



2024:DHC:7314



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 661/2024**

ADITYA BIRLA FINANCE LIMITEDPetitioner
Through: Mr. Nishant Srivastav, Mr.
Mahip Datta Parashar and Mr. Aman
Vasisth, Advs.

versus

PETAL CREATION AND ORS.Respondents
Through: Mr. Rahul Parasrampur, Mr.
Udit Agarwal and Ms. Disha Agarwal,
Advs.

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

ORDER (ORAL)
19.09.2024

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1. This is a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996¹, seeking reference of the disputes between the parties to arbitration.

2. The disputes arises in the context of a Facility Agreement dated 31 July 2019, executed between the petitioner and the respondents. Clause 32.17 of the agreement envisages resolution of disputes by arbitration and reads thus:

“32.17 Arbitration:

All claims or disputes arising out of or in relation to this Agreement shall be settled by arbitration. The arbitration tribunal shall consist of a sole arbitrator to be appointed by Lender. All parties to this Agreement hereby express consent to Lender being

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¹ “the 1996 Act”, hereinafter
ARB.P. 661/2024

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2024:DHC:7314



the sole appointing authority. Any vacancy created in the arbitration tribunal, for any reason whatsoever, shall also be filled only by Lender acting as the sole appointing authority. The place of arbitration shall be Delhi. Parties agree that the courts in Delhi shall have the exclusive jurisdiction to exercise all powers under the Arbitration and Conciliation Act, 1996.

Notwithstanding anything contained hereinabove, in the event the legal status of the Facility Provider changes or in the event of the law being made or amended so as to bring the Facility Provider under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the "DRT Act"), to proceed to recover dues from the Borrower(s) under the DRT Act, the arbitration provision hereinbefore contained shall, at the option of the Facility Provider cease to have any effect and if arbitration proceedings are commenced but no arbitral award is made, then at the option of the Facility Provider such proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date of the making of the law or the date when amendment becomes effective or the date when the Facility Provider exercises the option of terminating the mandate of arbitrator, as the case may be. Provided that neither a change in the legal status of the Facility Provider nor a change in law as referred to in this sub paragraph above, will result in invalidating an existing award passed by an arbitral tribunal constituted pursuant to the provisions of this Agreement."

3. Though Clause 32.17 envisages appointment of the Arbitrator by the petitioner, in view of Section 12(5) of the 1996 Act read with the judgments of the Supreme Court in *Bharat Broadband Network Ltd v United Telecoms Ltd*², *Perkins Eastman Architects DPC v HSCC (India) Ltd*³ and *Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd*⁴, an arbitration clause which grants unilateral right of appointment to one of the parties to the agreement cannot be implemented. Appointment of the arbitrator has to be by consensus *ad idem*, failing of the Arbitrator, failing which the Court has to intervene.

² (2019) 5 SCC 755
³ (2020) 20 SCC 760
⁴ (2021) 3 SCC 103



2024:DHC:7314



4. The petitioner issued a notice to the respondents under Section 21 of the 1996 Act, seeking reference of the disputes to arbitration on 23 October 2023. The respondents did not reply. The petitioner has, therefore, approached this Court under Section 11(5) of the 1996 Act to appoint an Arbitrator.
5. Despite issuance of notice, the respondents have not replied to this petition. The learned Counsel for the respondents has left the matter to the Court.
6. The claim of the petitioner against the respondents is in the region of ₹ 4.5 Crores.
7. Accordingly, this court appoints Mr. Ishkaran Singh Bhandari, Advocate, (Tel: 9810170087) as the arbitrator to arbitrate on the disputes between the parties.
8. The fees of the learned Arbitrator shall be decided by the Arbitrator in consultation with the parties.
9. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.
10. All questions of fact and law preliminary as well as on merits shall be left open to be agitated in the arbitral proceedings.

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20:36

Page 3 of 4



2024:DHC:7314



11. The petition stands allowed in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 19, 2024/aky

Click here to check corrigendum, if any

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