

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 14TH DAY OF JUNE 2018

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

OA.Nos.367 & 368 of 2018

In the matter of Arbitration
and Conciliation Act, 1996

And

In the matter of disputes and
differences between M/s.Tharu
and Sons, and The Senior
Divisional Mechanical
Engineer, Southern Railway,
Salem, arising under Contract
Agreement No.07/SA/M271/OBHS
dated 22.03.2018

M/s.Tharu and sons,
Rep.by its Managing Partner Mr.Antony Tharu,
Karipayi Road, Rajagiri P.O.,
South Kalamassery, Ernakulam District,
Kerala 683 104 ..Applicant in both OAs
Vs.

- 1.The Divisional Railway Manager,
Southern Railway,
Salem.
- 2.Senior Divisional Mechanical Engineer,
Southern Railway,
Salem.
- 3.M/s.Premier Garment Processing,
29, Govindan Street,
T.Nagar, Chennai 600 017 ..Respondents in both OAs

OA.No.367 of 2018 :

Original Application praying that this Hon'ble Court
be pleased to grant interim injunction restraining the
second respondent from terminating the Contract Agreement
No.07/SA/M271/OBHS dated 22.3.2018 entered into between
the second respondent and this applicant pertaining to
the work of on-board housekeeping services (OBHS) in

train number 12680/12679 (CBE-MAS-CBE), train number : 22616/22618/22615 (CBE-TPTY-CBE) for a period of three years commencing from 8.1.2018 to 7.1.2021 and consequently restrain the second respondent from entering into any contract or assigning work which has already been assigned to this applicant.

OA.No.368 of 2018 :

Original Application praying that this Hon'ble Court be pleased to grant interim injunction restraining the second respondent from allocating the work assigned to this applicant under the Contract Agreement No.07/SA/M271/OBHS dated 22.3.2018 to the third respondent.

These Original Applications coming on this day before this court for hearing the court made the following order:

O.A.No.367 of 2018 is filed by the applicant seeking an order of interim injunction restraining the second respondent from terminating the Contract Agreement No.07/SA/M271/OBHS, dated 22.03.2018. O.A.No.368 of 2018 is filed by the applicant seeking an order of interim injunction restraining the second respondent from allocating the work assigned to it under the aforesaid Contract Agreement to the third respondent pending disposal of the arbitration proceedings.

2. The applicant firm is in the business of undertaking the railways contract. The applicant participated in the tender floated by the second respondent for the purpose of On-Board Housekeeping Services (OBHS) in train numbers : 12680/12679 (CBD-MAS-CBE) and 22616/22618/22615 (CBE-TPTY-CBE). The tender was floated on 21.08.2017. The tender of the applicant was accepted and a Letter of Acceptance dated 04.12.2017 was intimated to the applicant.

2.1. Based on the contract value, the applicant was also required to remit a sum of Rs.6,85,650/- as Security

Deposit, besides the Performance Guarantee. Pursuant to the said Letter of Acceptance dated 04.12.2017, the second respondent had also entered into an agreement dated 22.03.2018 for a period from 08.01.2018 to 07.01.2021.

2.2. While so, the second respondent sent a communication dated 15.02.2018 to the applicant in the nature of Show Cause Notice (SCN). In the SCN, though it is reiterated by the second respondent that the contract was assigned to the applicant, it was proposed to foreclose or terminate the contract. A reply to the said SCN was also sent by the applicant on 17.03.2018. However, there was no further communication from the second respondent and the applicant continued the work peacefully.

2.3. On 03.04.2018, the representative of the third respondent had appeared at work site and directed the staff of the applicant to vacate the work site within a week. On enquiry, it was found that a second tender was floated on 17.01.2018 for the work, which was assigned to this applicant for a period of commencing from 08.01.2018 and a Letter of Acceptance was also issued in favour of the third respondent on 02.04.2018.

2.4. The applicant states that the contract cannot be terminated as per the whims and fancies of the second respondent, when the work has been assigned for a period of three years. When the Letter of Acceptance dated 04.12.2017 and the Agreement dated 22.03.2018 for a period from 08.01.2018 to 07.01.2021 were in force, the second respondent had floated the second tender, which is arbitrary. Hence, the applicant is seeking for injunction restraining the second respondent from terminating the contract entered into between the second respondent and the applicant and also injunction restraining the second respondent from allocating the work assigned to this applicant under the contract

agreement No.07/SA/M271/OBHS, dated 22.03.2018 to the third respondent.

3. Mr.R.Thiagarajan, learned Senior Counsel appearing on behalf of the first and second respondents, submitted that the affidavit filed by the applicant is guilty of "*suppresio veri suggestio falsi*". It is pointed out that the applicant was aware of the second tender notice issued on 17.01.2018 and in response to that, it also participated in the tender process jointly with M/s.Dynamic Enterprises, in the name of Dynamic Rajagiri Services. Hence, the applicant had knowledge about the second respondent issuing another tender and also participated in the same as a joint venture relating to the work, which is already carried out by the applicant, pursuant to the first tender. In the second tender, it is stated that it is for a comprehensive work of mechanised cleaning of primary/secondary maintenance trains, cleaning of depot premises and On Board Housekeeping Services in the Coimbatore train. The first tender, in which, the applicant was given the Letter of Acceptance, was only with respect to On Board Housekeeping Services alone in Train No.12680/12679 and train No.22616/22618/22615.

4. Be that as it may, it is also pointed out that as per Clause 19 of the Agreement, the Railway has the right to determine and terminate the contract at any time should in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause. In such an event, the work done till the date of the contract will be paid in part or in full at the rate specified in the contract. As per Clause 61(1) of the Indian Railways Standard General Conditions of Contract (GCC), which forms part of the agreement, a notice will be sent to the Contractor intimating the determination of the contract. Accordingly, following the SCN issued on 15.02.2018 explaining the reasons, the

second respondent had terminated the work awarded to the applicant. Any challenge to such a decision taken by the Railways to terminate the contract would be subject to arbitration as per Clause 61(1) and 61(2) of the GCC. In fact, the applicant had issued a letter dated 07.05.2018 invoking the said clauses read with Clause 35 of the Agreement dated 22.03.2018 seeking appointment of an arbitrator to resolve the aforesaid dispute as per the Arbitration and Conciliation Act, 1996.

5. Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of the third respondent, contended that it may not be open to the applicant to raise the above said untenable objections, when it had already participated in the second tender along with M/s.Dynamic Enterprises, as joint venture. When the applicant had taken part in the second tender, it is estopped from challenging the same under the guise of dispute.

6. This Court had earlier passed an order of interim injunction as prayed for by the applicant. The applicant had expressed its intention, in its letter dated 07.05.2018, requesting the appointment of an Arbitrator. So it is clear that the intention of the applicant is only to go before the learned Arbitrator.

7. It is also submitted by the learned counsel for the first and second respondents that as per Section 14 (1)(c) of the Specific Relief Act, 1963, a contract which is in its nature determinable cannot be specifically enforced. Admittedly, in the present contract it is determinable even to the knowledge of the applicant. Hence, the applicant cannot be aggrieved by the same and an injunction cannot be granted to prevent the breach of contract, when the determinable contract itself cannot be specifically enforced.

8. In the light of the above, the prayer in A.No.367 of 2018 seeking an order of interim injunction restraining the second respondent from terminating the

contract is not maintainable. The applicant having expressed its intention to go for arbitration, it is open to it to move the Arbitral Tribunal for appropriate relief.

9. It is also clear from the GCC that from the date of receipt of the letter from the Contractor, 60 days time is available for the Railways to appoint an Arbitrator. The letter from the applicant of its intention to go for arbitration and seeking appointment of Arbitrator is 07.05.2018. Hence, respondents 2 and 3 have time till the expiry of 60 days from 07.05.2018. The learned Senior Counsel also undertakes to appoint an Arbitrator before the expiry of 60 days from 07.05.2018. The said undertaking is recorded.

10. Admittedly, the work contract was awarded in favour of the third respondent on 02.04.2018, whereas, the application itself was filed before this Court on 10.04.2018. The applicant had suppressed the above details. In view of the award of the contract in favour of the third respondent before the grant of interim injunction, the second prayer becomes infructuous and no order is necessary in A.No.368 of 2018.

11. Accordingly, A.No.367 of 2018 is dismissed. As already the third respondent is awarded the contract even before filing of the application, the prayer has become infructuous. Hence, A.No.368 of 2018 is closed.

Sd/.P.S.N.J
14.06.2018

//Certified to be a true copy//

Dated this the day of 2018.

TR/18.06.2018 COURT OFFICER(OS)
From 25.09.2008 the Registry is issuing certified copies
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