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Arb.O.P.(Comm.Div.) No.568 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2022

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Comm.Div.) No.568 of 2022
and A.No.4660 of 2022

M/s.RPN Engineers Chennai Private Limited,
Represented by its Authorized Signatory:
Mr.P.K.Luqmmman Basha
M - 60, 9th Street, Anna Nagar East,
Chennai - 600 102.

... Petitioner

VS.

1.The Union of India,
Rept. By General Manager
Integral Coach Factory,
Dr.Ambedkar Road, Konnur,
Chennai, Tamil Nadu - 600 038.

2.The Deputy Chief Engineer,
Integral Coach Factory,
Chennai - 600 038.

3.R.Kuppan,
IRSME, Rtd. PCME/SR,
Presiding Arbitrator
No.7 (old No.4), 3rd Cross Street,
Trustpuram, Kodambakkam,
Chennai - 600 024.



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4.Shri.T.Venkatasubramanian,
IRSME, Rtd. PCME/SR,
Co-Arbitrator,
D4B Regal Palm Garden,
Velachery, Chennai - 600 042.

5.Shri.V.Murali Mohan,
IRAS, Retd FA & CAO/ICF,
Co-Arbitrator,
Pryam, G 1, 740A, 7th Main Road,
Ramnagar South, Madipakkam,
Chennai - 600 091.

... Respondents

PRAYER: Arbitration Original Petition filed under Section 14(2) Read with 11(6) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2019, pleased to terminate the mandate of the respondents 3 to 5, the Arbitral Tribunal and appoint an independent Arbitrator to arbitrate all the disputes and claims of the Petitioner to be submitted arising out of the Agreement No: ICF/1767 dated 15.02.2016.

For Petitioner : Ms.K.Aparna Devi

For Respondents : Ms.S.P.Arthi for R1 and R2



ORDER

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The claimant before the arbitral tribunal is the petitioner herein. By this petition, the petitioner seeks the termination of the mandate of respondents 3 to 5 and for the constitution of an arbitral tribunal by this Court. The petition is presented under Section 14(2) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. The dispute relates to a contract awarded by the respondents to the petitioner. Clause 64(3)(b) and clause 64(3)(c)(i) deal with dispute resolution. Since these two clauses are material to the adjudication of this petition, they are set out below:

*"64(3)(b): Appointment of Arbitrator
where applicability of Section 12(5) of A & C Act
has not been waived off:*

*The Arbitral Tribunal shall consist of a
panel of three (3) retired Railway Officer, retired
not below the rank of SAG Officer, as the
arbitrators. For this purpose, the Railway will
send a panel of at least four (4) names of retired*



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Railway Officers (s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.



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64(3)(c)(i): If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager falls to act without undue delay, the General Manager shall appoint new arbitrator / arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)."

3. Learned counsel for the petitioner submits that an arbitral tribunal was constituted in accordance with the above clause. The proceedings before the said tribunal which comprised Shri.Anilkumar Agarwal, presiding arbitrator, Shri.Rajendra Prasad and Shri.V.Murali Mohan, arbitrators, were at an advanced stage. Indeed, learned counsel states that written submissions had been submitted by both parties and the arbitral



tribunal was in a position to pronounce the award. At that juncture, Shri.Anilkumar Agarwal, the presiding arbitrator, tendered his resignation.

4. Upon the presiding arbitrator tendering his resignation, instead of substituting only the presiding arbitrator in accordance with clause 64(3)(c)(i), the respondents proceeded to constitute an arbitral tribunal consisting of Shri.R.Kuppan, presiding arbitrator, Shri.T.Venkatasubramanian and Shri.V.Murali Mohan. Learned counsel contends that the constitution of the arbitral tribunal by the respondents 1 and 2 under communication dated 06.10.2022 is contrary to law and contract.

5. In spite of notice being served on respondents 3 to 5, the said respondents are not represented in person or through counsel. Learned counsel for the first and second respondents submits that the General Manager of the respondents is entitled to substitute the arbitrator who resigned in terms of clause 64(3)(c)(i). Therefore, it is submitted that this



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Court should reject the petition under Section 11 even if the mandate of the current tribunal is terminated.

6. Section 14 of the Arbitration Act enables the Court to terminate the mandate of an arbitrator on arbitrators if such person(s) becomes *dejure* or *de facto* unable to perform functions. In this case, the admitted position is that the substitution of Shri.Rajendra Prasad with Shri.T.Venkatasubramanian was not in accordance with clause 64(3)(c)(i). Put differently, while the first and second respondents, acting through the General Manager, were empowered by contract to substitute Shri.Anilkumar Agarwal, the substitution of Shri.Rajendra Prasad clearly violated the terms of clause 64(3)(c)(i). Consequently, the present tribunal does not have authority under contract or law to adjudicate the dispute. Hence, the petitioner is entitled to succeed as regards the Section 14 prayer for termination of mandate.

7. Turning to the request for constitution of an arbitral tribunal,



learned counsel for the petitioner submits that the contract envisages substitution of only the arbitrator who withdraws or vacates from office by the General Manager. Since the appointing authority acted in controvention of the contractual stipulation, it is contended that the case falls within the scope of Section 11(6) of the Arbitration Act. As indicated earlier, this contention is countered by the learned counsel for the first and second respondents by stating that opportunity could be provided to the General Manager to re-constitute the tribunal as per the contract. The General Manager had the opportunity to make the substitution in accordance with the contract but clearly exceeded the scope of authority. In such circumstances, the present petition was filed. After the filing of the petition, such powers cannot be exercised by the General Manager. Therefore, the arbitral tribunal should be constituted by this Court. By taking into account the fact that the relevant contractual clause envisages a three member tribunal, a three member tribunal should be formed.

8. Accordingly, Arb.O.P.(Comm.Div.) No.568 of 2022 is allowed by appointing Mr.Justice K.Kannan, retired Judge of the Punjab and Haryana



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High Court, 3/11, Lakshmi Colony, North Crescent Road, T.Nagar, Chennai

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-17, as the presiding arbitrator and Ms.Chitra Narayan, Advocate, Mobile No.9094031934, and Mr.Anirudh Krishnan, Advocate, Mobile No.7299088824 as the member arbitrators. The arbitral tribunal is called upon to enter upon reference and adjudicate the dispute. The fees and expenses of the arbitral tribunal shall be fixed in consultation with the parties. Consequently, the A.No.4660 of 2022 is closed.

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Internet : Yes / No



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