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

+ **ARB.P. 456/2020**

J.K. TYRE AND INDUSTRIES LTD Petitioner
Through **Ms.Aakansha Kaul, Adv. with**
Mr.Nakul Jain, Adv.

versus

KAILASH SHIPPING SERVICES PVT LTD Respondent
Through **Mr.Vivek Kohli with Mr.Nalin**
Talwar, Mr.Sunil Tyagi, Ms.Neetika Bajaj &
Mr.Ayushman Kecker, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGEMENT (ORAL)

% **03.12.2020**
(Video-Conferencing)

1. This is a petition under Section 11 of the Arbitration & Conciliation Act, 1996, for appointment of an Arbitrator.

2. The dispute, as set out by the petitioner in the petition, may be reproduced thus:-

“7E. That being completely taken in by the representations made by the Respondent during various rounds of the negotiations and discussions held at Petitioner's Head Office at New Delhi and believing them to be true and correct, Petitioner, through its Materials Director, New Delhi, had granted/issued, through its Head Office at New Delhi, the contract of clearance of imported consignment of raw materials per Ship/Air at

Chennai vide Agreement dated 30.03.2012 bearing Ref No.: JKTL/CTP/NP/CHAKSS/2012 (hereinafter referred to as the "said Agreement") containing the various terms and conditions as mutually agreed between the parties. That it is a matter of record that the validity of the said Agreement has been extended by the Petitioner, through its Head Office in New Delhi, every year with the mutual consent of the parties on the same terms and conditions.

7F. That in terms of the said Agreement, Respondent had confirmed to the Petitioner of having sufficient bonding space for bonding of Petitioner's goods/consignment and that the same has been permitted for bonding by the custom authorities. Also, it was incumbent upon the Respondent, under the said Agreement, inter alia to ensure effective utilization of bonding space for safe storing of Petitioner's material(s) post completion of the custom clearance formalities of the said goods by the Respondent.

7G. That for safe storing of Petitioner's merchandise, Respondent had bonded the goods imported by the Petitioner with one M/s R.R. Warehousing Pvt. Ltd, whom Respondent represented to having a customs bonded warehouse situated at Ariyalur Village, Andarkuppam Check Post, Red Hills Road, Chennai - 600103, with sufficient bonding space and requisite permission for bonding by the customs authorities.

7H. That Petitioner had imported the following raw materials, to be used in the production/manufacturing of tyres, and which were bonded by the Respondent with the said M/s R.R. Warehousing Ltd, as aforementioned, after custom clearance of the same by the Respondent, under the said Agreement:

S.No.	PARTICULARS OF GOODS IMPORTED	INVOICE VALUE OF GOODS (INR)	VALUE OF GOODS AFTER PAYMENT OF CUSTOMS

			DUTY (INR)
I.	18306 Kg of Natural Rubber Grade RSS1 from M/s Petitioner Kharishma Pemasaran Bersama Nusantara, Jakarta, Indonesia, vide PO No.4100005281 dated 13.10.2016 Date of Arrival on Chennai Port: 22.10.2016	21,27,878/-	30,26,930/-
II.	100 MT of Natural Rubber Grade RSS3 from M/s Binh Thuan Rubber Co. Ltd, Vietnam vide PO No. 4100005232 dated 02.08.2016 Date of Arrival on Chennai Port: 13.09.2016	1,05,92,400/-	1,57,93,554/-
III.	100.80 MT of Natural Rubber Grade STR-20 from M/s Rubber Land Products Co. Ltd, Thailand, vide PO No.4100005099 dated 27.05.2016 Date of Arrival on	88,97,616/-	1,30,20,101/-

Signature Not Verified

Digitally Signed By: SUNIL SINGH NEGI

Signing Date: 10/12/2020 21:13:46

	Chennai Port: 25.08.2016		
	TOTAL	2,16,17,894/-	3,18,40,585/-

7I. That cyclonic storm Vardah made landfall near Chennai on 12.12.2016 resulting in heavy rainfall. It is submitted that under the said Agreement it was the legal obligation of the Respondent to ensure the safe storage of Petitioner's goods stored by the Respondent in the bonded warehouse of M/s R.R. Warehousing Ltd, however, Respondent failed and neglected in taking prompt action to secure the safety/protection of Petitioner's merchandise, thereby causing damage to the goods as mentioned in Table 1 at para 7H of the present petition.

7J. That the lackadaisical attitude, negligence and deficiency in service of the Respondent resulted in causing damage to the entire consignment of goods relating to Natural Rubber Grade RSS-1 and RSS-3, as stated in Table 1 at para 7H of the present petition. In respect of consignment relating to Natural Rubber Grade STR-20, out of 100.80 metric tonnes imported by the Petitioner, goods weighing 3955 Kgs thereof were affected.

7K. That the damage caused to the consignments enumerated in Table 1 at para 7H of the instant petition was assessed by the surveyor appointed by M/s United India Insurance Co. Ltd, being the insurer of M/s R.R. Warehousing Pvt. Ltd. It is submitted that upon making the survey, the surveyor of the Insurance Company opined that the damaged goods could be sold to a third party for recovering the residual value, if any. Accordingly, the surveyor had identified a buyer namely M/s Mahindra Rubber Industries, Ludhiana and advised Petitioner to sell the damaged materials/goods to the said buyer.

7L. That insofar as the consignment relating to Natural Grade RSS-3 is concerned, as against the total value of the goods (including custom duty) to the tune of Rs.1,57,93,554/- (Rupees One Crore Fifty Seven Lakhs Ninety Three Thousand Five Hundred Fifty Four only), the same was sold for a sum of Rs. 1,04,00,000/- (Rupees One Crore Four Lakhs only). With regard to goods relating

to Natural Rubber Grade STR-20 are concerned, 3,955 Kg of the damaged goods for a value of Rs.5,10,858/- (Rupees Five Lakh Ten Thousand Eight Hundred Fifty Eight only) were sold for a sum of Rs. 4,03,410/- (Rupees Four Lakhs Three Thousand Four Hundred Ten only). In respect of the consignment relating to Natural Rubber Grade RSS1 is concerned, the damaged goods could not be sold and are lying idle as the same are not in a condition to be utilized by Petitioner in the manufacturing process.

7M. That it is humbly submitted that owing to the inaction on the part of the Respondent, goods worth Rs. 1,93,31,342/- (Rupees One Crore Ninety Three Lakhs Thirty One Thousand Three Hundred Forty Two only) of the Petitioner were damaged out of which Petitioner could recover/realize only a sum of Rs. 1,08,03,410/- (Rupees One Crore Eight Lakhs Three Thousand Four Hundred Ten only), thus causing a net loss of Rs. 85,27,932/- (Rupees Eighty Five Lakhs Twenty Seven Thousand Nine Hundred Thirty Two only), which the Respondent is liable to pay under the terms of the said Agreement having expressly undertaken to protect the interest of the Petitioner including ensuring that no damage is caused to the material entrusted to the Respondent. In addition to the forementioned, Respondent is also liable for the excess amount paid by Petitioner for procuring raw material at higher cost to compensate for the damaged raw material which could not be utilized for production.”

3. The petitioner issued a legal notice, dated 5th June, 2019, calling on the respondent to pay ₹ 85,27,932/-, along with interest, to the petitioner. It is claimed that there was no response from the respondent.

4. Attempts for amicable resolution of the disputes having failed, the petitioner seeks to invoke Clause 8 of the Agreement between the parties, which provides for arbitration as the mode of resolution of the disputes, and reads as under:

“8 ARBITRATION

In the event of any dispute or difference arising under this contract, the same shall be referred to Materials Director, JK Tyre & Industries Limited, New Delhi or any person authorized by him to act on his behalf and whose decision shall be final and binding on both the parties."

5. On 29th November, 2019, the petitioner issued a legal notice to the respondent invoking the above extracted arbitration clause. The petitioner also points out, correctly, that, though Clause 8 (*supra*), provides for arbitration by the Materials Director of the respondent, or any person authorised by him to act on his behalf, as Arbitrator, the covenant cannot operated in view of Section 12(5) of the 1996 Act, read with the Seventh Schedule thereto and the judgment of the Supreme Court in ***Bharat Broadband Networks Ltd. v. United Telecoms***¹, and ***Perkins Eastmann Architects DPC v. HSCC (India) Limited***².

6. The petitioner has suggested names of three retired Judges of this Court as the sole Arbitrator, to arbitrate on the dispute between the parties.

7. Today, learned counsel for the respondent is agreeable to arbitration of the disputes by Hon'ble Mr. Justice R.C. Chopra, a retired Judge of this Court, who is one of the sole Arbitrators suggested by the

¹ (2019) 5 SCC 755

² (2019) SCC OnLine SC 1517

petitioner.

8. In view thereof, arbitrable disputes having arisen between the parties, Hon'ble Mr. Justice R.C. Chopra (Retired), is appointed as the sole arbitrator to arbitrate on the disputes.

9. This Court has not expressed any opinion on the merits of the case of the petitioner or the respondent. All contentions shall be left open to be agitated before the learned sole Arbitrator. Should the respondent seek to urge any counter claims, it would be at liberty to do so in accordance with law.

10. The learned sole Arbitrator would arbitrate within the aegis of the 1996 Act and would be entitled to fees in accordance with Fourth Schedule of the said Act.

11. The parties are directed to contact the learned sole Arbitrator with a copy of this order, as would be e-mailed by the Registry within 48 hours of obtaining the copy, so as to take the concurrence of the learned sole Arbitrator to arbitrate on the disputes and fix a schedule of the arbitration.

12. The learned sole Arbitrator would, thereafter, proceed to enter on the reference, within one week and furnish a requisite disclosure under Section 12(6) of the 1996 Act

13. With these observations, this petition stands disposed of with no orders as to costs.

C.HARI SHANKAR, J

DECEMBER 3, 2020/aa

