



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.04.2019

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP (MD) No.7368 of 2019

and

WMP (MD) Nos.5880 to 5882 of 2019

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PSA SICAL Terminals Limited,
Having its registered office at
South India House,
36-40, Armenian street,
Chennai - 600 001.
Rep.by its Authorised Signatory,
Suresh Narayana Amirapu

... Petitioner

Vs.

1.Union of India, Rep.by its Secretary,
Ministry of Shipping, Road Transport
and Highways,
Department of Shipping, Port Department,
Transport Bhawan No.1, Parliament Street,
New Delhi - 110 001.

2.The Board of Trustees of
V.O Chidambaranar Port Trust,
Rep.by its Chairman,
Having its registered office at,
Administrative Building, Tuticorin Port Trust,
Tuticorin - 628 004.

... Respondents

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, restraining the second respondent, its men, agents, servants and other persons claiming through or under them, from in any manner discriminating against the petitioner herein in the handling or operation of its Container Terminal at Berth VII at the VOC Port, by providing preferential treatment to any other party operating in any other Berth in the said Port, so that all the parties are on a level playing field and to consequently direct the second respondent to deepen the draught of Berth VII to the same level as that of Berth No.VIII or allot any other berth having a similar draught and to carry out any necessary extension or piling work to achieve the deepening of the draught in Berth No.VII and until such time, permit the petitioner to carry out its operations from an alternate berth with a Draught similar to what is offered to the other parties operating the Container Terminal in Tuticorin and till such time dispense with the obligation of minimum monthly guaranteed through put under the License Agreement and permit the petitioner to pay the royalty on the actual TEUs handled, and to forbear the Second Respondent, their men, Agents and Servants from demanding, recovering or initiating any coercive action against the petitioner including by way of invoking the Bank Guarantee dated 8th July, 2016 bearing No.04620BG 16008209 with a validity upto 14th October, 2019.



For petitioner : Shri.ARL.Sundaresan, Senior Counsel
for Shri.S.Ragunathan

For Respondents : M/s.B.Deepa for R1
Shri.G.Rajagopalan,
Additional Solicitor General of India
for Shri.S.Yaswanth for R2

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ORDER

V.O Chidambaranar Port Trust is a major Port Trust. It issued a global tender on 09.04.1997 inviting bids for development of Berth VII as a container terminal and to maintain the same for 30 years on build, operate and transfer basis. The writ petitioner won the bid and was granted the contract. A license agreement was entered into between the parties on 15.07.1998. The agreement envisages a minimum guaranteed traffic royalty in favour of the Port Trust. Clauses 7.3.3, 7.3.4 and 7.3.5 read as under :

“7.3.3.Traffic requirements

The Licensee guarantees to handle at the Container Terminal, annual container traffic of the level given in the schedule below. For purpose of this Agreement, the annual traffic would represent the total of import/export and transshipment containers converted into TEUs handled at the Container Terminal.

Period	Total
1 st Year of operation	Nil
2 nd Year of operation	148,800 TEU
3 rd Year of operation	188,800 TEU
4 th Year of operation	228,000 TEU
5 th Year of operation	268,000 TEU
6 th Year of operation and onwards	300,000 TEU

i.e upto 30 years.

7.3.4. Productivity

The Licensee agrees and undertakes that Gross Annual Average Productivity of quay side cranes at the terminal (s) to be provided by it shall not be less than 20 moves per hour per crane unless failure is attributed to factors outside the Licensee's control as specifically set out in Article 12.1.

7.3.5. Payment and Payment Terms

73.5.1 Initial Payment

In consideration of the grant of this License, the Licensee shall pay to the Licensor an initial amount of Rs.45 million (Rupees Forty Five Millions only) simultaneously on the Date of Award of License.

The Licensee shall pay to the Licensor, royalty calculated on the basis of Minimum guaranteed traffic royalty rates, as set out in Appendix 12 irrespective of discounts in tariffs, if any, that may be granted by the



Licensee. Royalty shall be paid every Month on the basis of annual minimum guaranteed traffic as set out in Appendix 12. Monthly royalty shall be initially calculated proportionately to the yearly royalty based on the annual minimum guaranteed traffic as per the Appendix 12 and shall be paid latest by 7th Day of the subsequent Month. At the end of each 3 Month period the total royalty payable shall be computed and the difference, if any, between the amount of royalty actually payable, calculated on the basis of actual TEUs handled and the corresponding amount as set out in the Appendix 12, and the amount of royalty already remitted, shall be paid by the Licensee to the Licensor within fifteen Days of expiry of the relevant 3 Months period.

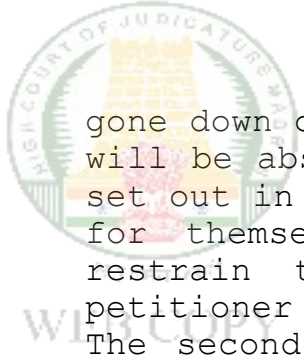
In case the actual traffic falls below the annual minimum guaranteed traffic as guaranteed by the Licensee and as set out in the Appendix 12, then the Licensee shall pay the amount of royalty as per its annual minimum guaranteed traffic.

It is to be noted that the minimum guaranteed traffic royalty rate as set out in Appendix 12 will be adjusted upwards or downwards as a one time measure of fixation of tariff for containers by the TAMP for the first time. This adjustment will be carried out by the Port based on a single percentage (plus or minus) to be applied to all the figures quoted as royalty vide Appendix 2."

2.The writ petitioner is thus under an obligation to make a minimum guaranteed payment. The writ petitioner is having certain disputes in this regard and they are presently pending before the Hon'ble Supreme Court in SLP (C) Nos.33260 and 33261 of 2017.

3.The case of the writ petitioner is that when the license agreement was entered into, the draught at the terminal was upto 10.7 meters. In the year 2014, the second respondent developed another Container Terminal, namely Berth VIII. As of now, the draught depth of Berth VIII has been increased to 14.2 meters which is 2.5 meters deeper than that of Berth VII which is handled by the writ petitioner herein. The second respondent has made a statement that there is going to be a further deepening of Berth VIII upto 15.5 meters.

4.According to the petitioner, the trade has undergone a major change. Unless the draught of Berth VII is deepened, the petitioner will not be able to cater to the needs of the larger vessels. On account of the change in scenario, even smaller vessels that were earlier utilizing the services of the writ petitioner have switched over to Berth VIII considering the other logistical advantages. As a result, the volume of traffic handled by the writ petitioner has



gone down drastically. At this rate, the writ petitioner's business will be absolutely ruined. The statistics in the comparative table set out in the affidavit filed in support of the writ petition speak for themselves. The petitioner therefore wants this Court to restrain the respondents from discriminating against the writ petitioner by providing preferential treatment to other parties. The second respondent must be directed to deepen the draught of Berth VII to the same level as that of Birth VIII. Since these measures will take time to get done, the writ petitioner must be permitted to carry on their operations from an alternate Berth where there is a draught similar to that of Birth VIII. The writ petitioner wants to be a rid of the obligation to pay the minimum monthly guaranteed amount. Instead the writ petitioner must be allowed to pay the royalty on the basis of the actual turn over. Since the petitioner has already given a bank guarantee, the respondents must be restrained from encashing the same.

5.The respondents have filed a detailed counter affidavit. According to the second respondent, the global bids on royalty model were invited in the year 1997 for development of the VII Berth as a container terminal and maintaining the same for 30 years on BOT basis. The petitioners' bid was the highest and that is why the agreement was entered into on 15.07.1998. As per Article 6.1 of the agreement, the writ petitioner must make payment to the port the amount of royalty calculated on the basis of the minimum guaranteed traffic. The operation of the terminal commenced on 21.12.1999.

6.According to the respondents, the petitioner has come to this condition because the equipments installed by it have become obsolete and that Birth VIII is attracting more business only because it is having the latest equipments and not because of availability of 14 meter draught. According to the second respondent, the petitioner complied with the agreement obligations only till 14.07.2011 and thereafter it has been a defaulter. The pending royalty dues along with interest and penalty would come to Rs.1556.20 crores for the period upto 31.12.2018.

7.The Port as per the agreement had agreed to provide the writ petitioner with a Berth having 10.7 meter draught. It was subsequently dredged upto 11.7 meters. Thus, the second respondent had fully complied with its contractual obligations. The petitioner was not declared the exclusive operator of the container terminal in Tuticurin Port. The writ petitioner cannot blame the second respondent for the changes that have occurred due to modernization. The other allegations made by the writ petitioners have been strongly controverted in the counter affidavit filed by the second respondent.

8.Since the second respondent fastened the entire blame on the writ petitioner, the writ petitioner has filed a rejoinder. Heard the learned Senior Counsel appearing for the writ petitioner and the learned Additional Solicitor General appearing for the respondents.



9. The learned Senior Counsel appearing for the writ petitioner contended that the second respondent is a State instrumentality. The agreement entered into between the parties is in terms of the provisions of the Major Port Trusts Act, 1963. The second respondent is statutorily required to perform certain works and services. By virtue of the license agreement, the petitioner is performing the services that are to be done by the Board itself. As observed by the Hon'ble Supreme Court as late as 08.03.2019 in **M/s. Surya Constructions vs. The State of Uttar Pradesh (Civil Appeal No.2610 of 2019)**, it is well settled that where the State behaves arbitrarily, even in the realm of contract, the High Court could interfere under Article 226 of the Constitution of India (**ABL International Ltd and another vs. Export Credit Guarantee Corporation of India Ltd., and others**) 2004 (3) SCC 553. Likewise, the second respondent is obliged to ensure the level playing field. It has to observe the principle of "non discrimination". The Hon'ble Supreme Court in the decision reported in (2007) 8 SCC 1 (Reliance Energy Ltd vs. Maharashtra State Road Development Corporation Ltd) held as follows :

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho vs. State of Tamil Nadu (2007) 2 SCC 1, Article 21/14 is the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The



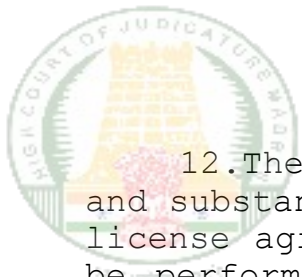
economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a standalone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

10. The learned Senior Counsel appearing for the writ petitioner drew my attention to the trade notice dated 22.11.2018 issued by the second respondent. The second respondent had announced that to facilitate handling of larger size container vessels, Berth No.VIII in VOC Port would have the following parameters :

"Maximum Length over all - 310 m
Maximum Beam - 48 m
Maximum Draft - 14.0 m"

On the other hand, in the trade notice dated 30.11.2018, the Port Trust informed the Trade that Berth No.VII is having 11.7 meter draught. Thus, the second respondent itself had contrasted the state of affairs prevailing in Berth No.VII with Berth No.VIII and it virtually proclaimed to the trade at large that the vessels must go to Berth No.VIII. Vide Trade Notice dated 31.2.2018, it was announced that the maximum permissible draught at Berth VIII and IX has been increased from the present 14 meter to 14.2 meter. The second respondent has also issued a notice dated 11.02.2019 inviting expression of interest from container terminal operators for developing Berth No.IX on "Own Operate and Maintain" (OOM) basis for a period of 20 years.

11. The learned Senior Counsel appearing for the writ petitioner drew my attention to the e-mail correspondence received by the petitioner from their existing customers. They had bluntly stated that they have switched over to Berth No.VIII due to commercial reasons. The Senior Counsel for the writ petitioner took me through the E-mail communication dated 22.03.2019 sent to the second respondent. In the said letter, the petitioner has drawn the attention of the second respondent to the proposal given by IIT, Chennai for deepening the draught of Berth No.VII. Since this would take about two years, the petitioner can use Berth No.IX till then.

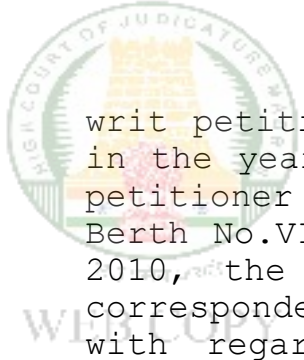


12.The petitioner has given few others proposals also. The sum and substance of the learned Senior Counsel's contention is that the license agreement that was entered into on 15.07.1998 can no longer be performed. The business model has become unviable. That was only because the second respondent had developed Berth No.VIII and IX with greater facilities. The Senior Counsel also rebutted the allegation that the machinery deployed by the petitioner are too old and obsolete.

13.Per contra, the learned Additional Solicitor General of India contended that this writ petition is an abuse of process and is not maintainable. The petitioner having entered into a contract is obliged to honour the terms set out therein. For several years, the Contract was profitable. When the petitioner has been overtaken by technological changes, he now wants to unilaterally alter the terms of the contract. The writ petitioner had already raised some dispute regarding making of royalty payments. The attempt was was not successful. The matter is presently pending before the Hon'ble Supreme Court. The present issue is simply old wine in a new bottle. The learned Additional Solicitor General of India also submitted that the agreement provides for resolving the disputes through arbitration. The petitioner ought to be non suited on the ground of availability of alternative remedy. More than anything else, these are commercial and contractual matters and therefore beyond the purview of judicial review. He wanted this Court to dismiss this writ petition.

14.I carefully considered the rival contentions. I agree with the contention of the petitioner's Senior counsel that the contract between the parties partakes the character of a statutory contract as it is referable to the provisions of the Major Port Trusts Act, 1963. Whether the contract is statutory or non statutory, in as much as the second respondent is a State instrumentality within the meaning of Article 12 of the Constitution of India, its actions are very much amenable to writ jurisdiction. I again concur with the submission of the learned Senior Counsel for the petitioner that the second respondent cannot conduct its affairs in an unreasonable or unfair manner. One need not delve deep to come to the conclusion that the business and commercial prospects of the writ petitioner have taken a real beating because the draught of Berth No.VIII is deeper compared to the draught of Berth No.VII maintained by the writ petitioner. But, the petitioner cannot blame the second respondent for its current woes.

15.As rightly contended by the learned Additional Solicitor General of India, way back in the year 2006, the second respondent in its meeting held on 21.07.2006 resolved to agree in principle approval to dredge the sea side of Berth No.VII also to 14.1 meters CD at Port Trust cost after carrying out necessary modification and strengthening of the port by the licensee at their cost, charge and expenses with the prior consent of the port. It appears that the



writ petitioner did not avail the offer made by the port way back in the year 2006. Probably the going was good then and the writ petitioner did not anticipate the weather turning adverse. Even Berth No.VIII did not come up yesterday. As early as in the year 2010, the proposal was mooted and there was also exchange of correspondence between the writ petitioner and the second respondent with regard to the conversion of the Berth VIII as container terminal on BOT basis. This agreement was entered into between the second respondent and another company on 04.09.2012. Even the Trade Notice dated 12.10.2011 confirmed the availability of depth upto (-) 14.70 meter from CD at Approach Channel and (-) 14.10 M from CD at harbour Basin covering Coal Jetty-I, Coal Jetty-II, Oil Jetty, Berth No.VIII and Berth No.IX.

16.The learned Additional Solicitor General of India also pointed out that as per Article 6 of the agreement, the licensee has to replace their equipments which are more than 19 years old. To come to the core issue, the writ petitioner essentially wants this Court to re-write the terms of the contract. The contract was entered into between the parties way back in the year 1998. It was running well for several years. Now, the petitioner is finding it difficult to perform the obligations under the said contract. If according to the petitioner, the performance of the contract has become impossible it has to issue termination notice. If according to the writ petitioner, the respondent Board has committed breach of the contractual provisions, it is always open to the writ petitioner to demand payment of compensation for loss or damage caused by such breach. Courts can direct specific performance of the contract if it is permissible to do so. In the alternative, they can award damages to the affected party. It is not open to the courts to re-write the terms of the contract.

17.Of course, as observed in Commentary on the Indian Contract & Specific Relief Acts Pollock & Mulla 15th Edition (R.Yashod Vardhan & Chitra Narayan), Court can vary or rescind any of the terms of a contract where it has the power to do so under a Statute. The court has, for example, power under the Usurious Loans Act to revise the transaction between the parties, reopen any account taken previously, to set aside or alter any security given for a loan, if the interest is excessive, and the transaction of loan is substantially unfair. One can refer to the provisions of Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003. The matrimonial courts exercise supervisory jurisdiction over maintenance of married persons and would have the power to vary any maintenance agreement between them. Likewise, in order to protect the consumers also the courts can step in notwithstanding the express terms that may be set out in a standard form of contract. But, that is not the case here. The writ petitioner herein responded to a notification issued by the second respondent and won the bid in a stiff competition. It was a global tender. Nothing compelled the writ petitioner to agree to the terms set out in the license agreement dated 15.07.1998.



18. Therefore, I have to necessarily hold that this Court exercising its writ jurisdiction lacks the power or authority to vary the terms of the contract entered into between the writ petitioner and the second respondent. No Statute confers such a power on this court. Common law does not provide for it. As already held, courts in such cases can direct either specific relief or damages. This is because any contract is finalised after there is what is known as consensus ad idem between the parties. Hence, there cannot be a unilateral variation of the terms of the contract at the instance of one party through court proceedings.

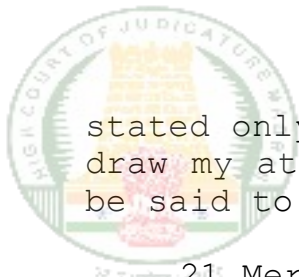
19. The Constitution Bench of the Hon'ble Supreme Court in the decision reported in (1994) 4 SCC 104 (Asstt. Excise Commissioner vs Issac Peter) after noting that the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract observed as follows :

"We must confess, we are not aware of any such doctrine of fairness or reasonableness. Not could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption



from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi v. State of U.P.* was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein"

20. The aforesaid decision has been followed consistently in a number of subsequent decisions. It was cited in the decision reported in (2017) 7 SCC 729 (*Shivasakthi Sugars v. Shree Renuka Sugar Ltd*). The case on hand is squarely covered by the principles laid down in (1994) 4 SCC 104 (*Asstt. Excise Commissioner vs Issac Peter*). The contention that on account of the action of the second respondent, there is no longer any level playing field, is to be



stated only to be rejected. The petitioner is not in a position to draw my attention to any specific clause in the agreement which can be said to have been violated by the second respondent.

21. Merely because the petitioner was granted license to operate Berth No.VII in the year 1998, that does not tie the hands of the second respondent Board from developing the other Berths ultimately. There is a larger national interest at stake. When there is march of technology, the major Ports are obliged to keep pace with the same. Otherwise vessels will simply pass by Tuticorin and go to Srilanka or other neighboring Nations. Therefore, the second respondent cannot be faulted for developing Berth No.VIII and IX. If according to the petitioner as a result of such development, contract has become impossible of performance, the remedy open to the petitioner is only to call off and issue termination notice or demand damages. The petitioner cannot call upon this Court to draft a new agreement for the parties. Merely because the second respondent is a State instrumentality, the position cannot be otherwise.

22. I cannot grant any relief to the writ petitioner. I dismiss this writ petition. No costs. Consequently, connected miscellaneous petitions are closed.

23. After this Court pronounced the verdict, the learned counsel appearing for the writ petitioner submitted that they would explore other options which can include filing of a writ appeal or invoking the remedy under Section 9 of the Arbitration and Conciliation Act, 1996. The learned counsel for the petitioner strongly prays that this Court should give them some breathing time. Considering the said plea of the learned counsel for the writ petitioner and the facts and circumstances of this case, this Court is of the view that if some breathing time is given, no real prejudice will be caused to the respondents. During the pendency of this writ petition, the bank guarantee furnished by the writ petitioner and which is live till October, 2019 was undertaken not to be enforced. This Court restrains the respondents from encashing the bank guarantee of the writ petitioner till 01.05.2019. If the writ petitioner is unable to obtain relief either before the Hon'ble Division Bench in a writ appeal or elsewhere, the second respondent would be at liberty to encash the petitioner's bank guarantee.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar (CS-)



To

1. The Secretary, Union of India,
Ministry of Shipping, Road Transport
and Highways,
Department of Shipping, Port Department,
Transport Bhawan No.1, Parliament Street,
New Delhi - 110 001.

2. The Board of Trustees of
V.O Chidambaranar Port Trust,
Rep.by its Chairman,
Having its registered office at,
Administrative Building, Tuticorin Port Trust,
Tuticorin - 628 004.

+1cc to Mr.S.Ragunathan, Advocate, SR.No.61986

+1cc to Mr.S.Yaswanth, Advocate, SR.No.62280

WP (MD) No.7368 of 2019
and

WMP (MD) Nos.5880 to 5882 of 2019
23.04.2019

SP/25.04.2019/12P/5C