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Arb.OP(Com.Div.)No.313 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.10.2024

PRONOUNCED ON : 29.10.2024

Coram:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Arb.O.P(Com.Div.) No.313 of 2024
and A.No.4049 of 2024

Usha

... Petitioner

Vs.

1. The Senior Divisional Commercial Manager,
Salem Division, Southern Railway,
Divisional Officer, Commercial Branch,
Salem – 635 005.

2. K.S.Bhaskar,
CMM/M/PER,
Sole Arbitrator,
Southern Railways,
Ayanavaram,
Chennai - 600 023.

... Respondents

Prayer: Original Petition is filed under Section 14(2) of the Arbitration and Conciliation Act, 1996, seeking to terminate the mandate of the sole Arbitrator K.S.Bhaskar/Respondent No.2 and consequently terminate the proceedings in arbitration commenced between the parties.



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For Petitioner : Mr.Antony R. Julian

For Respondents

For R1 : Mr.A.Kumaraguru

For R2 : No appearance

ORDER

This petition has been filed to terminate the mandate of the sole Arbitrator K.S.Bhaskar viz., second respondent herein and also consequently terminate the proceedings in arbitration commenced between the parties.

2. The first respondent had entered into a concession agreement on 19.09.2006, with the petitioner for advertisement right concession to design, develop, operate and market the advertising opportunity at Salem junction railway station. As per the agreement Clause 55.2 states that the Arbitration Act and its accompanying Rules would be deemed to be applicable for any dispute arising in pursuant to the agreement dated 19.09.2006. The concession agreement was deemed to have come into force on 21.04.2006 for the period of three years. As per the agreement the area allotted to the petitioner was 9904 sq.ft., and the petitioner was required to pay fixed yearly license fee of Rs.9,01,625/-. Further following year, the license fee would stand enhanced by 10%. The said terms and conditions were accepted and the petitioner remitted an amount of Rs.9,01,625/- and on receipt of the same, the first respondent allotted an area of 9904 sq.ft., in the Salem Junction



Railway Station to display advertisement. According to the petitioner, the usable area in Salem Junction Railway Station is only amounted to 9544 sq.ft., and there being a shortfall of 360 sq.ft. Therefore, there was a dispute between the petitioner and the first respondent. Further, the first respondent by its communication dated 13.12.2011, claimed a sum of Rs.12,38,010/- payable by the petitioner as outstanding license fee with applicable interest.

3. Therefore, invoking Clause 55.1 of the concessional agreement, the first respondent had appointed a sole arbitrator one D.Titus on 06.11.2013. Thereafter, one P.Balachandran was appointed as second arbitrator on 27.06.2014. Finally, one K.S.Baskar was appointed as sole arbitrator on 16.05.2023 viz., the second respondent herein. Aggrieved by the same the petitioner filed the present arbitration original petition with the above said prayer.

4. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

5. The challenge to the appointment of arbitrator is made on the preliminary ground of unilateral appointment of arbitrator and it violates the principles laid down by the Hon'ble Supreme Court of India. Further the arbitration



proceeding has been challenged on the ground of limitation, since the contract period itself was expired within the period of three years from the date on which the concessional agreement came into force i.e., from 21.04.2006.

6. The learned counsel appearing for the petitioner relied upon the judgment reported in **2020 20 SCC 760** in the case of **Perkins Eastman Architects DPC and anr Vs. HSCC India Ltd.**, in which the Hon'ble Supreme Court of India held that unilateral appointment of arbitrator results in an omnibus disqualification and the award passed by such arbitrator shall be void as initio and non-est in law. The relevant paragraph is extracted hereunder :-

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to



be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited⁴, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. *But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an*



element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

7. He also relied upon another similar judgment of the Hon'ble Delhi High Court reported in **2020 SCC OnLine Del 350** in the case of **Proddatur Cable TV Digi Services Vs. Siti Cable Network Ltd.**, as follows :-

“22. The issue that arises for consideration before this Court is the eligibility of the "Company" referred to in the Arbitration Clause between the parties, to unilaterally appoint a Sole Arbitrator to adjudicate the disputes between the parties. The principle contention of the petitioner is that in view of the recent judgment of the Supreme Court in the case of Perkins (supra), the 'Company' as provided in the Arbitration Clause between the parties herein cannot unilaterally appoint an Arbitrator. This Court finds merit in the contention of the petitioner. Supreme court in the case of Perkins (supra) was concerned with an Arbitration Clause wherein the CMD of the respondent was designated to appoint a Sole Arbitrator. Supreme Court after examining the said clause held that there could be two categories of cases, one where the Managing Director himself is made as an Arbitrator with an



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additional power to appoint any other person as an Arbitrator and the second where the Managing Director is not to act as an Arbitrator himself but is empowered to appoint any other person of his choice or discretion as an Arbitrator. Reliance was placed on the judgment of the Supreme Court in the case of TRF Limited (supra) in which case the Arbitration Clause fell in the first category. In the case of TRF Limited (supra), the Court had held that the Managing Director was incompetent because of the interest that he would have in the outcome of the dispute. The element of ineligibility was relatable to the interest that he had in the decision. The Supreme Court thus relying on the rationale of the decision in TRF Limited (supra) observed that if the test is the interest of the Appointing Authority in the outcome of the dispute then similar ineligibility would always arise even in the second category of cases. It was observed that if the interest that the authority has in the outcome of the dispute is taken to be the basis for possibility of bias, it will always be present irrespective of whether the matter stands under the first or the second category of cases. The Supreme Court also significantly noted that they were conscious that if such a deduction was drawn from the decision in TRF Limited (supra), in all cases with similar clauses, a party to the agreement would be disentitled to make a unilateral appointment.

23. Thus, following the ratio of the judgment in the case of Perkins (supra), it is clear that a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law. The Arbitration Clause in the present case empowers the company to appoint a Sole Arbitrator. It can hardly be



disputed that the „Company" acting through its Board of Directors will have an interest in the outcome of the dispute. In the opinion of this Court, the clause is directly hit by the law laid down in the case of Perkins (supra) and the petition deserves to be allowed.”

Thus it is clear that the unilateral appointment of sole arbitrator by a party or entity that is interested in the outcome of the arbitration proceedings is wholly invalid and impermissible under law.

8. On perusal of Clause 55.2 of the concessional agreement dated 19.09.2006 revealed that if it is not possible for a gazetted officer to act as an arbitrator, the matter must not be referred to arbitration at all. A combined reading of Clauses 55.1 and 55.2 shows that if a gazetted railway officer cannot act as arbitrator, then matters or disputes arising pursuant to the concession agreement cannot be referred to arbitration itself.

9. In view of the above discussions and also in the spirit of impartiality and to ensure that the true spirit of the amendments is not lost in such cases, it is deemed appropriate to appoint a sole arbitrator to adjudicate upon the disputes between the parties. Accordingly, the appointment of the second respondent as sole arbitrator is hereby terminated and Mr.R.Sendhil Kumar, Advocate, Ms.No.56/1994 having address at No.312, Vallalar Nagar, Housing Unit Backside, Ayyanthiru Maligai,

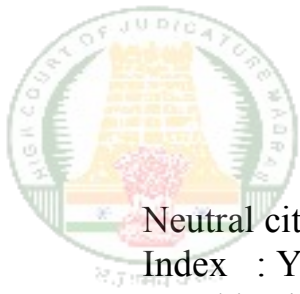


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Salem – 636 008 (Mobile No.9443288873) is appointed as sole arbitrator to adjudicate upon the disputes between the petitioner and the first respondent. The arbitration proceedings shall take place as per the concessional agreement and the Arbitration & Conciliation Act, and Rules thereunder and any modification thereon shall deem to be applied in the arbitration proceedings. The sole arbitrator is requested to enter into reference and adjudicate the dispute as expeditiously as possible considering the dispute itself is of the year 2007. The parties are directed to co-operate with the arbitrator to complete the arbitration proceedings. The arbitrator shall enter into reference from the stage at which the matter is pending before the earlier arbitrator. Pleadings and records may be obtained from the earlier arbitrator by the first respondent and be transmitted to the newly appointed arbitrator. The arbitrator shall endeavour to conclude the proceeding within a period of three months from the date of receipt of pleading and records from the earlier arbitrator. The second respondent is directed to hand over all the pleadings and records obtained from the parties to the newly appointed arbitrator forthwith.

10. With the above directions, the Arbitration Original Petition stands disposed of. Consequently, connected application is also closed. There shall be no order as to costs.

29.10.2024



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Neutral citation: Yes/No

Index : Yes/No

Speaking/Non Speaking Order
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G.K.ILANTHIRAIYAN, J.

rts

To

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Divisional Officer, Commercial Branch,
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