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

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Date of decision: 11.08.2021

(i) + **O.M.P. (T) (COMM.) 66/2021 & I.A. 9033/2021**

(ii) + **O.M.P. (T) (COMM.) 73/2021 & I.A. 9657-58/2021**

YOU-ONE MAHARIA JV

.....Petitioner

Through: Ms. Apoorva G. & Mr. Tushar
Mudgil, Advocates

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

(NHAI)

.....Respondent

Through: Ms. Neetika Sharma & Mr. Shreyansh
Rathi, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (oral)

The hearing has been conducted through video conferencing.

1. The above captioned petitions have been filed by the petitioner under the provisions of Section 14 of the Arbitration and Conciliation Act, 1996. Petitioner is an unincorporated joint venture between Hoban Engineering & Construction Ltd. (earlier known as YOU-ONE Engineering & Construction Co. Ltd.) under the laws of the Republic of Korea, who had submitted a bid to respondent, an autonomous agency of Ministry of Road Transport and Highway, Government of India for widening lanes and roads in the State of

Andhra Pradesh. Pursuant to acceptance of bid made by the petitioner, a Contract Agreement dated 23.05.2001 was entered between the parties and petitioner commenced the work.

2. According to petitioner, despite various lapses, defaults and breaches, petitioner continued to work in progress, however, on 23.09.2004, the work site of petitioner was forcefully taken over by the respondent at the stage when 68% work was already done by the petitioner. Thereafter, vide communication dated 21.12.2004, the respondent terminated the agreement alleging that petitioner had submitted fraudulent bank guarantees in satisfaction of work requirements of the agreement.

3. The petitioner, thereafter, invoked the arbitration proceedings under Clause 67.3 of the General Conditions of the Contract and on 31.05.2006 filed statement of claim before arbitral tribunal comprising Mr. EV Narayanan as Presiding Arbitrator and Hon'ble Mr. Justice (Retd.) Jaspal Singh and Mr. Bageshwar Prasad as Co-Arbitrators. However, on 07.02.2019, Justice (Retd.) Jaspal Singh withdrew from the proceedings on account of the respondent's attempt to reduce the fees payable to the Tribunal. After a chain of events, on 14.02.2020, petitioner informed the respondent having appointed Mr. Rajiv Dutta, Senior Advocate, as nominee

to the Tribunal. However, by a letter dated 02 July 2020, the respondent belatedly rejected the appointment of Mr. Dutta by the petitioner. Thereafter, several ex-parte communication and mis-communications are alleged to have been made, which has further gravely the disputes between the parties. Further, on 20.10.2020, the respondent addressed a letter to Mr. Narayanan and Mr. Bageshwar Prasad, informing appointment of Mr. Kumar. However, after unfortunate demise of Mr. Narayanan on 27.10.2020, the controversy to appoint the Presiding Officer deepened. Moreover, petitioner vide communication dated 30.10.2020, raised objection to the appointment of Mr. Kumar and prayed for resumption of arbitral proceedings before a new Tribunal presided over by a new Arbitrator to be so appointed by Mr. Dutta and Mr. Prasad. Thereafter, Mr. Lal also came to be appointed as Arbitrator and the Tribunal comprised of four Arbitrators, namely, Mr. Bageshwar Prasad, Mr. Rajiv Dutta, Mr. Lal and Mr. Kumar, which is impermissible under the provisions of Arbitration and Conciliation Act, 1996.

4. According to petitioner, both Mr. Lal and Mr. Kumar are empanelled Arbitrators of IRC and in this manner, their appointment with that of Mr. Bageshwar Prasad, is in the nature of unilaterally appointed tribunal and invalid in law. Hence these petitions have been filed seeking termination of

mandate of Mr.Dinesh Kumar and appointment of Mr.Rajiv Dutta.

5. Both sides have been heard and record of this case has been perused. This Court finds that despite several communications having been made amongst the parties, parties could not resolve the issue of appointment of Arbitrator.

6. During the course of hearing, this Court took a deep view of the matter and came to the conclusion that appointment of Mr. Bageshwar Prasasd, who is the nominee Arbitrator of respondent, is not disputed. However, further appointment of Mr. Lal and Mr. Kumar, who are empanelled Arbitrators of IRC i.e. respondent herein, cannot be permitted, as no party can be permitted to unilaterally appoint Arbitrator, as the same would defeat the purpose of unbiased adjudication of dispute between the parties. The Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*** 2019 SCC Online SC 1517 has categorically stated that *"in cases where one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator."*

7. To balance the equities, one nominee Arbitrator of petitioner is required and so, appointment of Mr. Rajiv Dutta, Senior Advocate, as Co-Arbitrator to the Tribunal, shall hold the field. However, after unfortunate demise of Mr. EV Narayanan, another appointment of Presiding Arbitrator has to be made.

8. Accordingly, **Justice KG Balakrishnan, former Chief Justice of India (Mobile:9717266700)** is appointed the Presiding Arbitrator to adjudicate the dispute between the parties.

9. The fee of the learned Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

10. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

11. With aforesaid directions, the present petitions are accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

AUGUST 11, 2021

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