

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:10.04.2015

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM**

O.P. Nos.449 & 450 of 2013

M/s.Omni Agate System Pvt., Ltd.,
Regd., Office at:
II Floor, Murugesu Naicker Complex,
No.99, Greaves Road,
Chennai – 600 006.
Rep., by its Managing Director,
Mr.K.R.Elanghovan

.. Petitioner in both O.Ps.

Vs

Southern Railway,
Rep., by the Senior Divisional
Commercial Manager,
Commercial Department,
Chennai Division,
Southern Railways,
Chennai – 600 001.

.. Respondent in both O.Ps.

Common Prayer :-Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint an Advocate from the panel as the Sole Arbitrator to resolve the dispute in terms of the tender notifications in Ref.No.M/C37/Pub/Tender/Led/Ms/II/07 & M/C37/Pub/Tender/Led/MAS/II/07, issued by Southern Railway on 30.10.2007 and 04.12.2007.

For petitioners .. Mr.S.R.Ragunathan

For Respondents .. Mr.V.G.Suresh Kumar

COMMON ORDER

Heard Mr.S.R.Ragunathan, learned counsel appearing for the petitioner and Mr.V.G.Suresh Kumar learned counsel appearing for the respondent.

2. These petitions have been filed under Section 11(6) of the Arbitration and Conciliation Act, to appoint a sole Arbitrator to resolve the dispute in terms of the Tender Notification No.M/C37/Pub/Tender/Led/Ms/II/07 and M/C37/Pub/Tender/Led/MAS /II/07, dated 30.10.2007 and 04.12.2007 respectively.

3. The respondent Railway Administration invited tenders for erection of 2 LED Screen in Chennai Central and Egmore Railway Station respectively for a period of three years. The petitioner participated in the tender and was declared as successful tenderer and awarded the contract and said to have paid the licence fee. The respondent vide letter dated 01.02.2008, communicated to the petitioner of the acceptance of the petitioner's offer and informed that

the contract would commence from the date of actual display of the advertisement or on 30th day of the acceptance of the contract, whichever is earlier.

4. The petitioner would submit that in accordance with the said condition, the petitioner remitted a sum of Rs.18,48,000/- as Licence Fee and furnished a Bank Guarantee of Rs.2,27,200/-. The petitioner would further state that they were not aware nor they were informed to the respondent about an order passed by this Court in W.P.No.7143 of 2006, banning installation of LED Displays and hoardings in Heritage Buildings as well as in the public places. Subsequently, the respondent issued a letter on 30.07.2008 for change of location. According to the petitioner the inordinate delay caused by the respondent in assigning a suitable change of location materially affected the terms and conditions of contract. It is further submitted that a show cause notice was issued to the petitioner for which the petitioner has submitted a reply and thereafter by order dated 17.03.2010, the contract was terminated. The petitioner made a representation on 10.05.2010 to withdraw the termination notice and sought for renewal of the contract and the petitioner also sought for waiver of service connection charge for the period during which the termination of contract would be in vogue till resumption of operation.

The petitioner preferred an application under Section 9 of the Act in O.A.No.653 of 2010 for grant of an order of interim injunction to restrain the respondent from invoking the Bank Guarantee. Initially an *exparte* order of injunction was granted which was subsequently vacated by order dated 15.11.2010. Aggrieved by the same, the petitioner preferred an appeal before the Hon'ble Division Bench in O.S.A.Nos.9 & 10 2011, challenging the dismissal of the applications in O.A.Nos.653 & 657 of 2010, dated 15.11.2010. The Hon'ble Division Bench disposed of the Appeals with certain directions, by order dated 01.07.2011. The operative portion of the order and direction issued reads as follows:-

29. Before we part with the matter, one aspect needs to be mentioned. As pointed out earlier, the appellant has made out a genuine case for referring the matter to arbitration. Learned counsel for appellant submitted that inspite of the appellant's request for arbitration, the 1st respondent has not referred the matter to arbitration. Therefore, considering the facts and circumstances of the case, we of the considered view that if any such request for referring the matter to arbitration was already made by the appellant, it would be appropriate for the 1st respondent to immediately refer the matter to arbitration. If no such request has been made so far, the appellant is at liberty to make such request to refer the matter to arbitration. On such request being made, notwithstanding the time prescribed in terms of the agreement, the 1st respondent shall refer the matter to arbitration.

30. In the result, the appeals are disposed of with the observation that the realisation of amount by invoking Bank Guarantee is subject to the outcome of the arbitration proceedings. As observed in paragraph No.29, we direct the 1st respondent to refer the matter to arbitration if any request was already made by the appellant for arbitration. If no such request has been made by the appellant so far, the appellant is

at liberty to make a demand for referring the matter to arbitration within a period of four weeks from the date of receipt of copy of this order and the 1st respondent is directed to refer the matter to arbitration notwithstanding the time prescribed in the terms of the agreement between the parties. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

5. Though in this applications, we are not concerned about the direction issued with regard to the Bank Guarantee, it is relevant to take note of the direction/observation made by the Hon'ble Division Bench in paragraph 29 of the judgment referred supra. The Hon'ble Division Bench virtually issued a positive direction observing that if a request is being made by the petitioner for referring the matter to arbitration, which has already been made, it would be appropriate for the Railway Administration to immediately refer the matter to Arbitration. It is seen that after the Hon'ble Division Bench passed the order, the petitioner have made a request on 11.07.2011 to refer the matter for arbitration. In the light of the above, the respondents are bound to refer the matter for arbitration.

6. It has to be pointed out that the existence of a valid Arbitration Agreement under the terms of contract is not in dispute. Thus, taking note of the observations made by the Hon'ble Division Bench stated above and the request made by the petitioner dated 11.07.2011, the respondents are bound to refer the matter for

arbitration.

7. As regards the contention raised by the respondent that they are entitled to appoint an Arbitrator of their choice that option is no longer available to the respondent in the light of the fact that they have lost their opportunity to exercise their option much prior to the directions issued by the Hon'ble Division Bench. In this regard, useful reference may be made to the decision of the Hon'ble Supreme Court of this Court in the case of ***National Insurance Co., Ltd., Vs. Mastan*** reported in **(2006) 2 SCC 641** and the Hon'ble Division Bench of this Court in the case of ***The General Manager (Telecom) Madurai Secondary Switching Area, Department of Telecommunication vs. Sesa Seat Information Systems Ltd.***, reported in **2005-4-MLJ-210**.

8. It has to be further pointed out that if the respondents have appointed the Arbitrator prior to filing of the petition under Section 11, its legality would not have been questioned, but once the petition for appointment is filed before this Court, the other party abdicates his right to appoint an Arbitrator as per the provisions stipulated in the agreement or in terms of the arbitration clause and the Court alone has the power to appoint an Arbitrator ***[C.A.Abdul Kadhar Vs.***

Union of India, Ministry of Railways, in O.P.No.769 of 2010, dated 14.08.2014].

9. In the light of the above, Original Petitions are allowed and I appoint Mr.M.Nandan, a retired Judge, as the Sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of this order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne equally by both the parties.

10.04.2015

pbn
Index :Yes/No
Internet:Yes/No

To
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T.S.SIVAGNANAM J.
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