

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

O.S.A. Nos. 397 of 2018 & 9 of 2019
&
C.M.P.Nos.23221 of 2018 & 620 of 2019

The Senior Divisional Mechanical Engineer,
Southern Railway, Salem Division,
Salem - 636 005.

...Appellant in O.S.A.No.397 of
2018

M/s.Tharu and Sons,
Rep by its Managing Partner,
Mr.Antony Tharu.

...Appellant in
O.S.A.No.9 of 2019

-vs-

1.M/s.Premier Garments Processing,
Rep by its Proprietor Ibrahim Sha
No.29, Govindan Street, T.Nagar,
Chennai - 600 017.

...Respondent in both the appeals

2.The Senior Divisional Mechanical Engineer,
Southern Railway, Salem Division,
Salem - 636 005. ... 2nd Respondent in OSA No.9/2019

Common Prayer: Original Side Appeals filed under Order 36, Rules 1 & 9 of O.S.Rules r/w. Clause 15 of the Letter Patent for setting aside the order passed by this Court in O.A.No.650 of 2018 dated 24.09.2018.

Prayer in O.A.No.650 of 2018:-

Original Application filed to grant an order of interim injunction remaining 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.

For Appellant : Mr.P.T.Ramkumar (O.S.A.No.397 Of 2018)
Standing Counsel
Mr.Thriyambak
(O.S.A.No.9 of 2019)

For Respondent : Mr.S.Elambharathi for
Sole respondent in O.S.A.No.397/2018
and for R1 in O.S.A.No.9/2019

Mr.P.t.Ram Kumar, Standing Counsel for
R2 in O.S.A.No.9 of 2019

COMMON JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]
O.S.A.No.397 of 2018

This Appeal by the Senior Divisional Mechanical Engineer, Southern Railway is directed against the order in O.A.No.650 of 2018 dated 24.09.2018 in an application filed by the respondent herein under Section 9 of the Arbitration & Conciliation Act, 1996 (herein after 'the Act').

2. The respondent in the said application prayed for an order of interim injunction to restrain the appellant from interfering with their right to continue the work of Mechanised cleaning of primary/secondary maintenance Trains, cleaning of depot premises covering 39,000 Sq. Mts. and on-board house keeping services in certain trains at Coimbatore Coaching Depot for a period of 4 years granted to the respondent vide Letter of Acceptance (herein after referred to as 'LoA') dated 02.04.2018.

3. The learned Single Bench by the impugned order allowed the application and issued other directions as well. The operative portion of the order reads as follows:

"(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."

4. The Railway administration being aggrieved by such order is before us by way of this appeal. At the time when the appeal was entertained, the Court granted an interim order against which the respondent preferred Special Leave Petition before the Hon'ble Supreme Court in SLP(Civil) No.28674 of 2018 and the Hon'ble Supreme Court by order dated 07.12.2018 pointed out that the impugned order in the Special Leave Petition is an interlocutory order and therefore they are not inclined to interfere in the exercise of jurisdiction under Article 136 of the Constitution of India. However, it was observed that the High Court should expeditiously dispose of O.S.A.No.397 of 2018. Further there was an observation that the High Court will decide the appeal on its own merit uninfluenced by the observation made in the interlocutory order dated 07.12.2018.

5. The appeal was listed before us on 12.03.2019 and the Court had pointed out to the learned counsel on either side that they may advance arguments on the main appeals at the earliest. Accordingly, with the consent of the learned counsel on either side, the appeal was listed for final hearing today (13.03.2019).

6. Mr.P.T.Ramkumar, learned Standing Counsel for the Railway Administration submitted that the respondent having not challenged the termination notice dated 04.07.2018, cannot maintain an application under Section 9 of the Act seeking an interim protection to continue the contract which was never commenced by the respondent. Further, it is submitted that the finding rendered by the learned Single Bench that the existing contractor was already terminated is factually incorrect as show-cause notice alone was issued on 15.02.2018 proposing to

terminate the existing contractor and no final order was passed and in the meantime the existing contractor filed O.A.Nos.367 and 368 of 2018 under Section 9 of the Act and in the said application though there was an interim order granted on 17.04.2018, on 14.06.2018, the applications were dismissed.

7. Further it is submitted that the observations made by the learned Single Bench that the respondent has invested huge amount for purchasing of machinery etc., is without any valid documents. It is further submitted that the respondent cannot contend that because of the order of status quo granted in O.A.No.367 and 368 of 2018 dated 17.04.2018, he could not commence the work since no such representation was made by the respondent to the Railway Administration for not being able to commence the work. Even assuming that there was an order of status quo that was pertaining only to one item of work i.e., On-board House keeping Service (OBHS) and if the respondent was really bonafide in their action, they could have commenced the work in respect of remaining two works and also submitted performance guarantee within the time permitted/stipulated in the LoA.

8. Further it is submitted that in terms of the conditions contained in the LoA dated 02.04.2018, the work has to be commenced within 21 days from the LoA and failing to commence the work as per terms and conditions of the LoA, the tender will be cancelled. Thus, the respondent having been failed to commence the work within the said time period, the contract was rightly terminated by the appellant. Further the second condition regarding furnishing of Performance Guarantee, in terms of Clause 16(4) of the General Conditions of Contract (herein after referred to as 'GCC'), the Performance Guarantee has to be submitted within 30 days. Another 30 days grace period is granted subject to the payment of penal interest, failure to comply with the conditions empowers the appellant to terminate the contract. The respondent did not submit Performance Guarantee on or before the cut-off date namely 01.06.2018. Thus, upon failing to comply with the condition, the contract was rightly terminated.

9. Further it is contended that validity of the termination order has to be decided only by the Arbitral Tribunal, which is yet to be constituted as per the GCC and cannot be decided by this Court in an application filed under Section 9 of the Act. Therefore, it is submitted that the observation made by the learned Single Bench more particularly in paragraphs 54 and 61 of the order impugned are not sustainable. Furthermore, it is submitted that there is no intention on the part of the respondent to invoke the arbitration clause, this is evident from the attitude of the respondent and the letter dated

28.07.2018 sent to an Authority who is not competent to initiate arbitration proceedings cannot in any manner advance the case of the respondent and in respect of the appellant administration having informed the respondent by letter dated 10.08.2018 advising the respondent to make a request for arbitration to the competent authority, General Manager, Southern Railway, Chennai, no such request has been made by the respondent till date.

10. Thus, it is submitted that the learned Single Bench exercised its jurisdiction while considering an application under Section 9 of the Act holding that the termination is ex-facie-illegal which cannot be done. In other words, it is submitted that by virtue of the order impugned, the contract has been re-written and re-validated which could not have been done as it is barred in law. Further it is contended that when a contract is determinable in nature, it cannot be specifically enforced as envisaged under Section 41(1)(c) of the Specific Relief Act, 1963. Further it is submitted that the order passed by the learned Single Bench in restoring the contract which is duly terminated is beyond the scope and ambit of Section 9 of the Act.

11. In support of his contention, the learned counsel for the appellant placed reliance on the decisions of the Hon'ble Supreme Court in the case of Arvind Constructions Co.(P) Ltd., Vs. Kalinga Mining Corporation & others [reported in (2007) 6 SCC 798], Adhnik Steels Ltd., Vs. Orissa Manganese and Minerals (P) Ltd., [reported in (2007) 7 SCC 125], Indian Oil Corporation Ltd., Vs. Amritsar Gas Service & others [reported in (1991) 1 SCC 533], Cox and Kings India Ltd., Vs. Indian Railways Catering and Tourism Corporation Ltd., & another [reported in (2012) 7 SCC 587] and the decision of the Hon'ble Division Bench of this Court in the case of Bharat Petroleum Corporation Limited Vs. Rajarajeswari Agency & another [reported in (2007) 6 MLJ 525] and the decision of the Bombay High Court in the case of Oil and Natural Gas Corporation Ltd., Vs. Streamline Shipping Co.Pvt.Ltd., [reported in AIR 2002 BOMBAY 420], and the decision of Delhi High Court in the case of Rajasthan Breweries Ltd., Vs. Stroh Brewery Company [reported in AIR 2000 DELHI 450] and the decision of the Hon'ble Division Bench of this Court in the case of M/s.Indian Oil Corporation Ltd., Vs. M/s.Bhagawan Balasai Enterprises [reported in (2018) Law Weekly 610] and the decision of the learned Single Bench of this Court in the case of Apple Finance Ltd., Vs. Gayathri Sugar Complex Ltd., [reported in (2004) R.A.J 54]. Further, very recently, the Hon'ble First Bench of this Court in the case of Archer Power Systems Private Limited Vs. Kohli Ventures Ltd., & others [reported in (2018) 2 CTC 241] followed the decision of Firm Ashok Traders Vs. Gurumukh Das Saluja, [reported in (2004) 2 CTC 208 (SC) held that manifest intention to arbitrate is a sine qua non for

moving the Court under Section 9 of the Act and obtaining the Interim Order when Section 9 Application is moved before commencement of Arbitral Proceedings.

12. On the above grounds, the learned counsel for the appellant sought for setting aside the order impugned in this appeal. Mr.S.Elambharathi, learned counsel appearing for the respondent sought to sustain the order impugned, after referring to the dates and events. It is submitted by the learned counsel that the LoA dated 02.04.2018 granted in favour of the respondent was for a mechanised cleaning of primary/secondary maintenance trains, cleaning of depot premises and On-Board House keeping Service was quite different from manual cleaning which was awarded in favour of the third party i.e., M/s.Tharu and Sons.

13. The learned counsel referred to Clause 63 of the GCC which deals with settlement of disputes and submitted that acceptance of request for arbitration is not automatic and the same has to be determined in terms of Clause 63 of the GCC and the respondent had made a request vide a letter dated 28.07.2018 for reference of dispute of Arbitration. However, the same was not considered. Further it is submitted that in terms of Clause 64(2) of the GCC even if the termination has taken place, the Engineer can issue directions to continue the work during the arbitration proceedings. It is further submitted that on 02.04.2018, the LoA was issued and the respondent was granted 21 days time to commence work.

14. On 17.04.2018, an order of injunction and status quo was obtained by the third party namely M/s.Tharu and Sons and the injunction was in force till 14.06.2018. Immediately, thereafter on 27.06.2018, Bank Guarantee was furnished by the respondent and it has been not accepted by the appellant and even as of now the respondent is ready and willing to furnish the Bank Guarantee and taking into account all these circumstances, the learned Single Bench elaborately considered the matter and held that the contract has been illegally terminated and granted appropriate relief to the respondent and such a relief granted by the Court should not be interdicted or interfered by this Court in this appeal and the directions issued by the learned Single Bench should be directed to be implemented by the appellant. Further, it is submitted that the learned Single Bench has exercised discretion in a proper manner and granted relief and the same need not be disturbed.

15. Heard the learned counsel on either side.

16. The first and foremost issue to be considered is whether the order and direction issued by the learned Single

Bench was proper and justified. Admittedly, in terms of the LoA dated 02.04.2018 if the work has not been commenced within 21 days from the date of issuance of LoA or as per the instruction of Engineer In-charge, the LoA shall be cancelled and tender security deposit will be forfeited. The LoA was issued on 02.04.2018. The respondent has nowhere stated that what action they have taken between 02.04.2018 and 16.04.2018. Assuming that because of the order of the injunction obtained by M/s.Tharu and Sons on 17.04.2018 prevented the respondent from commencing the work from 02.04.2018 to 16.04.2018, the same at best would apply to any one work of the three works allotted to the respondent. However, the respondent did not commence the two works out of the three works allotted to them. Further there was no representation made by the respondent to state that on account of the injunction obtained by the third party, they were prevented from commencing works.

17. Thus, it has to be seen that whether there was an order of injunction preventing the respondent from commencing the work admittedly, the Southern Railway has not terminated the contract of the third party M/s.Tharu and Sons, it only issued a show cause notice dated 15.02.2018 proposing to foreclose the contract by invoking GCC 61 B(e). This has been questioned by the third party by filing O.A.Nos. 367 and 368 of 2018 by virtue of which there was an injunction not to terminate his contract and an order of status quo was granted that would mean not to award the work to the respondent herein. Further the fact remains prior to grant of status quo, the contract has already been awarded to the respondent by LoA dated 02.04.2018. Therefore, if the respondent was really interested in doing the work they should have been the first person to approach the Court and get the order modified or an interpretation could have been made by the respondent stating that the status quo as on 17.04.2018 would mean that they are entitled to proceed further with the LoA dated 02.04.2018. The respondent having not done anyone of the above, it is clear that the respondent had no intention to commence the work.

18. The second aspect is with regard to the furnishing of Performance Guarantee. This guarantee is required to be furnished in terms of Clause 16 (4) (a) of the GCC which reads as follows:

"16(4) Performance Guarantee

The procedure for obtaining Performance Guarantee is outlined below:

(a) The successful bidder shall have to submit a Performance Guarantee (PG) within 30 days from the date of issue of Letter of Acceptance. Extension of time for submission of PG beyond 30 days and upto 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"

19. The condition imposed in the above clause is candid and clear. The time for submission of Performance Guarantee is 30 days from the date of issuance of LoA. The extension of time for submission of Performance Guarantee beyond 30 days and upto 60 days from the date of issuance of LoA is not automatic but it is only when the authority competent to sign the contract grants such extension. This presupposes that a request should be made by the Contractor to extend time and if the same is granted then the Performance Guarantee to be furnished shall carry interest. The LoA was issued on 02.04.2018 and the 30 days period within which the guarantee should have been furnished came to an end on 01.05.2018. Admittedly, no steps were taken by the respondent to furnish the Guarantee within the said period.

20. Furthermore, there was no request made by the respondent for grant of extension of time beyond the said period i.e., 01.05.2018. The time limit cannot be extended by the Authority beyond 31.05.2018 as Clause 16(4)(a) does not provide for any such extension. Thus, if at all the respondent had an intention to commence the contract then they should have approached the appellant/administration with a request or a representation. Nothing was done by the respondent and the Bank Guarantee was furnished on 27.06.2018 that too not in person but sent by Registered Post and received by the appellant/administration on 29.06.2018, on the very same day, the appellant by letter dated 29.06.2018 returned the Bank Guarantee pointing the major discrepancies which are extracted herein:

- "1. Address of the issuing Bank mentioned in the BG is different from the actual issuing Bank.
2. Validity of the Bank Guarantee is valid till 26.06.2022. The validity must be six months longer than the anticipated expiry date of defect liability period.
3. Name of contract work is incomplete and it should be mentioned as per LoA.
4. In many paras, the words are not as per the proforma enclosed along with LoA."

21. The above discrepancies were not rectified by the respondent nor there was any representation made by them seeking time for rectification etc. Therefore, the termination notice was issued on 04.07.2018. Thus, we are of the considered view that the reasons assigned by the respondent to state that there was impossibility of the performance of the twin conditions in the LoA namely commencement of work and furnishing of

Performance Guarantee is far from satisfactory. However, we make it clear that we have made the above observations only to test as to whether the respondent is entitled for a interim protection under Section 9 of the Act and this cannot in any manner affect the rights of parties in other proceedings which may be initiated. In any event, there is no challenge to the termination in accordance with the GCC i.e., by initiating arbitration proceedings. Having held so, it has to be seen as to whether the learned Single Bench was right in directing the contract to be restored, permitting the respondent to commence work, directing the appellant to invoke the arbitration. The answer to these questions should be in negative. The law is well settled and in the decisions referred to by the learned counsel for the appellant, the Hon'ble Supreme Court has categorically held as to what the Court can do while considering an application under Section 9 of the Act. It may not be necessary for us to refer to all the decisions referred to by the learned counsel for the appellant and suffice to refer the decision in the case of Adhunik Steels Ltd., (cited supra), wherein it is held as follows:

"16.....

Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

17. In *Nepa Ltd., Vs. Manoj Kumar Agarwal* a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the Court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders."

22. In the case of *Amritsar Gas Service* (cited supra), the Hon'ble Supreme Court pointed out that granting a relief of restoration of distributorship even on finding that the breach was committed by the appellant/corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and therefore the award granting such a relief was set aside. The Hon'ble Division Bench of this Court in the case of *Bharat*

Petroleum Corporation Limited (cited supra) held that when an agreement is determinable in nature and not specifically enforceable, the relief of restoration of the distributorship cannot be granted in view of Section 14(1)(c) of Act.

23. Considering a similar issue, the Hon'ble Supreme Court in the case of Cox and Kings India Limited (cited supra) held that the remedy if any, would lie in action for damages for breach of any terms and conditions of the agreement and the contract cannot be directed to be specifically enforced.

24. In the light of the settled legal position, we are of the clear view that the learned Single Bench could not have directed the contract to be restored and permitted the respondent to commence and continue work. Therefore, the order impugned calls for interference. That apart, the learned Single Bench also directed the appellant to initiate arbitration proceedings. This direction is contrary to Clause 64 of the GCC, which provides for a procedure. The respondent being a seasoned contractor of the Railway Administration carrying on the several works for several decades cannot feign ignorance of who is the competent authority to initiate arbitration.

25. Thus, under the guise of the letter dated 28.07.2018, the respondent cannot contend that they have invoked arbitration clause. The said letter dated 28.07.2018 appears to have been sent by post and received by the Senior Divisional Manager, Southern Railway, Salem on 08.08.2018 who is not the competent authority to initiate arbitration proceedings in terms of clause 63 of the GCC. What is interesting to note is that the said letter though states that they suggest three names of Hon'ble former Judges of this Court to be appointed as an Arbitrator, the said names have not been furnished and the place has been left blank. Therefore, we can safely infer that there were certain other intentions on the part of the respondent in sending a letter dated 27.08.2018 and the intention was not to initiate arbitration but to give an impression as if the respondent has initiated arbitration proceedings. The conduct of the respondent needs to be deprecated. The authority, to whom the said letter dated 28.07.2018 was addressed, on receipt of the letter immediately sent a reply on 10.08.2018 stating that the respondent has sent the letter to an authority who is not competent to refer the matter for arbitration and directed the respondent to approach the competent authority as per GCC 2014. The respondent did nothing thereafter. Therefore, the learned Single Bench was not correct in directing the appellant to initiate arbitration proceedings as directed in paragraph 65(iv) of the order impugned. That apart, the question of obtaining consent from the arbitrators that too by the appellant can never

arise in the facts and circumstances of the case on hand.

26. Thus, we are of the clear view that the Court could not have re-written the contract, could not have specifically directed to enforce the contract which was not enforceable as it was determinable and the Court exceeded in its jurisdiction to grant a relief to which the respondent was not entitled to. The conduct of the respondent also needs to be noted. Since, they had no real intention of initiating arbitration proceedings, if such was the conduct of the respondent, can an application under Section 9 of the Act be entertained and whether any relief can be granted to such a party. Identical question came for consideration in the case of Apple Finance Ltd., (cited supra) and the learned Single Bench of this Court held that the conduct of the applicants was never to commence arbitration proceedings. Therefore, by applying law laid down by the Hon'ble Supreme Court in the case of Firm Ashok Trader (cited supra) and the decision of the Hon'ble Supreme Court in the case of M/s.Sundaram Finance Limited Vs. M/s.NEPC India Limited, [reported in AIR 1999 SC 565], the application filed under Section 9 of the Act was dismissed. The above decision is fully applicable to the case on hand and this is one more reason that the application filed by the respondent under Section 9 should have been dismissed. With regard to the financial capacity of the respondent to furnish the Bank Guarantee, it is the own admission of the respondent in the affidavit filed in support of O.A.No.650 of 2018 that they were not in a position to immediately arrange the funds.

27. The reliance on the order of injunction obtained by the third party M/s.Tharu and Sons is of little avail since even before the award of the LoA, the respondent when they participated in the tender they were aware of the tender conditions. The pleadings regarding the financial capacity of the respondent will clearly show that the intention of the respondent was not to commence or continue the contract. Furthermore, the learned Single Bench in paragraph 46 of the impugned order has accepted that the contract can be terminated for not furnishing the Performance Guarantee. Having held so, the question of granting a direction or a mandatory injunction in the nature granted does not arise.

28. Furthermore, the Court could not have made an observation that termination of the contract was unfair or illegal, especially, when the respondent has not questioned the termination by initiating arbitration proceedings. Therefore, the finding to the said effect also needs to be effaced and eschewed. That apart, the observation that the termination of contract was done in a hurried manner and that it raises serious doubt in the manner in which exercise has been carried out are

all observations which are beyond the scope of an application filed under Section 9 of the Act. Therefore, all such observations made by the learned Single Bench touching upon the merits of the termination of contract stand vacated and accordingly set aside.

29. For the above reasons, the appeal filed by the Railway administration is allowed and the order impugned is set aside and consequently the directions issued therein are vacated. No costs. Consequently, the connected miscellaneous petitions are closed.

O.S.A.No.9 of 2019:

30. So far as O.S.A.No.9 of 2019 is concerned, this appeal is filed by the third party M/s. Tharu and Sons and in the light of the orders passed in O.S.A.No.397 of 2018 filed by the Railway Administration allowing the appeal, nothing survives in this appeal and consequently O.S.A.No.9 of 2019 is closed. No costs.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

mrm

To
The Senior Divisional Mechanical Engineer,
Southern Railway, Salem Division,
Salem - 636 005.

+2 cc's to Mr.P.T.Ram Kumar, Advocate Sr.No.23573 & 23574
+2 cc's to Mr.S.Elambharathi, Advocate Sr.No.23734 & 23735
+1 cc to Mr.TThiriyambak J.Kannan, Advocate Sr.No.24018

O.S.A. Nos. 397 of 2018 & 9 of 2019
&
C.M.P.Nos.23221 of 2018 & 620 of 2019

SSVI(CO)
CSL/06.06.2019