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Arb.OP(Com.Div)No.92 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Arb.OP(Com.Div)No.92 of 2024

and

O.A.Nos.156 & 157 of 2024

and

Arb.Appln.No.116 of 2024

KHFM Hospitality & Facility Management Services Ltd.,
CIN: L74930MH2006PIC159290,

Represented by its Company Secretary
cum Chief Finance Officer,

Mr.Rahul Krishna Pathak,
Having their registered office at:
No.01, "Nirma Plaza",
Makhwana Road, Marol Naka,
Andheri-East, Mumbai,
Maharashtra 400 059.

...Petitioner

Vs

1. The Union of India,
Represented by its General Manager,
The Southern Railways,
Office of the General Manager-Southern Railways,
The Southern Railways Headquarters,
Poonnamalle High Road,
NGO Annexe, Park Town,
Chennai 600 003.
2. The Divisional Railways Manager-Southern Railways,
The Southern Railways-Salem Division,



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Salem Railway Junction,
Suramamangalam Post,
Salem District, Tamil Nadu 636 005.

3. The Senior Divisional Mechanical Engineer,
The Southern Railways-Salem Division,
Salem Railway Junction,
Suramamangalam Post,
Salem District, Tamil Nadu 636 005.
4. The Divisional Environment and Housekeeping Manager,
The Southern Railways-Salem Division,
Salem Railway Junction,
Suramamangalam Post,
Salem District, Tamil Nadu 636 005.
5. The Chief Medical Superintendent-Southern Railways,
The Southern Railways-Salem Division,
Salem Railway Junction,
Suramamangalam Post,
Salem District, Tamil Nadu 636 005.
6. The Station Director,
Coimbatore Railway Junction,
State Bank Road,
Gopalapuram, Coimbatore 641 001.

....Respondents

Prayer:- This Arbitration Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint arbitrator to adjudicate the disputes between the petitioners and the respondent herein in connection with the Arbitration Agreement dated 26.02.2021.

For Petitioner : Mr.N.Ram Kumar

For Respondents : Dr.P.G.Santhosh Kumar



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ORDER

This Arbitration Original Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking to appoint an arbitrator to adjudicate the disputes between the petitioner and the respondents herein in connection with the Arbitration Agreement dated 26.02.2021.

2. The case of the petitioner is that, the petitioner is an Micro, Small and Medium Enterprise company, registered under the name and style of “KHFM Hospitality & Facility Management Services Ltd.” The petitioner-company is an integrated service provider engaged in the business of providing cleaning, pest control, gardening, housekeeping and other related facility management services to various spectrum of operations. It is stated that the respondent/Southern Railway had issued an E-Tender notice No.CMS-SA-1902 and Tender Notice No.SA-MD-52-CCC-SBD-CBE-2019 dated 19.10.2019 (hereinafter referred to as “Tender”), inviting bids for providing Comprehensive Cleaning Contract under SBD from the date of commencement of the work at Coimbatore Railway Station (hereinafter referred to as “Contract Work”), which falls



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under the Southern Railways-Salem Division. It is submitted that the estimated value of the work was a sum of Rs.15,06,66,206.46/- and the period of contract is four years. Pursuant to the Tender Notification, the offer presented by the petitioner was accepted by the respondent/Southern Railways by virtue of the letter of acceptance dated 04.06.2020. Thereafter, the agreement was entered between the petitioner and the respondent/Southern Railway, Salem on 26.02.2021.

3. The learned counsel for the petitioner submitted that, after the execution of the aforesaid agreement dated 26.02.2021, taking into the consideration the Covid-19 pandemic situation, the respondent/Railway Board has reduced the contract value from Rs.15,06,66,206.46/- to Rs.13,23,30,612.51/- inclusive of 18% GST and the contract period starts from 01.11.2020 to 30.11.2024. Further, he submitted that, in the meantime, the petitioner-company has raised bills on monthly basis, but, all of a sudden, vide letter dated 19.10.2020, the respondent/Railway Board has reduced the total cost that is payable to the petitioner-company towards the tender as Rs.7,90,631.48 per month against Rs.31,38,632.65 per month with the man power of 22 labourers by citing the reason of Covid-19



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pandemic situation and it is also contrary to the letter of acceptance and the tender conditions.

4. The main grievance of the petitioner is that the present dispute has arisen out of the agreement dated 26.02.2021 and the same can be resolved by referring it to the Arbitrator in terms of Clauses 7.3 and 7.4 of the said agreement. Though, the petitioner sent a notice dated 19.12.2023, to foreclose the contract with immediate effect and release their dues pertaining to the contract and to resolve the dispute by invoking Clause 7.0 of the agreement dated 26.02.2021, however, the respondent/Railway Board sent a reply only for re-conciliation. But they have not come forward to resolve the dispute between them. Therefore, without having any other option, the petitioner has filed the present O.P., before this Court, seeking appointment of Arbitrator to adjudicate the dispute arisen out of the agreement dated 26.02.2021.

5. Per contra, the learned counsel for the respondent submitted that the respondent/Railway Board made reduction of cost of cleanliness only with the consent of the petitioner-company. However, the petitioner-



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company has denied the same. Further, he vehemently opposed by citing Clauses 7.3 and 7.4 of the Agreement, where it has been categorically stated that it is open for the Arbitral Tribunal to decide the issue as regards continuation of work during arbitration proceedings and since applicability of Section 12(5) has been waived off, if at all the dispute is required to be referred to the Arbitrator, the respondent will appoint the Arbitrator as per Clause 7.4.3 of the Agreement. However, the petitioner proposed to nominate the Arbitrator contrary to the terms and conditions of the contract and now the present petition is filed, which is not maintainable. Hence, he prayed for dismissal of the arbitration original petition.

6. Heard the learned counsel for both parties and perused the entire materials available on record.

7. The learned counsel for the petitioner would submit that Clause 7.4 of the agreement dated 26.02.2021, no doubt talks about the appointment of the arbitrator by the respondent, but as could be seen from Clause 7.4.3.1(c) which refers the 'qualification of Arbitrator', viz., a serving Gazetted Railway Officer not below JA Grade or a retired Railway



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Officer not below SA Grade level, three years after his date of retirement, which is totally contrary to Section 12(5) of the Act read with Schedule VII. According to the learned counsel for the petitioner, Section 12 (5) of the Act stipulates that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Schedule VII shall be ineligible to be appointed as an arbitrator. Referring to Clause (1) and (5) of the Schedule VII of the Act, he would submit that if the Arbitrator is an employee or consultant has any other past or present business relationship with a party or if the Arbitrator is a Manager, Director or part of the management directly involved in the matters in dispute in the arbitration, are ineligible to be appointed as Arbitrators.

8. Therefore, the learned counsel for the petitioner submitted that contrary to the above provision, the respondent cannot nominate the Arbitrator either a serving Gazetted Railway Officer or a retired Railway Officer since the said persons being personnel of the respondent/Southern Railways, have direct relationship with the respondent and consequently, such appointment of the Arbitrator would render as 'unilateral appointment'



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as the petitioner would certainly not give consent for such appointment and thereby, the Clause 7.4.3.1 (c) of the Agreement which prescribes the qualification of the Arbitrator to be nominated, is null and void.

9. In reply, the learned counsel for the respondent submitted that except the agreement, no other consent in writing was expressed by the petitioner for the purpose of nominating the arbitrator as agreed between the parties by virtue of the agreement dated 26.02.2021 and moved the present application in contrary to the terms of the agreement.

10. Now the point that arises for consideration is whether the persons mentioned in Clause 7.4.3.1(c) of the Agreement, are eligible to be appointed as Arbitrator and whether such appointment in the absence of consent by the petitioner, can be termed as 'unilateral appointment' which is against the provisions of Section 12(5) read with Schedule VII of the Act?

11. Admittedly, the present dispute has arisen out of the agreement dated 26.02.2021 and the same can be arbitrable in terms of Clause 7.3 and 7.4 of the aforesaid agreement. The said aspect is not in dispute by any of



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the parties. The parties have agreed to nominate the Arbitrator to be appointed by the respondent/Railway. The qualification of Arbitrator is clearly mentioned in Clause 7.4.3.1 (c) of the Agreement dated 26.02.2021, which reads as follows:

“Qualification of Arbitrator(s) (a) Serving Gazetted Railway Officers of not below JA Grade level. (b) Retired Railway Officers not below SA Grade level, three years after his date of retirement (c) Age of arbitrator at the time of appointment shall be below 70 years. (i) An arbitrator may be appointed notwithstanding the total number of arbitration cases in which he has been appointed in the past.

(ii) While appointing arbitrator(s) under Sub-Clause 8.4.1 (a), 8.4.1 (b) and 8.4.2 above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.”



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12. On perusal of the above, it shows that a serving Gazetted Railway Officer or a retired Railway Officer can be nominated as an Arbitrator by the respondent/Railway Board.

13. Clause (1) and (5) of the Schedule VII of the Act, which reads as under:

“Arbitrator’s relationship with the parties or counsel:

(1) If the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party;

(5) if the Arbitrator is a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration, shall be ineligible to be appointed as Arbitrator.”

14. A perusal of the above, it shows that any person can be appointed as the Arbitrator, subject to that he shall not be either the employee, consultant, advisor or has any other past or present business relationship with party or a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

Therefore, if any of the above mentioned persons is appointed as



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Arbitrator, he is ineligible to act as an arbitrator in terms of Section 12(5) and Schedule VII of the Act.

15. According to the learned counsel for the petitioner, Clause 7.4 of the agreement dated 26.02.2021 even though permits the respondent to appoint an Arbitrator, but it is contrary to the provisions of the Act since Clause 7.4.3.1 (c) provides appointment of Arbitrator from among the persons who are none other than the staff of the respondent, having direct relationship with the respondent, viz., a serving Gazetted Railway Officer not below JA Grade or a retired Railway Officer not below SA Grade level, three years after his date of retirement. As rightly contended by the learned counsel for the petitioner, in terms of Schedule VII of the Act, if the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party or if the Arbitrator is a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration, shall be ineligible to be appointed as Arbitrator and such appointment would render as unilateral appointment.



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Therefore, the persons mentioned in Clause 7.4.3.1(c) are ineligible to be appointed as Arbitrators.

16. Law as regards unilateral appointment of Arbitrator has been very settled. In order to provide for “neutrality of arbitrators” and rule against bias, sub-section (5) of Section 12 (as inserted by 2015 Amendment) provided that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In the case of **“TRF Ltd. v. Energo Engineering Projects Ltd.**, reported in **(2017) 8 SCC 377**, the Hon'ble Supreme Court dealt with the question of as to whether an individual who has become ineligible by law under Section 12(5) of the Act to be the arbitrator be able to appoint another individual in his place. The Court held that once a person becomes ineligible by law to be the arbitrator he/she cannot nominate another person to be the arbitrator and observed in para 57 as under:

“57. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be



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otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

17. In its landmark judgment in “***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd***” reported in ***2019 SCC Online SC 1517***, the Hon'ble Supreme Court has settled the position of unilateral appointment of Sole arbitrators by holding that Unilateral appointment of the arbitrator



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shall be vitiated by Section 12(5) of the Arbitration and Conciliation Act, 1996. It has been observed in paragraph No.18 as under:

“18. The issue was discussed and decided by this Court as under:-

'50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may



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appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa v. Commr. of Land Records & Settlement*. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

*“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand v. State of Punjab*. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the *East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948*, delegated its appellate powers vested in it under Section 21(4)*



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to an “officer”, an order passed by such an officer was an order passed by the State Government itself and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.” (emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P., which followed the decision in Roop Chand v. State of Punjab. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji. In the said case, the three-Judge Bench applied the maxim “qui facit per alium facit per se”. We may profitably reproduce the passage: (SCC p. 214, para 9)

“9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: “qui facit per alium facit per se” (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the “pucca adatia”, or, as the High



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Court had held, he is clothed with the powers of an ordinary commission agent only.”

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view



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expressed by the High Court is not sustainable and we say so.”

Therefore, the above judgment of the Hon'ble Apex Court makes it clear that the appointment of sole arbitrator unilaterally by one of the parties would be ineligible by operation of law.

18. As already discussed above, Clause (1) and (5) of Schedule VII prohibits appointment of Arbitrator in respect of the persons, who are either the employee, consultant, advisor or has any other past or present business relationship with party or a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. In the present case, as could be seen from Clause 7.4.3.1 (c), the qualification of the Arbitrator is (a) Serving Gazetted Railway Officer or (b) Retired Railway Officer. By this, it is clear that the persons who are going to be nominated by the respondent/Railway Board are none other than their own personnel, viz., a serving Gazetted Railway Officer or Retired Railway Officer. Certainly these officers would have present and past business relationship with the respondent/Railways Board which means any employee would be considered as they have business



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relationship with the parties so, such persons are also directly prohibited by the Schedule VII and thereby, they would fall under the category of Clauses (1) & (5) of the Schedule VII and hence, they are ineligible to be appointed as Arbitrators. As rightly contended by the learned counsel for the petitioner that certainly, the petitioner would not certainly give their consent for such appointment of Arbitrator by the respondent/Railways Board and in which event, the same would render as 'unilateral appointment of the Arbitrator. Accordingly, the point is answered.

19. In the light of the above, I do not find any merit in the submissions made by the respondent. Since the dispute has arisen out of the agreement dated 26.02.2021 and the same can be arbitrable in terms of Clause 7.3 and 7.4 of the agreement dated 26.02.2021, this Court is inclined to appoint Arbitrator to resolve the disputes between the parties.

(a) The Hon'ble Mr.Justice T.Ravindran, Former Judge of this Court, Cell Nos.9941350926, 9444399700, New No.27, Old No.12, 3rd Avenue, Indira Nagar, Adyar, Chennai 600 020, is appointed as an Arbitrator to enter upon reference and adjudicate the disputes between the parties, arising out of the above said agreement.



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(b) The Sole Arbitrator shall initiate arbitration proceedings and after issuing notice to the parties concerned and upon hearing them, pass an award, on merits and in accordance with law and uninfluenced by any of the observations made in this order, within a period of six months from the date of receipt of a copy of this order.

(c) The Sole Arbitrator shall be paid fees and other incidental charges, as per the Schedule IV of the Act and the same shall be borne by both 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 is at liberty to recover the same directly from the Respondents.

20. With the above direction, this Arbitration Original Petition is allowed. Hence, the connected applications are closed.

21. With regard to O.A.No.157 of 2024, interim stay already granted by this Court is extended till the first hearing of the arbitration proceedings. Thereafter, the learned Arbitrator shall consider the present application as Section 17 application and accordingly, the respective parties



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may make submission for further continuation of the interim stay granted
by this Court.

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Index: Yes/No

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Speaking/Non Speaking

Neutral Citation: Yes/No

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