O.A.No.377 of 2019
and A.Nos.4223 and 4224 of 2019

PUSHPA SATHYANARAYANA, J.

O.A.No.377 of 2019 was filed seeking to grant an order of injunction restraining the respondent from invoking the Bank Guarantee, dated 18.01.2019 in No.:05391GPER000518 issued by the Bank of Baroda, Main Branch, Andal Street, Trichirappalli, till the disposal of the arbitral proceedings.

2. This Court, while ordering notice, on 08.04.2019 restrained the respondent from invoking the said Bank Guarantee (in short, "BG") till 29.04.2019.

3. Seeking to vacate the interim order dated 08.04.2019 granted by this Court in O.A.No.377 of 2019, A.No.3044 of 2019 was filed by the respondent. This Court disposed of A.No.3044 of 2019 with certain directions on 24.04.2019.

4. While so, the original applicant filed A.Nos.4223 and 4224 of 2019 with the following respective prayers :

"To extend the date of completion of the supply of six machineries as per the order dated 24.04.2019 passed in O.A.No.377 of 2019 from 30.06.2019 to further period till the respondent lift the six machineries after completing the final inspection and consequently restrain the respondent from invoking the BG till such time.

"... to direct the respondent to lift all the six machineries (A-3 to A-8) without fail after paying the value of those machineries within the extended time to be granted by this Court."

5. The facts of the case of the applicant, in a nutshell, run as follows :

5.1. The applicant, a Micro Small Medium Enterprise (MSME) engaged in the manufacture of engineering equipments, was given a Purchase Order (PO) dated 06.02.2018 by the respondent, a Multi National Company. The PO required the applicant to produce and supply 10 "Mill Body Assembly Machineries" (in short, "MBA machineries") to the respondent. Accordingly, the applicant supplied 10 MBA machineries to the respondent, which was acknowledged by the respondent, however, for eight machineries alone the cost was paid to the applicant.

5.2. The respondent issued another PO dated 08.05.2018 to the applicant for the supply of 16 MBA machineries. Only at this stage, the applicant realized that the wastage cost and the actual machine cost are much higher than what were quoted and they suffered huge loss. This is because, though the applicant claimed that it was in the manufacturing field for the last 30 years, the MBA machineries are new to them. Hence, the loss.

5.3. The applicant requested for a joint meeting with the respondent, which was held on 01.02.2019, wherein, the respondent permitted the applicant to supply 8 machineries, instead of 16 machineries, by then, the applicant claimed that it supplied two MBA Machineries out of 8 sought to be supplied.

5.4. In the interregnum, the applicant furnished a BG for a sum of Rs.62,41,849/-, which is 20% of the contract value, in terms of the PO conditions and the same was valid till 31.01.2019. The applicant extended the validity of the BG till 30.04.2019.

5.5. In the aforesaid joint meeting held on 01.02.2019, it was agreed by the respondent to return the BG, which was given for 16 machineries, enabling the applicant to resubmit it for the remaining six machineries. But they failed to do so.

5.6. Subsequently, the applicant made fabrication of the six MBA machineries and they were inspected by the respondent, which were to their satisfaction. After the applicant completed 3rd assembly machining work, they were kept ready for final inspection.

5.7. Suddenly, on 05.04.2019, the respondent issued a communication to invoke the BG dated 08.01.2019. The applicant replied to the said letter on the very next day, i.e., on 06.04.2019 seeking not to invoke the same, besides expressing consent to keep it alive till the dispute is resolved and to give a fresh BG from 01.05.2019 to the value of six MBA Machineries.

5.8. In such backdrop, the applicant filed O.A.No.377 of 2019 seeking injunction, as stated supra.

6. As indicated above, this Court restrained the respondent from invoking the said BG till 29.04.2019 and when the respondent sought to vacate the order by filing A.No.3044 of 2019, this Court disposed of the said application on 24.04.2019 on the following terms :

> "3. After some arguments, the learned counsel for both sides submit that, let the applicant take time upto 30.06.2019 and on or before 30.06.2019, the six number of machines, as agreed, shall be supplied without any default. In order to enable the applicant to take such time to supply the machines, the Bank Guarantees already given by the applicant shall be extended and shall be kept alive till 15.07.2019.
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> 4. If the applicant does not honour the commitment made before this Court, through the learned Senior Counsel for the applicant, by not supplying the six machines in complete, on or before 30.06.2019, the bank guarantees so extended and kept alive till 15.07.2019, can be invoked by the respondent. However, once the machines are supplied on or before

> 30.06.2019, the bank guarantees shall not be invoked and if still there are any issues between the parties, the same can be referred to the arbitrator for adjudication. ...."

7. Learned Senior Counsel for the applicant submitted that the original Bank Guarantee was renewed and handed over to the respondent, in compliance of the order of this Court and though all the six machineries were kept ready for lifting, as required by the respondent, they have not lifted the same.

8. On the other hand, learned counsel for the respondent contended that though their officials went to inspect the applicant company, they were not allowed to enter inside the premises and hence, it is clear that the applicant failed to comply with the undertaking given before this Court. Thus, he sought for dismissal of the application.

9. Indisputably, the question as to whether the machineries are manufactured to the satisfaction of the respondent or not is yet to be decided, as the complaint of the respondent is that they are allowed to inspect the machineries only on 29.06.2019, by then they were not ready. However, the applicant denied the same stating that all the

machineries were ready for lifting and painting was also done to the requirement of the respondent. Only if the machineries are not ready for lifting on or before 30.06.2019, the Bank Guarantee furnished earlier could be invoked.

10. The applicant reiterated that all the machineries were made ready, as mentioned in the earlier order, and the respondent officials carried out inspection and found them satisfactory and also cleared the same for further process with respect to the MBA machineries 3 to 5. Though the applicant claims that the personnel of the respondent were allowed for inspection on 28.06.2019 and 29.06.2019 with respect to the inspection qua MBA machineries 7, 8 and 6, as per their request, the respondent denied the same.

11. Be that as it may, as per the PO, whether the MBA Machineries are in order, as required by the respondent, is a question of fact, which can be decided only by the Arbitral Tribunal in terms of arbitration clause provided therein.

12. Though the first three numbers of machineries are given clearance by the respondent, for the next three machineries, it is

complained that the access was denied for inspection. However, learned counsel for the applicant produced photos of the machineries that are ready for lifting. If there is any complaint with respect to the requirement, it can be dealt with separately by the respondent.

13. As the earlier order passed by this Court for making the MBA machineries ready for delivery is complied with, the respondent cannot be allowed to invoke the Bank Guarantee, the validity of which is extended till 30.07.2019.

14. At this juncture, both the learned counsels agreed that the dispute may be referred to Arbitral Tribunal and a retired Hon'ble Judge of this Court may be appointed as the sole Arbitrator. Accordingly, Hon'ble Mr.Justice R.S.Ramanathan, a retired Judge of this Court residing at "Parijatham", Old No.4B2, New No.15, Rajagopalan Street, Valmiki Nagar, Thiruvanmiyur, Chennai-600 041, (Phone No.94450 22424), is appointed as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The

learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

15. The Original Application is ordered accordingly. Connected applications are closed.

12.07.2019

Index : Yes / No
Internet : Yes
Speaking Order

PUSHPA SATHYANARAYANA, J.

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12.07.2019