

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 30TH DAY OF JANUARY 2017

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM

O.A. No.67 of 2017
and
A.Nos.422 and 423 of 2017

In the matter of Section 9
of the Arbitration and
Conciliation Act, 1996.

And
Agreement dated 05.01.2000
between the Applicant and
Respondent

And
Award dated 03.03.2009 by
the Arbitral Tribunal of
Hon'ble Mr.Justice
P.Shanmugam, Hon'ble
Mr.Justice
K.P.Sivasubramanian &
Hon'ble Mr.Justice A.K.Rajan
(Rtd.Judges, Madras High
Court).

M/s.South India Hydrocarbons and
Terminals Limited.,
No.3, (Old No.9),
4th Main Road Extension,
Kottur Gardens,
Chennai-600 085,
Rep. by its Director.

...Applicant/Applicant
in both Applications

Vs

The Board of Trustees,
Chennai Port Trust,
Rep. by its Chairman,
Rajaji Salai,
Chennai-600 001

...Respondent/Respondent
in both Applications

Original Application praying that this Hon'ble Court be pleased to Grant an order of INTERIM INJUNCTION, restraining the Respondent, their agents, representatives, administrators, or any person claiming through them from in any manner acting pursuant to the letter Ref:A/566/2012/T(M cell) dated 07.01.2017.

A.No.422 of 2017

Application praying that this Hon'ble Court be pleased to set aside the impugned letter with Ref: A/566/2012/T (M cell) dated 29.11.2016 issued by the Respondent to the Applicant and consequentially set aside the further letter with Ref: A/566/2012/T(M cell) dated 07.01.2017.

A.No.423 of 2017

Application praying that this Hon'ble Court be pleased to direct the Respondent to comply with the Award dated 03.03.2009 passed by the Arbitrators by directing the Respondent to permit the Applicant with necessary entry pass to have access to the project site to carry on their obligations under the Agreement dated 05.01.2000.

These applications coming on this day before this court for hearing the court made the following order:-

Heard Mr.Om Prakash, learned counsel appearing for M/s.Ramalingam Associates for the applicant and Mr.R.Karthikeyan, learned Standing Counsel appearing for the respondent.

2.These applications have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking for certain interim reliefs. The necessity to approach the Court arose on account of the fact that communication was sent by the respondent to the applicant calling upon the applicant to remit the rent for the period from 23.02.2015 to 31.10.2016 amounting to Rs.24,89,35,410/- and also the lease rental charges from 01.11.2016 till the date of payment in terms of the order passed by the Hon'ble Division Bench of this Court in O.S.A.No.220 of 2014 dated 11.08.2016. This communication of the respondent Port Trust has been followed by another communication dated 07.01.2017. Therefore, the applicant seeks to set aside the communication dated 29.11.2016, consequent letter dated 07.01.2017 and to grant injunction to restrain the respondents from acting in furtherance to the communication dated 07.01.2017. Apart from that, there is an application in A.No.423 of 2017 to direct the respondents to comply

with the award dated 03.03.2009 passed by the learned Arbitrator. The prayer sought for in A.No.423 of 2017 is not sustainable since the applicant had filed an execution petition to execute the award. Therefore, these applications deserves to be dismissed.

3. With regard to the relief sought for in O.A.Nos.67 of 2017 and A.No.422 of 2017, the Court heard the learned counsels for the parties elaborately. The short issue which falls for consideration is whether the applicant is liable to pay the lease rental for the period claimed in the communication dated 29.11.2016. As noticed above, the impugned claim itself is pursuant to the judgment of the Hon'ble Division Bench in O.S.A.No.220 of 2014. Undoubtedly, this matter has had a checkered history and the parties are before the Court since 2009 onwards. The list of events which took place in the past and required to be noticed by the Court are that on 05.01.2000 the applicant entered into an agreement with the respondent Port Trust for leasing Rs.5.95 Crores of open space land area inside the Port for creation of tankage facilities for storage of kerosene and furnace oil and the lease period was for 30 years. Though the said agreement was entered into, on 28.05.2001 a notice was issued to the applicant cancelling the agreement with effect from 01.05.2001 for non-payment of advance charges within the stipulated period

which constitute violation of agreement condition. Earnest Money Deposit was also forfeited. This cancellation of the agreement was challenged by the petitioner and the matter was referred for arbitration to the Tribunal consisting three learned Arbitrators and an award was passed in favour of the applicant. The net result being the order of cancellation dated 28.05.2001 was held to be bad in law. In the interregnum by another communication dated 18.03.2005 the respondent conveyed their notice of intent to terminate the agreement for the alleged violation of the conditions of the lease agreement. Once again, the applicant raised a dispute and it was referred for arbitration before the Tribunal consisting of three retired Judges of this Court. The said Arbitral Tribunal passed an award which was in favour of the applicant.

4.The respondent Port Trust challenged the said award by filing O.P.NO.457 of 2009 and the said petition was dismissed by order dated 11.01.2012. Challenging the same, the respondent Port Trust had filed O.S.A.No.220 of 2014 which was dismissed by the Hon'ble Division Bench by judgment dated 11.08.2016. Thus, as on date awards which was passed in favour of the petitioner stands and the award would bind the respondent Port Trust subject to any challenge before the Hon'ble Supreme Court against the judgment of the Hon'ble Division Bench in O.S.A.No.220 of

2014. Further, nothing has been placed on record by the Port Trust to show that the judgment in O.S.A.No.220 of 2014 has been challenged before the Hon'ble Supreme Court. However, in this case the impugned communication dated 29.11.2016 is a communication calling upon the applicant to pay the further lease rental charges from 23.05.2005 to 01.11.2016. Time limit was given for payment, failing which, the respondents have stated that they will cancel the agreement in terms of Article 111(e)(15) of the agreement. On perusal of the award passed by the learned Arbitral Tribunal dated 03.03.2009, which also sets out the earlier award dated 09.02.2002, it is seen that the applicant had undertaken to remit the lease rent from 23.02.2005 and this has been recorded in paragraph 13 of the award dated 03.03.2009, which reads as follows:

"13.Rent

13.1) The case of the claimant is the land was handed over on 23.02.2004 and hence the rent is payable only from that date. The claimant has undertaken to remit the annual lease from 23.02.2005.

..... As the claimant has been in possession of the land they have to pay the lease amount payable in advance from 23.02.2004 the date of taking complete possession of land.

5. Admittedly, the applicant has not challenged the finding rendered by the Arbitral Tribunal as referred supra and it is only the respondent Port Trust which challenged the award in O.P.No.457 of 2009. In the said petition, while upholding the award the Court by order dated 11.01.2012 in paragraph 40 while dealing with the issue relating to lease rent, it has been held that the applicant has been in possession of the land and they have to pay the lease payable in advance from 23.02.2004, the date of taking complete possession of the land. The Hon'ble Division Bench while confirming the said order in O.P.No.457 of 2009, by judgment dated 11.08.2016 in O.S.A.No.220 of 2014, held in paragraph 17 as follows:

"17. So far as rent is concerned, the complete possession of the land was taken on 23.02.2004 and the first respondent is liable to pay the rent from that date. The Tribunal also found that excepting Custodial Regulation Zone certificate, all other certificates were obtained within one year by the first respondent. The above findings are based on the actual facts and materials available before the learned Arbitrators."

5. Thus, it is clear that the date from which rent is payable had been fixed not only by the Arbitral Tribunal as well as by the Court while dealing with the challenge to the award both by the Hon'ble Single Judge as well as the

Hon'ble Division Bench. Thus the applicant cannot now state in this application under Section 9 of the Act, that the said date has to be reverted or to advance another set of arguments as regards the liability to pay the lease rent and cannot call upon this Court to scrutinize the lease agreement to arrive at a finding as to whether at all the applicant is liable to pay the lease rent. The applicant having not challenged the order to that extent of the finding of the Court in O.P.No.457 of 2009 or in O.S.A.No.220 of 2014, in my considered view, the applicant is estopped from doing so in these proceedings. However, if the claim of the applicant is that there is a calculation error or there is some other dispute arising out of the terms of the agreement then the remedy of the applicant is not before this Court under Section 9 of the Act. Furthermore, the conduct of the applicant has also to be taken note of. From the typed set of papers filed by the respondent, it is seen that in spite of repeated communication to the registered office of the Company, the same were returned with postal endorsement "left" and only when the copy of the notice was sent to the two Directors to their residential address, immediately, the applicant woke up and has filed these applications. From the typed set of papers, it is further seen that paper publication has also been effected in the Tamil and English daily on 13.01.2017 by the respondent Port Trust.

6.Thus, for all the above reasons, this Court is of the view that the applicant has not made out any case for grant of any relief in these applications. Hence, these applications are dismissed.

Sd/-T.S.S.J

30.01.2017

//Certified to be a true copy//

Dated this the day of 2017

jj 18.07.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.