IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY THE 24TH DAY OF SEPTEMBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.A. No.650 of 2018

In the matter of Arbitration & Conciliation Act, 1996

And

In the matter of Dispute and Differences between M/s. Premier Garments Processing and Senior Divisional Mechanical Engineer, Salem Division, Southern Railway Pursuant to the Letter of Acceptance No. SA/M271/MCC/CBE/2018 dated 02.04.2018.

M/s. Premier Garments Proceeding
Rep.by its Proprietor
Ibrahim Sha
No.29, Govindan Street,
T.Nagar, Chennai 600 017. : Applicant

Vs.

Senior Divisional Machanical Engineer
Southern Railway,
Salem Division,
Salem - 636 005. :Respondent

Original Application praying that this Hon'ble Court be pleased to grant an order of interim injunction restraining the respondents herein, its men, agents, servants, subordinates or any other person or persons claiming through them or authorized by them from, in any manner, interfering with the right of the Applicant herein to continue the work of Mechanized cleaning of primary/secondary maintenance Trains, cleaning of depot premises covering 39,000 sq.meters and on-board house - keeping services in Train Nos. 12647-12648, 16614-16613, 12084-12083, 12680-12679, 22616-22618, 22617-22615 and 22616-22615 at Coimbatore Coaching Depot for a period of 4 years, granted to the applicant herein under Letter of Acceptance bearing No. SA/M/271/MCC/CBE/2018 dated 02.04.2018 of the respondent herein, pending disposal of the above petition.

This Original application coming on this day before this court for hearing the court made the following order:-

Short point that arises for consideration in this application is whether the applicant a successful bidder in a tender floated by the respondent railways and issued with a Letter of Acceptance (LOA) bearing reference No. SA/M/271/MCC/2018 dated 2.4.2018 can maintain an application under Section 9 of the Arbitration and Conciliation Act, 1996 for interim relief. If so, whether the applicant is entitled to the facts ande circumstances of the case?

2. By this application the applicant seeks for an injunction to restrain the respondent from in any manner interfering with its rights to operate mechanised cleaning of primary/secondary trains, cleaning of the depot premises covering 39,000 Sq.m and on board house-keeping services of trains specified and therein for a period of four years at

Coimbatore Coaching Depot pursuant to Letter of Acceptance.

3. If the "Letter of Acceptance" read with the General Conditions of the Contract (GCC) amounts to a valid contract, the arbitration clause contained therein will bind both the parties and therefore the applicant will be entitled to invoke the jurisdiction of this Court under Section 9 of the Act if not, the applicant will have to work out its remedy under law.

4. The applicant participated in a tender floated by the respondent railway by the respondent in their Tender Notification dated 17.1.2018 for cleaning of Coaches, Depot etc. The applicant was required to pay an Earnest Money Deposit of Rs.8, 42, 840/- at the time of submitting their bid. The estimated value of the contract was Rs.13, 85, 66, 086.76/-.

5. As per clause Sl.No.1 to Clause 6 of the Tender Document, GCC July 2014-15 is applicable. It also mandates furnishing of a "Performance Guarantee"" within 30 days by a successful bidder as per the Letter of Acceptance.

6. As per Clauses 8, 9 and 10 of the GCC, a contract

has to be executed within 7 days after notice that the contract has been awarded Clause and reads as under:-

> " **Execution of Contract Document** : The Tenderer whose tender is accepted shall be required to appear in person at the office of General Manager/General Manager (Construction), Chief Administrative Officer (Construction), Divisional Railway Manager or concerned Engineer, as the case may be, or if a firm or corporation, a duly authorized representative shall so appear and execute the contract documents within **7 days after notice that the contract has been awarded to him.** Failure to do so shall constitute a breach of the agreement affected by the acceptance of the tender in which case the full value of the earnest money accompanying the tender shall stand forfeited without prejudice to any other rights or remedies.
>
> In the event of any tenderer whose tender is accepted shall refuse to execute the contract document as here in before provided, the Railway may determine that such tenderer has abandoned the contract and there upon his tender and acceptance thereof shall be treated as cancelled and the Railway shall be entitled to forfeit the full amount of the Earnest Money and to recover the damages for such default."

7. On the other hand, Clause F4 of the Tender Document deals with " Signing of The Agreement". A successful bidder has to sign a contract within **45 days** from the date of issue of the "Letter of Acceptance".

8. As per the Tender Document are successful bidder will be issued with two copies of the "Letter of Acceptance". The

successful bidder has to return a signed copy within three days to the railways while retaining the other.

9. The applicant was declared as a successful bidder vide Letter of Acceptance dated 2.4.2018 and was required to furnish a Performance guarantee a sum of Rs. 1,76,58, 820/- within a period of 30 days from the date of receipt of the said Letter of Acceptance.

10.The 30th day would have expired on 2.5.2018 from the date of said Letter of Acceptance. The applicant delayed in furnishing the " "Performance Guarantee". The Letter of Acceptance also contemplates **commencement of work within 21 days** from the date of "Letter of Acceptance".

11. As per clause 16. (4) of the GCC, a successful bidder has to submit A "Performance Guarantee" (PG) within 30 days from the date of issue of Letter of Acceptance (LOA). It allows extension of time by another 30 days and up to 60 days from the date of the said Letter of Acceptance subject to permission and imposition of penal interest at 15% per annum beyond the 30th day from the LOA. As per clause 4.11 of GCC, 2018, a successful bidder gets a total of 90 days for LOA for furnishing P.G. Respective clauses reads as under :-

GCC 2014	GCC 2018
(a) The successful bidder shall have to submit a "Performance Guarantee" (PG) within 30 (thirty) days from the date of issue of Letter of Acceptance (LOLOA). Extension of time for submission of PG beyond 30 (thirty) days and upto 60 days from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a pedal interest of 15% per annum shall be charged for the delay beyond 30 (thirty) days, i.e., 31st day after the date of issue of LOA. In case the contractor fails to submit the pre-requisite PG even after 60 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shashall be debarred from participating in re-tender for that that work.	Performance guarantee at a rate of 10% of the contractual value shall be deposited by the successful bidder The successful bidder shall have to submit a Performance Guarantee (PG) valuing 10% of the contract value in four separate parts of 2.5% each of the contract value, within 30 (thirty) days from the date of issue of Letter of Acceptance (LOA). Extension of time for submission of PG beyond 30 (thirty) days and upt60 the date of submission of PG from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a penal interest of 15% per annum shall be charged for the delay beyond 30 (thirty days, i.e. from 31st day after the date of issue of LOA. In case the contractor fails to submit the requisite PG after 60 days from the date of issue of LOA, a notice shall be served to the contractor to deposit the PG immediately however not exceeding 90 days from the date of issue of LOA)/ In case the contractor fails to submit the requisite PG even after 90 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shall be debarred from participating in re-tender for that work. In case 60th day is a bank holiday or office closure next working day should be considered as the last day for submission of the P.G. Decision of Authority competent to sign the contract Agreement would be final in case of any dispute.

12. The applicant would state that they are bound by GCC

in 2018, while the respondent would state that the contract is bound by GCC, 2014.

13. The "Performance Guarantee" is to be valid for the entire duration of the contract and for a further period of six months after the completion of the contract.

14. In case a bidder fails to furnish the requested "Performance Guarantee" even after 60/90 from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against the contract. The failed bidder is also debarred from participating in the tender of that work.

15. Within fifteen days of the LOA dated 02.04.2018 being issued to the applicant, the previous contractor approached this Court and obtained a status-quo order on 17.04.2018 in O.A.Nos.367 and 368 of 2018 under Section 9 of the Arbitration and Conciliation Act, 1996.

16. A notice dated on 17.4.2018 was issued to the applicant and the respondent through the counsel of the

previous contractor regarding status-quo ordered. Thus, both the applicant and the respondent were enjoined from not proceeding further with the LOA. Under these circumstances, the applicant also could not commence the work within 21 days of the LOA.

17. Thereafter, the applications came to be contested and by an order dated 14.06.2018 and this Court ultimately dismissed the OA.Nos.377 and 780 of 2018 filed by the previous contractor on the ground of material suppression of facts while securing an *ex parte* interim order on 17.04.2018.

18. During the interregnum between the date of filing of the O.A.No.s367 and 368 of 2018 by the previous contractor and the ultimate dismissal of the applications filed by the previous contractor on 14.06.2018, the respondent by their letter dated 7.5.2018 addressed to the applicant alluded to the terms of the "Letter of Acceptance" dated 02.04.2018 and the failure of the applicant to furnish the ""Performance Guarantee"" within a period of 30 days from the date of receipt of the same and therefore called upon the applicant to offer their explanation on or before 11.5.2018 and to show cause as to why the "Letter of Acceptance" should not be cancelled by the railway administration.

19. This was issued even though the previous contractor had obtained a status-quo order on 17.04.2018. By another letter dated 28.5.2018, the time for furnishing the bank guarantee was extended up to 01.06.2018 .

20. The applicant thereafter obtained a Bank Guarantee in favour of the respondent's from HDFC Bank on 27.6.2018 and submitted. On 29.6 2018, the respondent pointed out certain deficiencies in the Bank Guarantee produced by the applicant and returned the same to the applicant. By a letter dated 4.7 2018 the respondent hurriedly cancelled the Letter of Acceptance issued to the applicant.

21. It is in this background, the present case has been filed by the applicant herein for the above reliefs.

22. The learned counsel for the respondent submitted that the applicant was governed by the GCC, 2014 and failure to furnish "Performance Guarantee" warranted cancellation of Letter of Acceptance and cancellation of the contract.

23. The learned counsel for the respondent submitted that

the respondent was justified in cancelling the "Letter of Acceptance" on account of the failure of the applicant to furnish the Bank Guarantee within the stipulated time.

24. The learned counsel for the respondent opposed the application and stated that the applicant was entitled to invoke the arbitration clause in the GCC, 2014 which reads as under:-

"**64.(1) Demand For Arbitration :**

> **64.(1) (i)** In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, 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 contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, 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.

> **64.(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 the Railway, shall be referred to arbitration and other matters shall not be included in the

reference.

64.(3) Appointment of Arbitrator :

64.(3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

64.(3) (a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."

25. The Learned Counsel for the applicant submits that actually the GCC, 2018 has replaced the GCC, 2014 and therefore the applicant still had time upto 01.07.2018 as under Clause 4.11 of the PG 2018 General Terms of Contract.

26. The learned counsel for the respondent relied on several decisions of the Hon'ble Supreme Court and of this Court and some of the other High Court's decision in support of his plea that the dispute being arbitral , only before the arbitrator under section 17 of the Arbitration and Conciliation Act, 1996,. The applicant has to work out remedy if any and the Courts power under Section 9 was limited in view of the amended Section 9 of the Act.

27. I have gone through the records of the case and the extracts from the tender documents filed by the learned counsel for the respondent.

28. The Letter of Acceptance dated 2.4.2018 issued to the applicant by the respondent merely states that "Performance Guarantee" required should be in accordance with the relevant clause of the GCC and clause 2 of SCC shall be for 10% of the contract price.

29. Clause 8 of the GCC, 2014 mandates that a successful bidder is required to appear in person at the office of the concerned officer or the engineer named therein to execute the contract documents within **seven days** after the receipt of notice awarding the contract. Failure to do so shall constitute a breach of the agreement affected by the acceptance of the tender in which case the full value of the earnest money accompanying the tender shall stand forfeited without prejudice to any other rights or remedies.

30. As per clause F3 .3 of the Tender Document the Letter of Acceptance will form part of the contract. Upon "Letter of Acceptance" being signed and returned by successful bidder, the respondent has to promptly notify the unsuccessful tenderer and discharge/return dated securities.

31. The "Letter of Acceptance: states that applicant has to commence the work within 21 days. In this case, the respondent failed appears to sign a formal contract with the applicant within 7 days. It appears that as per GCC,2014 or 45 days as per the Tender Document as the case may be of the "Letter of Acceptance". The Applicant was also not issued with work order. Perhaps, these exercises were not undertaken immediately and in view of the pendency of the O.A. Nos.367 and 368 of 2018 filed by the previous contractor. Thereafter contract it never came to be executed. The applicant also delayed in furnishing the "Performance Guarantee" to the respondent within 60 days of LOA.

32. Before proceeding with the merits of the case, it is necessary to deal with the first issue as to whether there is a contract between the applicant and the respondent.

33. In **Sundaram Finance Ltd. v. NEPC India Ltd.,** (1999) 2 SCC 479 the Hon'ble Supreme Court observed that "*But a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act.* ***If an application is so made, the court will first have to be satisfied that***

there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. *Once it is so satisfied, the court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.*

34. In **Jawahar Lal Burman v. Union of India**, (1962) 3 SCR 769 : AIR 1962 SC 378 the Court considered the existence of a contract pursuant to a Letter of Acceptance August 31, 1949. The offer was accepted *subject to your (contractor) depositing 10% as security. The letter further stated that "The contract is concluded by this acceptance and formal acceptance of tender will follow immediately on receipt of treasury receipt"*

35. The Court therefore held that " *Therefore, to begin with the tender treated the security deposit as a subsequent condition, the contract was for the immediate supply of goods and the acceptance purports to be in accordance with the relevant government rules and uses the expression that the contract was concluded by the said acceptance. Therefore, in our opinion, reading the letter as a whole it would not be possible to accept the appellant's argument that the letter was intended to make a substantial variation in the contract by making the deposit of security a condition precedent instead of a condition subsequent."*

36. In **Maharshi Dayanand University v. Anand Coop. L/C Society Ltd.**, (2007) 5 SCC 295, while dealing with the law pre-SBP & Co. [(2005) 8 SCC 618], the Hon'ble Supreme Court held that the question whether the fact that the parties have not signed the contract containing the detailed specifications as contemplated by the letter of acceptance would preclude the respondent from seeking an arbitration must be left to be decided by the arbitrator, since in terms of Section 16 of the Act the question can be raised before the arbitrator as the case was not governed by the principles recognized by **SBP & Co. V. Patel Engg. Ltd.**, (2005) 8 SCC 618.

37. In **SBP & Co. v. Patel Engg. Ltd.**, (2005) 8 SCC 618, the Hon'ble Supreme Court while dealing with the power under Section 11(6) of the Act, held that "*While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final*".

38. The Tender Document in the present case contemplates execution of contract within 45 days of the Letter of Acceptance while the General Terms of Contract 2014-2018 contemplates execution of the contract within 7 days of the Letter of Acceptance. LOA also contemplates

commencement of work within 21 days of its receipt.

39. The respondent ought to have signed a contract within 7 days of the Letter of Acceptance as per clause 8 of the General Conditions of Contract. As noted above, the respondent perhaps refrained from doing so in view of the interim orders of this Court in OA Nos. 367 and 368 of 2018 which was in operation between 17.4 2018 till 14.6.2018.

40.The fact that the applicant ought to have commenced the work within 21 days of the LOA makes it clear that there was a concluded contract between the parties. The execution of formal contract and furnishing of Performance Guarantee are subsequent to a binding contract between the parties.

41. Therefore, the arbitration clause is binding between the parties, though how far the said clause is enforceable in the manner in which it is para-phrased is another issue altogether in the light of the amendment to the Act in 2015. However, this is not the occasion to decide that issue.

42. Both the parties have harboured a view that the

dispute is arbitrable. The applicant would contend that the dispute is arbitrable to press for relief under Section 9 of the Act, While the respondent would contend the same for dismissing the application and to relegate the parties to arbitration proceeding.

43. Unfortunately, the applicant received a termination notice dated 4.7.2018 from the respondent. Therefore, question to be addressed is whether the applicant is entitled for the relief under Section 9 of the Act or whether the applicant should be directed to work out its remedy before the arbitrator under Section 17 of the Act.

44. In this case, arbitration Tribunal has not been constituted and therefore the applicant can maintain an application under Section 9 of the Act, Situation is not ripe for relegate the case for consideration under Section 17 of the Act.

45. Clause 61 of GCC specifically provides for instance for "Determination of Contact Owing to Default of Contractor: On going through the same, *prima facie* it appears, none of the circumstances are attracted warranting of termination of the

contract. Only under Clause 16-(4)(a) as extracted *supra*,

In the table gives the respondent to terminate the contract.

The procedure for obtaining Performance Guarantee is outlined below:

The successful bidder shall have to submit a "Performance Guarantee" (PG) within 30 (thirty) days from the date of issue of Letter of Acceptance (LOLOA). Extension of time for submission of PG beyond 30 (thirty) days and upto 60 days from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a pedal interest of 15% per annum shall be charged for the delay beyond 30 (thirty) days, i.e., 31st day after the date of issue of LOA. <u>In case the contractor fails to submit the requisite PG even after 60 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shall be debarred from participating in re-tender for that work.</u>

46. The respondent can thus terminate the contract for not furnishing the PG within the stipulated time from LOA.

47. However, the respondent was enjoined to maintain status-quo by an order dated 17.04.2018 of this Court in O.A. Nos.367 and 368 of 2018 and therefore the applicant could not

have been compelled to furnish "Performance Guarantee" within 30 days or before the expiry of 60 days with interest . The applicant also could not have commenced the work within 21 days in view of the order dated 17.4.2018 of the Court.

48. In view of the status-quo ordered, *prima facie,* I am of the view that 30 days or 60 days with extension to furnish the "Performance Guarantee" cannot be pressed against the applicant. During that period the applicant could not have been compelled to furnish "Performance Guarantee".

49. In fact, it would have been futile to furnish a bank guarantee as the Court was seized of the case at the behest of the previous contractor and a status quo order was in force. There would have no justifiable reason to furnish P.G. Fiscal prudence also would not justified furnishing of P.G.by way B.G.

50. In my view, a marginal delay in furnishing the Bank Guarantee after the Court dismissed the application on 14.06.2018 filed by the previous contractor did not justify termination of the contract on 4.7.2018. The respondent appears to have been inspired for reasons which are wholly

unconscionable to terminate the contract,

51.The applicant had reasonable cause for delay, if any in furnishing the Bank Guarantee as the period between 17.4.20178 and 14.6.2018 eclipsed both the parties from acting further and in accordance of the LOA. In this case, the applicant has come forward with the execution of "Performance Guarantee" which was returned by a letter dated 29.06.2018 followed by Letter of Termination dated 04.07.2018 in quick succession.

52. During the hearing, the learned counsel for the respondent also informed that the previous contractor has been allowed to continue with the operation even though previous contract had been terminated which led to the filing of the OA Nos. 367-68 of 2018 which has been disposed. The respondent being the "State" ought to have acted with fairness and reasonableness.

53. In **Mahabir Auto Stores and others Vs. Indian Oil Corporation and others** (1990) 3 SCC 752, the Hon'ble Supreme Court held as follows:

> "So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

54. In my view, the respondent being a largest State machinery cannot shut out an successful bidder and allow a unsuccessful party to continue despite the Court finding that such a party was guilty of suppression of fact while securing an *ex-parte* status quo order. *Prima facie,* termination of the contract appears to ex facie-illegal, arbitrary and appears to allow the previous contractor to continue with the work despite orders of the Court rejecting his plea.

55. Therefore, question to be addressed is whether the respondent can be now compelled to allow the applicant to commence work pending resolution of the dispute or not in the given facts and circumstances of the case. In other words, whether the applicant is entitled for an interim mandatory injunction or not?

56. As the general rule, the Courts normally direct the proceedings to be completed rather than to grant interim mandatory injunction. In **Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.**, (2007) 7 SCC 125, Hon'ble Supreme Court observed as under:

> " Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles

governing the grant of an interim injunction that generally govern the courts in this connection."

57.The Hon'ble Supreme Court held that In **Dorab Cawasji Warden v. Coomi Sorab Warden and others,** 1990 (2) SCC 117, while considering the scope of issuing Ad-interim Mandatory Injunction and after referring to several authorities the Hon'ble Supreme Court observed as under"

" The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status-quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, Courts have evolved certain guidelines. Generally stated these guidelines are:

1. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.

2. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

3. The balance of convenience is in favour of the one seeking such relief."

58. The Hon'ble Supreme Court in **Metro Marins and another v. Bonus Watch Co.(P) Ltd. and others,** 2004 (7) SCC 478, followed the view in **Dorab Cawasji Warden v. Coomi Sorab Warden,** 1990 (2) SCC 117 and observed that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In this case, the arbitration proceeding has not yet commenced.

59.The Hon'ble **Supreme Court in Kishore Kumar Khaitan v. Praveen Kumar Singh,** (2006) 3 SCC 312, held that before ordering an interim mandatory injunction or refusing it, the Court has first to consider whether the plaintiff has proved that he was in possession.

60. A Division Bench of this Court in **Sakthi Durga Builders and Developers Vs. P.S.Raman** 2007 (3) CTC 163 held that …."*it is apparent that before taking the extraordinary step of issuing Interim Mandatory Injunction, the Court is required to find out about the existence of a very strong prima facie case in favour of the plaintiff, apart from other aspects regarding irreparable loss and balance of convenience. As observed by the Supreme Court, the tests to be satisfied are to be much stringent while dealing with the*

Application for Interim Mandatory Injunction.”

61. In my view the applicant is entitled to commence the work as the contract has been *prima facie* unfairly terminated by the respondent. Further, the respondent by allowing the previous contractor to continue with the work is giving premium to an unsuccessful party to frustrate the contract of a successful contractor who unfortunately could not commence the work for no fault of his. Applicant would have started the work but for the status-quo order dated 17.04.2018 obtained by the previous contractor after suppressing facts.

62. The fact that the previous contractor has been allowed to continue despite dismissal of the O.A.No.367 of 2018 filed by him and hurried termination of the contract with the applicant also raises serious doubts in the manner in which the whole exercise has been carried.

63.The applicant has invested in not only paying EMD but also obtained Bank Guarantee for the performance guarantee. The applicant would have also invested heavily in the machinery and men and therefore to not to allow the applicant to commence work will certainly expose the applicant to irreparable loss.

64. The balance of convenience for grant of interim relief is overwhelming in favour of the applicant on the previous contractor is not qualified to carry on operations. No prejudice or harm will be caused to the respondent, if the applicant is allowed to commence the work as per the LOA pending resolution of dispute . In fact, by allowing the applicant to commence work, the respondent will be honouring the contract. Hence, the applicant is entitled for the relief.

65. As the relief to the applicant is being allowed , the respondent is directed to

i)Ensure that the applicant is given atleast 21 days time to get ready to commence the work from the date of receipt of this order unless the applicant is able to mobilise men and machine before the said date.

ii) Ensure smooth handing over of the work to the applicant both in letter and spirit without any deviation and without any inconvenience and disruption of the service as the work involves essential railway service connected with cleanliness for the convenience of the public.

iii) Applicant shall furnish Bank Guarantee to the respondent within 21 days time after correcting the

Applicant shall correct the defects pointed out in letter dated 29.06.2018 of the respondent.

iv)If dispute persist between the parties after the work is handed over to the applicant, the respondent may inform the applicant about the same and obtain consent for appointment of arbitrators to resolve the dispute between them.

v) In case, of reference of dispute for arbitration after the work is handed over to the applicant, the arbitral Tribunal shall decide the right of the parties.

vi)It is made clear that under no circumstances, the respondent shall frustrate the relief granted herein to the applicant.

66. In view of the above observation, the application is allowed.

Sd/-C.S.N.J

24/09/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 05.10.2018 COURT OFFICER

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