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Arb.O.P (Com.Div.) Nos.167 to 182 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.04.2022

CORAM  
**THE HON'BLE MR. JUSTICE M.SUNDAR**

**Arb.O.P (Com.Div.) Nos.167 to 182 of 2022**

Pennar Industries Ltd.,  
rep by its Authorised Signatory K.Lavanya Kumar  
3<sup>rd</sup> Floor (west wing),  
DHFLVC Silicon towers,  
Kondapur, Hyderabad.

Also at:  
Patta No.452/7,  
Periyapalayam Road,  
Kannigaipair Village,  
Thiruvallur District-601102.

... Petitioner in all Arb.OPs

**Vs.**

The Integral Coach Factory,  
Admin Building, Dr.Ambedkar Road,  
Chennai, Tamil Nadu 600 038  
Rep.by its General Manager.

... Respondent in all Arb.OPs

**Common prayer:** Arbitration Original Petition filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996 to appoint an independent sole arbitrator to adjudicate upon the disputes between the petitioner and the respondent.



For Petitioner in all Arb.OPs : Mr.Adithya Reddy

For Respondent in all Arb.OPs : Mr.P.T.Ramkumar  
Standing Counsel for Railways

### **COMMON ORDER**

This common order will govern and dispose of all the captioned 16 'Arbitration Original Petitions' ['Arb.OPs']

2. Captioned 16 Arb.OPs have been presented in this Court on 28.03.2022 under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] with a prayer for appointment of a sole Arbitrator.

3. When the captioned 16 Arb.OPs were first listed before this Court in the Admission Board (Motion List) on 11.04.2022, the following proceedings were made:

*'Mr.Adithya Reddy, learned counsel for petitioner in all the 16 captioned Arb.OP is before this Court.*

*2. Learned counsel submits that each of the captioned Arb.OP is predicated on a Purchase Order and an arbitration*



*clause which is construed as part of the Purchase Order. Learned counsel submitted that a common trigger notice dated 21.12.2021 was issued and there is no response from the respondent (ICF) regarding this trigger notice i.e., notice invoking the arbitration clause.*

*3. Learned counsel submits that increase in tax component by 7% is the central theme of the lis.*

*4. Learned counsel is permitted to serve Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railway (this Court is informed that learned Standing Counsel accepts notice for ICF also). Registry to show the name of Mr.P.T.Ramkumar, Standing Counsel from the next listing. List all the 16 captioned Arb.OPs on Monday in the Admission Board.*

*List on 18.04.2022.'*

4. Thereafter, there was one more listing on 18.04.2022 and on that day, the following proceedings were made:

*'Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 11.04.2022.*

*2. Mr.Adithya Reddy, learned counsel on record for petitioner in all the sixteen captioned Arb OPs is before this Court.*

*3. Adverting to the aforementioned earlier proceedings, Ms.G.Shankardevi, learned counsel representing*



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*Mr.P.T.Ramkumar, learned standing counsel for Southern Railways requests for a short accommodation to get instructions and revert to this Court.*

*4. Registry to show the name of learned standing counsel for Southern Railways in all these sixteen captioned Arb OPs in the next listing.*

*5. List in the Admission Board on Thursday. List on 21.04.2022'.*

5. In continuation of the aforementioned proceedings made in the earlier two listings, Mr.Adithya Reddy, learned counsel for petitioner in all 16 captioned Arb.OPs and Mr.P.T.Ramkumar (learned standing counsel for Southern Railways) on behalf of 'lone respondent' in the captioned 16 Arb.OPs ['The Integral Coach Factory' ('ICF' for the sake of brevity)] are before this Court.

6. There is no dispute about the existence of arbitration agreement between the petitioner and ICF in all / each of the 16 matters in hand. In other words, clause 2900 of 'Indian Railway Standard Conditions of Contract' ['IRSCC'] serves as arbitration agreement between the petitioner



and ICF in each of the 16 captioned Arb.OPs is the common say of both learned counsel. To be noted, this clause 2900 captioned 'Arbitration', reads as follows:

*'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 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.*

*(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason, it shall*



*be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*

*(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*

*(d) The arbitrator may from time-to-time with the consent of all the parties to the contract enlarge the time for making the award.*

*(e) Upon every and any such references, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.*

*(f) Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.*

*(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.*

*(h) In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.'*



7. Aforementioned clause 2900 in IRSCC serves as arbitration agreement between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act in each of the 16 matters on hand is further common say of both learned counsel. This Court is informed that reference to '**General Manager**' in aforementioned clause 2900 now stands amended as '**Retired General Manager**'. This submission is also recorded.

8. There is no dispute or disagreement that all the 16 arbitration agreements were invoked by the petitioner in and by notice dated 21.12.2021 (to be noted this arbitration agreement invocation notice was received by ICF on 27.12.2021). There is also no contestation or dispute that ICF has neither replied nor appointed an Arbitrator as per the arbitration agreements (aforementioned clause 2900 of IRSCC). This has necessitated the presentation of captioned 16 Arb.OPs on 28.03.2022 in this Court with a prayer for appointment of a sole Arbitrator as already alluded to supra.

9. Learned counsel for petitioner draws the attention of this Court to an order dated 17.02.2022 made in Arb.O.P.(Com.Div.)No.205 of 2021,



which reads as follows:

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*'Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of brevity] has been presented in this Court on 07.10.2021 under Section 11(6) of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] with a prayer for appointment of an Arbitrator.*

*2. Aforementioned prayer is predicated on an arbitration clause in an 'agreement dated 26.08.2016 bearing reference 09/Dy.CE/N/I/MDU/AIC/2016 between the petitioner and respondents' [hereinafter 'said contract' for the sake of convenience and clarity].*

*3. In the said contract, petitioner is the contractor and the respondents shall be collectively referred to as Southern Railway.*

*4. In the captioned matter, Ms.K.Aparna Devi, counsel on record for petitioner and Mr.P.T.Ramkumar, learned standing counsel for Southern Railway on behalf of both the respondents (Southern Railway) are before this Court.*

*5. There is no dispute or disagreement about the existence of the arbitration clause. To put it differently, there is no dispute or disagreement about the existence of an arbitration agreement between the contractor and Southern Railway i.e., an arbitration agreement within the meaning of 2(1)(b) read with Section 7 of A and C Act, which is in the form of a clause in said contract.*



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6. Short facts are, the contractor triggered the arbitration agreement by a notice dated 04.03.2021 which was received by Southern Railway on 09.03.2021. Under clause 64.(3) (a)(ii) of 'General Conditions of Contract' (hereinafter 'GCC' for the sake of convenience and clarity) which admittedly forms part of the said contract, Southern Railway should have sent a panel of three names of Gazetted Railway officers to the contractor within 60 days from the date of receipt of this trigger notice. In this case, as the trigger notice was received by Southern Railway on 09.03.2021, 60 days elapsed on 09.05.2021. Admittedly, Southern Railway did not send a panel of names in accordance with Clause 64.(3) (a)(ii) of GCC. Learned counsel for Southern Railway submits that respondents i.e., Southern Railway could not send the panel owing to pandemic and lock down and it is not deliberate. It may not be necessary to dilate much on the reasons as Southern Railway deemed to have waived its rights in the light of **Datar Switchgears Ltd., Vs. Tata Finance Ltd., and another** reported in (2000) 8 SCC 151, **Punj Lloyd Ltd., Vs. Petronet MHB Ltd.,** reported in (2006) 2 SCC 638 and **Union of India Vs. Bharat Battery Manufacturing Co (P) Ltd.,** reported in (2007) 7 SCC 684. Relevant paragraphs in these three case laws are as follows:

**'Para 19 in Datar Switchgears case:**

19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed



*under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.*

***Para 5 in Punj Lloyd case:***

*5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. [(2000) 8 SCC 151] (SCC p. 158, para 19) wherein this Court has held as under:*



*“[S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.’*

**Para 12 in Bharat Battery case:**

*12. A three-Judge Bench of this Court in Punj Lloyd Ltd. v. Petronet MHB Ltd. [(2006) 2 SCC 638] considered the applicability of Section 11(6) petition and considered the facts which are similar to the facts of the present case and held that once notice period of 30 days had lapsed, and the party had moved the Chief Justice under Section 11(6), the other party having right to appoint arbitrator under arbitral agreement loses the right to do so. While taking this view, the Court had referred to the judgment rendered in Datar Switchgears Ltd. v. Tata*



*Finance Ltd. [(2000) 8 SCC 151] wherein at SCC p. 158, para 19, this Court held as under:*

*“19. So far as cases falling under Section 11(6) are concerned—such as the one before us—no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”*

*(emphasis in original)*

*As already noticed, the respondent filed Section 11(6) petition on 30-3-2006 seeking appointment of an arbitrator. The appellant, thereafter, said to have appointed one Dr. Gita Rawat on 15-5-2006 as a sole arbitrator, purportedly in terms of Clause 24 of the agreement. Once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement*



*ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.'*

7. This takes this Court to the scope of a legal drill under Section 11 of A and C Act. The scope of a legal drill under Section 11 of A and C Act is within the legal landscape or legal perimeter ingrained in sub-section (6A) of Section 11 of A and C Act. This has ben highlighted by the Hon'ble Supreme Court in what has now come to stay as in **Mayavati** principle in litigation parlance, ratio of Hon'ble Supreme Court laid down in **Mayavati Trading Pvt. Ltd., Vs. Pradyuat Deb Burman** reported in (2019) 8 SCC 714] is contained in paragraph 10, which reads as follows:

'10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.'

**(underlining made by this Court to supply  
emphasis and highlight)**



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8. *In the light of the narrative thus far, this Court proceeds to appoint Mr.M.Sricharan Rangarajan, Advocate at New No.20A, Luz Avenue, 5<sup>th</sup> Street, Mylapore, Chennai-600 004 (Telephone No.2498 7863) as Sole Arbitrator to enter upon reference, adjudicate the arbitral disputes between the parties and make an award. Sole Arbitrator now appointed shall conduct arbitration in Madras High Court Arbitration Centre under the aegis of this Court [MHAC] in accordance with Madras High Court Arbitration Proceedings Rules, 2017 and Hon'ble Arbitrator's fee shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.*

9. *Captioned OP is disposed of in the aforesaid manner.'*

10. Learned counsel for petitioner submits that the captioned matters are directly and squarely covered by the principle in the aforementioned order in Arb.O.P.(Com.Div.)No.205 of 2021 [**Mr.S.Selvaraj Vs. Union of India and another**].

11. Learned counsel for ICF points out that clause 64 more particularly, clause 64.(3) (a)(ii) of 'General Conditions of Contract' (hereinafter 'GCC' for the sake of convenience and clarity) in aforementioned **Selvaraj**'s case



talks about Southern Railway giving a panel of Arbitrator within 60 days but no such time frame has been prescribed in the cases on hand. In the considered view of this Court, this hardly makes a difference when it comes to applying ratios in *Datar Switchgears Ltd., Vs. Tata Finance Ltd., and another* reported in (2000) 8 SCC 151, *Punj Lloyd Ltd., Vs. Petronet MHB Ltd.*, reported in (2006) 2 SCC 638 and *Union of India Vs. Bharat Battery Manufacturing Co (P) Ltd.*, reported in (2007) 7 SCC 684 which have been followed in the aforementioned *Selvaraj's* case in Arb.O.P.No.205 of 2021 (order dated 17.02.2022, extracted and reproduced supra). To be noted, the ratio in simple terms is that a party which does not respond qua arbitration agreement mechanism is deemed to have waived its right and in the cases on hand ICF has admittedly not responded until this day.

12. This makes the task of disposal of captioned 16 Arb.OPs fairly simple.

13. A Section 11 legal drill has to perambulate within the statutory perimeter sketched by sub-section (6A) thereat. This is *Mayavati Trading*



case law [*Mayavati Trading Private Limited Vs. Pradyuat Deb Burman*

reported in (2019) 8 SCC 714] has also been alluded to in the  
aforementioned *Selvaraj's* case. To be noted, paragraph No.10 of  
*Mayavati Trading* case law has also been extracted and reproduced in the  
earlier order and this paragraph No.10 of *Mayavati Trading* case law refers  
to *Duro Felguera, S.A* [*Duro Felguera, S.A. Vs. Gangavaram Port  
Limited* reported in (2017) 9 SCC 729], relevant Paragraphs in *Duro  
Felguera* case law are paragraphs 47, 59 and the same read as follows:

*'47. What is the effects of the change introduced by the  
Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter  
referred to as 'the 2015 Amendment' ) with particular reference to  
Section 11(6) and the newly added Section 11(6-A) of the  
Arbitration and Conciliation Act, 1996, (hereinafter referred to as  
"the 1996 Act") is the crucial question arising for consideration  
in this case.'*

*'59. The scope of the power under Section 11 (6) of the  
1996 Act was considerably wide in view of the decisions in SBP  
and Co. (supra) and Boghara Polyfab (supra). This position  
continued till the amendment brought about in 2015. After the  
amendment, all that the Courts need to see is whether an  
arbitration agreement exists - nothing more, nothing less. The  
legislative policy and purpose is essentially to minimize the*



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*Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in [Section 11](#) (6A) ought to be respected. '*

14. The narrative thus far will make it clear that there is no disputation or contestation regarding existence of arbitration agreement, eruption of arbitrable disputes which need to be adjudicated upon and therefore the need for appointment of a sole Arbitrator in each of the captioned Arb.OPs is an inevitable statutory sequitur qua Section 11 of A and C Act.



15. On this Court taking the aforementioned view, both learned counsel submitted that owing to the view taken by this Court it would be desirable to appoint a sole Arbitrator. This request is acceded to. Hon'ble Mr.Justice K.Ravichandrababu (Retd.), a former Judge of Madras High Court, residing at 1D, Crescent Castle, 13/6 II Crescent Park Road, Gandhi Nagar, Adyar, Chennai-600 020 (Mobile: 94980 33336, 94440 11433) is appointed as sole Arbitrator in each of the captioned 16 Arb.OPs. Hon'ble sole Arbitrator is requested to enter upon reference qua arbitrable disputes between the petitioner and ICF that have erupted qua 16 separate purchase orders, details of which have been set out infra, adjudicate upon the same and make awards. It is made clear that this common order means that 16 separate 'Arbitral Tribunals' ['ATs' in plural and 'AT' in singular for the sake of convenience] have been constituted and it is only a case where the Hon'ble Arbitrator is the same person in all 16 matters. This is permissible. To be noted as regards choice of Hon'ble Arbitrator, there is consensus and consent as between the petitioner and ICF.

| S.No. | Purchase orders   | PO Date    |
|-------|-------------------|------------|
| 1     | 02/17/2294/2715/S | 18.11.2017 |
| 2     | 02/17/3640/1446/S | 01.03.2018 |



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| S.No. | Purchase orders   | PO Date    |
|-------|-------------------|------------|
| 3     | 02190015100103    | 25.05.2019 |
| 4     | 02191912100811    | 22.07.2019 |
| 5     | 03191502102242    | 08.11.2019 |
| 6     | 02/17/2225/2476/S | 24.10.2017 |
| 7     | 02/18/0042/1945/S | 23.05.2018 |
| 8     | 02/18/2123/2973/S | 07.12.2018 |
| 9     | 02/18/2369/2482/S | 08.09.2018 |
| 10    | 02/18/2568/1092/S | 30.01.2019 |
| 11    | 02/18/3624/1148/S | 09.02.2019 |
| 12    | 02/18/3930/1225/S | 01.03.2019 |
| 13    | 02/17/2382/1247/S | 01.02.2018 |
| 14    | 02/17/2432/2787/S | 01.12.2017 |
| 15    | 02/17/3342/1177/S | 23.01.2018 |
| 16    | 02/17/4004/1607/S | 26.03.2018 |

16. This common order has been made only in Section 11 proceedings for the sake of convenience and clarity. Therefore 16 ATs will enter upon reference and adjudicate upon arbitrable disputes arising out of each of the purchase orders in each of the captioned Arb.OPs. The arbitration proceedings shall be held by holding sittings in the 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) and in accordance with the Madras High Court Arbitration Proceedings Rules 2017. Fee of the Hon'ble Arbitrator shall be in



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accordance with the Madras High Court Arbitration Centre (MHCAC)

(Administrative Cost and Arbitrator's Fees) Rules 2017.

17. All captioned 16 Arb.OPs are disposed of in the aforesaid manner.

There shall be no order as to costs.

**21.04.2022**

Speaking/Non-speaking order

Index : Yes / No

gpa/nsa

**Note: The Registry is directed to communicate this order forthwith to**

1.Hon'ble Mr.Justice K.Ravichandrabaabu (Retd.),  
1D, Crescent Castle,  
13/6 II Cresnet Park Road, Gandhi Nagar,  
Adyar, Chennai-600 020  
(Mobile: 94980 33336, 94440 11433)

2.The Director  
Tamil Nadu Mediation and conciliation Centre  
-cum-  
Ex Officio Member,  
Madras High Court Arbitration Centre  
Madras High Court, Chennai – 600 104.



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**M.SUNDAR.J.,**

gpa/nsa

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