BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.02.2018
(Reserved on 09.11.2017)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP(PD)(MD)No.1613 and 1699 of 2017
and
CMP(MD)Nos.9111 and 9308 of 2017

M/s.SKS Power Generation (Chattisgarh) Limited,
Rep. by its Director,
501-B, Elegant Business Park,
Andheri-Kurla Road,
J.B. Nagar,
Andheri(East),
Mumbai-400 059.
Maharastra State. ... Revision Petitioner in both CRPs

vs.

1)Indian Bank,
Rep.by its Chief Manager,
Trichy Cantonment Branch,
Naga Arcade,
Cantonment,
Tiruchirappalli-620 001.

2)M/s.Meenakshi Energy Private Limited,
Rep. by its Director,
''Meenakshi House''
9-2-418, Road No.7,
Banjara Hills,
Hyderabad-500 034,
Andra Pradesh.

Regd Office:

405, Saptagiri Towers,
1-10-75/1/1 to 6 Begumpet,
Sardar Patel Road,
Secundrabad-500 016,
Telangana State.

3)The Commissioner of Customs,
Custom House,
60, Rajaji Salai,
Chennai-600 001.

4)M/s.Cethar Limited,
(formerly known as Cethar Vessel Ltd.,).
No.4, Dindigul Road,
Tiruchirappalli-620 001.

5)K.Subburaj

6)K.Pothiraj ... Respondents in CRP.1613/2017

1)Canara Bank,
Rep. by its Chief Manager,
26, Nandhi Koil Street,
Teppakulam,
Tiruchirappalli-620 002.

2)M/s.Cethar Limited,
(formerly known as Cethar Vessel Ltd.,).
No.4, Dindigul Road,
Tiruchirappalli-620 001.

3)K.Subburaj

4)K.Pothiraj ... Respondents in CRP.1699/2017

COMMON PRAYER: Petitions filed under Article 227 of the Constitution of India, to call for the records relating to the plaint in O.S.Nos.163 and 169 of 2017 on the file of Hon'ble District Court, Tiruchirappalli (Mahila Court, Trichy) and strike off the same as the suit is barred by law.

For Petitioner : Mr.K.M.Vijayan, Senior Counsel for Mr.B.Saravanan
For R1/Caveator : Mr.Jayesh Dolia, Senior Counsel for Mr.P.N.Satagopan

COMMON ORDER

These revision petitions have been filed to strike off the plaints in O.S.Nos.163 and 169 of 2017 on the file of the District Court, Tiruchirappalli (Mahila Court), Trichy.

2.The revision petitioner is defendants 2 and 1 in O.S.Nos.163 and 169 of 2017 respectively and the 1st respondent in both the revisions are plaintiffs in the suits. O.S.No.163 of 2017 has been filed for permanent injunction restraining the defendants 1 to 3 from invoking the Bank guarantees morefully described in the schedule issued by the plaintiff at the request of the 4th defendant.O.S.No.169 of 2017 has been filed for permanent injunction restraining the 1st defendant from invoking the Bank guarantees morefully described in the schedule issued by the plaintiff at the request of the 2nd defendant. The present revision petitions have been filed to strike off the plaints in the suits.

3.Learned Senior Counsel appearing for the petitioner would contend that the Trial Court is ousted by one of the clauses of the Bank Guarantee which is the subject matter in suits, for, both parties agreed to submit to the exclusive jurisdiction of the Courts in Mumbai, Maharastra for the purposes of settling any disputes or differences which may arise or out of or in connection with the guarantee and hence, the Trial Court ought not to have taken the suits on file, thus, the plaints are liable to be struck off.

4.It is further contended that already a moratorium was declared by the National Company Law Tribunal in C.P.No.511/IB/2017 and hence, there is a specific bar of any entertainment of suit under Section 14 of the Insolvency and Bankruptcy Code 2016. Therefore, the moratorium declared against the 2nd respondent bars the institution of suits in the same subject matter and knowing fully well that the suits are barred by law, the 1st respondent has filed the suits with an intention to obtain orders by fraud and misrepresentation and hence the plaints are liable to be struck off.

5.Learned Senior Counsel for the petitioner further contended that the suit has been undervalued and though the value of the suit is astronomically high, in the memo of valuation of suit, a much lower value is mentioned and accordingly court fee has been paid and therefore, the plaints are liable to be struck off for deliberate undervaluation of suits. Further, the plaints do not disclose any credible cause of action to maintain the suits. It is also contended that the suits have been filed with suppression of all material fact and therefore, the plaints are liable to be struck off.

6.In support of his contentions, learned Senior Counsel for the petitioner relied upon the following judgments:-

(i)Shalini Shyam Shetty vs. Rajendra Shankar Patil reported in 2011 (1) CTC 854.

(ii)A.Venkatasubbiah Naidu vs. S.Challappan reported in 2000 (IV) CTC 358.

(iii)T.K.Chithran vs. C.Samsari @ Chithran reported in 2015 (3) CTC 485.

(iv)Suguna Poultry Farm Ltd., vs. Arul Mariamman Textiles Ltd., reported in AIR 2005 Madras 72.

7.Per contra, learned Senior Counsel appearing for the 1st respondent/plaintiff would contend that cause of action for the suits has arisen only in Tiruchirappalli, where the contract of bank guarantee was executed by the 1st respondent in favour of the revision petitioner. Therefore, when the whole cause of action under the contract of bank guarantee has arisen only within the jurisdiction of Tiruchirappalli under Section 20(c) CPC and no part of cause of action has arisen at Mumbai, the restriction of jurisdiction conferring exclusive jurisdiction in Mumbai alone where there is no cause of action, is unsustainable, thus, the Court at Trichy alone has got jurisdiction to entertain the suits. It is further contended that cause of action is disclosed in the plaints and the relief has been properly valued under Section 27(c) of Tamil Nadu Court Fees and Suits Valuation Act and no material fact is suppressed in the plaints.

8.Learned Senior Counsel for the 1st respondent further contended that under Clause No.5, the petitioner owes an obligation to inform the 1st respondent as and when 4th respondent supplies materials/works done in respect of the project to which performance or advance guarantee was issued by the 1st respondent. Therefore, the failure of the petitioner to inform the 1st respondent as per clause No.5 tantamounts to fraud and irretrievable injury to the 1st respondent.

9.It is the further contention of the learned Senior Counsel for the 1st respondent that despite the 1st respondent's letter dated 13.10.2015 calling for work progress/work done by the 4th respondent causing reduction of bank guarantee value, the petitioner have chosen to invoke the bank guarantee after receiving all the supplies made/works done for the value of several crores as evident from the progress report of the 4th respondent and under the guise of loss or damage due to delay, the petitioner attempts to make unjust enrichment at the cost of public money of the 1st respondent.

10.It is further submitted that one M/s.Llyod Insulation Ltd., colluding with the 4th respondent moved an application under Section 9 of Insolvency and Bankruptcy Code 2016 read with Rule 6 of Insolvency and Bankruptcy Rules to declare the 4th respondent as a Corporate Debtor and the said application was admitted by the Adjudicating Authority of National Company Law Tribunal, Chennai, and vide order dated 19.07.2017, the Tribunal appointed Interim Insolvency Resolution Professional. Thus, the petitioner's action in making a demand for payment under the said guarantee after the admission of the aforesaid Section 9 petition is not valid in law. Further, as per clause [a] of the condition, institution of suit/s or proceedings against the corporate debtor viz., 4th respondent alone is prohibited and institution of suit between the 1st respondent and petitioner is not prohibited. Since the 1st respondent is forbidden from taking recourse under SARFEASI Act against the 4th respondent, it moved the High Court for interim injunction from invoking the bank guarantee by the petitioner and two others to enable them to move National Company Law Appellate Tribunal, New Delhi, against the order of NCL Tribunal, Chennai. The Principal Seat granted interim injunction till 18.08.2017 with a condition to file appeal before that date. Accordingly, the 1st respondent filed appeal before NCALT, New Delhi in No.140/2017. Subsequently, when it was orally observed by the learned Judge that the 1st respondent can take recourse before civil courts, writ petition was withdrawn and a suit was filed against the petitioner, Meenakshi Energy Ltd., and Commissioner of Customs restraining them from invoking bank guarantees and the Court ordered status-quo till 08.09.2017 which fact has been suppressed in the plaints.

11.Learned Senior Counsel for the 1st respondent further contended that the petitioner was informed that in the arbitration proceedings pending between the 4th defendant and M/s.Meenakshi Energy Ltd., Hyderabad, the Arbitral Tribunal comprising former Judge of Supreme Court, Chief Justice of High Court and Judge of Madras High Court, the learned Arbitrators have passed an order dated 03.08.2017 directing them to maintain status quo as regards the invocation of Bank guarantee pending filing of response by 4th defendant. However, similar such order is not passed as regards the subject guarantees issued favouring the petitioner which warranted the 1st respondent to approach the High Court and thereafter to the District Court at Tiruchirappalli. It is further submitted that the 4th respondent/Corporate Debtor had set in motion for Arbitration under Section 11 of Arbitration Act, 1996 to resolve the disputes between the petitioner and the 4th respondent for all matters including the bank guarantees by issue of legal notice to the petitioner on 27.09.2017. Therefore, it is submitted that the present revisions are not maintainable without exhausting the alternate remedy provided under Order 39 Rule 4 CPC to vacate the order and to strike off the plaint under Order 7 Rule 11 CPC.

12.In support of his contentions, learned Senior Counsel for the 1st respondent relied on the following judgments:-

1)Southern and Rajamani Transport Private Limited vs. R.Srinivasan reported in 2010 (4) CTC 690.

2)Sahebgouda vs. Ogeppa reported in (2003) 6 SCC 151.

3)Surya Devi Rai vs, Ram Chander Rai reported in (2003) 6 SCC 675.

4)S.Viswanathan vs. M/s.Sri Muruga Agencies reported in 2002 (1) CTC 277.

5)K.K.Modi vs. K.N.Modi reported in (1998) 3 SCC 573.

6) Suguna Poultry Farm Ltd., vs. Arul Mariamman Textiles Ltd., reported in AIR 2005 Madras 72.

7)Shree Baidyanath Ayurved Bhawan Private Limited vs. Praveeh Bhatia reported in (2009) 8 SCC 779.

8)Rajasthan SEB vs. Universal Petrol Chemicals Ltd., reported in (2009) 3 SCC 107.

9)Hanil Era Textiles Ltd., vs. Puromatic Filters (P) Ltd., reported in (2004) 4 SCC 671.

13.Heard the learned Senior Counsel for the petitioner and the learned Senior Counsel for the 1st respondent.

14.The respondent bankers had filed suits before the District Court, Tiruchirapalli (Mahila Court), Trichy, seeking permanent injunction restraining the petitioner and other defendants from invoking the bank guarantees issued by the respondent bankers at the request of the 4th respondent viz. Cethar Vessels Limited. The petitioner alleges that the 4th respondent had defaulted in their contractual obligation against which bank guarantee was executed and therefore contends that they are free to invoke the Bank Guarantee and that the respondent bankers are obligated to release the guarantee money.

15.The petitioners had filed this Revision raising questions on the jurisdiction of the Tiruchirapalli Mahila Court, Trichy, to entertain the suit. They point to the condition in the Bank Guarantee submitting the parties to the exclusive jurisdiction of Mumbai Courts as mutually agreed in the contract. The petitioners had also sought to strike off the plaint on the allegation of undervaluation of Suits to lessen the burden of Court fee. The respondent bankers, on the other hand, contend that the cause of action for the suit arose in Trichy where the Bank Guarantee was issued and there is no cause of action in Mumbai and therefore, the jurisdiction of the Tiruchirapalli Mahila Court, Trichy cannot be questioned. They further contend that the bank guarantee is not unconditional. They allege that the petitioner had not fulfilled their reporting obligations under the terms of the Bank Guarantee. They point out to the relevant conditions in the Bank Guarantee which provides that the amount of the guarantee will be determined commensurate with the contractual default and therefore the reporting obligations of the petitioner as set out in the Bank Guarantee is sacrosanct. They allege that after having the contract of supply fulfilled by the 4th respondent, the petitioner attempts to unjustly enrich themselves in the guise of damage due to delay at the cost of public exchequer.

16.Admittedly, there is a dispute between the petitioner and the fourth respondent in the execution of the contract. It is also on record that an application is moved by an operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy Rules, 2016 to declare the 4th respondent herein as a corporate debtor and the same was admitted by the Adjudicating Authority of the National Company Law Tribunal, Chennai and vide Order dated 19.07.2017, the Tribunal appointed Interim Insolvency Resolution Professional. It is also brought on record to the notice of this court that a moratorium was declared by the National Company Law Tribunal in C.P.No 511/1B/2017 and there is a specific bar of any entertainment of Suit under Section 14 of the Insolvency and Bankruptcy Code, 2016. In the interregnum, the first respondent had approached this Court and obtained interim injunction and time to file appeal no 140/2017 before the National Company Law Appellate Tribunal, New Delhi. On oral observation of the NCLAT that recourse can be taken by the 1st respondent before civil courts, they had withdrawn the Writ Petition and the suit came to be filed against the Petitioner and the second and third respondents and Status Quo ordered by Court till 08.09.2017. The Arbitral Tribunal comprising a former Judge of Supreme Court, Chief Justice of High Court and a Judge of Madras High Court, in the arbitration proceedings between the 2nd and 4th respondents, vide Order dated 03.08.2017 had directed them to maintain status quo with regard to Bank Guarantee until filing of response by 4th respondent. The 4th respondent had also set in motion an arbitration proceeding under Section 11 of the Arbitration Act, 1996 to resolve the dispute between the petitioner and the 4th respondent for all matters including Bank Guarantees by issue of Legal Notice dated 27.09.2017.

17.While the petitioner contends that the suit cannot be filed when the Insolvency proceeding is pending against the 4th respondent, the respondent bankers contend that Bank Guarantee cannot be en-cashed when the Insolvency Proceeding is pending. On perusal of the records, it is seen that the dispute involves multiple parties from multiple contracts/Bank Guarantees. The disputes arise out of the default in the contractual obligations of the 4th respondent. Proceedings under the Insolvency and Bankruptcy Code have already been initiated against the 4th respondent by one of the operational creditors. The complaint is taken on file and the process is set in motion. In the above situations, this court is of the considered opinion that multiple litigations/proceedings at parallel forum do not serve the cause of Justice. In the matter before the Arbitral Tribunal in a connected dispute, the learned arbitrators had taken the correct view that status quo should be maintained with regard to Banking Guarantees until the mind of the 4th respondent is known.

18.This court is aware that the petitioners have a strong case on the question of jurisdiction. There is merit in the contention of the respondent bankers that cause of action to the suit did not involve the petitioners alone and that suit cannot be struck down but can only be returned for filing before the appropriate Jurisdiction. However, this Court is of the firm opinion that no purpose will be served by attempting to adjudicate the issue at this stage. Until the mind of the 4th respondent or their fate under the Insolvency and Bankruptcy code is known by way of an outcome in the proceedings before The National Company Law Tribunal, any attempt to adjudicate the CRP at this stage may lead to miscarriage of justice owing to the conflicting interests and claims of the competing parties.

19.In view of the proceedings initiated against the Insolvency and Bankruptcy Code, 2016 against the 4th respondent and the insinuations and allegations of fraud, connivance and conspiracy by the rival parties raised, invoking the Bank Guarantee, issued at the request of the 4th respondent, especially on the ground of damages of delay in executing the contract, can put public money into serious jeopardy.

20.Therefore, until the outcome of the proceedings under the Insolvency and Bankruptcy Code, 2016 instituted against the 4th respondent from the National Law Tribunal, there shall be an interim order of Status Quo.

21.Post the matter after the outcome of the proceedings under the Insolvency and Bankruptcy Code, 2016 against the 4^{th} Respondent before the National Law Tribunal.

Sd/-
Assistant Registrar(CS-I)

/True copy/

Sub Assistant Registrar

To

The Judge,
District Court,
Tiruchirappalli (Mahila Court, Trichy)

Copy to:
The Section Officer,
Judicial Section,
Madurai Bench of Madras High Court,
Madurai.

CRP(PD)(MD)No.1613 and 1699 of 2017
06.02.2018

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