



W.A.No.1031 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.09.2023

Delivered on: 19.10.2023

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

W.A.No.1031 of 2020

and

C.M.P. No.12706 of 2020

1. Tamilnad Mercantile Bank,
represented by Regional Manager, Salem Region.

2. Tamilnad Mercantile Bank
represented by Branch Manager,
Kannankurichi Branch, Salem.

3. Tamilnad Mercantile Bank,
represented by its Managing Director,
Thoothukudi.

.. Appellants

Vs.

1. Thriveni Earthmovers Private Limited,
represented by its General Manager -
Finance and Accounts.

2. Punjab State Power Corporation Limited,
Patiala [impleaded as 2nd respondent vide order in
C.M.P. No.13902 of 2020 dated 05.09.2022]

.. Respondents



W.A.No.1031 of 2020

WEB COPY

Prayer:- Appeal filed under Clause 15 of Letter Patent praying to set aside the order passed by this Court in W.P.No.9904 of 2020 dated 21.09.2020.

For Appellant : Mr. S. Sethuraman

For Respondent : Mr. P.H. Aravind Pandian, Senior Counsel
for Mr. C. V. Sailandharan [for R1]

Mr. Ashwani K. Chopra, Senior Counsel for
Mr. Naveen Bharadwaj, Mr. Vidu Kapoor
[for R2]

JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

The above Writ appeal is at the instance of the bank, which was the respondent in Writ petition No.9904 of 2020. The 1st respondent herein, as Writ petitioner, approached the Writ court seeking issuance of Writ of Mandamus to direct the release of margin money of Rs.30 Crores lying with the appellant bank in Fixed Deposit, together with accrued interest.

2. The brief case put forth by the Writ petitioner in seeking issuance of the Writ of Mandamus was that the respondent bank had failed to discharge its statutory functions, by arbitrarily withholding the Writ



W.A.No.1031 of 2020

WEB COPY

petitioner's funds with no good cause. The Writ petitioner was one of the bidders for a mining project which was tendered by Punjab State Power Corporation Limited (PSPCL) and one of the conditions of the tender required the Writ petitioner to furnish a bank guarantee in favour of PSPCL to the tune of Rs.30 Crores. In compliance of the said condition, at the instance of the Writ petitioner, the respondent bank had issued a bank guarantee, valid until 30.09.2016, with a claim period of three months which expired on 30.12.2016. It is the case of the Writ petitioner that the respondent bank had required the petitioner to deposit 100% of the value of the bank guarantee as margin value, which was held in fixed deposit.

3. Subsequent to the said bank guarantee being issued, disputes arose between the Writ petitioner and PSPCL and the petitioner approached the Punjab and Haryana High Court at Chandigarh in C.W.P. No.12397 of 2016, where, both PSPCL as well as the respondent bank were parties as respondents. The Punjab and Haryana High Court passed an interim order dated 07.06.2016 restraining the encashment of bank guarantee by PSPCL. Subsequently, on 01.04.2019, the Punjab and Haryana High Court passed an order to the effect that the Writ petitioner



W.A.No.1031 of 2020

WEB COPY

cannot be forced to keep the bank guarantee alive as the respondents were taking repeated adjournments. According to the Writ petitioner, the said order of the Punjab and Haryana High Court dated 01.04.2019 had become final and in the meantime on 27.03.2019, the bank had issued an extension of the bank guarantee to the petitioner. Citing the order dated 01.04.2019, the petitioner rejected the said extension proposal. Subsequently, a further final order came to be passed in the Writ petition in CWP No.12397 of 2016 wherein the Hon'ble High Court of Punjab and Haryana disposed of the Writ petition on 28.08.2019 in the manner following:-

"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 periods 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



W.A.No.1031 of 2020

WEB COPY

shall stand superseded automatically".

4. It is the further case of the Writ petitioner/1st respondent that pursuant to the said final order dated 28.08.2019, the respondent bank refused to release the margin money, despite several requests made by the Writ petitioner. In the meantime, in furtherance of the final order dated 28.08.2019, the petitioner submitted a detailed representation and on 01.10.2019, an order came to be passed by the 2nd respondent and the same was communicated to the petitioner on 04.10.2019. Challenging the said order, the Writ petitioner has filed a Writ petition (Civil W.P. No.4593 of 2020) which is pending before the Punjab and Haryana High Court at Chandigarh.

5. The grievance of the Writ petitioner is that though the Writ petition is pending before the Punjab and Haryana High Court, in view of the Covid situation, the petitioner had no other option except to file the Writ petition before this Court seeking release of the margin money of Rs.30 Crores lying with the respondent bank. The Writ Court, after hearing the



W.A.No.1031 of 2020

Writ petitioner as well as the respondent bank, directed the petitioner to give an undertaking to indemnify the bank and release the margin money.

6. Aggrieved by the said order of the Writ Court, the appellant bank has preferred the present appeal on the following grounds namely:

- (i) The Writ petition against a private bank was not maintainable.
- (ii) PSPCL, the beneficiary of the bank guarantee was a proper and necessary party. However, the PSPCL was not impleaded in the Writ petition.
- (iii) The Writ Court, having found that the bank guarantee was not in force on 01.10.2019, erred in directing release of the margin money.
- (iv) The Writ petition involving questions of fact arising out of a contract of guarantee could not be entertained under Article 226 of the Constitution of India.
- (v) The Writ petitioner has already filed a Writ petition before the Punjab and Haryana High Court and the matter is sub-judice and in such circumstances, approaching the



WEB COPY



W.A.No.1031 of 2020

High Court here and seeking an order behind the back of PSPCL was improper.

(vi) It is the specific contention that there is no territorial jurisdiction, since cause of auction arose in the agreement in Punjab, therefore the writ petition is not maintainable for want of jurisdiction before this Court.

7. Pending Writ appeal, PSPCL has been impleaded as 2nd respondent in the present Writ appeal.

8. We have heard Mr. S. Sethuraman, learned counsel appearing for the appellants, Mr. P.H. Aravind Pandian, Senior Counsel, for Mr. C.V. Sailandharan, learned counsel for the first respondent and Mr. Ashwari K. Chopra, Senior Counsel, for Mr. Naveen Bharadwaj and Mr. Vidu Kapoor, learned counsel for the second respondent. We have also perused the records which have been placed before us by way of typed sets. We have also paid our careful consideration to various authorities on which reliance has been placed by the respective Senior Counsel.



W.A.No.1031 of 2020

WEB COPY

9. Though the learned Senior Counsel appearing for the 2nd respondent Mr. A.K. Chopra would vehemently contend that the Writ petition was not maintainable against a private bank and that too without impleading the 2nd respondent, the Writ petitioner cannot be said to approach the Court with clean hands and, in such process, the Writ petitioner has attempted to obtain an order behind the back of the 2nd respondent and especially to the detriment of the 2nd respondent. The learned Senior counsel also further contend that it is a clear case of forum shopping, especially when the Writ petitioner has already challenged the order dated 01.10.2019 before the Punjab and Haryana High Court at Chandigarh, where the bank as well as the 2nd respondent, PSPCL are parties and pending the said Writ petition, mischievously, the Writ petitioner has approached this Court impleading only the bank as respondent and sought for an order to release the margin money of Rs.30 Crores. The learned Senior Counsel, Mr. Ashwani K. Chopra would also place reliance on several judgments of the Hon'ble Supreme Court as well as this Court to fortify his contentions, attacking the very maintainability of the Writ petition.



W.A.No.1031 of 2020

WEB COPY

10. Per contra, the learned Senior Counsel, Mr. Aravind Pandian would submit that the bank has been set up by PSPCL to file the Writ appeal. In fact, after the order of the Writ Court, the bank had moved towards compliance of the order of the Writ Court and for reasons best known to the bank, they have taken a totally divergent stand by filing the Writ appeal. The learned Senior Counsel, Mr. Aravind Pandian would also state that PSPCL was fully aware of the developments before the Writ Court and consciously chose to stay away. No attempt was taken to implead itself, the Writ petition. The learned Senior Counsel would also rely upon judgments of the Hon'ble Supreme Court in support of his contentions that a Writ petition against the private bank was certainly maintainable and he would also take us through the various orders passed by the Punjab and Haryana High Court to show the conduct of the 2nd respondent. In short, the learned Senior Counsel Mr. Aravind Pandian would conclude his submissions stating that the Writ petition was maintainable and there was no necessity to implead PSPCL as a party as the subject matter of the Writ petition was purely an issue between the Writ petitioner and the bank.



W.A.No.1031 of 2020

WEB COPY

11. Without going into the merits or demerits of the respective contentions put forth by the learned Senior Counsel on either side, we deem it fit to decide the issue of jurisdiction of this Court, which will have an impact on the further process in the appeal. If we hold that the Writ petition is maintainable, then the other issues will have to be gone into. However, if we hold that the Writ petition filed before the Writ Court is not maintainable, then it would be a futile exercise to go into the merits of the respective contentions canvassed and put forth by the learned Senior Counsel on either side.

12. In view of the above, we therefore, proceed to decide the maintainability of the Writ petition in so far as the territorial jurisdiction is concerned i.e., the issue as to whether the Writ petition filed before the Madras High Court is maintainable or not, is to be decided **in the Writ Petition**. In this context, we would like to straight away refer to para 25 of the affidavit filed in support of the Writ petition. Para 25 is extracted hereunder:

"25. Respondents 1 to 3 are well aware that during Covid, it is



WEB COPY



W.A.No.1031 of 2020

well nigh impossible to move the Hon'ble High Courts of the country, excepting in matters of grave urgency. The Hon'ble Punjab and Haryana High Court has even issued a notification (vide No.25/RG/Spl.Misc. dt.1206.2020) stating that it will commence taking up ordinary cases only after resumption of normal working of the court, and no request for mentioning in the said cases shall be entertained for listing of the said matter till further orders. Therefore, the Respondents 1 to 3 have taken a very pedantic approach to a cry for help, by the petitioner, by imposing an impossible pre-condition".

The said admitted fact stated by the Writ petitioner assumes relevance and importance for the purpose of deciding the jurisdiction of this Court in entertaining the Writ petition.

13. The Writ petitioner, has in no uncertain terms stated that the contentious issues are at large before the Punjab and Haryana High Court and because of the COVID situation, it has not been possible to move the Punjab and Haryana High Court for orders and in such circumstances, the Writ petitioner has chosen to file the Writ petition before this Court.

14. Two things emerge from the case projected by the Writ



W.A.No.1031 of 2020

petitioner.

WEB COPY

Firstly, the pendency of the Writ petition in **W.P.No.4593 of 2021** before the Punjab and Haryana High Court challenging the order dated 01.10.2019 is conceded.

Secondly, the Writ petitioner was conscious of the fact that the proper Court before which relief or remedy could be sought for, is only the Punjab and Haryana High /court and only because of not being able to have the matter listed before the Punjab and Haryana High Court, the present Writ petition has been filed before this Court, namely the High Court of Judicature at Madras.

15. Admittedly, in the Writ petition before the Punjab and Haryana High Court, the bank as well as PSPCL are parties. The order dated 01.10.2019 is challenged before the Punjab and Haryana High Court and the said Writ petition is admittedly pending. While so, without impleading PSPCL as a party respondent, by impleading the bank alone as respondent in the Writ petition, referring to the very same order dated 01.10.2019, which is impugned before the Punjab and Haryana High Court, the petitioner has sought for release of the margin money. We are not able to



W.A.No.1031 of 2020

WEB COPY

accept such a contention on behalf of the Writ petitioner. In all fairness, when the Writ petitioner states that only because the orders could not be obtained before the Punjab and Haryana High Court because of the COVID pandemic situation, they have moved this Court for relief, then it would have been proper, only if the parties before the Punjab and Haryana High Court, are also made party respondents before this Court. However, the Writ petitioner has chosen to implead only the bank as respondent in the Writ petition and for its convenience, has chosen not to implead PSPCL. Further, the question of release of margin money would also be dependent on the result of the challenge to the order dated 01.10.2019, which is impugned in the Writ petition before the Punjab and Haryana High Court. Moreover, in the bank guarantee, that was issued by the bank in favour of PSPCL, on behalf of the Writ petitioner, it has been clearly stipulated that the competent Courts at Patiala would have jurisdiction to decide any claim or dispute arising under the bank guarantee. Giving a go by to this Clause also, the petitioner has approached the High Court at Madras i.e., this Court and made a claim in respect of the very same bank guarantee. Though Mr. P.H.Aravind Pandian, Senior Counsel appearing for the Writ petitioner would submit that the Writ petitioner was not a party



W.A.No.1031 of 2020

WEB COPY

to the said bank guarantee and therefore, the Clause, agreeing to the jurisdiction of the competent Courts at Patiala, would not in any way affect or bind the Writ petitioner, we are unable to accept the said submission of the learned Senior Counsel, for the simple reason that the bank guarantee issued by the bank was only at the instance of the Writ petitioner, which is evident from even a reading of the bank guarantee, **is a part of the terms and conditions of the contractual agreement.**

16. The petitioner, moreover, being conscious of the fact that the Courts at Punjab and Haryana alone have jurisdiction, chose to file the earlier Writ petition in C.W.P. No.12397 of 2016 there. As already discussed hereinabove, the petitioner has also admitted that the proper Court to be adopted, was only to approach the Punjab and Haryana High Court and only because of his inability to get any orders from the Punjab and Haryana High Court, because of the prevailing COVID pandemic situation, the Writ petition came to be filed before this Court. We do not approve any such action on the part of the Writ petitioner. The Writ petitioner is fully aware of the adverse order dated 01.10.2019, that has been passed against the Writ petitioner. The operative portion of the said



order is extracted hereunder:-

WEB COPY

"27. Hence, the demand for release of your Bank Guarantees in line with Clause 7.9(e) is not acceptable as the decision for dropping the Global Tender Enquiry and the subsequent forfeiture of bank guarantees has arisen on account of acts and omissions and commissions on your part. Clause 7.9(e) cannot be read in isolation and have to be read along with other Clauses such as Clauses 7.9(j)(iii) & 7.9(j)(iv) which are also binding on you.

28. In view of position explained above, the present representation is liable to be dismissed as the same is misconceived. The issue as regards your eligibility and qualification was fully examined and it was specifically noticed that you did not fulfill the eligibility criteria as prescribed under Clause 6.2.4 of Bid document as member of consortium namely M/s. AMR had suffered termination from Government Undertakings. Further, it is evident that the information regarding termination was not disclosed first hand, and the same was disclosed on being asked by PSPCL therefore as per Clause 6.5(b) and (c) of the aforesaid tender it is a case of misrepresentation of facts by you.

29. In view of the Clause 6.2.4, Clause 6.5(c) and Clauses 7.9(j)(iii) & 7.9(j)(iv) and other relevant and above cited Clauses of the tender, the action of PSPCL is well in line with the



W.A.No.1031 of 2020

WEB COPY

conditions of the bid document, you stood ineligible and disqualified to participate in the said tender and the request to return EMD in 30 days after tender cancellation as per Clause 7.9(e) of the bid document is liable to be dismissed as the same is misconceived. Such Bank Guarantees are liable to be forfeited and stand as such. Finding no merit in facts brought out by you, your representation is hereby rejected. It is imperative upon your part to extend / renew / reissue the Bank Guarantee so that action as per Clause 6.5(c) and Clause 7.9 be taken".

Therefore, when the petitioner has challenged the said order before the Punjab and Haryana High Court at Chandigarh in its entirety, it is not open to the Writ petitioner to carve out one portion of the said order alone and seek for release of margin money, especially in the teeth of an order working against the Writ petitioner rejecting the request to return the EMD and further directing the Writ petitioner to extend / renew / reissue the bank guarantee to enable further action to be taken in terms of the contract which in effect, leads to forfeiture of the EMD money.

17. In the light of the said order and the pendency of the Writ



W.A.No.1031 of 2020

WEB COPY

petition challenging the said order before the Punjab and Haryana High Court at Chandigarh, it was highly unjust and improper on the part of the Writ petitioner to move this Court and seek release of the EMD amount. In view of the above discussions and finding, we do not deem it proper to go into the other contentions raised and argued by the respective Senior Counsel pertaining to maintainability of a Writ petition against the bank and maintainability of the Writ petition involving contractual matters and disputes etc. As we have decided with regard to the jurisdiction issue alone, it would be proper to leave all other questions open, which could be **agitated before** the Punjab and Haryana High Court at Chandigarh or wherever the parties may deem it fit and proper.

18. In fine, this Writ appeal is allowed on the limited ground that the Writ petition filed before the Madras High Court is not maintainable as this Court lacks territorial jurisdiction to entertain the Writ petition. Since we have decided on the preliminary issue of maintainability of writ appeal, we do not wish to go into the merits of the case. It is for the authorities concerned to agitate in the writ petition before the Punjab and Haryana High Court or any other forum, if the parties desire so.



W.A.No.1031 of 2020

19. In fine, the Writ appeal is allowed and the order in W.P. No.9904 of 2020 dated 21.09.2020 is set aside. There shall be no order as to costs.

Consequently the connected miscellaneous petition is closed.

(D.K.K.J) & (P.B.B.J)

19.10.2023

Internet : Yes

Index: Yes/No

Neutral Citation: Yes/No

mjs



WEB COPY



W.A.No.1031 of 2020

D.KRISHNAKUMAR, J.,
and
P.B.BALAJI, J.

(mjs/kpr)

Pre-delivery judgment in
W.A.No.1031 of 2020

19.10.2023