

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.02.2016

Date of verdict: 29.02.2016

CORAM

THE HONOURABLE MR. JUSTICE R.SUBBIAH

Writ Petition Nos.36694 and 39177 of 2015
and M.P.Nos.1 to 3 of 2015
in W.P.No.36694 of 2015
and M.P.No.1 of 2015
in W.P.No.39177 of 2015

A.V.Krishnaiah

... Petitioner in
both the writ petitions.

vs.

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

2. The Divisional Railway Manager
(Commercial),
Commercial Branch,
Southern Railway, Chennai Division,
Park Town, Chennai-3.

... Respondents in
both the writ petitions

Writ Petition No.36694 of 2015 has been filed under Article 226 of the Constitution of India for the issuance of writ of certiorari to call for the records of the second respondent's impugned notice letter No.M/C300/Cycles/TYMR Dt.8.9.2015 and quash the same.

Writ Petition No.39177 of 2015 has been filed under Article 226 of the Constitution of India for the issuance of writ of certiorarified mandamus to call for the records of the impugned office Advice No. M/C.300/Cycles/TYMR Dt.11.11.2015 served on 26.11.2015 and quotation No.M/C.300/cycles Quotations / 25/2015 19/10/2015 displayed at parking stand of Thiruvannamiyur Railway Station on 7.12.2015 on the file of the second respondent and quash the same, consequently, direct the respondents to restore the petitioner's contract which is valid upto 7.6.2017 and compensate the period which was lost due to the termination.

For Petitioner : Mr.V.Suryanarayana Reddy
in both the writ petitions.

For Respondents : Mr.P.T.Ramkumar, SC,
in both the writ petitions.

COMMON ORDER

W.P.No.36694 of 2015 has been filed by the petitioner challenging the impugned notice of the second respondent in letter No.M/C300/Cycles/TYMR dated 8.9.2015.

2. W.P.No.39177 of 2015 has been filed by the petitioner challenging the impugned office Advice No.M/C.300/Cycles/TYMR dated 11.11.2015 served on 26.11.2015 and quotation No.M/C.300/cycles Quotations / 25/2015 19/10/2015 displayed at parking stand of Thiruvanniyur Railway Station on 7.12.2015 on the file of the second respondent and consequently, to direct the respondents to restore his contract which is valid upto 7.6.2017 and compensate the period which was lost due to the termination.

3. Since the parties are one and the same and the issues involved in both the writ petitions are interrelated with each other, both the writ petitions are disposed of by way of a common order.

4. The short facts, which are necessary to dispose of both the writ petitions, are as follows:-

(a) The petitioner has been declared as a successful bidder in open sealed tender called for contract for manning the cycles / scooters / cars / vans parking lot in area of 638 sq.mtrs in Thiruvanniyur Railway Station for a period of three years. The petitioner had quoted the highest rate of Rs.25,00,002/- as license fee for three years and the Railway Administration awarded the said contract to the petitioner vide letter of acceptance dated 4.6.2014. The three years contract period which commenced on 8.6.2014, expires on 7.6.2017. Pursuant to the above contract, the petitioner has been asked to collect the authorized charges towards parking fee. The second respondent fixed a sum of Rs.4,16,667/- towards the half yearly license fee. The petitioner has also been asked to pay a sum of Rs.4,16,667/- towards advance license fee for a period of six months and a sum of Rs.8,333/- towards 2% income tax for half yearly license fee, in all amounting to Rs.4,25,000/- vide letter dated 4.6.2014. After awarding contract, the petitioner has paid the said amount. Further, before granting license, the petitioner was asked to furnish bank guarantee of Rs.8,33,334/-. Accordingly, the petitioner has furnished bank guarantee of Rs.8,33,334/-.

(b) Thereafter, the petitioner started the work for levelling the ground measuring to an extent of 638 sq.mtrs. on 9.6.2014. While levelling the parking stand, he noticed that there was stagnation of water. Immediately, he has reported the said problem to the second respondent and requested him to arrange for necessary drainage channel vide letters dated 1.7.2014 and 24.8.2014. But, his request was not considered by the second respondent. Hence, the petitioner made necessary provisions for drainage channel at his cost and spent about a sum of Rs.1,50,000/- for the same and spent another sum of Rs.50,000/- for levelling the ground and a further sum of Rs.8,519.86 for obtaining E.B. Service connection. Further, he has also fixed CCTV camera at his cost in the parking lot.

(c) While the petitioner was carrying on his contract work, to his shock and surprise, he received a letter dated 3.7.2015 from the second respondent stating that since the petitioner has encroached about 520 sq.mtrs., he has to pay a sum of Rs.10,000/- as fine. In fact, with regard to the allegation of encroachment of land about 520 sq.mtrs, no notice was issued to the petitioner before imposing the fine of Rs.10,000/-. Though the second respondent made spot inspection on 30.5.2015 and 25.6.2016, before making inspection, no notice was issued to the petitioner. Thereafter, the second respondent issued a termination notice dated 8.9.2015 informing the petitioner that the contract would be terminated from 15.9.2015 by forfeiting all the securities available with Railways. The said order was issued without assigning any proper reason for termination except mentioning the third half yearly license fee of Rs.4,16,667/- fell due on 8.5.2015 and the alleged encroachment about 520sq.mtrs. Hence, the petitioner sent a reply dated 14.9.2015 to the second respondent stating that since he was suffering from Cardiac problem, there was a delay in payment of third half yearly licensee fee and requested 15 days time for payment of the said amount along with interest. Thereafter, the petitioner sent a sum of Rs.4,16,667/- by way of demand draft dated 23.10.2015 being the half yearly license fee. The said demand draft was duly acknowledged by the second respondent on 26.10.2015. Before issuing the impugned notice dated 8.9.2015, no show cause notice was issued to the petitioner regarding the alleged encroachment of land or with regard to the delay in making the half yearly license fee. Hence, the petitioner has filed the writ petition in W.P.No.36694 of 2015 challenging the impugned notice of the second respondent dated 8.9.2015. After filing the said writ petition, the second respondent sent another impugned order dated 11.11.2015 terminating the contract of the petitioner, which was received by the petitioner on 26.11.2015. The respondents are also taking necessary steps to call for fresh tender and they are also invoking serious steps to forfeit the petitioner's deposits including the bank

guarantee. Hence, the petitioner has filed another writ petition in W.P.No.39177 of 2015 challenging the impugned office Advice No. M/C.300/Cycles/TYMR dated 11.11.2015 and consequently, to direct the respondents to restore his contract which is valid upto 7.6.2017 and compensate the period which was lost due to the termination.

5. The respondents have filed counter affidavit in W.P.No.36694 of 2015, wherein, the following facts have been set out:-

(a) The Railway Administration vide Notification dated 14.2.2014, invited open tenders for awarding contract for operating cycles / scooters / cars / vans parking lot in area of 638 sq.mtrs. in Thiruvanniyur Railway Station for a period of three years. The petitioner quoted the highest rate of Rs.25,00,002/- as license fee for three years and hence, the Railway Administration awarded the said contract to the petitioner vide letter of acceptance dated 4.6.2014. The contract has commenced on 8.6.2014 and expires on 7.6.2017. An agreement was also entered into between the parties on 23.7.2014.

(b) During the periodical inspection of the Thiruvanniyur Railway Station parking area by the Engineering Department officials on 20.4.2015 and on 30.5.2015, it was detected that the petitioner had unauthorizedly been using additional area of about 520 sq.mtrs. The inspection report with regard to the encroachment was received by the second respondent on 25.6.2015. Accordingly, by letter dated 3.7.2015, the second respondent advised the petitioner to pay a fine of Rs.10,000/- as per clause 7(b) of the agreement dated 23.7.2014. In the same letter, it was also informed that in view of the encroachment made by the petitioner into the nearby area about 520 sq.mtrs., the proportionate license fee payable by him would be intimated shortly and the petitioner was also reminded to pay the third half yearly license fee of Rs.4,16,667/-, which was outstanding from 8.5.2015.

(c) Though the petitioner had received the said letter dated 3.7.2015, he did not pay the fine amount as well as the third half yearly license fee even as on 8.9.2015 i.e., nearly three months after the expiry of the due date. Clause 28(i) of the agreement dated 23.7.2014 gives authority to the second respondent to terminate the license without giving any notice and also to take consequential action, if the railway dues cross the three months period from the actual date of payment. The petitioner did not pay the railway dues for more than three months. Therefore, in terms of Clause 28(i) of the agreement dated 23.7.2014, the second respondent issued a letter dated 8.9.2015 giving all the details of the dues and the non-payment,

as a result of which, the contract has to be terminated with effect from 15.9.2015. For compensating the loss due to the non-payment of the dues by the petitioner, the second respondent invoked the bank guarantee of Rs.8,33,334/- and it was encashed on 14.9.2015.

(d) In these circumstances, on 18.9.2015, the second respondent received a letter from the petitioner seeking 15 days time to remit the amount with interest. In consideration of the petitioner's request, the second respondent issued a reply on 28.9.2015 clarifying that the bank guarantee furnished by the petitioner had been encashed to cover the past dues and in case the petitioner wanted to continue the contract, he must submit a fresh bank guarantee for Rs.13,23,146/- having validity until 8.12.2017, on or before 30.9.2015.

(e) Without considering the correspondence exchanged between the parties so far, the petitioner submitted a demand draft for a sum of Rs.4,16,667/- only as the third half yearly license fee on 26.10.2015 and did not furnish the bank guarantee for Rs.13,23,146/- Hence, the said demand draft has not been encashed by the respondents. In the result, the Railway Administration terminated the contract of the petitioner with effect from the midnight of 12.11.2015 vide letter dated 11.11.2015.

(f) In order to ascertain the exact encroachment made by the petitioner, the officials belonging to the engineering and commercial department took measurement on 8.9.2015 and found that the petitioner had occupied excess area of 375 sq.mtrs. The petitioner's representative, who was present in the survey, refused to sign the report. The encroachment during the seven months period was indicative of the fact that there is requirement for additional area in the parking stand and that more area could also be earmarked for parking facility. Based on the engineering report dated 8.9.2015 about the usage of additional area by the existing contractor, the finance department had also directed to fix the parking area in Thiruvannamiyur as 1013 sq.mtrs. Right from the first inspection done by the engineering officials on 20.4.2015 to 8.9.2015 and thereafter also, the petitioner had been unauthorizedly using additional area for about seven months. The Railways will incur heavy loss and also face audit objection, if the available resource is not put to proper use. In fact, the agreement dated 23.7.2014 entered into between the petitioner and the respondents contains a clause for arbitration in Clause 29 of the agreement. Hence, the writ petition is not maintainable. Thus, they sought for the dismissal of the writ petition.

6. Learned counsel appearing for the petitioner submitted that the petitioner was declared as a successful bidder by the respondents for operating cycles / scooters / cars / vans parking stand at Thiruvannamiyur Railway Station. The contract period commenced on 8.6.2014 and expires on 7.6.2017. As per the agreement dated 23.7.2014, the petitioner has to pay the third half yearly license fee of Rs.4,16,667/-. Since the petitioner was suffering from cardiac problem, he has not paid the said amount within the prescribed time. While so, the second respondent has issued a termination notice dated 8.9.2015 to the petitioner citing two reasons. The first reason is that the petitioner has not paid the third half yearly license fee of Rs.4,16,667/-, which fell due on 8.5.2015. The second reason is that the petitioner encroached an additional area of 520 sq.mtrs. The said order was passed in total violation of the principles of natural justice, since before inspecting the parking area, no notice was issued to the petitioner. Further, the respondents ought to have measured the parking area in the presence of the petitioner. Further, no explanation was called for from the petitioner with regard to the delay in payment of third half yearly license fee. Since the said order was passed without issuing notice and without affording an opportunity of hearing to the petitioner, the same is liable to be set aside on the ground of violation of the principles of natural justice. Further, when the writ petition in W.P.No.36694 of 2015 is pending, again another order dated 11.11.2015 terminating the contract of the petitioner was issued. Hence, challenging the same, the writ petition in W.P.No.39177 of 2015 has been filed.

7. Learned counsel appearing for the petitioner has also relied upon a number of judgments in support of his contention. In the decision reported in 2010(2) CWC 52 - E.Mohan v. Madras Fertilizers Limited, this Court has held that only if there is arbitrariness or unreasonableness in the order of cancellation, the Court can interfere in exercise of writ jurisdiction. For the similar proposition, he has also relied upon the decision of the Hon'ble Supreme Court reported in 2009 (7) Supreme 229 - Satwati Deswal v. State of Haryana & Ors.

8. Per contra, learned counsel appearing for the respondents submitted that the petitioner has not paid the third half yearly license fee and the third half yearly license fee of Rs.4,16,667/- was outstanding from 8.5.2015. Hence, the second respondent sent a letter dated 8.9.2015 to pay the said amount. Even thereafter, the petitioner has not chosen to pay the said amount. Hence, as per clause 28(i) of the agreement dated 23.7.2014, the second respondent is entitled to terminate the license without giving any notice to the petitioner. Therefore, by invoking clause 28(i) of the agreement, the contract was terminated. Further, the learned counsel appearing for the respondents submitted that at the time of inspecting the parking

area, the representative of the petitioner was present. But, he refused to sign the inspection report. In this regard, he has also produced a copy of the inspection report prepared by the engineering and commercial department of the respondents and submitted that absolutely there is no violation of principles of natural justice. Further, he has submitted that since the agreement dated 23.7.2014 contains a clause for arbitration, if there is any dispute between the parties, the petitioner has to seek remedy only by invoking the arbitration clause. In support of his contention, learned counsel appearing for the respondents has also relied upon the following decisions:-

(i) 2013 Writ L.R. 1080 - Tecco & R.D.(JV) v. The Chief Administrative Officer / Construction, Southern Railways & others.

(ii) 2013 (1) CWC 225 - The Senior Manager (Contracts Cell) v. Lakshmi Travels.

(iii) 2014 (2) CWC 434 - S.K.Kanniah Naidu & Co. v. The G.M., Bharath Petroleum Corporation Ltd.

9. Keeping the submissions made on either side, I have carefully gone through the entire materials available on record.

10. The present writ petitions have been filed mainly on the ground that the impugned orders dated 8.9.2015 and 11.11.2015 have been passed without giving notice to the petitioner and without giving any opportunity of hearing to the petitioner. But, according to the learned counsel appearing for the respondents, under clause 28(i) of the Agreement dated 23.7.2014, the respondents are empowered to terminate the contract for non-payment of the premium amount without issuing notice to the petitioner. Clause 28(i) of the agreement dated 23.7.2014 reads as follows:-

" 28(i) In the event of failure on the part of the Licensee in the payment of license fee or electrical energy charges or any other charges due to the Railway Administration within the stipulated time as mentioned in the bills and as per clause 23 and 27(iii) of this Agreement, the Licensee is liable to pay liquidated damages at the rate of one and a half percent (1.5%) per month or part thereof (i.e. 18% per annum), the date being reckoned from the due date of actual payment. In case the Licensee still fails to remit the Railway dues within three months from the date of actual due date of payment, the Railway Administration shall terminate the license ipso facto without any notice duly forfeiting all the security available with railways and evict the Licensee from Railway premises without any prejudice. "

A reading of the said clause would go to show that the Railway Administration shall terminate the license ipso facto without any notice duly forfeiting all the security available with the railways and evict the Licensee from Railway premises without any prejudice. The petitioner is the signatory of the said agreement. Therefore, now he cannot say that the impugned orders were passed without issuing any notice to him. Though the learned counsel appearing for the petitioner submitted that before making inspection of the parking area, the petitioner was not served with any notice, this fact was denied by the learned counsel appearing for the respondents. The learned counsel appearing for the respondents has submitted that at that time when the survey was done by the officials of the engineering and commercial department, the representative of the petitioner was present. But, he refused to sign the inspection report. Since the submission of the learned counsel appearing for the petitioner was denied by the learned counsel appearing for the respondents, I am of the opinion that this Court cannot conduct any roving enquiry on the disputed fact under Article 226 of the Constitution of India. However, in my considered opinion, clause 28(i) of the Agreement dated 23.7.2014 empowers the respondents to issue a termination order without any notice. In such circumstances, the petitioner cannot say that there is violation of principles of nature justice, particularly, when he is the signatory of the said agreement. Further, I find that since there is an arbitration clause, the petitioner has to seek his remedy only by invoking the arbitration clause as per clause 29(1)(i) of the Agreement dated 23.7.2014. Clause 29(1)(i) of the Agreement dated 23.7.2014 reads as follows:-

" 29(1)(i) In the event of any dispute or difference of opinion between the parties hereto as to the respective rights and dispute or difference on any matter in question, dispute or difference on any account or if the Railway Administration fails to make a decision within a reasonable time, then and in any such case, save the matters wherein relief specified in these presents, after 90 days but within 180 days of his presenting his final claim on disputed matter shall demand in writing that the dispute or difference to be referred to arbitration."

Thus, since an arbitration clause is provided under the agreement, I am of the opinion that the present writ petitions are not maintainable. In this regard, a reference could be made in the judgment of the Division Bench of this Court reported in 2013 (1) CWC 225 - The Senior Manager (Contracts Cell) v. Lakshmi Traves, wherein, it has been held that when there is an arbitration clause which was duly signed by parties, the petitioner has to seek remedy only by invoking the arbitration clause. Further, I am of the opinion, that the

issue raised by the petitioner cannot be decided in these writ petitions since this Court is not conducting any roving enquiry on the disputed facts.

11. For all the reasons stated above, I am of the opinion that both the writ petitions are not maintainable and the same are liable to be dismissed.

12. Accordingly, both the writ petitions are dismissed. However, the petitioner is at liberty to invoke clause 29(1)(i) of the Agreement dated 23.7.2014 for arbitration, if he is so advised. No costs. Consequently, connected miscellaneous petitions are closed.

sbi

s/d-

Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

To

1. The General Manager,
Southern Railway,
Park Town, Chennai-3.
2. The Divisional Railway Manager
(Commercial),
Commercial Branch,
Southern Railway, Chennai Division,
Park Town, Chennai-3.

+ 2 cc to Mr V.Surayanarana Reddy, Advocate, SR 12710, 12709

+ 1 cc to Mr.P.T.Ramkumar, Advocate, SR 13440

sv(co)
prk29/3

W.P.Nos.36694 and
39177 of 2015

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