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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.10.2016

CORAM :

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition (MD) No.19461 of 2016

and

W.M.P (MD) No.14022 of 2016

M/s.Srishti Communications,
represented by its Proprietor S.Kumar,
1218/18, 34th Cross 28th Main,
4th T Block, Jaya Nagar,
Bangalore 41.

... Petitioner

Vs.

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

2.The Senior Divisional Commercial Manager,
Southern Railway, Divisional Office,
Commercial Branch,
Madurai.

3.S.M.V.Saravanan,
Sr.EDPM/MDU,
Sole Arbitrator,
Information Technology Centre,
Southern Railway,
Madurai 625 016.

... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records relating to the first respondent dated 27.10.2015 vide proceedings No.G.16/DGM/ARB/CCM, nominating the third respondent as sole arbitrator and to quash the same, and consequently, set aside the proceedings of the third respondent, dated 26.09.2016 and to appoint an independent arbitrator to decide the disputes arisen between the petitioner and the respondent on the execution of contract dated 11.06.2011.

For Petitioner

: Mr.S.Vijayakumar

**ORDER**

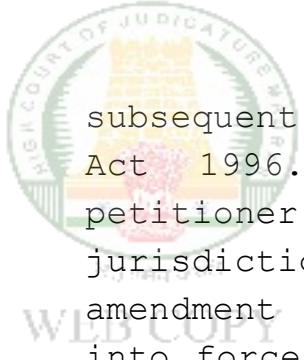
Challenging the appointment of Arbitrator and also the consequential order passed by the third respondent Arbitrator, the present writ petition has been filed.

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2. According to the petitioner, he entered into an agreement with Southern Railway for displaying commercial advertisement at the façade, Madurai Railway Station on 11.6.2011 for a period of five years commencing from 29.4.2011 to 28.4.2016. During the course of its business, certain disputes have arisen between the parties and consequently the first respondent herein has invoked the bank guarantee with a *mala fide* intention, thereby causing great loss to the petitioner's firm. In terms of the agreement entered into between the parties, an Arbitration clause is provided for reference to sole arbitration. Subsequently, the first respondent terminated the agreement with effect from 27.7.2015 and that the security deposit was forfeited. Since in terms of the agreement entered into between the parties, an arbitration clause is provided for reference to sole arbitrator, the petitioner sent a communication to the first respondent on 23.07.2015 to refer to the disputes to arbitration as contemplated under the above clause of the tender agreement and not to en-cash the bank guarantee pending disposal of the arbitration proceedings.

3. Subsequently, on 27.10.2015, the first respondent by his communication dated 27.10.2015 nominated the third respondent as an Arbitrator to decide the disputes arisen between them. Though the said communication was forwarded to the third respondent, he received a communication from the third respondent only on 15.04.2016 for a meeting on 20.4.2016 for transparent discussion clarifying all doubts and getting direct appraisal for the letter dated 23.07.2015. On the said day, no discussion was taken place and ultimately the third respondent fixed hearing of the arbitration on 09.8.2016 and subsequently postponed to 29.8.16 to sort out the various aspects to proceed with the arbitration.

4. According to the petitioner, as per the amendment to the Arbitration and Conciliation Act 1996, the third respondent cannot be appointed as an Arbitrator. He would further submit that the sole administrator nominated by the first respondent under the tender condition cannot have jurisdiction to decide the dispute between the parties. Since the third respondent being the employee of the railway, he is ineligible to act as an Arbitrator



subsequent to the amendment to the Arbitration and Conciliation Act 1996. In the above circumstances, on 29.08.2016, the petitioner submitted before the third respondent that he has no jurisdiction to proceed with the matter on account of the amendment to the Arbitration and Conciliation Act 1996 which came into force on 27.10.2015. Therefore, it is inappropriate on the part of the respondents to proceed with the arbitration especially when there is a bar in the statute to proceed with the matter. The third respondent after hearing the preliminary objections on 29.8.2016, without withdrawing his reference from the arbitration or referring the matter to the first respondent proceeding further in the matter issued the impugned communication dated 26.09.2016 informing the petitioner that he should appear before the first respondent who is the authority to decide and reject the preliminary objection and fixed the next date of hearing on 07.10.2016 to proceed with the matter. Hence, the petitioner has filed this writ petition challenging the above orders.

5. Learned counsel appearing for the petitioner would contend that the third respondent being an employee of the respondents 1 and 2 cannot be appointed as Arbitrator especially after amendment of the Arbitration and Conciliation Act, 1996 and he is ineligible to act as Arbitrator. He would further contend that there is no bar in challenging the order of appointment under Article 226 of the Constitution. In support of his contention, he relied upon a judgment of Hon'ble Supreme Court in *Konkan Railway Corporation Ltd., and others Vs. Mehul Construction Co.*, reported in (2000) 7 SCC 201.

6. I have considered the submissions made by the learned counsel appearing for the petitioner.

7. Admittedly, the order against the appointment of the Arbitrator and also any order passed by the Arbitrator on the preliminary issue, the petitioner has remedy under the Arbitration and Conciliation Act, 1996 to challenge the same before the appropriate forum, without resorting to such remedy, the petitioner cannot maintain the writ petition. There are elaborate mechanisms provided under the Act and against an order appointing the Arbitrator and also the order passed by the Arbitrator on its own jurisdiction. Therefore, the petitioner cannot maintain a writ petition under Article 226 of the Constitution of India.

8. So far as the judgment relied upon by the learned counsel appearing for the petitioner that is a case where the order of appointment of Arbitrator by the Chief Justice of High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 wherein the Supreme Court has held that it is only an



administrative order and the said order is amenable. Therefore, the above judgment is not applicable to the facts of the present case.

9. It is always open to the petitioner to approach the appropriate forum to redress his grievance by raising all the grounds which have raised in this writ petition. In the above circumstances, the writ petition is dismissed. No costs. Consequently, W.M.P(MD)No.14022 of 2016 is closed.

Sd/-

Assistant Registrar (CS-I)

/True copy/

Sub Assistant Registrar

To

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

2.The Senior Divisional Commercial Manager,
Southern Railway, Divisional Office,
Commercial Branch,
Madurai.

3.The Section Officer, E.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.VIJAYAKUMAR, Advocate, SR No.60168

Predelivery Order made in
Writ Petition (MD) No.19461 of 2016
and
W.M.P (MD) No.14022 of 2016
07.10.2016

sms

SH/SKS-RR:11.11.2016:4P/5C