



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.01.2023

Pronounced on : 25.01.2023

CORAM

THE HON'BLE Mr. JUSTICE **C.V.KARTHIKEYAN**

W.P.No.33566 of 2022

and

W.M.P.Nos.33017 & 33018 of 2022

K.G.Suresh Kumar

.. Petitioner

Vs.

1.The General Manager
Southern Railway,
Chennai Region,
Chennai – 600 003.

2.The Senior Divisional Commercial Manager,
Palakkad Division,
Southern Railway.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the impugned order issued by the 2nd respondent in J/C.300-VPS/CAN 2nd entry/4 dated 29.11.2022 and quash the same as far as the petitioner is concerned.



For Petitioner

.. M/s.Karan and Uday

For Respondents

.. Mr.B.Rabu Manohar,

Senior Central Government Panel Counsel.

ORDER

This writ petition has been filed in the nature of Certiorari seeking interference with an order of the 2nd respondent dated 29.11.2022.

2.The writ petitioner, K.G.Suresh Kumar, was doing business in the name and style of K.G.S.Foods and Caterers. He had registered the same in the year 2018. He had obtained contract from Southern Railway in April 2021. Southern Railway had called for tenders for vehicle parking division, in second entry at Kannur Railway Station, Palkkad Division. The contract was for a period of three years. The petitioner had participated in the tender and was declared as the successful bidder for a sum of Rs.1,06,51,065/-. The petitioner was also issued with a letter of acceptance. He also completed other formalities like executing a bank guarantee, paying licence fee along with the GST. The bidding amount has to be paid in 12 instalments in the three year period. The petitioner stated that one



instalment would come to Rs.8,87,589/- and the GST for the said amount would be Rs.1,59,766/- and income tax payable would be Rs.20,326/- which would mean that the total licence fee for one instalment would be Rs.10,67,681/-. The petitioner had paid the first instalment and had commenced running the parking stand.

3.It had been further stated in the affidavit that owing to Covid – 19 pandemic in August 2021, the Kerala Government had imposed State wide lockdown and also night curfew. The railways had also cancelled several trains. The petitioner was not able to pay the second instalment. He then filed W.P.No.25761 of 2021 to consider a representation given by him on 18.08.2021 and this Court had directed consideration of the said representation. The petitioner then approached the respondents seeking concession of licence fee, but the 2nd respondent refused such request. The petitioner then paid the pending two instalments amounting to Rs.25,82,019/-. Thereafter, on 10.10.2022, the 2nd respondent closed the vehicle parking stand with the help of Railway Protection Force.

4.The 2nd respondent issued a further notice on 03.11.2022 calling



due the amount due of Rs.25,82,019/-. He did not still pay the amount. The contract was therefore terminated on 29.11.2022. It was stated that on the date of the filing of the counter namely, 28.12.2022, the petitioner was due and payable a sum of Rs.29,11,690/- which also included the penalty amount.

6. It was specifically stated that the petitioner had suppressed giving details about the agreement dated 25.08.2021 where the schedule for payment of licence fee was clearly mentioned. It was therefore stated that the respondents had terminated the contract only in accordance with the terms of contract. It was stated that the respondents had the right to terminate the contract after giving the 15 days notice. It was therefore stated that the writ petition should be dismissed.

7. Heard arguments advanced by M/s.Karan and Uday, on behalf of the petitioner and by Mr.B.Rabu Monohar, learned Senior Central Government Panel Counsel for the respondents.



8.It is the contention of the learned counsel for the petitioner that sufficient notice was not issued prior to termination of the contract. It was also stated that even during the subsistence of the period of licence, the respondents had terminated the contract and had invited e-auction for the remaining period. It was also stated that owing to Covid-19 pandemic, trains were cancelled. There was also lockdown and night curfew, which factors directly affected the business of the petitioner. The learned counsel further pointed out that the petitioner had actually remitted a sum of Rs.8,87,589/- on 12.05.2022 which was the amount due by way of a Demand Draft and lamented that inspite of the payment of the said amount, the respondents had terminated the contract.

9.Mr.B.Rabu Monohar, learned Senior Central Government Panel Counsel for the respondents, however, disputed the contentions of the petitioner herein. It was pointed out that the petitioner was a chronic defaulter. He had paid only the first instalment, but did not remit the second instalment of Rs.8,87,589/- which was for the period from 13.11.2021 to 12.02.2022 on the due date. The petitioner was issued with a letter dated 08.12.2021 to pay the dues. Another letter was issued on 05.01.2022 to pay



the second instalment due. Thereafter, a further letter was again issued on 07.02.2022. In the meanwhile, the third instalment for the period from 13.02.2022 to 12.05.2022 became due. Another letter on 24.02.2022 had been issued calling upon the petitioner to pay the second and third instalments. However, there was no response from the petitioner.

10. It was contended by the learned counsel for the respondents that notice prior to termination was given to the petitioner on 23.03.2022. As a matter of fact, the Senior Divisional Commercial Manager had invited the petitioner to come over to the office on 19.04.2021 and to remit the second instalment licence fee and that was only remitted on 12.05.2022. In the meanwhile, the fourth instalment then fell due. The petitioner had stated that he would pay the 3rd instalment within one month and the 4th instalment in the subsequent month vide letter dated 12.05.2022. But the petitioner paid the 3rd instalment only after three months after this undertaking. It is thus contended by the learned counsel for the respondents that the petitioner had paid the 2nd instalment after a delay of six months. The 3rd instalment was again paid with delay of six months. The 4th instalment had not been paid. The 5th instalment also became due. It was therefore contended that the



petitioner cannot seek any relief from this Court, particularly, since the fault was on the petitioner in not having paid the instalments.

11.The learned Senior Central Government Panel counsel for the respondents then drew the attention on the agreement between the parties and stated that there was right given to the respondents to terminate the contract after giving 15 days' notice for breach of any of the conditions. The primary condition was to pay the licence fee. It was also contended that there was a specific clause for settlement of disputes and the petitioner should have taken recourse to such proceedings. It was also contended that in view of that particular fact, the writ petition should not and cannot interfere with the contractual arrangement between the parties. It was therefore insisted that the writ petition should be dismissed.

12.I have carefully considered the arguments advanced and perused the material records.

13.The petitioner had been awarded contract for running of vehicle



parking stand at Kannur (Second Entry) Railway Station, Paiyangadi and Mangalore Junction Railway Station vide letter of acceptance dated 17.05.2021, 11.06.2021 and 09.07.2021 respectively, whereby, the bids of the petitioner which were opened on 09.04.2021, 19.04.2021 and 16.04.2021 respectively were accepted. It is also seen that there is no provision in the agreement between the parties for revocation of the licence fee for the contract awarded. A contract had been entered into between the petitioner and the respondents on 25.08.2021 with respect to the terms of the lease. The agreement is binding on both parties.

14.It is the case of the petitioner that he had paid the 1st instalment and had commenced running the parking place. But, however, there was a delay in payment of the 2nd instalment. There was a further delay in the payment of the 3rd instalment. There was yet another delay in the payment of the 4th instalment. It was stated that the 5th instalment had also fallen due.

15.The documents produced show that there has been consistent correspondences from the respondents calling upon the petitioner to pay the dues. The petitioner had to pay the 2nd instalment of Rs.8,87,589/- which fall



due on 12.02.2022. Letters were addressed on 08.12.2021, 05.01.2022 and 07.02.2022 to pay the 2nd instalment due. The petitioner had not paid the amount. In the meanwhile, the 3rd instalment became due on 07.02.2022. This was for the period of 13.02.2022 to 12.05.2022. In this connection, again a letter was addressed on 24.02.2022. The petitioner did not pay the 2nd and 3rd instalments. A notice was therefore issued for termination of the contract 23.03.2022. The petitioner was also asked to have an interaction with the Senior Divisional Commercial Manager. The petitioner had given a letter dated 11.04.2022, undertaking to pay the 2nd instalment. But, however, the petitioner paid the 2nd instalment only on 12.05.2022. On that date, the 3rd instalment and the 4th instalment became due. The petitioner then undertook to pay the 3rd instalment by letter dated 12.05.2022 within a period of one month and the 4th instalment within a period of further one month. But the 3rd instalment was paid only after six months on 20.08.2022. The 5th instalment then fell due.

16.It is therefore seen that the petitioner was not able to perform his part of the agreement namely, to pay the amounts within the stipulated period.



17. Clause 14 of the agreement is as follows:-

“14.(i) Licensee shall make payments of license fee on or before 7th day of the first month of each quarter (i.e. Every three months) during the period of contract irrespective of the date of allotment of the contract. If the licensee/licensees delays the payment, the Administration after giving a grace period of 7 days will have the liberty to impose penalty @ 14% of the due amount per annum for each of delayed payment. Whenever payments are received, adjustments will be made towards any amount due before accountal of license fee.

(ii). In case of the failure in payment of two subsequent advance quarterly license fee, Sr.Divisional Commercial Manager at his discretion may terminate the contract by issuing a show cause notice.”

18. As a matter of fact, in the agreement, this clause has been given in



bold and had been underlined, to emphasise the necessity for payment of the instalments within the stipulated period and to emphasise the consequences, if there is a delay. The consequence is that, the respondents can exercise their right to terminate the contract. A show cause notice, of course, has to be issued. The grievance of the petitioner, in this case, is that a show cause notice has not been issued. But a perusal of the records shows that notice of termination has issued on 23.03.2022 itself, when the instalments fell due. Even prior to that particular date, as mentioned, several continuous correspondences have been issued by the respondents calling upon the petitioner to pay the dues. More than sufficient opportunity had been granted to the petitioner to pay the dues. The petitioner had not responded to them. Whenever he had given an undertaking to pay, he again defaulted.

19.It is the contention of the petitioner that he had paid the instalment which was due namely, a sum of Rs.8,87,589/- on 12.05.2022, but again that had been paid beyond the stipulated period. In this connection, in the letter dated 03.11.2022, the petitioner had clearly given the amounts of instalments due, which were from the period 13.11.2021 onwards. The total amount due as on that date was Rs.25,82,019/-. After setting out the



respondents would initiate clause 14(ii) of the agreement relating to termination of the contract.

21.The petitioner had then issued an e-mail expressing readiness to pay the 4th and 5th instalments. That was on 22.11.2022. But, however, he did not pay any amount and on 29.11.2022, the respondents had stated as follows:

“However, the licence fee for the 4th, 5th and 6th instalment which became due on 07.05.2022, 07.08.2022 and 07.11.2022 respectively were not remitted and still due. Also IT and GST for the period from 13.11.2021 are outstanding. This is despite several reminders given vide the references quoted at Sl.No.2 above. You failed to remit licence fees and continued collecting parking fees from the customers and did not avail the opportunities offered by railways to continue the contract as per agreement. This is considered as material breach of contract and it is decided to terminate the contract with immediate effect, in terms of clause 14(ii)



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& 37(c) of the agreement.

Hence, please note that the contract awarded to you is terminated from 29.11.2022 and the security deposit stands forfeited as per the conditions of the contract. It is advised to clear the dues for the operated period immediately, failing which action shall be initiated for legal recovery of the dues.”

22.It is thus seen that the respondents had expressed a clear opinion that they had taken a decision to terminate the contract. It is for the petitioner to pay the amounts due. The respondents had still given that opportunity. However, the petitioner had not paid the entire dues. It was only thereafter, on 02.12.2022, did the respondents invite offers for vehicle parking contract at Kannur (second entry) Railways station.

23.In the agreement itself, there is a further clause relating to penalty and termination. Clause 37(c) is as follows:-

“37(c).Failing to commence the contract within one month



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*from the date of award of contract, improper maintenance of premises, non payment of license fee and interest on or before due dates, non payment of punitive charges wherever levied, over charging and non courteous behaviour of staff, fraudulent practices and unsatisfactory performance will be considered as material breach of contract. The Railway shall without prejudice to other rights and remedies in the event of material breach by the service provider of any of the terms and conditions of the contract or due to the Service provider's liability to perform as agreed for any reason for whatsoever Railways has the **right to terminate the contract duly giving fifteen days notice.** The decision of Railways regarding the breach/failure on the part of Service Provider shall be final and binding on the Service provider and shall not be called into question.”*

24.It is thus seen that the respondents have a right to terminate the



contract after giving 15 days' notice. Notices have been issued again and again. The petitioner cannot insist that notice in a particular format should be given. More than sufficient opportunity had been granted to the petitioner to pay the amount dues. The only obligation on the petitioner was to pay the amounts. If he does so, he could have continued with the agreement.

25. It is a fact that there would have been lesser number of vehicles coming over to the parking area in a particular period. But, there is every possibility that in the next period, the number of vehicles would increase. The petitioner will necessarily have to determine his profit only at the end of the contractual period. Till such time, the only obligation on the part of the petitioner was to remit the instalments. He had taken the contract with knowledge that the total value would be Rs.1,06,51,065/-. That amount has to be paid through instalments to the respondents. It cannot be expected that he should earn the amount which he has to pay in every instalment in that block period. He could be earning more. He could be earning less. On holidays and on festival occasions the railway station would be congested with vehicles. There would also be lean periods when there would be less



use for the parking place. But the amount bid was an overall assessment spread over the total period of licence.

26. The petitioner as a prudent businessman, should pay the licence fee within the stipulated period. The Court, as a third party to the agreement cannot thrust itself and impose conditions and direct either the petitioner or the respondents to accept such conditions. The Court at the same time also cannot direct clauses in the agreement to be breached, to be violated or be ignored. The agreement had been entered into with consensus ad idem between the petitioner and the respondents. If any dispute arises over the terms of the agreement, then settlement of those disputes should be only in accordance with the terms of the agreement.

27. There is a clause for settlement of disputes. The said clause is as follows:

“42. Settlement of Disputes:-

All disputes and differences of any kind whatsoever arising out of or in connection with the licence, whether during the progress of the work or after their completion



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and whether before or after the determination of the licence, shall be referred by the licensee to the Railway and the Railway shall within 120 days after receipt of the licensee's representation make and notify decisions on all matters referred to by the licensee in writing provided that matters for which provision has been made in the General Conditions of tender or in any clause of the special conditions of the licence shall be deemed as “excepted matters” and decisions of the Railway authority, thereon shall be final and binding on the Licensee; provided further that “excepted matters” shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

(1)(i).Demand for Arbitration:-In the event of any dispute or difference between the parties hereto as to the construction or operation of this license, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the



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licensee may claim to be entitled to, or if the Railway fails to make a decision within 120 days then and in any such case, the licensee after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(1)(ii).The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item wise. Only such dispute(s) or difference (s) in respect of which the demand has been made, together with counter claims or set off given by Railways shall be referred to arbitration and other matters shall not be included in the reference.

(a).The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.”

(b).....

.....”

28.It is thus seen that the petitioner had every right to seek the matter



to be examined by the Arbitral Tribunal.

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29.Clause 42(7) is as follows:-

“42(7).Subject to the provisions of the aforesaid, Arbitration and Conciliation Act, 1996 and the rules there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.”

30.It is thus seen that the parties would be governed by the provisions of the Arbitration and Conciliation Act, 1996. The said Act is a comprehensive Act providing for any and every relief to be sought prior to, during and even subsequent to the conclusion of the arbitration proceedings.

31.This Court in its writ jurisdiction under Article 226 of the Constitution of India also has to function only within the four corners of the law. The rule of law equally applies to this Court also. When the parties and in this case, the petitioner and the respondents have consciously decided to settle all issues through the provisions of the Arbitration and Conciliation



Act, then it is only advisable that the petitioner, if he has any dispute, invokes such arbitration clause.

32. In **(2000) 7 SCC 529, Aligarh Muslim University and Others Vs.**

Mansoor Ali Khan, the Hon'ble Supreme Court had an occasion to consider the effect of “useless formality” - a theory, which is an exemption to the principles of natural justice.

*“21. As pointed recently in **M.C. Mehta Vs. Union of India (1997 (6) SCC 237)**, there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in **Gadde Venkateswara Rao vs. Government of Andhra Pradesh [1966 (2) SCR 172 = AIR 1966 SC 828]**, it is not necessary to quash the order merely because of violation of principles of natural justice.*

*22. In **M.C. Mehta {1997} 6 SCC 237** it was pointed out that at one time, it was held in **Ridge vs. Baldwin (1964 AC 40)** that breach of principles of natural justice was in itself treated as prejudice and that no other 'defacto' prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In **S.L. Kapoor Vs. Jagmohan (1980 (4) SCC 379)**, **Chinnappa Reddy, J.** followed **Ridge vs. Baldwin** and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.*

*23. **Chinnappa Reddy, J. in S.L. Kapoor's case [(1980) 4 SCC***



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379J, laid two exceptions (at p.395) namely, " if upon admitted or indisputable facts only one conclusion was possible", then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In **K.L.Tripathi Vs. State Bank of India (1984(1) SCC 43)**, Sabyasachi Mukherji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed: quoting Wade Administrative Law, (5th Ed.PP.472-475) as follows: (para 31)

"....it is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as their scope and extentThere must have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth".

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in **State Bank of Patiala Vs. S.K. Sharma (1996(3) SCC 364)**. In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in **Rajendra Singh Vs. State of M.P. (1996(5) SCC 460)**.

25. The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above,- there has been considerable debate of the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in **M.C. Mehta** referred to above. This Court surveyed the views expressed in various judgments in **England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Staughton L.J.** etc. in various



cases and also views expressed by leading writers like Profs. Garner, Craig, De. Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.”

33.The same position had been reiterated in **2006 (8) SCC 647**

[Punjab National Bank and Others]:

“In an industrial dispute referred to by the Central Government which has an all-India implication, individual workman cannot be made parties to a reference. All of them are not expected to be heard. The Unions representing them were impleaded as parties. They were heard. Not only the said Unions were heard before the High Court, as noticed hereinbefore from a part of the judgment of the High Court, they had preferred appeals before this Court, Their contentions had been noticed by this Court. As the award was made in presence of the Unions, in our opinion, the contention of Respondents that the award was not binding on them cannot be accepted. The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The court will not insist on compliance of the principles of natural justice in view of the binding nature of the award. Their application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principles of natural justice.”

34.A Division Bench of this Court in a Judgement reported in **2006 4**



LLN 358 [Dr.C.Chendroyaperumal Vs. National Institute of Port

Management] had also expressed their views on this aspect.

“9. Coming to the legal aspects canvassed by the learned counsel for the appellant, it is seen that they revolve around violation of the principles of natural justice. Even at the outset, we are not impressed with the said argument, since in our opinion, “Principles of natural justice is for thoroughbred horses and not wild horses.” Wild horses understand only the language of the whip and hence there is no use trying to tame them with persuasion. The principles of natural justice themselves have traversed a long way from the stage at which they were treated as a “tharaka manthra” or panacea for all diseases, to the present stage where the Courts have started looking at the credentials of the person using them as a shield or sword and accepting the fact that they are not indispensable.”

35.In **Nagar Nigam Meerut v. AL Faheem Meat Exports (P) Ltd.**, reported in **(2006) 13 SCC 382**, it had been laid down as follows:

“All contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well-known newspapers having wide circulation, so that all eligible persons will have an opportunity to bid in the auction, and there is total transparency...”

36.In **Uflex Ltd. Vs Government of Tamil Nadu and others**, reported



in **2021 SCC OnLine SC 738**, the Hon'ble Supreme Court held as follows :

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“42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome.... The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”

37. In **Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1**, the Hon'ble Supreme Court held as follows :

“108.Section 16 empowers the Arbitral Tribunal to rule upon its own jurisdiction, including the ruling with respect to the existence or validity of the arbitration agreement. Further clause (b) to Section 16(1) stipulates that a decision by an Arbitral Tribunal that the main contract is void, will not entail ipso jure the invalidity of the arbitration clause. The arbitration agreement survives for determining whether the contract in which the



arbitration clause is embodied is null and void, which would include voidability.”

38. In view of the binding ratio and more particularly in view of the reasons stated above, I hold that the writ petition before this Court has to suffer an order of dismissal and accordingly, the writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

39. However, I would grant a small concession that even if the period to refer the dispute for arbitration is over, the petitioner can still invoke the arbitration since technically the period of contract is still subsisting. If he has any dispute to raise, he should raise such dispute on or before 10.02.2023. If the petitioner raises any dispute in the manner provided under the agreement, then the respondents may answer to the issues raised by the petitioner and let the matter proceed further in manner known to law.

25.01.2023

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Neutral citation : Yes / No
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To



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1.The General Manager

Southern Railway,
Chennai Region,
Chennai – 600 003.

2.The Senior Divisional Commercial Manager,

Palakkad Division,
Southern Railway.

C.V.KARTHIKEYAN,J.



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