



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED 14.12.2016

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THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P(MD)Nos.23875 to 23877 of 2016

and

W.M.P(MD)Nos.17222 and 17223 of 2016

1. M/s.Transstroy North Cargo Berth III Port Private Limited,
H.No.8-3-833/104, Main Road,
Kamalapuri Colony,
Hyderabad - 500 073.
represented by its Director R.Srinivasa Kannan
..Petitioner in W.P(MD)No.**23875** of 2016
2. M/s.Transstroy Shallow Draught Berth Port Private Limited
H.No.8-3-833/104, Main Road,
Kamalapuri Colony,
Hyderabad - 500 073.
represented by its Director R.Srinivasa Kannan
..Petitioner in W.P(MD)No.**23876** of 2016
3. M/s.Transstroy North Cargo Berth Port Private Limited,
H.No.8-3-833/104, Main Road,
Kamalapuri Colony,
Hyderabad - 500 073.
represented by its Director R.Srinivasa Kannan
..Petitioner in W.P(MD)No.**23877** of 2016

Vs.

1. The Board of Trustees,
V.O.Chidambaranar Port Trust,
Tuticorin,
represented by its Chairman
Tuticorin.
 2. The Chairman,
V.O.Chidambaranar Port Trust,
Tuticorin.
 3. The chief Engineer,
V.O.Chidambaranar Port Trust,
Tuticorin.
- ...Respondents in all W.Ps'

Prayer in W.P(MD)No.23875 of 2016: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus directing the respondents to refund the



wrongly forfeited Performance Guarantee furnished by the Petitioner Company for due performance of its obligations during the Construction Phase, amounting to Rs.21,00,00,000/- (Rupees twenty one crores only) along with interest at State Bank of India Prime Lending Rate (SBI PLR) plus 2% per annum from the date of forfeiture till the date of repayment to the Petitioner within a time frame fixed by this Court and for consequential orders.

Prayer in W.P (MD) No.23876 of 2016: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus directing the respondents to refund the wrongly forfeited Performance Guarantee furnished by the Petitioner Company for due performance of its obligations during the Construction Phase, amounting to Rs.4,20,00,000/- (Rupees four crores and twenty lakhs only) along with interest at State Bank of India Prime Lending Rate (SBI PLR) plus 2% per annum from the date of forfeiture till the date of repayment to the Petitioner within a time frame fixed by this Court and for consequential orders.

Prayer in W.P (MD) No.23877 of 2016: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus directing the respondents to refund the wrongly forfeited Performance Guarantee furnished by the Petitioner Company for due performance of its obligations during the Construction Phase, amounting to Rs.17,75,00,000/- (Rupees seventeen crores and seventy five lakhs only) along with interest at State Bank of India Prime Lending Rate (SBI PLR) plus 2% per annum from the date of forfeiture till the date of repayment to the Petitioner within a time frame fixed by this Court and for consequential orders.

For Petitioner : Mr.V.Raghavachari
in all W.Ps' for M/s.S.Ramesh

For Respondents : Mr.A.Arivuchandran
1 and 2 in all W.Ps'

COMMON ORDER

In all these three Writ Petitions, the Petitioner, who is one and the same, is seeking for a Writ of Mandamus directing the respondents to refund the forfeited Performance Guarantee furnished by the Petitioner/Company along with interest.

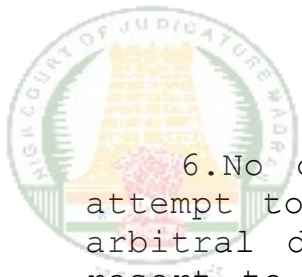
2. According to the Petitioner, such forfeiture was illegal and the respondents/Port Trust is not entitled to do so when they themselves have defaulted in performing their part of the conditions of the Concession Agreement entered between the parties.



3. Heard Mr.V.Raghavachari, learned counsel for the Petitioner and perused the materials placed before this Court.

4. Mr.V.Raghavachari, learned counsel for the Petitioner vehemently contended that the respondents/Port Trust is not justified in forfeiting the Performance Guarantee when they have not obtained Clearance Certificate from the competent authorities, so as to enable the petitioner to commence the work. Therefore, the learned counsel contended that the forfeiture is bad and one-sided action. He also invited the attention of this Court to various clauses of the Concession Agreement to substantiate his contention that the action of the respondents in forfeiting the Performance Guarantee cannot be sustained.

5. This Court, at this stage is not inclined to go into all these contentions made by the learned counsel for the Petitioner as well as the grounds raised in the present Writ Petitions seeking for a Writ of Mandamus as stated supra, for the simple reason that, admittedly, there is an arbitration clause in the said Concession Agreement entered between the parties which specifically contemplates under Article 19 certain procedures for resolving the dispute between the parties by way of dispute resolution. Article 19.1 emphasises first for making an attempt for amicable settlement between the parties by meeting together at request of any parties in an effort to resolve any dispute, difference or claim by discussion between them. Article 19.2 stipulates that a party may, in appropriate cases, refer the matter to an expert appointed by them with mutual consent. Failing such an attempt of settlement either amicably under Article 19.1 or through an expert under Article 19.2, the parties can then resort to finally settle their dispute by way of arbitration as contemplated under Article 19.3 and as per the procedures contemplated under Arbitration and Conciliation Act, 1996. Therefore, when these methods of dispute resolution are available in the Concession Agreement itself, the petitioner cannot be permitted to agitate the matter before this Court by filing the present writ petitions. Needless to say that Section 8 of the Arbitration and Conciliation Act, 1996 mandates the Court to refer the parties to arbitration, when it finds the existence of the clause for arbitration in the agreement entered between the parties. The Petitioner being a party to the said Concession Agreement, is bound by the same and thus the Petitioner/Company shall have to resort to such alternative redressal mode for redressal of their grievances. As I find that the said Article 19 of the said Concession Agreement takes care of the interest of both parties for deciding any dispute or difference or claim of any kind arose between them, filing of the present Writ Petitions



6.No doubt, the learned counsel for the petitioner made an attempt to contend that there is no dispute at all much less an arbitral dispute that has arisen between the parties, so as to resort to the arbitral proceedings as contemplated under Article 19 of the agreement. I do not think that such submission has any merit, when a perusal of the order passed for forfeiting the performance guarantee would certainly show that there is an arbitral dispute between the parties, as the respondent Port Trust has set out some reasons in justification of such forfeiture. Therefore, I reject the above contention of the learned counsel for the petitioner and hold that there is an arbitral dispute between the parties. At this juncture, it is useful to refer to the following decisions of the Apex Court.

(i) In **(2003) 6 SCC 503** (Hindustan Petroleum Corporation Limited vs. Pinkcity Midway Petroleums), it has been observed at paragraph Nos.14, 15 and 16 as follows:-

"14.This Court in the case of **P.Anand Gajapathi Raju v. P.V.G. Raju** [(2000)4 SCC 539] has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator....."

"15.The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand ? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own



jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in *Konkan Rly* (SCC p.405, para 21) with reference to the power of the arbitrator under Section 16 has laid down thus :

"21.It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." (emphasis supplied)

16.It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Kondan Rly* (SCC p.405, para 21) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in clause 40 of the Dealership Agreement and as required under Section 8 and 16 of the Act.

(emphasis supplied)

(ii) In **(2014)SCC 677** (*Swiss Timing Limited vs. Commonwealth Services (India) Private Limited*), the Apex Court has observed at paragraph No.28 as follows:-



"28.To shut our arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings...."

7.Accordingly, without going into the merits of the matter and the claim made by the petitioner, all these Writ Petitions are dismissed only on the ground that they are not maintainable in view of the existence of the arbitration clause in the agreement. However, liberty is granted to the petitioner to resort to the proceedings available under Article 19 of the Concession Agreement. It is open to the Petitioner to do so within a period of four weeks from the date of receipt of copy of this order. If any such steps are taken by the Petitioner, as requested by the learned counsel for the Petitioner, such proceedings shall be commenced and concluded within a period of four months thereafter. Consequently, connected Miscellaneous Petitions are dismissed. No costs.

Sd/
Assistant Registrar(C.O.,)

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Sub Assistant Registrar

To

1. The Board of Trustees, V.O.Chidambaranar Port Trust, Tuticorin, represented by its Chairman, Tuticorin.
 2. The Chairman, V.O.Chidambaranar Port Trust, Tuticorin.
 3. The Chief Engineer, V.O.Chidambaranar Port Trust, Tuticorin.
- +6cc to M/s.V.Raghavachari, Advocate, in SR No.80716 to 80718.
- +3cc to M/s.A.Arivuchandran, Advocate, in SR No.80750 to 80752.

W.P(MD)Nos.23875 to 23877 of 2016
and W.M.P(MD)Nos.17222 and 17223 of 2016
14.12.2016

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