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

% **Date of order: 1st February 2023**

\+ O.M.P. (COMM) 509/2020, I.A. 9551/2020 & I.A. 18042/2022

MS MITTAL PIGMENTS PVT LTD ..... Petitioner

Through: Mr. Vijay Kumar Pandey, Advocate.

versus

MS GAIL GAS LIMITED ..... Respondent

Through: Mr. Deepayan Mandal, Mr. Naman Varma and Mr. Mridul Bansal, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

O R D E R

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") has been filed on behalf of the petitioner against the *ex-parte* Arbitral Award dated 21st October 2019 (hereinafter "the Award") passed by the learned Sole Arbitrator. The following reliefs are prayed for on behalf of the petitioner:-

> *"a) Set aside the ex-parte award dated 21.10.2019 received on 05.11.2019 passed by Hon'ble Mr. Justice K. Ramamoorthy (Retd.) in arbitration proceedings held between M/s Gail Gas Ltd. and M/s Mittal Pigments Pvt. Ltd.*

b) And/or pass such other order/orders as this Hon'ble Court may deem it to be fit and proper in the facts and circumstances of the case."

FACTUAL MATRIX

2. The facts relevant for adjudication of the instant petition are as under:-

a. The petitioner is a Private Limited Company engaged in manufacturing of metals and chemicals and the respondent is a Central Public Sector Undertaking having diversified interests across the Natural Gas value chain of trading, transmission, LPG production & transmission, LNG re-gasification, petrochemicals, city gas, etc.

b. The petitioner obtained supply of Natural Gas for its factory premises located at A-203, Road No.5, Indraprastha Industrial Area, Kota, Rajasthan-324005 and accordingly, on 9th March 2010 a Gas Sale Agreement (hereinafter "the Agreement") was executed between the parties. In terms of the Agreement, the supply was to commence from 1st August 2010 and was to continue till 2025.

c. As per the agreement, Minimum Guaranteed Quantity of Gas (hereinafter "MGQ") had to be purchased every month equivalent to the quantity obtained by multiplying 90% of the daily Nominated Quantity. Moreover, in accordance with a Price Side Letter dated 9th March 2010, the selling price of the Gas for the quarter beginning from January 2010 to March 2010 was decided

to be Rs. 17.2/- SCM, including taxes. Another Side Letter dated 15th April 2010 was executed between the parties, whereby certain clauses of the Agreement were amended/revised, including the Arbitration Clause.

d. The amended Arbitration Clause read as follows:-

"If any dispute, difference or question shall at any time hereafter arise between the parties hereto or their respective representatives in respect of the construction of these presents or concerning anything hereunder contained or arising out of these presents or as to the rights, liabilities or duties of the said parties hereunder, which cannot be mutually resolved by the parties, within (60) days after written notice of a dispute by one party to the other party, the same shall be referred to sole Arbitration. After the expiration of sixty (60) days seller shall suggest a panel of three (3) distinguished persons to the Buyer to select any one among them to act as the sole Arbitrator within thirty (30) days. The Buyer shall select sole Arbitrator within thirty (30) days from the receipt of communication suggesting the panel of Arbitrators. In the event of failure of the Buyer to select the sole Arbitrator within thirty (30) days from the receipt of the communication suggesting the panel of Arbitrator, the right of selection of Sole Arbitrator by the Buyer shall stand forfeighted and the seller shall have discretion to proceed with the appointment of sole Arbitrator. The decision of the Arbitrator shall be binding on both the parties. "The Arbitration proceedings shall be held in accordance with the provision of the Arbitration and Conciliation Act, 1996, as amended from time to time. The Arbitrator shall decide by whom and in what proportions the Arbitrator's fees as well as cost incurred in Arbitration shall be borne. The Arbitrator may, with the consent of the parties, enlarge the time,

from time to time, to make and publish award, as the case may be. The venue of Arbitration shall be at Delhi."

e. During the course of the business between the parties, certain disputes arose amongst them, regarding which communications were also made. The issue initially arose regarding the delay in commencement date and thereafter, regarding the modification in the Daily Nominated Quantity, then regarding the invoices and ultimately regarding the payment and the default thereto.

f. The respondent, vide its letter dated 7th August 2017, intimated the petitioner that its failure to clear outstanding dues of Rs. 1,29,73,780.01/- within the stipulated period entitled the respondent to terminate the Agreement, as per Clause 15.2 (vi) of the Agreement. Thereafter, the respondent also served a Legal Notice dated 27th March 2017 upon the petitioner invoking the Arbitration Clause of the Agreement and suggesting three names of potential Sole Arbitrators.

g. The petitioner was advised not to participate in the arbitration proceedings since the petitioner had already approached the District Court at Kota, Rajasthan against the respondent seeking injunction against the invocation of Letter of Credit. In the month of December 2018, the petitioner was furnished a letter from the Arbitrator informing the date and place of arbitration, where the petitioner did not partake.

h. Meanwhile, the Arbitrator initiated, held and concluded the

arbitration proceedings and made an *ex-parte* Award dated 21st October 2019.

i. Aggrieved by the said *ex-parte* Award, the petitioner has approached this Court, seeking a challenge to the same.

SUBMISSIONS

3. Learned counsel appearing on behalf of the petitioner submitted that the Award was erroneous and bad in law. There was no attempt to serve the petitioner with a Show Cause Notice or any other pre-emptory notice/order before the learned Arbitrator proceeded *ex-parte* against the petitioner. It is also submitted that the learned Arbitrator failed to observe the provisions laid down under Section 25 (b) and 25 (c) of the Arbitration Act. According to the said provisions, the learned Arbitrator had the powers to inquire whether there was sufficient cause for absence of the party at the hearing and for the same should have issued a notice before proceeding *ex-parte.*

4. It is submitted that not only is the Award liable to be set aside for the reason of being proceeded with *ex-parte* without sufficient notice, but also because the learned Arbitrator has passed an unreasoned order, summarily allowing the claims of the respondent without sufficient cause or elaborate analysis and evaluation.

5. Learned counsel submitted that the Award has been passed without proper appreciation of the terms of the Agreement executed between the parties. Referring to Clause 11.1 (A)(ii) of the Agreement, learned counsel for the petitioner submitted that the respondent was duty bound to raise MGQ obligations, if any, in the second fortnight invoice of each

month which was not done by the respondent, however, the learned Arbitrator overlooked this aspect.

6. It is submitted that the learned Arbitrator erroneously awarded interest @24% without considering the fact that the long term prime lending rate of State Bank of India in the year 2016 was 14.05%. It is also submitted that the learned Tribunal went beyond the terms of the contract between the parties. Learned counsel relied upon the judgment of ***State of Rajasthan vs. Nav Bharat Construction Company Ltd***., **(2006) 1 SCC 86,** ***Bharat Coking Coal Ltd. vs. Annapurna Construction*****, (2003) 8 SCC 154** to give force to his arguments.

7. It is also submitted that the learned Arbitrator did not consider crucial facts in consonance with the terms of the contract, which led to several erroneous findings. Moreover, the petitioner did not get the opportunity to present its case before the learned Arbitrator.

8. In light of the aforesaid contentions, it is prayed that the impugned order may be set aside.

9. *Per Contra*, the learned counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that although the petitioner has raised the challenge to the Award stating that the learned Arbitrator failed to give reasons for the order, however, has not argued the same in its pleadings. The petitioner is attempting to travel beyond the pleadings. Reliance has been placed upon ***National Thermal Power Corporation Ltd. vs. Wig Brothers Builders and Engineers Ltd***., **2009 SCC OnLine Del 911**, to submit that objections must be pleaded in the Section 34 petition for them to be entertained by the Court at the time

of hearing.

10. It is submitted that there is no error in the impugned Award as the learned Arbitrator has given sufficient reasons while passing the Award. It is submitted that an arbitral award need not be elaborate and is to be read in context of the material referred to in it.

11. It is further submitted that the petitioner has entered into the facts and merits of the case which would amount to re-appreciation of evidence, and this Court does not have to power to enter into detailed evidence at this stage under Section 34 of the Arbitration Act.

12. Learned counsel for the respondent opposed the submission made on behalf of the petitioner that no notice was served with respect to the arbitration proceedings, however, it is also admitted that in December 2018, a notice was served upon the petitioner by the learned Arbitrator. Despite the said notice, the petitioner chose not to attend proceedings and has now approached this Court seeking remedy under Section 34 of the Arbitration Act.

13. It is submitted that the learned Arbitrator has considered all material facts, circumstances, claims and the material before it while passing the Award which is free from errors and hence, there is no merit in the objections raised on behalf of the petitioner. Therefore, it is submitted that the instant petition is liable to be dismissed.

ANALYSIS AND FINDINGS

14. Heard learned counsel for the parties and perused the record, including the impugned Award dated 21st October 2019.

15. The petitioner has invoked the jurisdiction of this Court under Section 34 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 sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> > *(a) the party making the application [establishes on the basis of the record of the arbitral tribunal that]—*
> >
> > > *(i) a party was under some incapacity, or*
> > >
> > > *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> > >
> > > *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> > >
> > > *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
> > >
> > > *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in*

accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]"

16. The scope of Section 34 of the Arbitration Act is limited yet extensive. The contents of the provision abundantly show that the intention of legislature while enacting the Arbitration and Conciliation Act, as well as while amending the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the proceedings have been concluded and an Award thereto has been made by the concerned Arbitrator(s). Therefore, the situations in which a Court can have been clearly laid down under the provision where a Court can interfere. It is an established principle of law that a Court exercising its jurisdiction under Section 34 of the Arbitration Act cannot enter in to the

merits of the case while appreciating facts and evidence afresh. Therefore, this Court as well, without entering into the merits of the case, shall examine the impugned Award dated 21st October 2019.

17. By way of filing the instant petition, the petitioner has sought indulgence of this Court while challenging the Arbitral Award in question. Upon a perusal of the pleadings and the upon hearing the learned counsel for the parties at length, this Court finds that the controversy between the parties *qua* the impugned Arbitral Award may be narrowed down to the following issues:-

> Issue I- Whether sufficient notice was served upon the petitioner regarding arbitration proceedings as well as *ex-parte* proceedings.
>
> Issue II- Whether the Award dated 21st October 2019 was a reasoned Award not inviting the interference from this Court.

Issue I

18. A preliminary objection raised on behalf of the petitioner is that sufficient notice was not served upon it before the arbitration proceedings were proceeded against him *ex-parte.*

19. The respondent had furnished the notice dated 27th March 2018 upon the petitioner, in accordance with Section 21 of the Arbitration Act, suggesting three Arbitrators to adjudicate the disputes between the parties. To the said notice, the petitioner furnished its reply dated 4th May 2018, whereby the respondent was intimated that proceedings under Suit No. 311/2016 before the Civil Court against the respondent were initiated and pending, therefore, the petitioner could not participate in the

arbitration proceedings.

20. Thereafter, admittedly no communication was made by or on behalf of the respondent intimating the initiation of arbitration proceedings. It was only in the month of December 2018, that the petitioner had received a communication from the Arbitrator concerned, calling upon the petitioner to appear for the arbitration proceedings at the time and place decided. It is the case of the petitioner that since the proceedings against the respondent pertaining to the disputes between the parties were already pending, which was also in the knowledge of the respondent, the arbitration proceedings ought not to have been initiated or continued.

21. The Section 25 of the Arbitration Act, provides for powers of the Arbitrator to terminate the arbitration proceedings, forfeit the right of defence, and proceed *ex-parte* in the following cases:-

> *"25.Default of a party.—*
>
> *Unless otherwise agreed by the parties, where, without showing sufficient cause,—*
>
> *(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;*
>
> *(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited].*
>
> *(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may*

> *continue the proceedings and make the arbitral award on the evidence before it."*

22. The instant case lies within the ambit of Section 25(c) of the Arbitration Act. Here, the petitioner chose not to appear before the learned Arbitrator. However, the pertinent question to be answered is whether before proceeding *ex-parte* against the petitioner, was there any procedural requirement, including furnishing of notice etc., to be fulfilled by the learned Arbitrator or the respondent.

23. A bare reading of the provision shows that an Arbitrator may continue the proceedings and make the arbitral award on the evidence before it where a party fails to appear at an oral hearing or to produce documentary evidence without showing sufficient cause, unless otherwise is decided amongst the parties. It is clear, that before taking an action in accordance with Section 25(c) of the Arbitration Act, the Arbitrator is to examine whether the absence of the parties is with or without showing sufficient cause. Therefore, it is evident that an opportunity is to be given to a party to the dispute before the Arbitrator decides to proceed on the basis of the evidence before it.

24. In the landmark judgment of ***Juggilal Kamlapat v. General Fibre Dealers Ltd.*, 1954 SCC OnLine Cal 53,** the principle of pre-emptory notice for *ex-parte* proceedings and principle of prejudice being cause in case of such *ex-parte* proceedings was discussed**:-**

> ***"20.*** *On those facts, the Court held that the holding of the arbitration proceedings on the first day without any notice to the defendants was itself sufficient to invalidate the award and that, throughout, the arbitrators had rushed the hearing of the case without paying any attention to the protests of the*

defendants. Referring to the meeting of the first day, the learned Chief Justice observed that in holding that meeting, the arbitrators did not appear to him to have acted "with that absolute impartiality, with that sense of fairness to both sides", which was "so essential and so preliminary an element" in cases of that class. The necessity of giving a notice of an intention to proceed ex parte in the event of the non-appearance of a party was not specifically referred to in the judgment, but the learned Chief Justice said that it was a strong thing for the arbitrators to proceed after the letter of the defendants' attorney without giving any further intimation that they intended to proceed. The conduct of the arbitrators, it was held, amounted to misconduct.

25. *More or less of the same nature was the case of — 'Bhowanidas Ramgobind v. Harsukhdas Balkishendas', AIR 1924 Cal 524 (D), decided by Mookerjee and Rankin, JJ. There also, no notice was given by the arbitrators that they would proceed ex parte against any party who would not appear and an award was made against certain parties, who were the sellers, in their absence. The principles laid down in the earlier case of AIR 1920 Cal 853 (C), were reiterated in the judgment. As to the facts, it was pointed out that on a certain date the sellers had intimated that they would not submit to the jurisdiction of the tribunal of arbitrators as in their view, that tribunal could not possibly have any jurisdiction over the subject matter of the dispute. They had not also taken a part in the arbitration proceedings at any stage, those circumstances, the Court held that the sells could not be said to have been prejudiced by the course taken by the arbitrators and, therefore, the award, although made ex parte against them, ... not liable to be set aside.*

29. *If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence. But if after making such a peremptory appointment and issuing such a*

notice, the arbitrator does not in fact proceed ex parte on the day fixed, but fixes another subsequent date, he can-, not proceed ex parte on such subsequent date unless he issues a similar notice in respect of that date as well.

30. *If he issues a similar notice and the party concerned does not appear, an award made ex parte, will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds ex parte, the award will be liable to be set aside in spite of a notice of a peremptory hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused to the party against whom the ex parte order was made. But this duty to give notice of an intention to proceed ex parte is not an absolute duty.*

31. *If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recant, the arbitrators are not required to issue a notice of an intention to proceed ex parte against such a recusant person and may proceed ex parte and make a valid award without issuing a notice. The better course, however, even in such a case is to issue a notice and give the party concerned a chance to change his mind.*

32. *The above is what the arbitrators are required on their own part to do. Where the question arises after an ex parte award has, in fact, been made and it appears that no notice of an intention to proceed ex parte had been given, the principle to be applied is that the award will not be upheld, unless it is shown or it appears that the omission to give a notice has not caused any prejudice to the party against whom the ex parte award was made, because he had made it abundantly clear that he would not appear before the arbitrators in any circumstances. When there has been an omission to give a notice, there will, however, always be a presumption that prejudice has been caused. But the presumption can be rebutted by the other party or can be*

seen to be rebutted by circumstances appearing on the face of the record. The principle to be borne in mind in such cases is that the failure to attend is not required to be explained on satisfactory grounds in order to dislodge the ex parte in ward, but the ex parte award requires to be defended by establishing that the omission to issue in notice of an intention to proceed ex parte has not caused any prejudice."

25. A Co-ordinate Bench of this Court in ***Lovely Benefit Chit Fund & Finance Pvt. Ltd vs. Shri Puran Dutt Sood & Ors.,*** **1983 SCC OnLine Del 22,** made observations on the principle of *ex-parte* proceedings as under:-

*"**10**. The question for decision is whether in this case the arbitrator should have given notice of change of venue and of his intention to proceed ex-parte against the respondents when they had not appeared before him. There is no hard and fast rule of giving notice by the arbitrator of his intention to proceed exparte or to change the venue of arbitration proceedings. But the principles of natural justice require that a person cannot be condemned unheard and he should be afforded a reasonable opportunity of being heard. In the instant case all the respondents are not residents of Delhi but of Ludhiana. The petitioner-claiment has its registered office at New Delhi. The respondents selected their Advocate, briefed him and paid his fee. They can remain confident that their lawyer will look after their interest and as such they have done what was in their power and expect the lawyer to do the needful. The respondents after having appointed the lawyer should not suffer for the in action or deliberate ommission of their counsel. In Rafiq and another v. Munshilal and another, AIR 1931 S.C. 1400 it has been held that a party should not suffer for the inaction of his counsel. In that case appeal was dismissed for default of appellant's counsel. The dismissal was set aside by the Supreme Court. In the instant case, as already stated, the respondents are residents of Ludhiana and therefore the arbitrator before proceeding ex parte ought to have given*

notice of his intention to proceed ex parte against them on a specified date, time and place of arbitration proceedings. In Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590 page 306 it has been stated as under:

> *"Where the arbitrator proposes to proceed with the reference notwithstanding the absence if one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the appointment can be shown, the court will set aside an award made by an arbitrator who has proceeded ex parte."*

In Russell on Arbitration, Nineteenth Edition page 271 the following passage appears.

> *"Notice of intention to proceed ex parte:*
>
> *In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word" "Peremptory" marked on it is, however, sufficient.*
>
> *If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex-parte at the second meeting, unless the appointment for it was also marked "peremptory" or contained a similar intimation of his intention."*

In Bhowanidas Ramgobind v. Harasukhdas Balkishendas, AIR 1924 Calcutta 524 a Division Bench has held that arbitrators should give notice of their intention to proceed ex-parte if one of the parties should not appear but their award is valid if the complainant has not been prejudiced in any manner by the failure of the arbitrators to give such notice. In Udaichand Panna Lall v. Debibux Jewanram AIR 1920 Calcutta 553 it has been observed that before an

arbitrator proceeds ex-parte he should give notice in writing to each of the parties, otherwise the award may be liable to be set aside.

In Bratapsingh v. Kishanprasad and Co. Ltd. AIR 1932 Bombay 68 it has been observed that even when an arbitrator considers that the time and place fixed by him for the meeting are reasonable and if after service of notice one of the parties to the arbitration fails to attend before him he is entitled to proceed with the arbitration ex-parte. But it is still advisable for him though it is not compulsory, that he should give that party notice of his intention to do so. Similar observation were made in Ariyur Mohammad Habeebur Rahman and others v. Aasuri Varama (died) and another AIR 1974 Andhra Pradesh 113(118) and Prem Nath L. Harsaran Dass and another v. Om Parkash L. Ram Kishen Dass Aggarwal AIR 1956 Punjab 187. In Juggilal Kamlapat v. General Fibre Dealers Ltd. AIR 1955 Calcutta 354 the following principles have been alaid down to determine whether the failure of the arbitrator to give notice of his intention to proceed ex parte amounts to misconduct.

> *1. If a party to an arbitration agreement fails to appear at one of the sittings, the arbitrator cannot or, at least, ought not to, proceed ex parte against him at that sitting. Where in such a case it does not appear that the non appearance was anything but accidental or causual, the arbitrator ought ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party.*
>
> *2. If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend, he will proceed in his absence. But if after making such a peremptory appointment and issuing such a notice, the arbitrator does not in fact proceed ex parte on the day*

fixed, but fixes another subsequent date, he cannot proceed ex parte on such subsequent date unless he issues a similar notice in respect of that date as well.

3. If he issues a similar notice and the party concerned does not appear, an award made ex parte, will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds ex parte, the award will be liable to be set aside in spite of a notice of a peremptory hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused to the party against whom the ex parte order was made. But this duty to give notice of an intention to proceed ex parte is not an absolute duty.

4. If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recent the arbitrators are not required to issue a notice of an intention to proceed ex parte against such a re-sant person and may proceed ex parte and make a valid award without issuing a notice. The better course, however, even in such a case is to issue a notice and give the party concerned a change to change his mind.

5. Where the question arises after an ex parte award has, in fact, been made an it appears that no notice of an intention to proceed ex parte had been given, the principle to be applied is that the award will not be unheld, unless it is shown or it appears that the omission to give a notice has not caused any prejudice to the party against whom the ex parte award was made, because he had made it abundantly clear that he would not appear before the arbitrators in any circumstances. When there has been an omission to give a notice, there will, however, always be a presumption that prejudice has been caused. But the

> *presumption can be rebutted by the other party or can be borne in mind in such cases is that the appearing on the face of the record. The principle to be borne in mind in such cases is that the failure to attend is not required to be explained on satisfactory grounds in order to dislodge the ex parte award, but the ex parte award requires to be defended by establishing that the omission to issue a notice of an intention to proceed ex parte has not caused any prejudice."*
>
> *In Mt. Amir Begam v. Syed Badr-ud-din Husait and others, AIR 1914 Privy Council 105 it has been observed that if irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or partiality of the arbitrator. Similar observations were made in Sadu Singh and others v. Ramdeo Singh, AIR 1943 Patna 318.*
>
> ***11**. From these authorities, it is apparent that an arbitrator ought not to proceed ex parte against a party if he has failed to appear at one of the sittings. The arbitrator should fix another date for hearing and give notice to the defaulting party, of his intention to proceed ex parte on a specified date time and place. Even after notice if the defaulting party does not take part in the proceedings the arbitrator may proceed in his absence.*
>
> ***12**. When an ex parte award has been made the principle to be applied is that the award will not be upheld unless it is apparent that the failure to give notice of intention to proceed ex parte has not caused any prejudice to the party against whom the ex parte award was made."*

26. The Calcutta High Court in ***Magma Leasing Limited vs. Gujarat Composite Limited*, 2006 SCC OnLine Cal 235,** entertaining the question whether the Arbitrator therein was right to proceed *ex-parte* due to non-appearance of the party on one hearing observed as under, while remitting the case back to the arbitrator:-

*"**10.** Now coming to the merit of the matter it appears to us that learned first Court has held upon applying his mind that opportunity of being heard was not given and also that no reason was given by the learned Arbitrator. We shall deal with the decision of the first Court regarding giving of opportunity. It appears from the records that learned Arbitrator at one point of time proceeded with this matter without any evidence being adduced. And we think this procedure is not illegal.*

***11.** From the records we find the notices were given upon both the parties on each and every occasion. The respondent appeared before the learned Arbitrator and participated in the proceedings either effectively making submission or obtaining adjournment. However, on the last occasion the respondent failed to appear and on that date itself the learned Arbitrator proceeded with finally and concluded the hearing and thereafter award was passed.*

***13.** In our opinion the aforesaid provision is enabling provision and ample discretion has been left with learned tribunal with the word "may". It is settled position of law that power of discretion is exercised with restraint and when there other option left, in particular in judicial and quasi-judicial proceedings. It does not mean that the learned Arbitrator should exercise this extreme power in case of one default. We are not for a single moment supporting any lackadaisical litigant to take refuge to the aforesaid discretionary provision. Discretion is always a judicial if not judicious. Judicious action demands in a case of this nature that on one hand unnecessary latitude of indulgence should not be given, and on the other hand the learned Arbitrator should not proceed hastily. There are decisions of this Court while considering and discussing the procedure of arbitration proceedings held under repealed Arbitration Act, 1940 wherein Court formulated concept of serving peremptory notice of hearing so that a litigant may be warned if he defaults in future, final act may be performed by the learned Arbitrator. In this connection a decision of Division Bench of this Court reported in AIR 1955 Cal 354*

may be referred to.

4. *Here factually the respondent defaulted only on one day and we think the learned Arbitrator should not have exercised discretionary power while concluding the hearing.*

15. *We think another chance should have been given because in the record there is no successive failure on the part of the respondent, although adjournment was sought for, true. But in all fairness a peremptory notice should have been given. Under those circumstances, we feel the reasoning of the first Court is justified. However, the aforesaid elaborate discussion was not recorded by His Lordship.*

18. *Learned Arbitrator shall proceed on day-to-day basis and shall give chance of hearing to the respondent on merit and he shall proceed from the stage where it was left by him and will not start de novo…"*

27. Therefore, it is abundantly clear that, though not stipulated under the Act in clear terms, it has always been preferred and encouraged that an Arbitrator provides a preemptory notice to any party against whom it is seeking to proceed *ex-parte*. There is no doubt to the fact that in the instant case the learned Arbitrator did not communicate the facts of proceedings being initiated, continued and proceeded with *ex-parte* to the petitioner, which it ought to have at some point of time before making the Award. Strong observations have been made on this question by the Courts and hence, this Court also submits to the observations as quoted in the foregoing paragraphs. The action on part of the learned Arbitrator was erroneous and hence, warrants interference from this Court.

28. Another aspect to be seen it that as per the reply dated 4th May 2018, the respondent also had the knowledge of pending proceedings before the Civil Court at Kota, Rajasthan, yet after over six months, the arbitration proceedings were initiated, continued and concluded without

the petitioner. Therefore, this Court finds that the Suit pertaining to the same issues between the parties being pending was in itself sufficient cause for learned Arbitrator not to proceed *ex-parte* against the petitioner after only one intimation and opportunity to appear for arbitration proceedings.

Issue II

29. To evaluate second issue, it is to be seen whether an Arbitrator is to pass a well reasoned order while passing an award, if yes, whether in the instant case the impugned Award could said to have been a reasoned award.

30. At the very outset, this Court deems it fit to refer to Section 31(3) of the Arbitration Act, which is reproduced hereunder:-

> *"31. Form and contents of arbitral award.-*
>
> *(3) The arbitral award shall state the reasons upon which it is based, unless—*
>
> *(a) the parties have agreed that no reasons are to be given, or*
>
> *(b) the award is an arbitral award on agreed terms under Section 30."*

31. It is apparent that one of the essential requirements to be met while making an award includes that the reasons for passing the award must be stated.

32. The Hon'ble Supreme Court in ***Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.*, (2019) 20 SCC 1,** while determining a similar question held as under**:-**

> *"**26.** Having established the basic jurisprudence behind*

Section 34 of the Arbitration Act, we must focus on the analysis of the case. The primary contention of the learned counsel appearing on behalf of the appellant is that the award by the learned Tribunal was perverse for want of reasons. The necessity of providing reasons has been provided under Section 31 of the Arbitration Act, which reads as under:

> *"**31. Form and contents of arbitral award**.—(1)-(2)*
> * * *
>
> *(3) The arbitral award shall state the reasons upon which it is based, unless—*
>
> *(a) the parties have agreed that no reasons are to be given, or*
>
> *(b) the award is an arbitral award on agreed terms under Section 30."*

***27.** Under the Uncitral Model Law the aforesaid provision is provided as under:*

> *"**31. (2)** The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30."*

***28.** Similar to the position under the Model Law, India also adopts a default rule to provide for reasons unless the parties agree otherwise. As with most countries like England, America and Model Law, Indian law recognises enforcement of the reasonless award if it has been so agreed between the parties.*

***35.** When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based*

on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

37. *In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced.*

42. *From the facts, we can only state that from a perusal of the award, in the facts and circumstances of the case, it has been rendered without reasons. However, the muddled and*

confused form of the award has invited the High Court to state that the arbitrator has merely restated the contentions of both parties. From a perusal of the award, the inadequate reasoning and basing the award on the approval of the respondent herein cannot be stated to be appropriate considering the complexity of the issue involved herein, and accordingly the award is unintelligible and cannot be sustained."

33. Further, ***Som Datt Builders Ltd. vs. State of Kerala*, (2009) 10 SCC 259,** an elaborate finding regarding reasoned arbitral awards was made by the Hon'ble Supreme Court, which is reproduced hereunder:-

"20. *Section 31(3) mandates that the arbitral award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award under Section 30. ..... By legislative mandate, it is now essential for the Arbitral Tribunal to give reasons in support of the award. It is pertinent to notice here that the 1996 Act is based on UNCITRAL Model Law which has a provision of stating the reasons upon which the award is based.*

21. *In Union of India v. Mohan Lal Capoor [(1973) 2 SCC 836: 1974 SCC (L&S) 5] this Court said: (SCC p. 854, para 28)*

"28. ... Reasons are the links between the materials on which certain conclusions are based and the actual conclusions."

22. *In Woolcombers of India Ltd. v. Workers' Union [(1974) 3 SCC 318 : 1973 SCC (L&S) 551 : AIR 1973 SC 2758] this Court stated: (SCC pp. 320-21, para 5)*

"5. ... The giving of reasons in support of their conclusions by judicial and quasijudicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search

for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations."

23. *In S.N. Mukherjee v. Union of India [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445] the Constitution Bench held that recording of reasons*

> *"(i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making." (SCC p. 612, para 35)*

25. *The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed."*

34. Therefore, it is evident that the Hon'ble Supreme Court has reiterated the significance of passing a reasoned award. As per the interpretation as aforesaid, the award is not just to be reasoned by such reasons, which give effect to the findings and the final award, must be proper, intelligible and adequate. The recording of reasons and the

findings thereto is also a testament to the fact that the concerned arbitrator has applied his mind while passing the award and deciding claims in favour of either or both the parties. An award without reasons and findings is mere reiteration of the claims of the parties. Hence, the passing of a reasoned award laying down the grounds and findings was imperative for the learned Arbitrator.

35. The question which now remains is whether the impugned Award dated 21st October 2019 was reasoned. The relevant portion of the Award whereby the claims were decided in the favour of the respondent is reproduced herein:-

> *"9. Having considered the materials submitted by the claimant, I am satisfied that the claimant has proved its claim against the respondent for the amount due from the respondent at Rs.1,75,86,533.78.*
>
> *12. In view of this, the claimant is entitled to interest at the rate of 24% P.A. on the sum of Rs. 1,75,86,533.78 w.e.f. 01.04.2019 till the date of payment.*
>
> *13. Regarding the costs, I direct the respondent to pay the claimant a sum of Rs. 1,76,962/-.*
>
> *14. I place on record all assistance rendered by Mr. Deepayan Mandal Ld. Counsel for the Claimant on the projection of the case explaining the details of the matter in clear terms.*
>
> *15. Accordingly, I pass the award:*
>
> > *I. Directing the respondent to pay Rs. 1,75,86,533.78*
> >
> > *II. Directing the respondent to pay Interest at the rate of 24% P.A on the sum of Rs. 1,75,86,533.78 w.e.f. 01.04.2019 till the date of payment."*

36. A perusal of the order reveals that the same is a mere four page order reiterating the claims of the respondent and making the aforesaid

summary findings while accepting the said claims. The order does not reveal appreciation of evidence or material or record and also does not lay down the grounds taken for the decision made. The claims were decided in the favour of the respondent as they were claimed and pleaded before the learned Arbitrator.

37. The learned Arbitrator need not have given elaborate, comprehensive or extensive Award but the mere recording of reasons for the findings made was an indispensable requirement to be met. Fulfilling the requirements under Section 31(3) of the Arbitration Act, is not a mere formality, but this provision makes way for a fair, reasonable and equitable opportunity to have the objective knowledge of the reasons why a claim is not decided in their favour. Accordingly, this Court finds that the principles laid down by the Hon'ble Supreme Court favour the case of the petitioner *qua* the requirement of passing a reasoned order being indispensable.

CONCLUSION

38. In light of the facts, circumstances, contentions raised in the pleadings, argument made on behalf of the parties, the observations of the Hon'ble Supreme Court and other High Courts of the country, the provisions of the Arbitration Act and the discussion in the foregoing paragraphs, this Court finds merit in the petition and is inclined to allow the same.

39. The Arbitral Award dated 21st October 2019 was passed without proper communication to the petitioner, before proceeding *ex-parte*, and without affording reasonable opportunity to present its case. The learned

Arbitrator did not make adequate efforts to be satisfied that sufficient cause was to be shown for non-appearance before proceeding *ex-parte* against the petitioner. Further, it was incumbent for the learned Arbitrator to furnish reasons for his findings in favour of the respondent.

40. Accordingly, the instant petition and the prayers therein are allowed and *ex-parte* Arbitral Award dated 21st October 2019 is set aside for the reasons stated as above.

41. Pending applications stand disposed of, in light of the observations made above.

42. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

FEBRUARY 1, 2023
dy/ms

Click here to check corrigendum, if any