

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 11-10-2018

CORAM

THE HONOURABLE MR.JUSTICE HULUVADI G.RAMESH

AND

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

WRIT APPEAL Nos.2259 & 2260 OF 2018

M/s.Premier Garments Processing

...Appellant in both appeals

-vs-

1.The Divisional Railway Manager,
Southern Railway,
Salem Division,
Salem - 630 005.

2.The Senior Divisional Mechanical Engineer,
Southern Railway,
Salem - 630 005.

...Respondents in both appeals

W.A.No.2259 of 2018 is filed under Clause 15 of the Letters Patent, against the order dated 24.09.2018, passed in W.P.No.17914 of 2018, on the file of this Court.

Prayer in WP.No.17914 of 2018:Petition filed under Article 226 of the Constitution of India for the issuance of a writ of mandamus, directing the Respondents herein to accept the Performance Guarantee No.004 GT02181730007 dated 22.6.2018 issued by HDFC Bank Limited Salem and permit the Petitioner to continue with the work of Mechanized cleaning of En-route pass through Trains under CTS Scheme at Erode Railway Station pursuant to the Letter of Acceptance dated 13.3.2018 in / No.SA / M 271 / CTS / STN / ED /2018 of the 2nd Respondent.

W.A.No.2260 of 2018 is filed under Clause 15 of the Letters Patent, against the order dated 24.09.2018, passed in W.P.No.9723 of 2018, on the file of this Court.

Prayer in WP.No.9723 of 2018:Petition filed under Article 226 of the constitution of India for the issuance of a writ of certiorari calling for the records relating to the order dated 9.4.2018 in No.SA/M 271/ CTS/ STN/ ED /2017 of the 2nd respondent and quash the same.

For appellant in both appeals : Mr.P.Wilson,
Senior Counsel,
for M/s.Ilam Bharathi

For respondents in both appeals: Mr.P.T.Ramkumar

COMMON JUDGMENT

(Judgment of the Court was delivered by K.Kalyanasundaram,J.)

Heard Mr.P.Wilson, learned Senior Counsel, appearing for the appellant; and Mr.P.T.Ramkumar, learned Standing Counsel, for the respondents, and also perused the material available on record.

2. These Writ Appeals have been filed, challenging the orders of the learned single Judge, dated 24.09.2018, passed in W.P.Nos.17914 of 2018 and 9723 of 2018 respectively.

3. Appellant had filed W.P.No.9723 of 2018, assailing the order of cancellation of Letter of Acceptance, dated 09.04.2018, and W.P.No.17914 of 2018, seeking for issuance of a writ of mandamus, directing the respondents to accept the performance guarantee.

4. The facts necessary for disposal of these Writ Appeal would run thus :

Pursuant to the tender notification issued by the respondents, the appellant participated in the tender process and he was selected therein. Letter of Acceptance was issued by the second respondent to the appellant on 13.03.2018 and later it was cancelled by the second respondent on 09.04.2018 for administrative reasons. Contending that the order of cancellation did not have any reason, W.P.No.9723 of 2018 was filed on 17.04.2018. The Writ Court granted interim order on 23.04.2018. When the appellant furnished performance guarantee, the same was refused by the respondents and hence the other Writ Petition No.17914 of 2018 was filed.

5. According to the learned Senior Counsel for the appellant, after the contract was concluded by issuance of Letter of Acceptance, dated 13.03.2018, the respondents have no authority to cancel the Letter of Acceptance, without affording an opportunity and also without providing any reasons thereto. Placing reliance on a decision of the Supreme Court in Mohinder Singh Gill V. Chief Election Commissioner, 1978 (1) SCC 405, the learned Senior Counsel would contend that when the impugned order does not have any reason, that cannot be permitted to be improved by way of filing counter and also by way of arguments.

6. It is the submission of the learned Standing Counsel for the respondents that Letter of Acceptance, dated 13.03.2018, stipulates that the appellant should commence work within 21 days and also furnish performance security of 10% i.e., for Rs.1,48,31,680/- within the stipulated time and since those conditions have been violated by the appellant, the respondents cancelled the Letter of Acceptance. It is also argued that even though writ petition was filed contending that the appellant had already commenced work pursuant to the Letter of Acceptance, dated 13.03.2018, the letter submitted by the appellant, dated 22.06.2018, would reveal that even after a period of three months, no work was commenced and even as per the amended guidelines, the appellant did not furnish performance guarantee within the period of 90 days and further an attempt was made to furnish performance guarantee after 100 days.

7. Even though the learned single Judge granted interim stay on 23.04.2018, eventually, the writ petition came to be dismissed by a common order, dated 24.09.2018. In the instant case, a perusal of the Letter of Acceptance would show that the work should commence within 21 days from the date of its issuance, as per the instructions of the Engineer In-charge. It further stipulates that in case of failure to commence work as per the terms and conditions, the Letter of Acceptance shall be cancelled and the security deposited forfeited.

8. Although the learned Senior Counsel for the appellant vehemently contended that works were already commenced by the appellant, but, during the pendency of the writ petition, he was prevented from doing the work further, however, no proof has been furnished to substantiate the said contention. Moreover, the letter of the appellant, dated 22.06.2018, amply proves that even after lapse of three months the appellant did not commence the work. Hence, we do not find any substance in the argument of the learned Senior Counsel for the appellant.

9. It is next argued by the learned Standing Counsel for the respondents that the contract has an arbitration clause and if there is any violation in cancelling the Letter of Acceptance, the remedy for the appellant is before the arbitrator, seeking damage, and the writ petition, seeking a direction to continue the contract, cannot be maintained. In this regard, the learned Standing Counsel placed reliance on a decision of the Apex Court in Cox and Kings India Limited v. Indian Railways Catering & Tourism Corporation Ltd., 2012 ((7) SCC 587, wherein, the Hon'ble Supreme Court has held as follows :

"26. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction

to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding.

27. Taking into consideration the totality of the circumstances, we are inclined to agree with the suggestions which had been made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. We, therefore, dismiss the Special Leave Petitions, but make it clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. We also make it clear that the observations made by the learned Single Judge, the Division Bench of the High Court and by us, shall not, in any way, influence the outcome of the arbitral proceedings, if resorted to by the parties."

10. In the case on hand, it is to be noted that the appellant did not commence work within the stipulated period of 21 days and the contention of the appellant is found to be false. Therefore, we are of the considered opinion that the writ petitioner did not approach the court with clean hands. It is also a fact that performance security to the extent of 10% of the contract was not furnished within the stipulated time, but only after 100 days, an attempt was made to furnish the same, which is self-explanatory. That is exactly the reason for cancellation of Letter of Acceptance and for ordering re-tender. Now, the re-tender process is in progress and time is still available for the appellant to participate in the re-tender process. The learned single Judge has also given liberty to the appellant to participate in the re-tender process. Further, the learned Standing Counsel also expressed the view that the appellant could participate in the re-tender. In view of the observations made by the learned single Judge coupled with the violation of conditions of Letter of Acceptance by the appellant, the question of compliance of principles of natural

justice on the part of the respondents, in our view, does not arise. In addition, since liberty is given to the appellant, it is open to him to participate in the re-tender notification issued.

11. For all the foregoing reasons, these Writ Appeals are dismissed, confirming the order of the learned single Judge. No costs. Consequently, the connected C.M.P.Nos.18047,18049 and 18050 of 2018 are also dismissed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

dixit

To

1.The Divisional Railway Manager,
Southern Railway,
Salem Division,
Salem - 630 005.

2.The Senior Divisional Mechanical Engineer,
Southern Railway,
Salem - 630 005.

+2cc to M/s.S.Ilam Bharathi, Advocate SR.NO.70443, 70444

+1cc to M/s.P.T.Ramkumar, Advocate SR.NO.70657

CP(CO)

sm:31.10.2018

W.A.Nos.2259 & 2260 OF 2018

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