



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 02.11.2021

Order Pronounced on : 30.11.2021

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CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN

Writ Petition No. 12950 of 2021

and

WMP. Nos. 13757, 13759 and 18462 of 2021

M/s. MMTC Limited

represented by the Additional General Manager

Mr. E. Malar Vannan

6, Esplanade, Chennai House

Chennai - 600 108

...Petitioner

Versus

1. M/s. Kamarajar Port Limited

No.17, Jawahar Buildings

Rajaji Salai, Chennai - 600 001

2. Yes Bank Limited

ONE, International Center, Tower-II

15th Floor, Senapatti Bapat Marg

Elphinstone (W)

Mumbai - 400 013

3. UCO Bank

Chief Manager

Flagship Corporate Branch

1st Floor, Mafatlal Center

Nariman Point, Mumbai - 400 021

4. SICAL Logistics Limited

represented by (Insolvency Resolution Professional)

Mr. Sripatham Venkatasubramanian Ramkumar

(Regd.No.IBBI/IPA-001/IP-P00015/2016-2017/10039)

South India House

No.73, Armenian Street

Chennai - 600 001

5. SICAL Iron Ore Terminal Limited

South India House

No.73, Armenian Street

Chennai - 600 001

...Respondents



Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent relating to the impugned termination notice KPL/OP/3.12/130 dated 22.03.2021 insofar as terminating the contract entered between first and fifth respondent is concerned, quash the same and consequently direct the second respondent to grant extension of time for completion of work and thereby granting time for making payments to the second respondent.

For Petitioner : Mr.P.H.Aravindh Pandian, Senior Advocate
for Mr.Ramasubramaniam Raja

For Respondents : Mr. R. Sankara Narayanan
Additional Solicitor General
assisted by Mr.Ramaswamy Meyyappan for R1

Mr. Karthick Seshadri for R2

Mr. Anant Merathia for R4

Mr. S. Gopinath for R5

ORDER

The petitioner has come forward with this writ petition praying to issue a Writ of Certiorarified Mandamus to call for the records of the first respondent relating to the termination notice bearing No.KPL/OP/3.12/130 dated March 22, 2021 insofar as it relates to the termination of the contract entered between the first and fifth respondents, quash the same and consequently direct the second respondent to grant extension of time for completion of work and making payments.

2.The necessary facts, which are required to be appreciated for disposal of this writ petition, are as under:

2.1 The petitioner - MMTC Limited is a government owned trading company engaged in the business of minerals, metals and precious products. It is stated by the petitioner that the fifth respondent company was incorporated on 05.09.2006 and is a subsidiary of the fourth respondent company, which is holding 63% equity in the fifth respondent company. The petitioner company also owns 26% equity in the fifth respondent company. While so, the first respondent was directed by the Ministry of Shipping to develop one common user Iron Ore Terminal through Public Private Partnership (PPP) under Built Operate Transfer (BOT) mode to shift the existing Iron Ore Export unit from



Chennai Port Trust due to pollution and environmental issues. For this purpose, the first respondent resorted to a competitive bidding process and entered into a License Agreement with the fifth respondent, a Special Purpose Vehicle jointly promoted by the fifth respondent (then holding 89% equity) and L&T Infrastructure Development Projects Limited (holding 11% equity) during September 2006 for development of Iron Ore berth to handle Iron Ore capacity of 12 MMTPA.

2.2 According to the petitioner, even prior to the license agreement between the first and fifth respondents, they were already exporting Iron Ore from Chennai Port for many decades, however, due to pollution and environmental issues, there was every possibility of closing down of the Iron ore loading at Chennai port, due to which, the petitioner constructed a temporary jetty with approval of Ennore Port Limited during the year 2003 and started Iron Ore Vessel loading operations from September 2004 onwards. Initially, Ennore Port Limited permitted the petitioner to operate jetty for three years, which was subsequently, extended by another three years. Since the petitioner was already having experience of running iron ore loading facility, they have entered into a Shareholders Agreement dated 25.02.2009 with the fourth respondent and L & T IDPL thereby holding equity share of 26%, 63% and 11% respectively in the fifth respondent company. Pursuant to the same, the petitioner invested large sum of money to acquire 26% equity share in the fifth respondent company from the fourth respondent company. Thereafter, for the purpose of establishment of a Special Purpose Vehicle (SPV), steps were taken by the petitioner along with the fifth respondent. While so, the Government of Karnataka imposed a ban on movement of Iron Ore for export, as a result of which, no cargo was available for export from the SPV and the trial run could not be conducted and the said ban was partially lifted by the Honourable Supreme Court during September 2012. On account of these adverse developments in the Iron ore sector, the fifth respondent could not complete the trial run and load test.

2.3 The petitioner further averred that during April 2015, the Union Ministry of Shipping decided to allow modification of the existing facility to also handle common user coal and asked the first respondent to discover the market price of the project by inviting bids including from the fifth respondent who also had right of first refusal. Consequently, the first respondent issued a Letter of Intent on 02.06.2016 to the fifth respondent for grant of licence for implementation of the modification of the existing Iron Ore Terminal, which culminated in execution of Licence Agreement dated 11.07.2016. Thereafter, the petitioner and the fourth respondent entered into a Share Purchase Agreement dated 30.05.2018 as per which the fourth respondent



agreed to purchase the petitioner's entire shareholding of 26% in the fifth respondent company for Rs.3426 lakhs and paid Rs.50 lakhs as interest free refundable security deposit. However, due to various reasons, the transaction did not complete and the petitioner continues to hold 26% equity shares in the fifth respondent company.

2.4 It is also stated by the petitioner that on 07.06.2018 a Common Loan Agreement was entered into among the fifth respondent, second respondent / Bank, IDBI Trusteeship Services Limited and the lenders, pursuant to which the second respondent/Bank extended credit facilities to the fifth respondent and the same was followed by a Substitution Agreement dated 13.06.2018 for financing the project. As per clause 5 of the agreement, licence period was to commence on the "Zero date" i.e., the date on which the licensor and licensee satisfy all the conditions, as enumerated under Clause 3 of the agreement. As per the agreement, the first respondent also announced the zero date for the project as 19.08.2017 in anticipation of clearance from the Ministry of Environment, Forest and Climate Change, but such clearance was given only on 11.05.2018. Therefore, the fifth respondent was constrained to issue a letter dated 28.05.2018 to the first respondent for declaration of zero date to 14.05.2018, but it was not considered. Subsequently, after procurement of consent from the Tamil Nadu Pollution Control Board, the fifth respondent once again issued a letter dated 11.09.2018 requesting the first respondent to declare 20.07.2018 as the zero date. Accordingly, the first respondent fixed the zero date for the project with effect from 20.07.2018, consequent to which commercial operation date was fixed as 19.07.2019 and it was also intimated to the second respondent bank. The commercial operation date (COD) was also subsequently extended to 31.01.2020 and thereafter till 31.05.2020. While so, due to the onset of the Covid-19 Pandemic, the construction/ modification activities of the project were interrupted and the fifth respondent invoked the Force Majeure clause with effect from 19.02.2020.

2.5 The petitioner further stated that in November, 2019, the contractor engaged by the fifth respondent had demobilised and stopped the project work due to the default of the second respondent/bank in not disbursing the funds within the specified time and after the funds were provided, he resumed the work. Thus, the delay or laches, if any, in completion of the project is attributable only on the part of the second respondent bank. Even in the month of March 2020, the Reserve Bank of India has issued a moratorium on the operations of the second respondent/bank which led to the disturbance of progress in the project. The fifth respondent also pre-occupied with discussion with various investors to improve the business prospects and to



infuse capital for the project. In such circumstances, the second respondent/bank, without regard to the prevailing Covid-19 pandemic situation, classified the facilities granted to the fifth respondent as Non-Performing Asset from 18.08.2020 on unjustified reasons. Following the same, a Notice of Financial default came to be issued on 07.12.2020 to the fifth respondent referring to certain alleged events of default as per the substitution agreement and demanding payment of outstanding amounts. Subsequent to the notice dated 07.12.2020, the second respondent also issued a notice dated 16.12.2020 to the first respondent referring to the financial default on the part of the fifth respondent and requested the first respondent to issue a 'Notice of Intent to terminate'. Immediately, the fifth respondent sent a reply notice on 19.12.2020 denying the unsubstantiated allegations made by the second respondent. Pursuant to the notice dated 16.12.2020, the first respondent issued a notice of intent to terminate on 21.12.2020 to the fifth respondent without verifying the correctness of the allegations of financial default raised by the second respondent. Thereafter, on 22.03.2021, the first respondent issued the impugned termination notice invoking clause 22.3.5 of the License agreement. Challenging the same, the petitioner is before this Court with this writ petition.

3.1 The learned senior counsel appearing for the petitioner, at the outset, submitted that the petitioner, through the shareholders agreement dated 25.02.2009 invested huge sum and acquired 26% shares of the fifth respondent company. The fifth respondent company is a joint venture partner of the fourth respondent, petitioner and L & T Infrastructure Development Projects Limited. The joint venture partnership was constituted for the purpose of developing the first respondent port. Therefore, the petitioner has locus standi to question the impugned termination notice issued by the first respondent against the fifth respondent inasmuch as it will have a direct bearing on the business affairs of the petitioner company.

3.2 Adding further, the learned senior counsel submitted that the jurisdiction of this Court to grant relief in favour of the petitioner cannot be denied or curtailed, when the action of the first respondent terminating the contract entered into with the fifth respondent, impairs not only the rights of the fifth respondent company, but also the rights of the individual shareholders. The petitioner being a public sector undertaking is the custodian of public funds and it has to take all necessary steps to safeguard the interest of the public. That apart, the fifth respondent has been complacent and has not initiated any action against the termination and the fourth respondent, the promoter and majority shareholder of the fifth respondent has gone before the Company Insolvency Resolution



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3.4 As regards the notice of termination, it is submitted by the learned senior counsel for the petitioner that a common loan agreement was entered into between the fifth respondent and second respondent bank to facilitate financing of the project by extending credit facilities. The licence period was to commence on the 'zero date' which was admittedly extended from time to time due to delay in obtaining various clearance from the Government. The delay to commence the project was also attributable due to the nationwide lockdown imposed to arrest the spread of Covid-19 Pandemic. However, the second respondent has declared the accounts of the fifth respondent as 'Non performing Assets' (NPA) without giving any opportunity of hearing to the fifth respondent or the petitioner. After declaring the account of the fifth respondent as NPA on 18.08.2020, the second respondent bank sent a notice dated 07.12.2020 to the fifth respondent intimating about the failure to pay the amount as on 01.10.2020. The second respondent thereafter issued a notice on 16.12.2020 inducing the first respondent to issue the notice of termination of the Licensing Agreement entered into between the fifth respondent and the first respondent. Though the fifth respondent has issued a letter of objection dated 19.12.2020 to both the notices dated 07.12.2020 and 16.12.2020 to the second respondent, after



marking copies to the first respondent, the first respondent without considering the same, has issued the notice of intent to terminate on 21.12.2020 followed by the impugned order of termination dated 22.03.2021, which is hasty and without proper application of mind.

3.5 The learned senior counsel further proceeded to submit that as per clause 22.3.1 (II) of the License Agreement, a notice of intent to terminate shall specify the details relating to defaults committed by the fifth respondent. In this case, the first respondent, without assigning proper reasons, has issued the notice of intent to terminate, which simply states that the fifth respondent has not taken any measures to rectify or remedy the event of financial default. Admittedly, the notice of intent to terminate was sent by the first respondent on 21.12.2020 after receipt of the objection dated 19.12.2020 of the fifth respondent. However, the first respondent has not recorded or even referred to the objections raised by the fifth respondent in the notice of intent to terminate. Thus, the notice of intent to terminate lacks fairness and is in total violation of the principles of natural justice.

3.6 To substantiate his contention, the learned senior counsel placed reliance on the decision of the Supreme Court in *New Horizons Limited and another vs. Union of India and others* [(1995) 1 SCC 478], wherein, it was held that "while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant; and if unreasonableness and arbitrariness are palpable, the court exercising jurisdiction under Article 226 of The Constitution of India can interfere with the same, in the larger public interest.

Stating so, the learned senior counsel prayed for setting aside the order of termination passed by the first respondent against the fifth respondent and allowing this writ petition.

4.1 Per contra, the learned Additional Solicitor General of India appearing for the first respondent contended that the order, which is impugned in this writ petition, is the one passed against the fifth respondent. The Board of Directors of the fifth respondent has decided not to question the order of termination, as the fifth respondent company is not possessed of funds to complete the contract. The sub contractor of the fifth respondent company has proceeded against the fifth respondent by invoking the arbitration clause for non-payment of the consideration for the asset alleged to have been created by



them. However, the petitioner has filed this writ petition to quash the said termination notice issued to the fifth respondent. According to the learned counsel, the petitioner, a shareholder of the fifth respondent company, is only entitled to receive dividend, attend general meetings, vote on resolutions proposed to the General meeting and not entitled to sue on behalf of the company or by making the company as a party to the writ proceedings and therefore, the writ petition filed by the petitioner is not maintainable and it has to be dismissed in limine.

4.2 Adding further, the learned Additional Solicitor General of India submitted that pursuant to the notice of termination, which is impugned in this writ petition, a meeting dated 01.04.2021 was convened between the first respondent and the fifth respondent in accordance with Clause 18.2.12 of the Licensing Agreement, in which the future course of action was discussed and deliberated. However, as there was no way and the fifth respondent lacks funds to complete the project, no solution to revoke or rescind the termination notice could be found out. In effect, it is contended by the learned Additional Solicitor General of India that the present writ petition is a derivative action by the shareholder of the fifth respondent company. Such derivative action is an exception to the general principle of locus and it has to be strictly treated as such. A requirement for such derivative action to succeed would be to show that the action is on behalf of the company and that the shareholder has in fact approached this Court with clean hands. Whereas, in this case, the petitioner admitted that it had already entered into a share purchase agreement with the fourth respondent in the year 2018 for sale of shareholding in the fifth respondent company, however, the same did not fructify for obvious reasons, which would clearly indicate that the petitioner, who has no bona fide interest in the fifth respondent company, has approached this court with unclean hands. Therefore, the derivative action initiated by the petitioner by filing this writ petition, is not maintainable.

4.3 The learned Additional Solicitor General of India also contended that the first respondent is a Major Port Trust and it is a company incorporated under The Companies Act. For the purpose of developing iron-ore berth, tenders were invited for development of such berth in which the fourth respondent company along with L&T Infrastructure Developing Projects Limited participated and emerged as the successful bidder. The fifth respondent is a Special Purpose Vehicle (SPV) created for running the said project. Subsequently, the petitioner purchased some shares from the fifth respondent company and presently holds 26% of the shares. A Letter of Intent was issued to the fifth respondent on 02.06.2016 to undertake the project.



However, the fifth respondent failed to comply with the terms of the Licence Agreement for want of funds. After granting extension of time from 01.02.2020 to 31.05.2020 with levy of Liquidated damages, the fifth respondent could not revive the project. Even the fifth respondent invoked the Force Majeure clause which was accepted by the first respondent from 19.02.2020, but due to failure on the part of the fifth respondent, the force majeure concession given was revoked on 14.09.2020 and the revised date for completion was set as 25.12.2020. It was at this stage the second respondent bank invoked the lender's right under Section 3.2.1 of the Substitution Agreement and declared the assets of the fifth respondent as NPA. Thereafter, the second respondent issued a notice dated 16.12.2020 listing out the events of financial default committed by the fifth respondent. It is on the basis of the notice dated 16.12.2020, the first respondent issued the Notice of intent to terminate under Clause 22.3.1 of the Licensing Agreement giving an option to the fifth respondent to rectify the events of default within 90 days. However, the fifth respondent could not rectify the events and therefore, the notice of termination was passed against the fifth respondent. Thus, according to the learned counsel, the notice of termination was passed in terms of the Licensing Agreement and by following the principles of natural justice, giving abundant time to the fifth respondent to rectify the events of default and hence, the same warrants no interference by this court.

4.4 The learned Additional Solicitor General of India also drew the attention of this court to the fact that after the order of termination was passed, the petitioner sent a letter dated 13.05.2021 to the first respondent not to proceed with the process of termination and to give time for identifying a strategic investor for the fifth respondent company. By a reply dated 18.05.2021, the first respondent informed the petitioner that they are not obliged to exchange any communication with the petitioner, an individual shareholder and the communication, if any, has to emanate from the fifth respondent. Even in the reply dated 18.05.2021, reference was made to the necessity to pass the order of termination owing to financial default committed by the fifth respondent and the failure to adhere to the obligations set out in the Licensing Agreement and Substitution Agreement. Thereafter, the fifth respondent by letters dated 08.06.2021 and 11.06.2021 sought three months time on the ground that the petitioner was non-cooperative and refusing to surrender the possession of the Terminal. Thus, owing to the action of the petitioner, the fifth respondent could not adhere to the process of rescind the termination. Therefore, by another letter dated 17.06.2021, the first respondent directed the petitioner to handover and/or surrender possession of all transfer assets without encumbrance on or



before 20.06.2021. It is at this stage, the petitioner has filed this writ petition to prevent the first respondent to give effect to the order of termination of the project.

4.5 The learned Additional Solicitor General of India also submitted that the first respondent has taken all steps to enable the fifth respondent to complete the project. Even the first respondent had granted extension of time for a period of 196 days, which is more than 50% of the stipulated construction period by a letter dated 04.11.2019. However, the fifth respondent was unable to complete the project even in the extended period and achieved only 25% physical progress thereof. There were several communications exchanged between the first respondent and the fifth respondent, which would stand testimony to the fact that the first respondent has not hastily passed the order of termination, but it was a necessity to do so owing to the continued financial events of default committed by the fifth respondent. Thus, it is contended that all the procedures as contemplated under the Licensing Agreement and Substitution Agreement entered into between the first and fifth respondents have been complied with, before passing the order of termination.

4.6 The learned Additional Solicitor General of India also relied on the following decisions:

(i) State of Rajasthan and others v. Commissioner of Income Tax, Bombay [AIR 2016 SC 510] wherein the question arose for consideration before the supreme court is whether in the given fact situation, the transfer of entire shareholding and change of all the directors of a newly formed company to which lease rights were transferred by a declaration that it was mere change of form of partnership business, without any transfer for consideration being involved, can be taken as unauthorised transfer of lease, which could be declared void; and it was held that "the state must have a declared policy for exercise of its power of permitting or refusing transfer of mining leases and such policy should be operated in a transparent manner. However, even in absence of a policy and irrespective of exercise of power in the past, transfer of lease for private benefit without corresponding benefit to the public or the state exchequer is not permitted. After all, minerals vest in the state and the state has to exercise its power to deal with them as per doctrine of public trust. Thus, in the present case, the state can certainly be entitled to exercise its jurisdiction to cancel lease transferred in violation of rules".

(ii) Life Insurance Corporation of India v. Escorts Limited and others [AIR 1986 SC 1370] wherein it was held by the supreme court that in matters of contractual dispute, the interference



"For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company like any other shareholder.

<https://hcservices.ecourts.gov.in/hcservices/>



5.1 The learned counsel appearing for the second respondent-bank submitted that this writ petition has been filed by the petitioner to prevent the second respondent bank from legally enforcing their terms and conditions of the agreements entered into with the fifth respondent. There was a contract between the second respondent and the fifth respondent by virtue of a Common Loan Agreement and a Substitution Agreement. Pursuant thereto, the second respondent had extended financial facilities to the fifth respondent for taking up the project with the first respondent. The petitioner is a stranger to such loan transaction between the second respondent bank and the fifth respondent. Merely because the petitioner holds 26% equity shares in the fifth respondent company, they will not confer with any right to file this writ petition. The fifth respondent had committed events of financial default and hence, their assets were declared as NPA after following the due procedures established under law.

5.2 The learned counsel for the second respondent Bank further submitted that the petitioner has two Directors on board of the fifth respondent company. The fifth respondent had breached the dates of completion for achieving commercial operations. Hence, the assets of the fifth respondent were declared as NPA even during August 2020, consequent upon which a financial default notice was issued to the fifth respondent during December 2020. However, the petitioner did nothing to remedial the situation relating to the events of default committed by the fifth respondent or made attempts to assist the fifth respondent to confront such a situation. In such circumstances, the present writ petition has been filed by the petitioner questioning the termination notice issued to the fifth respondent, which cannot be allowed to sustain.

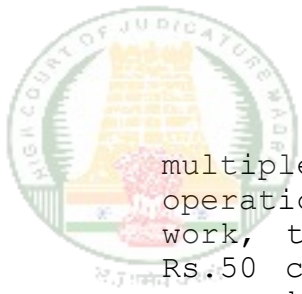
5.3 The learned counsel for the second respondent bank further submitted that the second respondent is following the guidelines and norms issued by the Reserve Bank of India by way of Master Circular on Prudential Norms on income recognition, Asset Classification and Provisioning pertaining to Advances dated 01.07.2015 and it was as per this Circular, the assets of the fifth respondent were classified as NPA. For declaration of the assets of the fifth respondent, the second respondent had taken into account the Lender's Independent Engineers Report during June 2019, as per which the progress of the project till 31.03.2019 by the fifth respondent was estimated at 24.92% as against the estimated progress of 49.20%. Further, during the course of the said project, FL Smidth, sub-contractor of the fifth respondent, demobilized from the site due to non-payment and they claimed an outstanding amount of Rs.52.56 crores from the fifth respondent. The issue with respect to payment between



the fifth respondent and the sub-contractor is still subsisting and FL Smidh also participated in the meeting arranged by the lenders during December 2019. Thus, according to the learned counsel, the second respondent Bank had acted fairly and diligently in the best interest of protecting the lender - fifth respondent. There was no delay on the part of the second respondent in any manner in relation to disbursement of the sanctioned loan. In any event, the power to classify an account as NPA is statutorily mandated by the Circulars issued by the Reserve Bank of India from time to time and the second respondent is bound by such circulars. The second respondent Bank had requested the first respondent to issue a notice of intent to terminate by referring to the repeated events of financial default committed by the fifth respondent. Therefore, the petitioner, being a shareholder, cannot be permitted to step into the shoes of the fifth respondent and file the present writ petition, when the petitioner did nothing to ensure the revival of the project by the fifth respondent. Thus, this writ petition at the instance of the petitioner, is liable to be dismissed.

5.4 The learned counsel for the second respondent Bank placed reliance on the Lender's Independent Engineer's reports dated 30.07.2019 and 25.03.2020 to show that the performance of the fifth respondent is dismal and therefore, the classification of the assets of the fifth respondent as NPA by the second respondent is wholly justified. Therefore, the learned counsel prayed for dismissal of the writ petition so as to enable the second respondent bank to realise the loan amount from the fifth respondent.

6.1 The learned counsel for the fourth respondent submitted that the fourth respondent was appointed as a Resolution Professional for the fifth respondent by the National Company Law Tribunal in the order dated 02.06.2021. By placing reliance on the counter affidavit, the learned counsel submitted that the fourth respondent was appointed to provide effective, innovative and best solutions for multiple projects being currently worked upon keeping in mind the interest of stake holders as well as their obligations towards the society. It is submitted that the fifth respondent herein is a Special Purpose Vehicle incorporated in the year 2006 under the Companies Act and it was created specifically for the purpose of development of an iron-ore berth to handle the 12 MMTPA capacity at the port including design, engineering, financing, construction, operation, maintenance and marketing and they are governed by the License Agreement dated 11.07.2016. For infusing financial support to the project, the fifth respondent entered into an agreement with the second respondent bank namely Substitution Agreement dated 13.06.2018. The construction period for the terminal was 12 months from 01.04.2016, but it was subsequently extended on



multiple occasions till 31.12.2020 to get the project operational. Ultimately, owing to the disruption in project work, the unpaid bills of the fifth respondent accumulated to Rs.50 crores. By taking account of the huge debts, the second respondent informed the first respondent about the events of financial default and it resulted in the first respondent issuing the notice of intent to terminate and the consequential notice of termination.

6.2 According to the learned counsel for the fourth respondent, the fifth respondent has completed 80% of the work in the project and at this stage, the termination would dilute and erode almost half of the asset base of the Corporate Debtor namely the fifth respondent. It is further submitted that if the termination process is continued, there would be no means for the fourth respondent to recover even a single penny from the project, which it has been carefully tending to and building from scratch after all the hassles of obtaining the relevant clearances from the MoEFCC and State Pollution Control Board and ultimately, striving to ensure that the contractors complete the construction of the terminal and make it fully operational. Therefore, according to this respondent, the license agreement ought not to be terminated, but rather the fifth respondent should be given a fair chance to revive the terminal, by overcoming the odds of the pandemic, disbursal related challenges, etc.

6.3 The learned counsel for the fourth respondent also submitted that in view of the issuance of termination notice, an application was filed under Section 60 (5) and Section 19 of the Insolvency and Bankruptcy Code, 2016 by the fourth respondent before the National Company Law Tribunal, Chennai bearing number CHE/IA/574/2021 in which the first and fifth respondents are the respondents. The learned counsel also invited the attention of this Court to various applications filed by Operational Creditors before the National Company Law Tribunal, Division Bench-I, Chennai against the fifth respondent-Corporate Debtor and to initiate Corporate Insolvency Resolution Process and for appointment of an Interim Resolution Professional.

6.4 In effect, the learned counsel for the fourth respondent would contend that unless this Court protects the fifth respondent against the process of termination initiated by the first respondent, they will be put to severe hardship and loss. The process of termination would also result in corporate death thereby ruining the livelihood of numerous employees by setting off a domino reaction. It is reiterated by the learned counsel that when 80% of the project work has been completed by the fifth respondent, it would be in the best interest of livelihood of numerous employees of the Corporate debtor (fifth



respondent) to allow the fifth respondent to complete the project by setting aside the order of termination. The learned counsel therefore prays for interference by this Court in this writ petition filed by the petitioner.

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7. The learned counsel appearing for the fifth respondent, against whom the order of termination was passed, would contend that already the National Company Law Tribunal in the order dated 02.06.2021 has appointed the fourth respondent herein as the Resolution Professional. The fifth respondent is taking all efforts to revive the project, complete the construction of the terminal and make it operational. The fifth respondent is confronting numerous litigations before the Company Law Board at the instance of the creditors. In any event, the fifth respondent is only attempting to process the revival with the various stake holders and has not questioned the order of termination passed by the first respondent. The learned counsel therefore sought for appropriate orders in the writ petition filed by the petitioner, on merits.

8. Heard the learned counsel on either side and perused the materials placed on record.

9. The facts remain undisputed are that the petitioner is one of the shareholders of the fifth respondent company and it is a government owned trading company engaged in the business of minerals, metals and precious products. The fifth respondent company was incorporated on 05.09.2006 and it is a subsidiary of the fourth respondent company, which is holding 63% equity share in the fifth respondent company. The petitioner company also owns 26% equity share in the fifth respondent company. In the competitive bidding resorted to by the first respondent, the fifth respondent participated and eventually it had been declared as successful bidder and the first respondent entered into a License Agreement with the fifth respondent. The fifth respondent was appointed by the first respondent as a Special Purpose Vehicle during September 2006 for development of Iron Ore berth to handle Iron Ore capacity of 12 MMTPA. Admittedly, the fifth respondent, as a SPV, could not kick-start or operationalise the iron ore berth due to various reasons. The fifth respondent also could not honour the financial commitments made to the borrowers, including the second respondent Bank. The second respondent, therefore, declared the assets of the fifth respondent as NPA, consequent upon which the first respondent issued a notice of intent to terminate, which was followed by the order of termination dated 22.03.2021. The order dated 22.03.2021, terminating the contract entered into between the first and fifth respondents is questioned in this writ petition not by the fifth respondent, but by the petitioner in the capacity of its shareholder.



10. On appraisal of the above factual position, it is evident that the order of termination was passed by the first respondent against the fifth respondent. However, the fifth respondent has not filed the present writ petition assailing the said order of termination, whereas the petitioner has filed this writ petition stating that they are one of the shareholders of the fifth respondent company having 26% of equity shares and any order passed against the fifth respondent would adversely affect their interest. Therefore, this court has to first examine whether this writ petition at the instance of the petitioner, is maintainable.

11.1 According to the learned senior counsel appearing for the petitioner, the petitioner owns 26% of equity shares in the fifth respondent company and is a joint venture partner with the said company along with others and thereby invested not only public money, but also its expertise and resources for development, besides technical assistance to the fifth respondent; and the said joint venture partnership was constituted for the purpose of developing the first respondent Port. Further, the petitioner is the custodian of public funds and it has to take all steps to safeguard the interest of the public. Therefore, the petitioner being a shareholder of the fifth respondent, has locus standi to file this writ petition, to question the termination notice issued against the fifth respondent. It is also submitted that the second respondent bank has extended several crores of financial assistance to the fifth respondent company; when there is involvement of such huge sum of money, the declaration of the fifth respondent company as a defaulter, would definitely have an element of public interest; and the coercive action taken by the second respondent bank against the fifth respondent / borrower through the first respondent and forcing them to accept such action, would not only affect the rights of the fifth respondent, but also the rights of the individual shareholders. Therefore, this Court has to interfere with the impugned order of termination.

11.2 On the other hand, it is contended on behalf of the first respondent that the order impugned in this writ petition was passed against the fifth respondent. When the Board of Directors of the fifth respondent has decided not to question the order of termination, it is futile on the part of the petitioner to assail the same under the guise of a shareholder of the fifth respondent company having 26% equity shares. It is further stated that merely because the petitioner is a shareholder of the fifth respondent company, it will not confer them any right to sue on behalf of the fifth respondent company. Even otherwise, the order of termination has been passed for the



11.3 As a matter of fact, it must be observed that the dispute involved in this writ petition is between the first respondent, which is a Major Port and a company incorporated under the Companies Act and the fifth respondent, which is a private entrepreneur. They have entered into several agreements for undertaking the development of iron ore berth in the land situated at the Kamarajar Port Limited and are governed by the terms and conditions thereof. The second respondent Bank extended financial support to the fifth respondent for completing the said project. It is an admitted fact that the fifth respondent has not completed the project within the time specified as well as extended by the first respondent and they have also defaulted in payment of dues to the second respondent bank. Hence, according to the terms of the loan agreement and the guidelines framed by the RBI, the second respondent bank declared the assets of the fifth respondent as NPA. Consequently, the first respondent, at the instance of the second respondent bank, issued the notice of termination followed by the termination order, which is impugned herein to the fifth respondent, in terms of the agreements entered into between the parties. Such being the position, this court is of the opinion that the said contractual dispute, which is purely private in nature, cannot be subjected to judicial review in writ jurisdiction. At this juncture, it is pertinent to point out that the said termination order was not challenged by the fifth respondent, but by the petitioner, in the capacity as shareholder of the fifth respondent company. It is settled law that in matters of this nature, the courts cannot exercise the jurisdiction conferred under Article 226 of The Constitution of India and to grant relief, rather, it has to observe self-imposed restriction without substituting it's opinion over the decision of one party, on the basis of the terms and conditions of the contract.

"26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it



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can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though case of nationalized banks stands on a different footing. There may, well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lacs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The Banking companies have not been set up for the purposes of building economy of the State on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by the Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business



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activities may be manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. The care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy may not go down yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of Ajay Hasia (supra) and approved in the later decisions in the case of Ramana (supra) and the



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seven Judges Bench in the case of Pradeep Kumar Biswas (supra) may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the mal-functioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank of India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Association (supra) does not advance the case of the respondent. It is only in case of mal-functioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental



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functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, are such which do have impact on the economy of the country in general. But such activities cannot be classified one falling in the category of discharging duties, functions of public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the government and transferred to the appellant company. For the sake of argument even if it may be assumed that one or the other test as provided in the case of Ajay Hasia (supra) may be attracted that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant.

32. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.



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33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

11.5 In this context, reference can also be made to the order dated 02.07.2021 passed by this Court in WP No. 12381 of 2021 (Marg Limited, represented by its Director vs. Karaikal Port Private Limited represented by its Chief Financial Officer and others) [2021 SCC Online Madras 2585] wherein it was held as follows:-

"65. The examination of the issue of maintainability of the writ petition ought to be from the stand point of whose action under challenge and whose interest, it seeks to unsettle and in the process of any collateral effect of the impugned action cannot be the basis or reason to hold that the writ is maintainable. If this Court were to accept the above arguments, the same principle would have to be applied to all large loan transactions involving crores of rupees, as any adverse action initiated by the private lender, there would always be challenges galore from the defaulters in the realm of public law remedies. If the doors of public law remedy are to open to such defaulters, the public law remedy would become handy for the large borrowers to approach this Court for judicial



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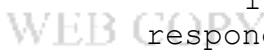
review of action taken by the lenders in the realm of private and commercial relationship. Such contrived route to be adopted by the defaulters for serving their own commercial ends would certainly not be in public interest. Therefore, the plea of public interest in a private loan transaction is only a mask to conceal for petitioners- interest with a view to obstruct the enforcement of contractual obligation.

66. In exercise of writ jurisdiction, this Court would certainly not get involved in the commercial disputes entirely arising from the private relationship driven by commercial consideration and issue any command as that would amount to injudicious intrusion and invasive transgression into the defined areas of conflict governed by mutual rights, liabilities and obligations. If the doors of public law are to be thrown open for matters like the present one, it would only lead to opening the pandora's box and all the private disputes would find a back door entry and have recourse to writ jurisdiction as a easier option for serving private ends. Such scenario would eventually lead to dilution of the essence of the writ jurisdiction namely, serving public interest.

67. For all the above reasons, this Court finds that the writ petition is not maintainable and hence, the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed."

11.6 Applying the legal proposition laid down in the aforesaid decision to the facts of the present case, wherein, the dispute between the first respondent and the fifth respondent is purely contractual in nature, this court is of the view that the writ petition arising out of the contractual dispute, cannot be maintainable, that too, at the instance of the petitioner claiming themselves as a shareholder of the fifth respondent company, who is a third party to the contract between the parties and hence, the same is liable to be dismissed on the ground of maintainability.

12.1 The further contention of the learned senior counsel for the petitioner is that the termination of the contract with the fifth respondent by the first respondent would cripple the economy of the region and it would have a direct impact on the livelihood of the entire employees of the fifth respondent company, who will be rendered as jobless and their



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13. As regards the contention of the learned senior counsel for the petitioner that the order of termination is liable to be set aside as it was passed without adhering to the principles of natural justice, it could be seen that before passing the order of termination dated 22.03.2021, a notice of intend to terminate was issued by the first respondent, giving 90 days time to enable the fifth respondent to rectify the defects pointed out



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therein. Admittedly, the fifth respondent could not comply with the demands made in the notice of intent to terminate, which resulted in the first respondent passing the order of termination. Even otherwise, as pointed out by the learned Additional Solicitor General of India appearing for the first respondent, after the order of termination has been passed, attempts have been made by the petitioner, by sending a letter dated 13.05.2021 to the first respondent and requested the first respondent to give time to the fifth respondent for identifying an investor to infuse funds. By a reply dated 18.05.2021, the first respondent refused to accede to the demands made by the petitioner on the ground that the petitioner is only a shareholder of the fifth respondent company. Even in the reply dated 18.05.2021, it was stated that the order of termination came to be passed owing to the events of financial default committed by the fifth respondent and the failure to adhere to the obligations set out in the Licensing Agreement and Substitution Agreement. Therefore, it is clear that at each and every stage, there was a meeting between the petitioner, fifth respondent and other stakeholders and attempts have been made to revive the fifth respondent to continue the project, but those attempts ended in vain. While so, it cannot be said that the order of termination has been passed by the first respondent against the fifth respondent, without complying with the principles of natural justice. Hence, the said contention raised on the side of the petitioner is rejected by this court.

14. Furthermore, it is to be pointed out that the Department of Legal Affairs, Ministry of Law and Justice, Government of India has already issued Office Memorandum dated 31.03.2021 to avoid inter-departmental litigations and to resolve such disputes amicably through Administrative Mechanism for Resolution of Commercial Disputes (AMRD). Further, the fourth respondent was appointed as a Resolution Professional for the fifth respondent by the National Company Law Tribunal in the order dated 02.06.2021 and they are resorting to a resolution process to assist the fifth respondent to revive the project. Some of the creditors have also taken out applications before the National Company Law Tribunal, Division Bench-I, Chennai against the fifth respondent for appropriate relief and the same are pending adjudication. As held in the preceding paragraphs, the writ petition is not maintainable as against a private bank, private entity or entrepreneur and the contractual duties to be performed by a private body cannot be enforced by issuing a mandamus. At this stage, it is apt to refer to the observation of the supreme court in Binny Limited v. V. Sadasivan [2005 (6) SCC 657], which reads as follows:

"The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The



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prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration."

Such being the position of law, this court is of the view that the remedy available to the petitioner is elsewhere and not before this court.

15. Above all, the other contentions raised on the side of the petitioner challenging the termination order passed by the first respondent, do not cut ice with this court, as the writ petition filed by the petitioner itself is not maintainable.

16. Thus, in the ultimate analysis, the writ petition deserves to be dismissed as devoid of merits and is accordingly, dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar



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WP No. 12950 of 2021

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NSK 14/12/2021