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W.P.No.17533 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.08.2023

Pronounced on : 01.09.2023

CORAM : JUSTICE N.SESHASAYEE

W.P.No.17533 of 2018
and WMP.Nos.20802 and 39739 of 2018

M/s.South India Hydrocarbons and
Terminals Limited
T-1A, Chona Center, III Floor
45, College Road
Chennai - 600 006.
Rep by its Director

... Petitioner

Vs.

The Board of Trustees
Chennai Port Trust
Rep by its Chairman
Rajaji Salai
Chennai - 600 001.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent relating to its letter dated 29.11.2016 in Ref.No.A/566/2012/T(Mcell) received by the petitioner on 14.12.2016 and the consequential communication in Ref.No.A/566/2012/T(Mcell) passed against the petitioner dated 07.01.2017 and quash the same.



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For Petitioner : Mr.M.E.Om Prakash, Senior Advocate
Assisted by Ms.Pavithra Sundararajan

For Respondent : Mr.R.Karthikeyan

ORDER

The petitioner herein challenges a notice dated 29.11.2016 issued by the Port Trust, the respondent, demanding payment of rent for the period 2005-2016 from the petitioner.

2.The facts that provide the backdrop for this litigation may be bullet pointed:

(a) On 05.01.2000, the petitioner entered into an agreement with the respondent for storing kerosene in its yard. In 2001, the petitioner applied for an amendment to the said agreement, to enable it to store other petroleum products as well. Not only was the request for this amendment declined, but the very agreement which the petitioner had entered into with the respondent itself was terminated. This had happened in the year 2001.

(b) The petitioner now invoked Clause 20 of the said agreement and moved for arbitration of the dispute, challenging the termination of the



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agreement. The respondent filed its version, and ultimately on 09.08.2002, an award came to be passed by the Arbitrator. The salient aspects of the award are:

- i. The termination of agreement is not justified and the Arbitrator has directed the parties to renegotiate it, and also directed the petitioner to put up certain construction;
- ii. Regarding putting the petitioner back in possession of the property covered under agreement is concerned, it was allowed and the respondent was directed to make a fresh demand for rent at Rs.20/- per sq.mtr;
- iii. There are few other issues relating to storage of certain petroleum products, which the arbitrator has directed the parties to negotiate.

3. Subsequently, the respondent issued a notice of termination dated 18.03.2005, and directed the petitioner to vacate the premises. This became the subject matter of the second round of arbitration. On 03.03.2009, the Arbitrator passed an award setting aside the notice of termination. This was



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challenged by the respondent in O.P.No.457 of 2009, but it was in vain. The respondent then took up the matter in O.S.A.No.220 of 2014, and the appeal came to be dismissed by a division bench of this Court on 11.08.2016.

4.The respondent herein would challenge the order passed by this Court in OSA.No.220 of 2014 in SLP Civil No.5196 of 2017 and this came to be dismissed by the Hon'ble Supreme Court vide its order dated 17.04.2017. During the pendency of the SLP, the respondent has raised the demand for Rs.24,89,35,410/- as arrears of rent payable by the petitioner for the period from 23.02.2005 to 31.10.2016. This demand is made yet again vide the impugned proceedings dated 07.01.2017. The foundation for the demand of the respondent is that the petitioner has not paid the arrears of rent in terms of either of the award dated 03.03.2009 or in terms of the order passed in OSA.No.220 of 2014. This is now under challenge.

5.Learned counsel for the petitioner submitted that after the termination of the lease on the first occasion, it is successfully challenged by the petitioner before the Arbitrator, when the latter allow the petitioner's claim vide order dated 09.08.2002. The petitioner was put in possession only on 23.02.2004.



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The second notice of termination was issued on 18.03.2005 and the petitioner ceased to be in possession from 22.05.2005. There is no dispute that the petitioner had paid the rent for the period it was in occupation of the portion leased to it. However, the present demand was made after the second termination order dated 18.03.2005.

6.It is not in dispute that the petitioner is not in possession of the property pursuant to the second notice of termination from 22.05.2005. Even today, the petitioner has not been put in possession and this possibly may happen on execution of the second award dated 03.03.2009 passed by the Arbitrator (and confirmed by the Hon'ble Supreme Court in its order in SLP Civil No.5196 of 2017, dated 17.04.2017).

7.The demand presently made relates to the period when the petitioner is not even in possession. The respondent being the party in default in not letting the petitioner to retain the property leased to it despite its continuous success right from the stage of arbitration, till up to the Supreme Court between 03.03.2009 and 17.04.2017, but the petitioner is yet to taste the fruit of labour it has put in. It is in this period, the respondent makes the claim for payment of rent for



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not enjoying the lease.

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8.Learned counsel for the respondent took this Court through the award of the Arbitrator dated 03.03.2009 and more pointedly, para 13, wherein the Arbitrators have entered a finding for issue number 5 and the claimant had put to pay the lease amount payable in advance from 23.02.2004, the date of taking complete possession of the land. He submitted that this part of the award was not challenged by the petitioner at any time. This Court has discussed it in its order dated 30.01.2017 in O.A.No.67 of 2017.

9.The petitioner's response is that after all it is to be paid only after 03.03.2009, the date of the award and not beyond it.

10.In response, the learned counsel for the respondent relied on paragraph 5 of the award order of this Court in OA.No.67 of 2017, and they read as :

"5.Thus it is clear that the date from which rent is payable had been fixed not only by the Arbitral Tribunal as well as by the Court while dealing with the challenge to the award both by the Hon'ble Single Judge as well as the Hon'ble Division Bench. thus the applicant cannot now state in this application under Section 9 of the Act, that the said date has to be reverted or to advance another set of



arguments as regards the liability to pay the lease rent and cannot call upon this Court to scrutinize the lease agreement to arrive at a finding as to whether at all the applicant is liable to pay the lease rent. The applicant having not challenged the order to that extent of the finding of the Court in O.P.No.457 of 2009 or in O.S.A.No.220 of 2014, in my considered view, the applicant is estopped from doing so in these proceedings. However, if the claim of the applicant is that there is a calculation error or there is some other dispute arising out of the terms of the agreement then the remedy of the applicant is not before this Court under Section 9 of the Act. Furthermore, the conduct of the applicant has also to be taken note of. From the typed set of papers filed by the respondent, it is seen that in spite of repeated communication to the registered office of the Company, the same were returned with postal endorsement "left" and only when the copy of the notice was sent to the two Directors to their residential address, immediately, the applicant woke up and has filed these applications. From the typed set of papers, it is further seen that paper publication has also been effected in the Tamil and English daily on 13.01.2017 by the respondent Port Trust."

11. In the arbitration award dated 03.03.2009, in paragraph No.13, the Arbitrators have entered the findings as below :

"13. Rent : As the claimant has been in possession of the land they have to pay the lease amount payable in advance from 23.02.2004 the date of taking complete



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possession of land. We also find that the possession was given in a working condition i.e., with the power point. On inspection it is noticed that the claimant had put up construction and sheds and had drawn power lines which are in working condition. Issue No.5(2) is answered accordingly."

12. When this Court perused the issues framed by the Arbitrators, not one relates to the need for paying any rentals in advance from 23.02.2004. However, the arbitrators have directed the petitioner to pay the said sum of money from 23.02.2004. Indeed it is an admitted fact that the petitioner was not allowed to enjoy the lease from 22.05.2005 to 31.10.2016, and till now. Therefore, there is considerable merit and force in the contention of the petitioner that it is not liable to pay any rent for the period it was not allowed to enjoy. In each of the two occasions, when the respondent had terminated the lease of the petitioner, it was successful in having the same declared as unsustainable by two different set of arbitrators. Therefore, morally and legally, the respondent may not have the right to rent when it is at wrong.

13. But, this Court cannot come to the rescue of the petitioner essentially because it allowed the Arbitrators' findings to stand, which has also formed the basis for the order in O.A.No.67 of 2017. And the petitioner neither



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chose to challenge the findings of the Arbitrators in the Arbitration Award dated 03.03.2009, nor it chose to challenge the order in O.A.No.67 of 2017.

All the circumstances has now been created by the petitioner for itself, and this Court though find merits in the petitioner's contention, still cannot hold it tenable, as the findings in the award has become final.

14. In conclusion, this Court dismisses the writ petition. No costs.
Consequently, connected miscellaneous petitions are closed.

01.09.2023

Index : Yes / No
Speaking order / Non-speaking order
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To:

The Board of Trustees
Chennai Port Trust
Rep by its Chairman
Rajaji Salai, Chennai - 600 001.



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N.SESHASAYEE.J.,

ds

Pre-delivery order in
W.P.No.17533 of 2018

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