IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.9904 of 2020 and
W.M.P. No.12038 of 2020
(heard through VC)

Thriveni Earthmovers Private Limited
Rep by its General Manager - Finance and Accounts
having its Registered office at
22/110, Greenways Road
Fairlands, Salem,
Tamil Nadu - 636 016 ... Petitioner

Vs

1.Tamilnad Mercantile Bank
Rep. by Regional Manager, Salem Region
No.105, Ramakrishna Road
1st Floor
Near ATC Depot
Salem - 636 007

2.Tamilnad Mercantile Bank
Rep. by Branch Manager, Kannankurichi Branch
D. No.4/153C
GV Complex
Yercaud Main Road
Gorimedu, Kannankurichi
Salem - 636 008

3.Tamilnad Mercantile Bank
Rep. by its Managing Director
No.57, VE Road, Tuticorin HO
Thoothukudi
Opposite Holy Cross Convent
Tamil Nadu - 628 001 ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Mandamus, directing the respondents 1 to 3 to release the Margin Money of Rs.30,00,00,000/- (Rupees Thirty Crores) lying with the 3rd respondent in Fixed Deposit Nos.060200400700328 together with accrued interest thereon.

For Petitioner : Mr.Srinath Sridevan

For Respondents: Mr.S.Sethuraman

O R D E R

The petitioner has sought for a writ of mandamus, directing the respondents 1 to 3 to release the Margin Money of Rs.30,00,00,000/- (Rupees Thirty Crores) lying with the 3rd respondent in Fixed Deposit No.060200400700328 together with accrued interest thereon

2. The petitioner is a private limited company, incorporated under the Companies Act, 1956 engaged in the business of providing end-to-end mining services in India and abroad. The petitioner emerged as one of the bidders for a mining project in Pacchwara Mine situated in Pakur District in the State of Jharkand tendered by the Punjab State Power Corporation Limited (hereinafter called as "PSPCL"). As the tender required furnishing of Bank Guarantee in favour of the PSPCL, the petitioner approached the respondent bank for issuance of a Bank Guarantee to the tune of Rs.30.00 Crores. On 09.12.2015, the second respondent bank acting through the third respondent bank issued a Bank Guarantee for Rs.30.00 Crores vide BG.No.060BG160597 (hereinafter called "BG") in favour of PSPCL. The said BG was valid till 30.09.2016 with the claim period of three months ending on 30.12.2016. It is further stated that the second respondent bank had asked the petitioner to deposit 100% value of the subject BG as Margin Money, which the petitioner also did, by creating a fixed deposit with the third respondent, which is called the Margin Money. Thus the entire value of the BG was duly deposited with the respondent bank in the form of a fixed deposit.

3. While so, as the disputes arose between PSPCL and the petitioner, PSPCL attempted to invoke the BG, which constrained the petitioner to approach the Hon'ble Punjab and Haryana High Court at Chandigarh by filing W.P. No.12397/2016 seeking an order of injunction restraining PSPCL from invoking the BG. An interim order was also granted by the Punjab & Haryana High Court on 07.06.2016, which was extended from time to time. The last of such extension of the BG was valid till 31.03.2019 with the claim period upto 30.06.2019. Though the second respondent had issued an extension of BG to the petitioner, the same was returned to the second respondent in view of the order passed on 01.04.2019. PSPCL also made an attempt to get the BG extended by their e-mail dated 26.02.2019. While so, final order was passed on 28.08.2019 by Punjab and Haryana High Court, giving a direction to the petitioner to approach the competent authority and once the competent authority passes a fresh order, all the earlier orders would stand superseded automatically. Thus the final order effectively set aside the order of PSPCL invoking the BG. In view of the order passed by the Punjab and Haryana High Court on 1.4.2019 and also on 28.08.2019, the validity of the BG came to an end on 31.03.2019 itself and admittedly, there is no renewal of the same after that.

4. In the meanwhile, because of the Pandemic, the petitioner was put to tremendous financial constraint, and therefore, they have requested the respondent bank to return the Margin Money, but the second respondent has refused to release the Margin Money by its reply dated 16.04.2020 contending that the Bank Guarantee will expire only on 30.09.2020. Inspite of several requests, the second respondent bank refused to release the Margin Money of Rs.30.00 Crores. The petitioner also issued a legal notice on 14.07.2020. Hence the petitioner has come before this court seeking a mandamus to the respondents 1 to 3 to release the Margin Money of Rs.30.00 Crores lying with the second respondent as fixed deposit along with accrued interest.

5. The respondent bank had admitted that BG was issued for a sum of Rs.30.00 Crores in favour of PSPCL on behalf of the petitioner. Originally, the due date of the BG was 30.09.2016 and later, it was extended till 31.03.2019. The respondents also had been parties all through proceedings before the High Court of Punjab and Haryana at Chandigarh in W.P. No.12397/2016. The respondents further had stated that while disposing of the writ petition No.12397 of 2016 on 28.08.2019, the Hon'ble Punjab and Haryana High Court, had given liberty to the writ petitioner to make a representation to PSPCL regarding the allegations made against them. PSPCL was directed to give an opportunity to the writ petitioner and pass suitable orders. The order of the Hon'ble High Court further stated that once fresh orders are passed by the competent authority, the earlier impugned orders/resolutions, shall stand superseded automatically.

6. Pursuant to the above said direction of the High Court of Punjab and Haryana, the writ petitioner had made a representation to PSPCL, which had rejected the representation, by letter dated 01.10.2019. The respondents had further stated that the said rejection order dated 01.10.2019 is not challenged by the petitioner till date, and therefore, the respondents were hesitant to release the Margin Money deposited by the petitioner.

7. The only question that arises for consideration in this writ petition is, whether the petitioner is entitled to get the Margin Money released by the second respondent, which was deposited in lieu of BG?

8. Heard both sides and perused the materials available in the form of typed set of papers.

9. The learned counsel appearing for the petitioner contended that, under the Master Circular on Bank Guarantees and Co-acceptances, issued by the Reserve Bank of India in RBI/2013-14/66 DBOD No.Dir.BC.12/13.03.00/2013-14 dated 01.07.2013, banks have no authority to keep the guarantee pending beyond the claim period. As the bank guarantee was not extended beyond 31.03.2019 and the petitioner had deposited

the Margin Money of Rs.30.00 Crores, in view of COVID-19 Pandemic situation, the petitioner requires the said amount for its very existence, and for the payment of thousands of its employees. It is further contended that the Margin Money in the hands of the respondents 1 to 3 is only as a trustee and once the bank guarantee itself expired, the bank is duty bound to return the same to the extent at least the unutilised amount and in this case, the entire amount to be returned. The bank, according to the petitioner, has been holding the Margin Money with respect to a lapsed bank guarantee.

10. The learned counsel also placed reliance on the order passed by the Punjab and Haryana High Court on 01.04.2019, which is as follows:

> " In the meantime, the respondents are directed not to force the petitioner to keep the bank guarantee alive, keeping in view the fact that repeated adjournments are being sought by the respondents themselves. This would be subject to the outcome of the LPA."

11. The learned counsel specifically pointed out that, even as early as on 01.04.2019, the Hon'ble Punjab and Haryana High Court, had upheld that the petitioner cannot be compelled to keep the bank guarantee alive. The final order in the said W.P. No.12397/2016 is under the following words.

> "Accordingly, we dispose of all the writ petitions with the direction that the representation shall be made by the petitioner (s) within a period of two weeks from today, which shall be decided within a period of two weeks thereafter. The representation shall be decided by passing a speaking/detailed order after taking into consideration all the pleas raised by the petitioner(s) in their respective representations.
>
> We make it clear that the time granted to move representations is imperative and mandatory and in case the needful is not done within the period specified, the impugned orders shall stand automatically revived. It is made clear by way of abundant precaution that once fresh orders are passed by the Competent Authority, the earlier impugned orders/resolutions shall stand superseded automatically."

12. Pursuant to the said order, the petitioner had approached PSPCL for considering their representation and PSPCL had rejected the representation by letter dated 01.10.2019 observing that, it is imperative upon the petitioner to extend/renew/re-issue the bank guarantee so that action as per the agreement Clause No.6.5(c) and Clause 7.9 can be taken.

13. The above said order is not challenged by the petitioner or enforced by PSPCL. The respondent bank had written to PSPCL on 22.06.2020 after the receipt of a legal notice from the petitioner to release the Margin Money on the ground that the bank guarantee issued in favour of PSPCL expired and that PSPCL had not made any claim. In fact, the respondent bank had given an ultimatum that, if PSPCL did not clarify its stand within 15 days from the date of receipt of the said letter, it will be presumed that PSPCL will not have any claim over the subject mentioned bank guarantee.

14. In response to the same, PSPCL has also given a reply to the bank on 06.07.2020. In the said letter, PSPCL, has contended as follows:

> " ...The writ petition in question was disposed off by the Hon'ble High Court vide its order dated 28.08.2019 (Annexure-A) whereby the parties were granted liberty to submit a representation to the PSPCL and a decision on the said representation was to be taken by the PSPCL within a period of 2 weeks thereafter. Thus, the interim order dated 01.04.2019 stood merged in the final order dated 28.08.2019. The exemption from non-renewal of the Bank Guarantee or restraining the PSPCL from taking coercive measures or from enforcing its rights was no more in force. The PSPCL thus became entitled to enforce its right against M/s.Thriveni Earth Movers Ltd."

15. The said letter further stated that the petitioner had submitted a representation to the PSPCL for release of the bank guarantee which was declined and PSPCL had decided to forfeit the said bank guarantee.

16. Quoting the above said letter, the learned counsel for the bank contended that the petitioner, having not challenged the said letter dated 01.10.2019, cannot be allowed to contend that PSPCL cannot invoke the bank guarantee. The orders passed by the Punjab and Haryana High Court on 01.04.2019 and 28.08.2019 have become crucial in deciding the release of the bank guarantee. The interim order dated 01.04.2019 had specifically stated that the respondents are directed not to force the petitioner to keep the bank guarantee alive keeping in view of the fact that repeated adjournments were sought for by the respondents themselves.

17. It is not in dispute that the bank guarantee was not extended beyond 31.03.2019. In the meanwhile, final order dated 28.08.2019 came to be passed. The final order also specifically stated that, if the petitioner does not approach the competent authority within the time frame given, the impugned order shall stand automatically revived. The

petitioner, had, in obedience to the orders passed by the Punjab and Haryana High Court, had approached the competent authority of PSPCL within the time stipulated. However, their request was rejected on 01.10.2019. Once again adverting to the order passed on 28.08.2019 by Punjab and Haryana High Court, wherein it is stated that once fresh orders are passed by the competent authority, the earlier impugned orders/resolutions shall stand superseded automatically. Therefore, as on date of passing of the rejection order by PSPCL on 01.10.2019, the bank guarantee was not in force.

18. In clause 2.2.7.2 of Master Circular issued by the Reserve Bank of India regarding Guarantees and Co-acceptances, it is specifically mandated that the beneficiary of the bank guarantee should also be advised to invariably obtain a confirmation of the concerned bank about the genuineness of the guarantee issued by them as a measure of safety.

19. As mentioned earlier, the respondent bank had specifically written to the PSPCL to clarify whether the bank guarantee was renewed or not. Though PSPCL may claim a subsisting right on bank guarantee and is entitled to negotiate the same in order to enforce its right, it should have been vigilant enough to keep the same alive. Admittedly, the bank guarantee was allowed to expire on 31.03.2019. The PSPCL was also a party to the order dated 01.04.2019, wherein, the Punjab and Haryana High Court had specifically mentioned that the petitioner cannot be compelled to keep renewing the bank guarantee. The PSPCL could have obtained a direction from the High Court of Punjab and Haryana on 28.08.2019, when the final order was passed to issue a direction to the petitioner to renew the bank guarantee. Thus, having failed to keep the bank guarantee alive till the claim is realised, the petitioner cannot be put to hardship by keeping the Margin Money lying with the second respondent bank, especially in the time of hard financial strain.

20. In paragaph 19 of the affidavit, the petitioner has expressed its willingness to indemnify the respondents against any future claims by PSPCL in a manner acceptable to them. The petitioner, therefore, requested the second respondent, to release the Margin Money deposited and even mentioned bona fide need of the said money in view of the financial crisis due to COVID-19 Pandemic situation.

21. As the petitioner has given an undertaking to indemnify Tamilnad Mercantile Bank, namely the respondent, in the form and manner, acceptable to the bank, any claim on account of claim under the bank guarantee, there cannot be impediment for the bank to release the Margin Money. Accordingly, the second respondent is directed to release the Margin Money of Rs.30.00 Crores to the petitioner after obtaining an undertaking or any kind of indemnity in a form and manner acceptable to the bank from the petitioner against

any claims, losses or demands that the bank may suffer on account of a claim under the subject bank guarantee.

22. With the above direction, the writ petition is allowed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

Asr

To

1. The Regional Manager,
   Tamilnad Mercantile Bank
   Salem Region
   No.105, Ramakrishna Road
   1st Floor
   Near ATC Depot
   Salem - 636 007

2. The Branch Manager,
   Tamilnad Mercantile Bank
   Kannankurichi Branch
   D. No.4/153C
   GV Complex
   Yercaud Main Road
   Gorimedu, Kannankurichi
   Salem - 636 008

3. The Managing Director
   Tamilnad Mercantile Bank
   No.57, VE Road, Tuticorin HO
   Thoothukudi
   Opposite Holy Cross Convent
   Tamil Nadu - 628 001

+1cc to Mr.Srinath Sridevan, Advocate SR.No.30737

+1cc to Mr.S.Sethuraman, Advocate SR.No.30610

W.P.No.9904 of 2020 and
W.M.P. No.12038 of 2020

VD(CO)
GMY(21/10/2020)