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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 23rd August, 2023
Pronounced on: 04th September, 2023**

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ARB.P. 969/2022**TATA CAPITAL FINANCIAL SERVICES LTD** Petitioner
Through: Mr.Dhruv Dewan, Mr.Arvind
Thapliyal and Mr.Siddhant
Grover, Advocates.

versus

MS SHREE INTERNATIONAL & ORS. Respondents
Through: Mr.Pranav Proothi, Ms.Manasi
Chatpalliwar, Mr.Angad Deep
Singh and Mr.Aditya Singh,
Advocates.**CORAM:****HON'BLE MR. JUSTICE YOGESH KHANNA****YOGESH KHANNA, J.**

1. This petition is filed by the petitioner under Section 11(5) of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole Arbitrator in terms of the Clause 12 viz. arbitration clause of the loan cum guarantee agreement dated 10.08.2020, executed between the petitioner and respondent no. 1, through its partners i.e., respondent nos. 2 and 3.

2. The petitioner is a non-banking finance company, incorporated under the provisions of the Companies Act, 1956. The respondent no.1 is a partnership firm, respondent no. 2 and 3 are the current partners of respondent no. 1. The respondent no. 1, through its partners, has availed various loan credit facilities from the Petitioner from time to time, for making payments to its sellers for the goods purchased during the course of its dealership business. Respondent no.1, continued taking such loan



facilities from petitioner for the years 2015, 2016, 2018, 2019 and 2020, by executing separate Channel Finance Agreements each time by representing to the petitioner of its financially sound position to honor its liabilities arising out of the aforesaid loan facilities.

3. The respondent no. 1, through respondent no. 2 and one Mr.Laxmikant Chaudhary (now deceased) (partner at that time), in the year 2015, approached the petitioner seeking loan facility for an amount of Rs.2,00,00,000/-. Pursuant to their request, petitioner vide its sanction letter dated 24.08.2015, sanctioned the loan facility for the said amount as per the terms and conditions specified therein. Pursuant to the said sanctioning, the respondent no.2 and Late Mr. Laxmikant Chaudhary executed Channel Finance Agreement dated 24.08.2015, and certain other documents securing the repayment such as letter of guarantee, deed of hypothecation, irrevocable power of attorney etc. The respondent No. 2 and late Mr. Laxmikant Chaudhary, stood as personal guarantors for the loan facility no. 1, in their personal and individual capacity, guaranteeing its due re-payment.

4. In the year 2016, the respondent no. 2 and late Mr.Laxmikant Chaudhary, requested the petitioner to *renew* the loan facility for a sum of Rs.2,00,00,000/ - in favour of Respondent no. 1, pursuant to which, the petitioner, vide its sanction letter dated 21.11.2016 renewed the said loan facility. The respondent no.2 and late Mr.Laxmikant Chaudhary, again executed the Channel Finance Agreement dated 02.12.2016 and other relevant documents as a security towards repayment of the said loan amount. The respondent no.2 and late Mr.Laxmikant Chaudhary stood as guarantors, in their personal and individual capacity,



guaranteeing its due re-payment.

5. In the year 2018, the respondent no. 2 and late Mr.Laxmikant Chaudhary, requested the petitioner to **renew** the loan facility for a sum of Rs.2,00,00,000/- in favour of respondent no. 1, pursuant to which, the petitioner vide its sanction letter dated 22.03.2018 renewed the said loan facility. Pursuant to the said sanctioning, the respondent no.2 and late Mr.Laxmikant Chaudhary yet again executed Channel Finance Agreement dated 31.03.2018 and other relevant documents as a security towards repayment of the said loan amount. Respondent no.2 and late Mr.Laxmikant Chaudhary stood as guarantors, in their personal and individual capacity, guaranteeing its due re-payment.

6. In the year 2019, the respondent no. 2 and late Mr. Laxmikant Chaudhary, requested the petitioner for **renewal and modification** of the facility with a reduced sum of Rs.1,50,00,000/- in favour of respondent no.1, pursuant to which, the petitioner vide its sanction letter dated 30.05.2019, renewed and modified the said loan facility to Rs.1,50,00,000/- in favour of respondent no. 1. Pursuant to the said sanctioning, the respondent no.2 and Late Mr.Laxmikant Chaudhary yet again executed loan cum guarantee agreement dated 04.07.2019 and other relevant documents as a security towards repayment of the said loan amount respondent no. 2 and respondent no. 4 stood as guarantors, in their personal and individual capacity, guaranteeing its due re-payment. Mr.Laxmikant Chaudhary expired on 26.02.2020 and thereafter, Mrs.Shrishti Kanodia i.e., respondent no. 3 herein, was admitted as a new partner of respondent no.1 with effect from 27.02.2020.



7. In the year 2020, the respondent nos. 2 and 3, requested the petitioner for renewal of the loan facility for a sum of Rs.1,50,00,000/-in favour of respondent no.1, pursuant to which, the petitioner vide its sanction letter dated 21.07.2020, **renewed** the said loan facility of Rs.1,50,00,000/-in favour of respondent no. 1. Pursuant to the said sanctioning, the respondent nos.2 and 3, executed *loan cum guarantee agreement dated 10.08.2020* and other relevant documents as a security towards repayment of the said loan amount. Respondent nos. 2, 3 and 4 stood as guarantors, in their personal and individual capacity, guaranteeing its due re-payment. That the respondent no.1 committed defaults in repayment of the abovementioned loan facilities and as per the statement of account maintained by the petitioner, default is to the tune of Rs.1,61,47,416.00/-.

8. That despite several follow ups and reminders by the petitioner for repayment, the respondents continued defaulting the payment of loan facilities. Aggrieved by the aforesaid, the petitioner was constrained to issue notice dated 23.06.2022, for recall of loan and invocation of arbitration and seeking the repayment of the defaulted amount.

9. The clause 12 of the loan cum guarantee agreement dated 10.08.2020, categorically provides *in the event of any dispute, difference or claim arising between the parties to the agreement, in connection with the loan facility, the same shall be referred to a sole arbitrator, to be appointed by the petitioner*. It is pertinent to submit the appointment procedure agreed by the parties for appointment of the sole arbitrator has been rendered invalid due to judgment passed by the Supreme Court in the matter of *Perkins Eastman Architects DPC & Anr. versus HSCC*



(India) Ltd., (2020) 20 SCC 760, wherein it was held the person who has interest in the outcome of the decision of the dispute, must not have the power to appoint a sole Arbitrator. In view of the aforesaid judgment, the Petitioner is incapacitated to nominate/ appoint the arbitrator, as agreed between the parties in the loan cum guarantee agreement, therefore, the petitioner is constrained to file the present application as there is no means for securing the appointment of arbitrator except by way of the present petition, hence this petition.

10. The learned counsel for the respondent raised an objection that no proper notice under Section 21 of Arbitration and Conciliation Act was ever issued. He refer to the legal notice dated 23.06.2022 more specifically its para 10 as under:

*“10. In the event you fail to comply with the requirements of the present notice, it shall be presumed that you all have acquiesced to the invocation of the arbitration under the relevant clause of the Channel Finance Agreement, and the service or the present notice **may be treated as service u/s 21 of Arbitration and Conciliation Act, 1996** for the purposes of invocation of arbitration also.”*

11. It is submitted by the learned counsel for the respondent, the petitioner did not clarify as to which Channel Agreement is operative and the arbitration clause of which of four agreements he is relying upon in its notice and further this was only a notice seeking dues and not a notice for invocation of arbitration. It is submitted the said notice is bad in view of *Shriram Transport Finance Co. Ltd. vs. Shri Narender Singh* FAO(COMM) 179/2021 decided on 13.10.2022.

12. I have gone through the said judgment. The issue involved in the said judgment is not akin to the facts of the present case. In the cited judgment one of the parties had on its own appointed an arbitrator



without sending a notice under Section 21 of Arbitration and Conciliation Act and notice under Section 21 was never received by the respondent therein and hence it was said there was no compliance of Section 21 (supra) but whereas the facts of the case herein are different. The learned counsel for the respondent has fairly admitted the notice dated 23.06.2022 was duly received by the respondent. Further admittedly it was only the first Channel Agreement dated 24.08.2015 which was being **renewed** from time to time and lastly the Channel Agreement of dated 2020 only was in operation. It is admitted the earlier Channel Agreements got extinguished/replaced from time to time, hence argument of the learned counsel for petitioner is wholly misplaced, as it was only an agreement dated 10.08.2020 which was in force.

13. Even otherwise, in *State of Goa vs. Praveen Enterprises* (2012) 12 SCC 581, the Court held the purpose of Section 21 is to determine the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Further in *Badri Singh Vinimay Private Limited vs. MMTC Limited* 2020 SCC OnLine Delhi 106, it was held the respondent's communication dated 14.10.2012 meet the requirements of Section 21 of Arbitration and Conciliation Act. The letter dated 14.10.2012 was as under:

*“Under the facts and circumstances stated herein above, I by way of this notice to pay a sum of Rs. 88,08,932/- alongwith interest @ 18% p.a. w.e.f. 05.10.2011 till the date of payment/realization; to my client within a period of 15 days from the receipt of this notice, failing which my client shall be constrained to initiate appropriate legal action against you for recovery of the said amounts and interest thereon **including initiation of arbitration proceedings entirely at your risk, costs and consequences.** Copy of this notice is retained in my office for taking further action in the matter.”*



14. In view of the fact only the last Channel Agreement of the year 2020 was in operation and further since the notice under Section 21 (supra) admittedly is received by the respondent, there is no cogent ground to challenge the present petition.

15. Accordingly, Ms.Ina Malhotra, Former District Judge Mob.No.9910384651 is appointed as an arbitrator to adjudicate the disputes between the parties. The fee of the learned arbitrator shall be as per Schedule IV of the Arbitration and Conciliation Act.

16. The petition stands disposed of along with pending application(s).

YOGESH KHANNA, J.

SEPTEMBER 04, 2023

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