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Arb.O.P (Com.Div.) No.57 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2024

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THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.57 of 2024

Malu Sleepers Ltd.,
(Formerly Malu Sleepers Private Limited),
Rep by its Managing Director,
No.8, 1st Main, Gandhi Nagar, Bangalore 560 009.

... Petitioner

Vs.

1.The General Manager,
Southern Railway, Park Town, Chennai 3

2.The Chief Engineer,
Southern Railway, Park Town, Chennai 3

... Respondents

Prayer:

Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an independent Arbitrator to arbitrate all the claims and disputes arising out of the Contract bearing the Agreement No.CS/1/CE/1994 dated 09.02.1994 and the Rider Agreement No.CS/Rider-1/CE of 2000 dated 05.07.2000 between the petitioner and the respondents and also to direct the respondents to pay the cost of this petition.



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Arb.O.P (Com.Div.) No.57 of 2024

For Petitioner : Mr.Amalraj S.Penikilapatti

For Respondent : Ms.S.P.Aarthi, Senior Panel Counsel

ORDER

This Arbitration Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) to appoint a Sole Arbitrator to adjudicate the dispute between the petitioner and the respondents.

2. The present case has a chequered history and the brief facts of the case are as follows:

2.1 Both the learned counsel appearing for the petitioner and the respondents would submit that there is no dispute with regard to the fact that the present dispute is arising out of the Agreement dated 09.02.1994 and the same shall be arbitrable in terms of the provisions contained in the said Agreement.



2.2 As per the terms of provisions Clause 2900 of the Agreement, the

learned Arbitrator can be appointed by the 1st respondent in the rank of
Gazetted Officer. The said clause 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 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.***



(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.

2.3 By referring the above clause, initially, the learned Arbitrator was appointed by the 1st respondent and the award was passed on 29.06.2004. However, both the parties challenged the said award vide O.P.Nos.14 and 525 of 2005, wherein the award was set aside by this Court vide order dated 13.08.2008.

2.4 Thereafter, the 2nd Arbitral Tribunal was constituted and the award was passed on 21.05.2014. However, the said award was also set aside by this Court vide order dated 25.10.2021 in O.P.No.421 of 2014. While setting aside the said award, this Court directed the respondents to nominate the Arbitrator. However, since the respondents were in process of appointing their own officer, the petitioner had preferred an appeal in



O.S.A.(CAD)No.11 of 2022 challenging the order passed by the Hon'ble Single Judge dated 25.10.2021.

2.5 In the said appeal filed by the petitioner, the Hon'ble Division Bench of this Court had passed an order dated 27.11.2023, wherein a particular portion of the order dated 25.10.2021, with regard to the direction issued to the respondents to nominate the Arbitrator, was set aside by the Hon'ble Division Bench. The relevant portion of the said order dated 27.11.2023 reads as follows:

“4. The learned counsel for the appellant submitted that the the order of the learned Single Judge directing the respondent to unilaterally nominate a fresh sole Arbitrator will only lead to a compromise of the cardinal principles of natural justice i.e. impartiality and neutrality. If the respondent appoints an Arbitrator, he will only be biased in favour of the respondent and against the appellant. Therefore, the learned Single Judge while setting aside the order ought not to have granted direction to the respondent for appointment of a fresh Arbitrator. Hence, said portion of the order is liable to be set aside.



5. *The learned counsel appearing for the respondent submitted that the as per the direction of this Court, a second arbitrator has been appointed. However, the learned counsel for the respondent fairly stated before this Court that they are now ready to appoint a new arbitrator in accordance with law.*

6. *The above submission is not controverted by the leaned counsel for the appellant.*

7. *In view of the above submissions, we are inclined to set aside the direction issued by the learned Single Judge directing the respondent to nominate a fresh Arbitrator. Accordingly, the said portion of the impugned order in this appeal is set aside. However, liberty is given to the parties to invoke arbitration clause in the agreement and seek appropriate remedy for appointment of a new Arbitrator.”*

2.6 Thereafter, no appeal was filed by the respondents against the above order passed by the Hon'ble Division Bench of this Court. Therefore, by citing the above order, the learned counsel for the petitioner would submit that no serving officer can be appointed as Arbitrator as contained in the Agreement. Hence, this petition has been filed for appointment of a neutral Arbitrator.



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3. The learned counsel for the respondents has also accepted for the appointment of Arbitrator to adjudicate the dispute between the parties and requested this Court to appoint an independent and impartial Arbitrator.

4. Heard the learned counsel for the petitioner and the respondents and also perused the materials available on record.

5. In the present case, it appears that the dispute between the parties is arising out of an Agreement dated 09.02.1994. Upon perusal of the said Agreement, it is clear that the dispute among the parties shall be resolved by virtue of Arbitration as per the Clause 2900 of Agreement (extracted supra).

6. From the reading of the said Clause, it appears that it was agreed by both the parties that the dispute, arising out of the Agreement, shall be referred to the Arbitration of a Gazetted Railway Officer to be appointed by the General Manager in the case of contracts entered into by the Zonal



Railways and Production Units, which is contrary to the Schedule V(1) of the Act.

7. When a similar request was made for the appointment of Serving Officers in Arb.O.P.(Com.Div.)No.573 of 2023, this Court rejected the same vide order dated 18.04.2024 and the relevant portion of the said order reads as follows:

“10. There is no dispute on the aspect that when the parties have agreed something, the same should not be beyond the scope of the provisions of the Act and the law laid down by the Hon'ble Apex Court. However, in the present case, the agreement of the parties are contrary to the provisions of the Schedule V(1) of the Act, wherein it has been stated as follows:

“The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”

11. A reading of the above provision would make it clear that appointment of any person referred in the Schedule



V(1) of the Act, would be construed as ground for raising the justifiable doubt with regard to the independence and impartiality of the Arbitrator.

12. In the present case, the persons named for the panel of Arbitrators in the above Clause 64 are their past employees, who were in the higher positions and they were fully into the business relationship with the Respondents while performing their duty on behalf of the Company. The term “business relationship” refers to working and supporting for the business of the respective company, in which case, the persons nominated at Clause 64(3)(b)(ii) would be considered to have a past business relationship with the parties and appointing the said persons as Arbitrator would be a ground to raise the justifiable doubts as to the independence and impartiality of the Arbitrator. In such case, those persons cannot be appointed since they are interested persons in terms of provisions of the Act and hence they are ineligible to be appointed as Arbitrator. Accordingly, the terms of the agreement entered between by the parties is contrary to the provisions of Schedule V(i) of the Act.

*13. Further, such appointment is also against the law laid down by the Hon'ble Apex Court in **Perkins case***



(referred supra). When such being the case, considering the submissions made by the learned counsel for the petitioner and in view of the fact that the dispute between the petitioner and the Respondents squarely falls within the purview of the Clause 64 of the Contract dated 18.04.2023, this Court is inclined to appoint an Arbitrator.”

8. Therefore, in view of the law laid down by the Hon'ble Apex Court in ***Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.***” reported in ***2019 SCC OnLine SC 1517*** and by following the above order passed by this Court and also considering the fact that the dispute between the parties can be resolved by virtue of Arbitration in terms of Clause 2900 of the Agreement, this Court is inclined to appoint a neutral Arbitrator to adjudicate the disputes between the parties.

9. Accordingly, this Court feels it appropriate to pass the following order:

i) The Hon'ble Mr.Justice Sanjay V.Gangapurwala, Former Chief Justice, Madras High Court, residing at Durga Mata Mandira Samor, House No.2-2-278, Govardhanagiri, Kharakuwa, Aurangabad – 431 001,



Phone No.95451 11995, is appointed as sole arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, in accordance with the provisions of the Act. The learned Arbitrator is also directed to decide the matter without influenced by any of the observations made by this Court in the present order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, as per Schedule IV of the Act and the same shall be borne by the parties equally. In the event of non-appearance of the respondents, the petitioner shall bear the entire remuneration and other expenses and thereafter, the petitioner can recover the same directly from the respondents and vice versa.

10. This Arbitration Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, it is open to the petitioner as well as the respondent to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996



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before the Arbitrator.

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Speaking/Non-speaking order

Index : Yes / No

Neutral Citation: Yes / No

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Note: Issue order copy on 12.07.2024



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KRISHNAN RAMASAMY.J.,
nsa

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