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

+ ARB.P. 493/2021

PRIME COMFORT (P) LIMITED Petitioner
Through: Mr. G.K. Mishra, Adv.

versus

THE NEW INDIA ASSURANCE CO. LTD Respondent
Through: Mr. Bomi Patel, Sr. Adv. with
Mr. Rohan Batra, Mr. Naval Sharma,
Mr. Saket Satapathy, Ms. Sonali Malik and
Mr. Dhruv Sethi, Adv.

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

ORDER (O R A L)

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18.08.2021

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, consequent on failure of the parties, between them, to appoint a competent arbitral tribunal to arbitrate on their disputes.

2. Given the nature of the controversy, it is not necessary to set out the facts relating to the disputes. Suffice it to state that paras 4.1 to 4.11 of the petition set out the disputes in controversy.

3. Consequent to the claim, raised by the petitioner on the respondent, not being met by the respondent, the petitioner, *vide* letter

dated 26th June, 2020, invoked the provision for arbitration in the agreement between the parties. The said letter also appointed an Advocate, to arbitrate on the disputes, and called upon the respondent to appoint/nominate its arbitrator.

4. The petition asserts that the arbitration clause, in the agreement between the parties, provided for a period of two months within which the respondent could appoint its arbitrator. The respondent did not do so. The petitioner has, therefore, invoked the jurisdiction of this Court under Section 11(6) of the 1996 Act.

5. Mr. Patel, learned Senior Counsel for the respondent points out that the arbitration clause, in the agreement between the parties, provides that, in the event of default, on the part of either party, to appoint its arbitrator within two months of issuance of notice by the other party, the disputes would be arbitrable by a sole arbitrator, to be appointed by the latter party. This, he points out, would amount to a substitution of the provision for a three member arbitral tribunal, as contained in the said clause. For ready reference, the clause relating to arbitration, between the parties, reads thus:

“12. If any difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two dis-interested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provision of the Arbitration Act, 1940, as amended from time to time and for the time being in

force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.”

6. A reading of the afore-extracted Clause 12 makes it clear that, while the normal mode of resolution of the disputes between the parties would be by a three member arbitral tribunal, in the event of one party appointing its arbitrator, and calling on the other party to do likewise and on the latter party defaulting in doing so, the former party would have a right to appoint a sole arbitrator to arbitrate on the disputes. This clause, as worded, may not be workable in the light of the law laid down by the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*¹, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*², *TRF Ltd. v. Energo Engineering Projects Ltd.*³ and *Haryana Space Application Centre v. Pan India Consultants (P) Ltd.*⁴, which do not permit the right to appoint an arbitrator devolving exclusively on one of the parties to the agreement.

¹ 2019 SCC OnLine SC 1517

² (2019) 5 SCC 755

³ (2017) 8 SCC 377

⁴ (2021) 3 SCC 103

Clause 12, therefore, read with Section 11(6) of the 1996 Act, would require this Court to appoint the sole arbitrator, as the respondent has defaulted in appointing its arbitrator within two months of the issuance of receipt of notice from the petitioner.

7. The claim is stated to be in the region of around ₹ 20 crores, apart from interest.

8. As such, this Court appoints Mr. Ashok Kumar Panda, a respected Senior Counsel, as the Arbitrator to arbitrate on the disputes between the parties. The contact details of the learned Arbitrator are as under:

Mr.Ashok Kumar Panda,
Sr. Advocate
Ph. : 9810067899
E-mail ID. : sr_adv_akpanda@yahoo.co.in

9. The learned Arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act.

10. The learned Arbitrator would furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

11. This petition stands disposed of in the aforesaid terms.

12. Needless to say, all contentions, including arbitrability of the disputes, validity of the arbitration agreement, limitation, etc. remain

open to be agitated before the learned Arbitrator and this Court expresses no opinion thereon.

C. HARI SHANKAR, J

AUGUST 18, 2021/kr

