parties have otherwise agreed, as follows:*
> *... any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known*

place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.

In fact, although not specifically spelt out as a ground for annulling the award, it certainly cannot be considered binding until such time as it is delivered to the parties through an official channel in accordance with the law of the lex arbitri or the parties' chosen institutional rules…..

44. The ***UNCITRAL Model Law on the International Commercial Arbitration: A Commentary*** on Article 3 gives the following meaning to a *'Party's Place of Business':*

"The most appropriate definition of a party's 'place of business', for the strict purposes of article 3, is not necessarily the legal seat of a party, or its principal place of business, or head office.55 Given that the objective of article 3 is effective receipt of a written communication – and in this light it allows even for personal delivery – the place of business may be different from the seat of the party, if its actual place of business is elsewhere. In transnational arbitration, a company ordinarily seated in country A may have to incorporate again in country B, which is where the contract is to be performed. The new company premises in country B are merely a representative office, with its principal seat and place of key operations remaining in country A. For the purposes of arbitral proceedings, however, the party's place of business is the address in country B, as long as this remains an effective address during the arbitral proceedings.

We have already seen that in CLOUT Case 1448 the claimant sought to identify the defendant's place of business through the Russian register of foreign companies. As a matter of caution, he was advised to look in the similar register of the defendant's country of origin (Turkey) because its accreditation in the Russian register had

> *expired.56 In case of multiple places of business, the prevailing one is that which has featured the most in the parties' transactions (i.e. by reason of prior mail exchanges, effective letterheads, appearance in official website, past place of meetings, registered company address, etc.).57 In general, substance over form is the best determinant of a party's place of business*."

45. However, in the present case, the Respondent has failed to bring anything on record to substantiate that the delivery of the award was made to the Petitioner, apart from the delivery to Mr. Shrey Baxi. In the opinion of this Court, this cannot constitute as an effective delivery to the Petitioner more so, when in the arbitral dispute, the Petitioner was individually concerned and that the dispute did not pertain to her position at Knowledge Planet LLC. This Court is conscious that it has been close to 8 years since the award has been passed and a pedantic approach ought not to be taken, however, justice cannot be thwarted only because substantial time has elapsed when there is nothing on record to substantiate compliance with the mandatory provisions of Section 34(3) read with Section 31(5) of the Arbitration Act particularly, in view of the decision in ***Benarsi Krishna Committee*** (***supra***). This court is conscious of its duty to ensure compliance with the principles of natural justice and when an award has been passed without complying with the mandatory principles of natural justice, this Court being the custodian of rights and liberties of parties has to take its guard to correct the infirmities which have already been carried out. Nothing has been brought in record to portray that Mr. Baxi had accepted the arbitral award on behalf of the Petitioner. Therefore, delivery to the employee of an entity in which the Petitioner is a shareholder but the arbitration dispute did not pertain to

that entity, would not constitute as a proper delivery in terms of the Arbitration Act.

46. Next question which requires adjudication is that:

II. Whether notice under Section 21 of the Arbitration Act was given to the Petitioner? If not, can the entire arbitral proceedings be set aside on this account?

47. The Petitioner has submitted that no effective notice under Section 21 of the Arbitration Act has been served upon her. Before dealing with this question, it is necessary to reproduce Section 21 of the Arbitration Act:-

> *"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."*

48. The question as to whether compliance with Section 21 is mandatory or directory is no longer *res integra*. Recently, a Division Bench of this Court has categorically held that compliance with Section 21 is mandatory in nature and not a matter of choice. The relevant portion of the judgment rendered in ***Shriram Transport Finance Co. Ltd. vs. Shri Narendra Singh,*** **(2022) SCC OnLine Del 3412**, is reproduced below:

> ***"25.*** *A perusal of the Arbitral record as filed by the Appellant Company shows that a letter dated 20.09.2018 was addressed by the Appellant Company to the Respondent stating that in the event, the payment due is not made within 7 days, the disputes "stand referred to Arbitration" and*

further that the Appellant Company shall initiate Arbitral proceedings. The relevant portion of the said letter is extracted below:

> *"7. Hence kindly take Note that you addresses are advised to pay and clear entire outstanding dues amounting to Rs. 470248/- as on date 12/09/2018 and also with accrued interest/Penal all other charges till the date of repayment/realization and charges, within 7 days on the receipt of this notice, failing which company will refer the matter for arbitration.*
>
> *8. If you have failed to comply with the requisitions contained in notices, the disputes, differences and claims shall be deemed to have arisen under the said Agreement and the said disputes, differences and claim shall stand referred to the Arbitration.*
>
> *9. If you are failed to pay the outstanding amount as per out [sic : our] loan agreement ARTICAL [sic : Article] No. 15. We have a right to initiate arbitration processing. So we will initiate the arbitration proceeding"*
>
> *[Emphasis is ours]*

26. *From a plain reading of this letter, two things are clear:*

(i) The letter dated 20.09.2018 merely states that the Appellant Company has a right to initiate Arbitration proceedings so they will initiate such proceedings;

(ii) This letter does not name any person as an Arbitrator, nor the fact that the person is being appointed as an Arbitrator in terms of the procedure set forth in the Loan Agreement.

27. *A week later, a letter dated 27.09.2018, was sent by the Appellant Company to the Arbitrator appointing him as the "Sole Arbitrator to adjudicate the disputes and differences between Shriram Transport Finance Co. Ltd. and Mr Narender Singh (Hirer) and pass the award." This letter was neither marked to the Respondent nor is there any averment by the Appellant Company that the letter dated 27.09.2018 was in fact sent to the Respondent.*

28. *From a perusal of the Arbitral Award, it is also apparent that the letter dated 27.09.2018 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 concerned Respondent. Therefore, the commencement of Arbitral proceedings is incumbent on the "receipt of such request or notice". If no notice is received by the concerned Respondent, 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 (supra) 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 (supra) 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 (supra), 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 counter-claims.

(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."

49. In the present case, the Respondent has relied on legal notice dated 6th November 2013 to contend that the same is equivalent to a notice under Section 21 of the Arbitration Act. It is imperative to reproduce the contents of the above-mentioned legal notice:-

"Legal Demand-cum-Cease/Desist Notice

"Respected Madam,

Under the instruction & authority and on behalf of my client company M/S CL Educate Ltd having its Regd Office at R-90, Greater Kailash –1, New Delhi – 110048 through its Managing Director – Mr. Gautam Puri, I hereby serve you with the following Legal Demand –cum- Cease/desist Notice:

1.That my client company is a duly incorporated company under the Companies Act, 1956 in the name and style as CL Educate Ltd (formerly known as Career Launcher (I) Ltd)

having its Regd Office at R-90, Greater Kailash –1, New Delhi (India) 110048 and corporate office at 15-A, Knowledge Park – II, Greater NOIDA (UP) (India).

2.That you entered into an agreement dated 15.2.2010 with my client company, whereby you were appointed as Principal Consultant of my client company for its Dubai Centre for the purpose of running/operating the study centre/professional learning centre for conducting IIT-JEE & AIEEE programme for the aspiring students.

3.That as per the terms & conditions of the said agreement term of your appointment was from 15 February 2010 to 14 February 2013.

4.That as per the terms & conditions of the said agreement, it was one of your prime obligation amongst others, to collect fees from the students in the name of and on behalf of my client company and further to deposit the fee so collected in the bank account of my client company.

5.That you were also liable to enter all the details pertaining to enrolment of students, collection of fee, balance fee etc. in the ERP system of my client company provided on line.

6.That on reconciliation of the bank statement and ERP entries made by yourself, it has been come to the notice of my client company that you did not deposit in the bank account of my client company an amount of AED 625,775/- (Six Hundred Twenty Five Thousand Seven Hundred and Seventy Five only), despite the fact that this amount was collected by yourself from the students as per the records available in the ERP system, entries wherein were made by you only.

7.That you have even failed to deposit this amount in my client company's bank account despite repeated verbal as well as written reminders/communications made by my client company thereby demanding to pay this outstanding amount

which was received by you as a trustee of my client company.

8.That further, you have also collected the installment of fee from the students due as on 31.1.2013 on behalf of my client company. As per the ERP records made by yourself in the ERP system of my client company an amount of AED 1,392,200/- was due on this account. Though you have fully collected this amount from the students but did not deposit in the bank account of my client company even after repeated reminders by my client company. Even my client company sent you a statement of accounts alognwith a list of students and amount due, duly audited by third party auditors, thereby demanding to pay the same but of no avail.

9.That as per the records held with my client company you made the last student enrolment entry in the ERP system on 15.12.2012 and no enrolments have been entered into the system thereafter. My client company has not only learnt but got concrete piece of evidence that you have been enrolling the students upto 31.1.2013 under the agreement and in the name of my client company and did not make the entries of students enrolled after 15.12.2012 in the system, rather enrolled these students in the name of Knowledge Planet LLC (a competitive company which is being managed and run by you for the purpose of starting a competitive business that to of my client company in gross violation of the terms and conditions of the agreement dated 15.2.2010) despite the fact that these students were enrolled and fee was collected by yourself in the name and on behalf of my client company.

10.That all these acts on your part amounts to criminal breach of trust as well as misappropriation of funds, which makes you liable for criminal action apart from recovery of money by my client company.

11. That further, as per the agreement you were liable to give a written confirmation with 30 days advance notice regarding non-continuation of the contract and in case of

failure to issue such notice under clause 8 of the agreement, it was automatic renewal of agreement and hence my client company was under belief that you will be continuing with the agreement and as such they were deprived of the opportunity to find out a suitable replacement well within time and thus suffered huge business losses, which though can not be quantified in term of money but the same is determined as AED 50,000/- for the purpose of claim, which you are liable to pay to my client company.

12. Further more, it has also come to the notice of my client company alongwith relevant evidence that even after 31.1.2013 you have been mis-representing yourself as a service partner/provider of my client company with sole intent to mis-guide the parents/students and to lure them to take admission with your new named entity Knowledge Planet LLC under the guise that you are a service provider of my client company and thus caused huge losses to my client company, for which you are liable to pay damages to my client company.

13. Further as per the term of the agreement, you were under legal obligation not to start a direct competing business that to of my client company in the territory of United Arab Emirates for a period of 01 year from the date of termination of agreement, but whereas you immediately on alleged termination of agreement (through no communication was made as per the requirement under the agreement) joined with M/S Knowledge Planet LLC and started a competing business in gross violation of terms and conditions of the agreement.

14.Further, you have not only started a competing and similar business in association of the said Knowledge Planet LLC but also started using the data/information, manuals etc. pertaining to my client company which were in your possession and you did not hand over the same to my client company till date despite repeated reminders by my client company. You have been using this data/information,

manuals with malafide intentions and thereby making wrongful gains for yourself and wrongful losses to my client company and thus made liable to yourself to pay damages to my client company.

15. That further more, my client enrolled an employee named Mr. Yogeshwar Singh Batyal and got him issued visa in its name since you were not having any licence to get the visa for employees in your name. This employee was required for the purpose of discharging your duties/obligations under the agreement and as such he was paid all his salary and other emoluments by you. But, with malafide intentions, you not only failed to clear all the dues on account of salary & allowances of said Mr. Yogeshwar Singh Batyal but also failed to complete the formalities for cancellation of his visa from the Dubai authorities and as such my client company was compelled to pay an amount of AED 18120/- (AED 2828 for cancellation of visa and AED 15292 for settlement of his wage account) on account of settlement of his dues as well getting his visa cancelled, which you are liable to pay to my client company.

16. That at the time of taking over the operations of study center of my client company, my client company's then Centre Manager, Mr. Akhilesh Jha, handed over to you his mobile Number 00971-50-4515576, which was used for the company's business purposes and it was also agreed that you shall be regularly paying all the dues pertaining to this mobile number, but you with malafide intention did not pay the bill of said mobile number amounting to AED 4300/- as a result not only this mobile number was blocked by the service provider but also the other mobile number 00971-50-1487045 held by said Mr. Akhilesh Jha of my client company was also blocked by the service provider, due to which my client company was/is unable to avail banking facilities through phone banking.

17.In view of the above facts, you are hereby called upon to :

a. Pay an amount of AED 625,775/- (Six Hundred Twenty Five Thousand Seven Hundred and Seventy Five only on account of short deposit of fee collected by you in the name of my client from the students;

b. Pay an amount of AED 1,392,200/- on account of fee collected by you against the installment due as on 31.1.2013 and did not deposit in the bank account of my client company.

c. Pay an amount of AED 50,000/- on account of losses suffered by my client company due to non-communication by you regarding termination of agreement;

d. Pay an amount of AED 1,000,000/- on account of damages for starting a same/similar business in violation of terms of the agreement and unauthorizedly using data/information, manuals etc. pertaining to my client company;

e. Pay an amount of AED 18120/- on account of settlement of wage account and cancellation of visa of said Mr. Yogeshwar Singh Batyal by my client company;

f. Pay an amount of AED 4300/- on account of payment of outstanding dues of bill in respect of mobile No 00971-50-4515576 held by Mr. Akhilesh Jha, an employee and erstwhile center manager of Dubai office of my client company;

g. To render the account of profits made by you since 15.12.2012 by enrolling the students under the mis-representation made by you that you are a service provider of my client company; and h. Immediately stop using for your wrongful gains the data/information, manual etc. pertaining to my client company, return the data/information, manual etc. to my client company and also to give an undertaking not to use any data/information, manuals pertaining to my client company, in any manner, whatsoever.

That in case you fail to comply with the above legal demands of my client company as stipulated in para 17 (a)

> ***to (h) hereinabove, within a period of 10 days from the date of receipt of this legal demand notice, I have definite instructions from my client company to proceed legally against you, as deemed fit, including but not limited to lodging criminal complaint before the appropriate authorities as well as to refer the dispute for arbitration as provided under the agreement and you shall be solely responsible for the cost and consequences. Further, you are also liable to pay cost of legal charges incurred by my client company for issuance of this legal notice amounting to Rs.20,000/-.*** *A copy of this legal notice is being retained in my office for further necessary action.*
>
> *(DK Sharma)*
>
> *Advocate"*

50. This Court has carefully perused the legal notice and is unable to come to a conclusion that this *'Legal Demand cum Cease/Desist Notice'* can qualify as a notice invoking arbitration under Section 21 of the Act. This Court says so primarily for two reasons:

a) This letter merely states that the Respondent has a right to initiate Arbitration proceedings in future, but does not intend to do so at present;

b) This letter does not name any person as an Arbitrator, nor the fact that the person is being appointed as an Arbitrator in terms of the Employment Agreement has been mentioned.

51. Other things which have to be taken into consideration before coming to any conclusion is that whether the correspondences which have been exchanged between the parties either *pre-arbitration* or *post-*

arbitration can be said to constitute sufficient notice to the Petitioner, thus ensuring compliance with the statutory dictum envisaged under Section 21?

52. It is not disputed that a *pre-arbitration* legal notice dated 6th November 2013 (as discussed above) was received by the Petitioner which, as held above, does not constitute a notice under Section 21 of the Arbitration Act. Apart from this notice, the Petitioner has admitted the receipt of the email dated 5th June 2014 from the Arbitrator to the Petitioner which states that the arbitration proceedings were deferred in view of the Delhi Bar Elections. The Respondent has claimed that other communications were also made to the Petitioner which include ***first***, a letter dated January 2014 pertaining to appointment of Arbitrator; ***secondly***, a notice dated 10th March 2014, stating commencement of arbitration (which was directed to be resend along with order dated 23rd September 2014 to the respondent and the courier receipt of same is claimed to be filed on 1st November 2014).

53. This Court has carefully perused the documents on record, especially the notice dated 10th March 2014 by way of which the consent of the Arbitrator was recorded and which stated commencement of arbitration, but this Court is unable to find any documentary evidence on record to satisfy its conscience that this notice was ever served upon the Petitioner, by post or by email, as only speed post receipts evidencing delivery to the Respondent herein have been brought on record. Accordingly, this Court is satisfied that a proper notice under Section 21 of the Arbitration Act was not served upon the Petitioner and the dictum

of ***Shriram Transport (supra)*** is fully applicable to the facts and circumstances of the present case.

54. Another question that arises for consideration is that:

III. Whether the impugned arbitral award is liable to be set aside on the ground that the Arbitrator has wrongly applied the Indian law as the substantive/governing law of the Contract?

55. The Petitioner has contended that the substantive law of the contract was the UAE Federal Labour Law whereas, the Arbitrator has relied on Indian law as the substantive law of the contract, as the Arbitrator has relied on Indian laws and judicial pronouncements while arriving at his findings. It has also been argued that under the UAE Federal Labour Law, employment and/or labour disputes are not capable of resolution by arbitration.

56. The position pertaining to various laws governing an arbitration proceeding is no longer *res integra* and has been authoritatively dealt by judicial pronouncements and has also been dealt by various acclaimed authors around the globe. Before adverting to these decisions, it is necessary to refer to the relevant clauses in the Employment Agreement governing the parties.

"9. Governing Law

This Employment Contract and the Employment shall be governed by and construed in accordance with the United

Arab Emirates Federal Labour Law for the Private Sector (being Federal Law No. 8 of 1980 as amended) only until Sharjah regulatory authority puts into place separate regulations concerning employment in Sharjah at which time such separate regulations will govern this Employment Contract and the Employment.

10. Restraint of Trade

Any dispute arising under this agreement will be referred for arbitration to a sole arbitrator appointed by the Managing Director of Career Launcher India Ltd. and having its jurisdiction/place at New Delhi, India."

57. ***Enka Insaat Ve Sanayi AS vs. OOO Insurance Company Chubb,*** **[2020] UKSC 38,** is a watershed decision explaining the different laws governing a contract which also contains an arbitration clause. The Supreme Court of United Kingdom has beautifully explained the position of law in the following words:

"43. It is rare for the law governing an arbitration clause to be specifically identified (either in the arbitration clause itself or elsewhere in the contract). It is common, however, in a contract which has connections with more than one country (or territory with its own legal system) to find a clause specifying the law which is to govern the contract. A typical clause of this kind states: "This Agreement shall be governed by and construed in accordance with the laws of [name of legal system]." Where the contract also contains an arbitration clause, it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law.

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45. There is a considerable body of English case law which proceeds on the assumption that a choice of law for the contract will normally apply to an arbitration clause in the contract. The approach was summarised by Colman J in Sonatrach Petroleum Corpn (BVI) v Ferrell International Ltd [2002] 1 All ER (Comm) 627 at para 32:

> *"Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."*

46. It has not generally been considered to make any difference in this regard that the arbitration clause provides for arbitration to take place in a different country from the country whose law has been chosen to govern the contract. Examples of decisions in which a choice of law clause in the contract has been treated as applying to the arbitration agreement despite the seat of arbitration being in a different jurisdiction include: Cia Maritima Zorroza SA v Sesostris SAE (The Marques De Bolarque) [1984] 1 Lloyd's Rep 652, 653; Union of India v McDonnell Douglas Corpn [1993] 2 Lloyd's Rep 48, 49-50; Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep 45, 57; Deutz AG v General Electric Co (Thomas J, 14 April 2000) at p 17; Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm); [2004] 1 Lloyd's Rep 603, paras 43-46; Leibinger v Stryker Trauma GmbH [2005] EWHC 690 (Comm), para 38; and Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 2437 (Comm); [2006] 1 All ER (Comm) 731, paras 76-77.

58. ***Redfern and Hunter: Law and Practice of International Commercial Arbitration, 6th ed (2015) at para 3.12*** states as under:

> *"Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause. If the parties expressly choose a particular law to govern their agreement, why should some other law - which the parties have not chosen - be applied to only one of the clauses in the agreement, simply because it happens to be the arbitration clause?"*

59. ***Merkin on Arbitration Law, Issue 84 (2020), para 7.12***, states that:

> *"... even if there is no express contractual statement to that effect, a choice of law clause for the entire agreement is likely to be construed as extending to the arbitration clause. There are numerous decisions to this effect ... However, that presumption may be ousted in appropriate circumstances ..."*

60. ***Dicey, Morris & Collins on The Conflicts of Laws, 15th ed (2012) at para 16-017:*** states as under:

> *"If there is an express choice of law to govern the contract as a whole, the arbitration agreement may also be governed by that law."*

61. The UK Supreme Court in **Enka (*supra*)** has also dealt with the role of the law applicable to the seat of arbitration, i.e., the curial law in the arbitration proceedings in the following manner:

> *"67. On this appeal Chubb Russia disputed the initial premise that a choice of seat for an arbitration involves any choice of law at all, procedural or substantive. Counsel for Chubb Russia submitted that the application of the curial law of the seat is something that follows automatically from a choice of place of arbitration rather than being itself a*

matter of choice. They cited as an analogy a hypothetical case postulated by Redfern and Hunter: Law and Practice of International Commercial Arbitration, 6th ed (2015), para 3.63, of an English motorist who takes her car to France. Redfern and Hunter comment that:

> *"... it would be an odd use of language to say that this notional motorist had opted for 'French traffic law'; rather, she has chosen to go to France - and the applicability of French law then follows automatically. It is not a matter of choice."*

68. We agree that it would be inapt to describe the tourist in this example as having made a choice to be regulated by French traffic law. But as Mr Dicker QC for Enka submitted, it is difficult to conceive that a person's decision to visit France might be informed by a desire to be governed by French traffic law. By contrast, the nature and scope of the jurisdiction exercised by the courts of a country over an arbitration which has its seat there is a highly material consideration in choosing a seat for the arbitration. That is reinforced by the fact that the seat of an arbitration is a legal concept rather than a physical one. A choice of place as the seat does not dictate that hearings must be held, or that any award must actually be issued, in that place. As the Court of Appeal observed (at para 46), it is perfectly possible to conduct an arbitration with an English seat at any convenient location, anywhere in the world. Furthermore, under section 53 of the Arbitration Act 1996, unless otherwise agreed by the parties, where the seat of an arbitration is in England and Wales, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties (see also article 31(3) of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985). The point of agreeing a seat is to agree that the law and courts of a particular country will exercise control over an arbitration which has its seat in that country

to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law.

69. As noted at the beginning of this judgment, however, the curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement. Whether a choice of the curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement - and, if so, the strength of any such implication - must depend on the content of the relevant curial law.

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70. In ***Carpatsky Petroleum Corpn v PJSC Ukrnafta [2020] EWHC 769 (Comm); [2020] Bus LR 1284,*** *the claimant applied to enforce in England and Wales an arbitration award made in Sweden. Enforcement was resisted on the ground (among others) that there was no valid arbitration agreement in the contract between the parties. This argument depended on the assumption that the validity of the arbitration agreement was governed by the law of Ukraine. The contract provided for the "law of substance of Ukraine" to apply "on examination of disputes". Butcher J held (at paras 67-71) that this was not a choice of Ukrainian law to govern the arbitration agreement and that, in the circumstances, the choice of Stockholm as the seat for any arbitration demonstrated an implied choice that the validity and interpretation of the arbitration agreement should be governed by Swedish law.* ***His reasons were that: (1) it was reasonable to infer that the parties had deliberately chosen a neutral forum to resolve their disputes and hence "intended the law of that jurisdiction to determine issues as to the validity and ambit of that choice";*** *and (2) by choosing Sweden as the seat for the arbitration, the parties agreed to the application of the Swedish Arbitration Act, including section 48 which provides that, in the absence of*

> *agreement on a choice of law to govern an arbitration agreement with an international connection, the arbitration agreement shall be governed by the law of the country in which, by virtue of that agreement, the arbitration proceedings have taken place or will take place. It follows that, by providing for a Swedish seat, the parties were impliedly agreeing that Swedish law should govern the arbitration agreement."*

62. In international commercial arbitrations, it is a well-established rule that if the parties opt to have the arbitration's seat in a specific nation, that nation's rules governing arbitration proceedings will take effect and its courts will have supervisory jurisdiction over the arbitration. This Court is persuaded with the submissions advanced by the learned senior counsel for the Petitioner that the Arbitrator has grossly erred in applying Indian laws to govern and adjudicate upon the disputes arising between the parties even when there was a specific agreement to the effect that the Employment Agreement will be governed by the UAE Federal Labour Law. Accordingly, the impugned arbitral award is unsustainable on this ground as well.

63. Now, it is necessary to determine what constitutes a violation of the fundamental policy of Indian Law.

64. In ***Associate Builders vs. Delhi Development Authority,*** **(2015) 3 SCC 49**, the Hon'ble Supreme Court clarified the meaning and scope of 'Fundamental Policy of Indian Law' in the context of Section 34 of the Arbitration Act in the following manner: —

28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

> *35. What then would constitute the ―fundamental policy of Indian law is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression ―fundamental policy of Indian law, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a ―judicial approach in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its*

decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior

courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest".

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where: 1. a finding is based on no evidence, or 2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or 3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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33. It must clearly be understood that when a court is applying the — "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an

> *award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score1 . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”*

65. Therefore, what really flows from above is that *first*, the learned arbitrator must have taken a judicial approach; *secondly*, the principles of natural justice must have been adhered; *thirdly*, the decision must not be perverse.

IV. Whether the impugned arbitral award is liable to be set aside under 34(2)(a)(ii) of the Arbitration Act on the ground that there was no privity of contract between the Petitioner and M/s CL EDUCATE Ltd., as the Employment Agreement was between the Petitioner and CEITI?

66. The Petitioner has taken the argument that there was no valid arbitration agreement between the parties. The Employment Agreement dated 15th February 2010 containing the arbitration clause was entered into between the Petitioner and CEITI, Dubai which is a separate and distinct legal entity from the Respondent and as such, there is no privity of contract and no arbitration agreement between the Petitioner and the Respondent herein. Thus, the Arbitral Award is liable to be set aside under Section 34(2)(a)(ii) of the Act.

67. This argument of the Petitioner raises the question as to whether the ‘*Group of Companies’* doctrine is attracted to the facts and circumstances of the present case to justify the arbitration proceedings between M/s CL Educate Ltd. and the Petitioner. This concept was

created specifically by the French courts and International Chamber of Commerce (ICC) arbitration tribunals. Its goal is to make it possible, under specific circumstances, for non-signatory members of the same group of companies to be included in an arbitration agreement that was originally only signed by one or a small number of those companies. ***Pietro Ferrario, The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist? (Journal of International Arbitration)*** while dealing with the *'Doctrine of Group of Companies'* in detail has expressed the following opinion.

> *In particular, as will be explained in more detail below, for the application of the group of companies doctrine the following conditions are necessary:*
>
> > *(a) the intention of all the parties involved to consider the whole group as the contracting party without giving importance to which company would conclude or perform the contract. Thus, arbitration tribunals will extend the arbitration agreement if they interpret the parties' will in the sense that the parties meant all units of the group to be party to the contract without attaching importance to the form of the contract;*
> >
> > *(b) the active participation of the non-signatories in the negotiation, performance or termination of the contract, showing the will of those companies to be party to the contract and, as a consequence, to the arbitration agreement even though they did not sign it. Arbitration tribunals and courts give great importance to this active role of the non-signatories and consider it fundamental in order to apply the group of companies doctrine.*

As will be shown below in conclusion, the existence of a group of companies is a factor taken into account by case law, but it is not the sole ground on which the extension of the arbitration agreement is based.

68. In ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641,** the Hon'ble Supreme Court while dealing with Section 45 of the Arbitration Act, held as follows:

*"*71. *Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]*

72. *This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.*

73**.** *A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement*

between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."

69. In ***Cheran Properties Ltd. v. Kasturi & Sons Ltd. & Ors.*, (2018) 16 SCC 413,** a three judge bench of the Hon'ble Supreme Court interpreted the Doctrine of Group of Companies in the context of the enforcement of a domestic arbitration award in the following words:

"23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered

structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

70. In ***MTNL v. Canara Bank & Ors.*, (2020) 12 SCC 767,** the Hon'ble Supreme Court held as follows:

"10.3. A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.

"10.5. The group of companies doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. [Interim award in ICC Case No. 4131 of 1982, IX YB Comm Arb 131 (1984); Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988). See also Gary B. Born : International Commercial Arbitration, Vol. I, 2009, pp. 1170-1171.]

10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]."

71. Gary B. Born in his treatise on ***International Commercial Arbitration*** indicates that:

"*The principal legal basis for holding that a non signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego).*
"Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but

> *exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities.*
> *[……]*
> *the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories."*

72. This Court has perused the Employment Agreement which has been entered into between the Petitioner and the Respondent. This Agreement itself was executed on the letter-head of Career Launcher (M/s CL EDUCATE Ltd. was previously known as Career Launcher. In addition to this, it has been clearly mentioned in the Employment Agreement itself that CEITI is authorized to run the Career Launcher test-prep courses in UAE. The legal notice dated 6th November 2013 itself has been sent on behalf of M/s CL Educate Ltd. to which the Petitioner had responded.

73. However, this Court is conscious of the dictum of the Hon'ble Supreme Court in **Cox and Kings Limited vs. SAP India Pvt. Ltd., (2022) 8 SCC 1,** wherein a three judge bench of the Hon'ble Supreme Court had doubted the application of this Doctrine as well as the decision in *Chloro Controls (supra)* and hence, referred the matter to a larger bench for further consideration. It was held as follows:

> *"36. The interpretation of Chloro Controls was further expanded in the three-Judge Bench decision of this Court in Cheran Properties Ltd. v. Kasturi & Sons Ltd. In that*

case, this Court interpreted Section 35 of the Arbitration Act to enforce an award against a non-signatory, even though it did not participate in the proceedings.

37. This Court in Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd. [Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd., (2019) 7 SCC 62 : (2019) 3 SCC (Civ) 453] , wherein the two-Judge Bench of this Court refused to apply the "Group of Companies" doctrine as the applicant failed to prove the commonality of intention of the respondents to be bound by the arbitration agreement : (SCC pp. 64 & 74, paras 4 & 12)

> *"4. Keeping in mind the exposition in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] ...* ***In other words, whether the indisputable circumstances go to show that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties, namely, Respondent 1 and Respondent 2, respectively, qua the existence of an arbitration agreement between the applicant and the said respondents.***
>
> ***
>
> *12. ... Thus,* ***Respondent 2 was neither the signatory to the arbitration agreement nor did have any causal connection with the process of negotiations preceding the agreement or the execution thereof, whatsoever****. If the main plank of the applicant, that Mr Frederik Reynders was acting for and on behalf of Respondent 2 and had the authority of Respondent 2, collapses, then it must necessarily follow that Respondent 2 was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if Respondent 2 happens to be a constituent of the group of companies of which Respondent 1 is also a constituent, that will be of no avail.* ***For, the burden is on the applicant to establish that Respondent 2 had an intention to consent to the arbitration agreement and be***

party thereto, maybe for the limited purpose of enforcing the indemnity Clause 9 in the agreement, which refers to Respondent 1 and the supplier group against any claim of loss, damages and expenses, howsoever incurred or suffered by the applicant and arising out of or in connection with matters specified therein*. That burden has not been discharged by the applicant at all. On this finding, it must necessarily follow that Respondent 2 cannot be subjected to the proposed arbitration proceedings. Considering the averments in the application under consideration, it is not necessary for us to enquire into the fact as to which other constituent of the group of companies, of which the respondents form a part, had participated in the negotiation process."*

38. In the Division Bench decision of this Court in MTNL v. Canara Bank [MTNL v. Canara Bank, (2020) 12 SCC 767] , it was observed that the group of companies doctrine can be utilised to bind a third party to an arbitration, if a tight corporate group structure constituting a single economic reality existed. The Court held as under : (SCC pp. 779-80, para 10)

> *"10.6. The circumstances in which the "Group of Companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.*

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982 : (1984) 9 Yearbook of Commercial Arbitration 131; ICC Case No. 5103 of 1988 : (1991) 2(2) ICC Bull 20.] "

39. We may notice that these cases have been decided by this Court, without referring to the ambit of the phrase "claiming through or under" as occurring under Section 8 of the Arbitration Act.

40. The ratio of the Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] alludes to the subjective intention of parties to be bound by arbitration agreement when the parties have clearly not been signatory to the agreement. Reconciling the two is difficult and requires exposition by this Court.

41. It may be noted that the doctrine, as expounded, requires the joining of non-signatories as "parties in their own right". This joinder is not premised on non-signatories "claiming through or under". Such a joinder has the effect of obliterating the commercial reality, and the benefits of keeping subsidiary companies distinct. Concepts like single economic entity are economic concepts difficult to be enforced as principles of law.

42. The areas which were left open by this Court in Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] has created certain broad-based understanding of this doctrine which may not be suitable and would clearly go against distinct legal identities of companies and party autonomy itself. The aforesaid

exposition in the above case clearly indicates an understanding of the doctrine which cannot be sustainable in a jurisdiction which respects party autonomy. There is a clear need for having a re-look at the doctrinal ingredients concerning the group of companies doctrine.

43. Internationally, the group of companies doctrine has been accepted in varying degrees. Swiss Courts usually do not recognise such a doctrine under their Switzerland de lege lata. [Award in Geneva Chamber of Commerce Case of 24-3-2000, 21 ASA Bull. 781 (2003).] One English Court has observed as under:

"... Mr Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged." [Bank of Tokyo Ltd. v. Karoon, 1987 AC 45, p. 64 : (1986) 3 WLR 414 (CA)]

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51. In view of the aforesaid discussion, we feel it appropriate to refer the aspect of interpretation of "claiming through or under" as occurring in amended Section 8 of the Arbitration Act qua the doctrine of group of companies to a larger Bench to provide clarity on this aspect. The law laid down in Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and the cases following it, appear to have been based, more on economics and convenience rather than law. This may not be a correct approach. The Bench doubts the correctness of the law laid down in Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and cases following it.

74. Accordingly, as a matter of utmost judicial propriety, as the larger bench of the Hon'ble Supreme Court is seized of the issue at hand, this Court is not inclined to render any judicial finding on the issue of application of the Doctrine of Group of Companies in the facts and circumstances of the present case. It is also to be noted that findings on this issue do not tilt the conclusion which is reached in the present case on the findings already recorded on the other issues.

CONCLUSION

75. In view of the discussion aforesaid on facts and law, this Court is satisfied that there was no effective delivery of arbitral award to the Petitioner and the present case is fully covered by the decisions of the Hon'ble Supreme Court in ***Tecco Trichy (supra)***, ***Benarsi Krishna (supra)*** and ***ARK Builders (supra)***. Accordingly, the present application is within the purview of limitation as envisaged under Section 34(3) of the Arbitration Act. This Court is also satisfied that no mandatory notice under Section 21 of the Arbitration Act was given to the Petitioner, in view of the dictum of the Division Bench of this Court in ***Shriram Transport (supra)***. This Court is also satisfied that the Arbitrator has applied wrong governing law while adjudicating the disputes between the parties. The entire dispute was to be adjudicated by the substantive law of the Contract which was the UAE Federal Labour Law in view of the dictum of the Supreme Court of United Kingdom in ***Enka Insaat (supra)***. The impugned arbitral award is contrary to settled norms of 'Fundamental Policy of Indian Law' in view of the dictum of the Hon'ble Supreme Court in ***Associate Builders (supra)***.

76. Accordingly, the impugned arbitral award dated 16th March 2015 passed by the learned sole arbitrator, Mr. Divya Darshan Sharma in the case titled as '***CL Educate Ltd. vs. Monika Oli'*** is quashed and set aside. The Petition stands allowed in the above terms.

77. Pending applications, if any, also stand disposed of.

78. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 18, 2023
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