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Arb.O.P.(Comm.Div.) No.224 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2022

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

**Arb.O.P.(Comm.Div.) No.224 of 2022**

M/s.Concrete Products & Construction Company  
Rep. by its Joint Managing Partner,  
No.398, Poonamallee High Road,  
Kilpauk, Chennai – 600 010.

... Petitioner

VS.

1.Southern Railways,  
Rep. by its Principal Chief Engineer/  
General Manager,  
Headquarters Office,  
Park Town, Chennai-600 003.

2.Mr.Kota Krishnamurthy  
Appointed as Sole Arbitrator,  
Flat No.304, Shilpa Park View Apartments,  
8-2-428/A/2, Road,  
No.5, Banjara Hills,  
Hyderabad – 500 034.

... Respondents

**PRAYER:** Arbitration Original Petition filed under Section 11(6) and 14(2)  
of the Arbitration and Conciliation Act, 1996, praying to (i) pass order and



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directions terminating the appointment of the Sole Arbitrator, 2<sup>nd</sup> respondent by the first respondent vide letter No.G.16/DGM/ARB/2012/39 (E.117350) dated 07.03.2022 under Section 14(2) of the Arbitration and Conciliation Act,1996; (ii) Pass order and directions to appoint an Independent and Sole Arbitrator to adjudicate upon all disputes and differences between the petitioner and the first respondent arising out of Agreement bearing No.CE/2/CS of 2010 dated 20.02.2010.

For Petitioner : Mr.E.Manoharan

For Respondents : Mr.P.T.Ramkumar for R-1  
Standing counsel, Railways

### **ORDER**

This petition is presented as a composite petition under Section 11(6) and 14(2) of the Arbitration and Conciliation Act,1996(the Arbitration Act). Upon disputes arising between the parties under the Agreement dated 20.02.2010, an arbitral tribunal was constituted. The said tribunal pronounced an arbitral award dated 03.03.2014. Such award was challenged by filing O.P.No.185 of 2015. The said O.P. was allowed by



order dated 06.12.2021. While allowing the petition, the Court left it open to the petitioner to institute *de novo* arbitral proceedings in accordance with the relevant contract as regards refusal of interest as per the Micro, Small and Medium Enterprises Development Act, 2006(the MSMED Act), the grant of liquidated damages and forfeiture of security deposit.

2. Pursuant to the above order, the petitioner issued a communication dated 02.02.2022 and requested the first respondent to agree upon an arbitrator for the resolution of disputes pertaining to the three issues referred to above. By reply dated 07.03.2022, the first respondent appointed the second respondent as the sole arbitrator under Clause 2900 of the IRS Conditions of Contract. Such appointment is assailed and the petitioner seeks the appointment of an arbitrator by this Court.

3. Learned counsel for the petitioner submits that the appointment under communication of 07.03.2022 is not in accordance with the arbitration clause. By drawing reference to the amended Clause 2900, it is submitted that the said clause provides for a panel of arbitrators to be



appointed as per prescribed procedure. It is further submitted that an arbitral tribunal consisting of three arbitrators should be appointed if the cumulative value of the claim exceeds Rs.50 lakhs. The second submission is that the first respondent did not provide a panel within 60 days of the receipt of the communication dated 02.02.2022. Consequently, the first respondent has forfeited the right to appoint arbitrators. In support of this contention, learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court in *Deep Trading Company v. Indian Oil Corporation and Others* (2013) 4 SCC 35, particularly paragraph 22 thereof.

4. These contentions were refuted by learned counsel for the first respondent. The first submission is that this is the second round of dispute resolution and the first round was in accordance with unamended clause 2900. Therefore, the unamended Clause 2900 applies to the second round also. As per the unamended Clause 2900, a Gazetted Railway Officer should be appointed by the General Manager as the sole arbitrator. In view of the fact that a Gazetted Railway Officer is ineligible after the amendment



to Section 12(5) of the Arbitration Act, an ex-employee was appointed under communication dated 07.03.2022. By relying upon the orders of this Court in *M/s.Nellai Concrete Products & Construction Co. (P) Ltd. v. Union of India*, order dated 05.09.2014 in O.P.No.173 of 2014, and *Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited*, 2017 (6) CTC 301, particularly paragraphs 26 to 28 thereof, it is contended that there is no prohibition under Schedule VII of the Arbitration Act for the appointment of an ex-employee. It is further submitted that the request for appointment of an arbitrator was not addressed to the General Manager.

5. In response to these contentions, learned counsel for the petitioner submitted that the amended arbitration clause was submitted to this Court by the first respondent. If the amended arbitration clause is inapplicable and the original arbitration clause is applicable, learned counsel submits that the original arbitration clause contravenes Section 12(5) read with Schedule VII of the Arbitration Act. Learned counsel invites my attention to the judgment of the Hon'ble Supreme Court in *Perkins Eastman Architects DPC and another v. HSCC (India) Limited* (2020) 20 SCC 760, particularly



paragraph 20 thereof, and submits that the Hon'ble Supreme Court held categorically that the unilateral appointment of the arbitrator by an employee of one party is unlawful.

6. Upon taking note of the rival contentions, at the outset, unamended Clause 2900(a) of the IRS Conditions of Contract is set out below:

**"2900. Arbitration.**

*(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract(except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisations under the*



*Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract."*

The above clause provides for the reference of the dispute to sole arbitration by a Gazetted Railway Officer. If an appointment is made in terms of Clause 2900(a), it would clearly contravene Section 12(5) read with the VII Schedule thereof inasmuch as such person would be within the embargo prescribed in the first entry of Schedule VII. Therefore, the unamended Clause 2900 is no longer enforceable. Learned counsel for the first respondent submitted that arbitral proceedings commenced upon receipt of the Section 21 notice prior to the first round of arbitration. Even proceeding on the assumption that the said submission is correct, the amendment to Section 12(5) read with VII Schedule would apply to all appointments made



upon entry into force of Act 3 of 2016 on 23.10.2015. Since this appointment was made on 07.03.2022, the amendment, including the ineligibility prescribed in the VII Schedule, would apply.

7. On the other hand, if the amended Clause 2900 were to apply, such clause provides for the provision of a panel of three arbitrators if the cumulative value of claims exceeds Rs.50 lakhs. Learned counsel for the petitioner states that the cumulative value of the claims, once interest is included, would exceed Rs.50 lakhs. Therefore, the appointment is also not in accordance with the amended Clause 2900. The other objection that the notice dated 02.02.2022 was not addressed to the General Manager cannot be countenanced because the first respondent transmitted the communication to the General Manager, who made the appointment by communication dated 07.03.2022. Since the first respondent did not act in accordance with either the unamended Clause 2900 or the amended Clause 2900 until this petition was filed, the appointment would have to be made by this Court.

8. Therefore, Arb.O.P.(Comm.Div.) No.224 of 2022 is allowed by



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appointing Mr. Justice V.Parthiban, retired Judge of this Court, No.5069,  
12<sup>th</sup> Street, Z – Block, Anna Nagar, Chennai – 600 040(Mobile No.94440  
94401), as the sole arbitrator. The sole arbitrator is requested to enter upon  
reference and adjudicate the dispute. The fees and expenses in relation to  
the arbitral proceedings may be fixed by the arbitral tribunal in consultation  
with the parties.

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Index : Yes / No  
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**SENTHILKUMAR**

**RAMAMOORTHY,J.**

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