

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF AUGUST, 2021

PRESENT

THE HON'BLE Mr. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE Mr. JUSTICE PRADEEP SINGH YERUR

COMMERCIAL APPEAL No.135 OF 2021

BETWEEN:

M/S.AXIS BANK LTD.,
AXIS HOUSE, C-2, WADIA
INTERNATIONAL CENTRE
PANDURANG BUDHKAR MARG
WORLI, MUMBAI – 400 025

REP. BY ITS SENIOR MANAGER
MR.CHENGAPPA P.T
AGED ABOUT 40 YEARS
AXIS BANK LIMITED
BASAVANAGUDI BRANCH
NO.41, SUBHASHRI PRIDE
SOUTH END ROAD
BASAVANAGUDI
BENGALURU -560 004

... APPELLANT

(BY SRI UNNIKRISHNAN M., ADVOCATE)

AND:

1. BANGALORE METROPOLITAN TRANSPORT
CORPORATION LIMITED (BMTC)
CENTRAL OFFICES, K.H.ROAD
SHANTHINAGAR
BENGALURU – 560 027

REPRESENTED BY ITS
MANAGING DIRECTOR

2. THE CHIEF TRAFFIC MANAGER (O)
PROJECT MANAGER
BENGALURU METROPOLITAN
TRANSPORT CORPORATION (BMTc)
CENTRAL OFFICES
K.H.ROAD, SHANTHINAGAR
BENGALURU - 560 027

3. THE DIRECTOR (FINANCE)
FA, CO, BRANDED SMART CARD PROJECT
BENGALURU METROPOLITAN
TRANSPORT CORPORATION (BMTc)
CENTRAL OFFICES
K.H.ROAD, SHANTHINAGAR
BENGALURU - 560 027

.... RESPONDENTS

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13
1(A) OF THE COMMERCIAL COURTS ACT R/W SECTION 37(1)(B)
OF THE ARBITRATION & CONCILIATION ACT, 1996 PRAYING TO
SET ASIDE THE ORDER DATED 30.06.2021 IN COM.AA.
NO.6/2020 PASSED BY LXXXII ADDITIONAL CITY CIVIL AND
SESSIONS JUDGE AT BENGALURU AT ANNEXURE-A
DISMISSING THE PETITION FILED BY THE APPELLANT UNDER
SECTION 94 OF THE ARBITRATION AND CONCILIATION ACT,
1996 AND ETC.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY,
ARAVIND KUMAR J., DELIVERED THE FOLLOWING:

J U D G M E N T

Heard Sri Unnikrishnan M., learned counsel
appearing for appellant. Perused the records.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') is filed by the plaintiff challenging the order dated 30.06.2021 passed in Corn.AA.No.6/2020 whereunder petition filed under Section 9(ii)(c)(d)(e) of the Arbitration Act came to be dismissed. Prayer which came to be sought for by the appellant before the Court below in the petition filed for grant of interim measures reads:

"a) To issue an ad interim order of injunction restraining the Respondents from appointing any financial institution or any Service Provider for Smart Card Based Fare Collection System Project till an Arbitrator is appointed to adjudicate the disputes between the parties.

b) To direct the Respondents for the continuation of the use of Smart Cards by the customers of the Petitioner and since the Agreement, Dated:28.02.2014 has not been terminated in terms of the procedures as agreed between the parties in the same.

c) To direct the Respondents to maintain / keep the Bank Guarantee amount of Rs. 75 Lakhs in a Fixed Deposit in IndusInd Bank Trade Finance Department or any other Nationalised bank in order to protect the interest of the Petitioner till the disposal of the Arbitral Proceedings."

3. On service of notice before trial Court, respondents appeared and filed detailed statement of objections vide Annexure-W denying averments made in the petition except to the extent expressly admitted thereunder. As noticed hereinabove, learned trial Judge has considered rival contentions and by impugned order dismissed the application. Hence, this appeal.

4. Appellant is a Company incorporated under the Companies Act, 1956 and carrying on business of Banking and having several branches across the country including one at Bengaluru. The first respondent floated a tender in March, 2013 calling upon the proposed bidders to submit their bids in order to set up and implement Intelligent

Transport System and to facilitate the collection of bus fares by introducing smart cards to the passengers/ traveling public. In the tender so floated in March, 2013, appellant was selected as a "Financial Institution" and a letter of intent dated 28.11.2013 came to be issued. Thus, appellant was chosen as Nodal Bank for Bangalore Metropolitan Transport Corporation (for short 'BMTC') to implement the Smart Card Fare Collection System. The terms and conditions as agreed to thereunder between the parties is said to have not been adhered to by the appellant and on account of request made by respondents to implement Smart Card System by communication dated 17.03.2018, it was alleged by respondents that appellant was not able to take up the development of system and facilitate the issue of several modules like student pass conversion, monthly pass, daily pass etc. It was the grievance of the respondents that failure on the part of the appellant to implement the project as envisaged under the agreed terms resulted in respondents being compelled to avail other Service Providers on ad-hoc basis and this

resulted in a show-cause notice being issued by respondents to the appellant to terminate the contract and by communication dated 22.08.2019, the contract is said to have been terminated. At that juncture, appellant herein filed a petition before the learned Single Judge of this Court under Section 11(6) of the Arbitration Act seeking for appointment of an Arbitrator for adjudicating the disputes arising out of the Master Service Agreement dated 28.02.2014 which petition was disposed of on 14.10.2020 (Annexure-T), in the background of petitioner seeking permission to withdraw the petition and to approach the Project Management Committee in terms of Clause-1.15(a) of the Master Service Agreement dated 28.02.2014. It is thereafter, appellant submitted its claim before the Project Management Committee seeking for resolving the dispute between the appellant and the respondents arising out of the agreement dated 28.02.2014 and same is said to be pending. During pendency of these proceedings before the Project Management Committee, a petition under Section 9 of the

Arbitration Act was filed for the reliefs noted hereinabove came to be filed by appellant. Said application was resisted to by the respondents by filing a detailed statement of objections and learned trial Judge by impugned order has dismissed the application on the ground that appellant has a remedy to seek for award of damages and as such, issue relating to termination of contract cannot be adjudicated in a proceeding under Section 9 of the Arbitration Act and it would be an issue well within the domain of Arbitral Tribunal. Hence, Commercial Court dismissed the application. Hence, this appeal.

5. It is the contention of Sri Unnikrishnan M., learned counsel appearing for appellant that trial Court committed a serious error in dismissing the application without considering the fact that petitioner and respondents are partners in a venture and clauses in the agreement dated 28.02.2014 would clearly support appellant's case and as such, tribunal was not justified in dismissing the application. He would also draw the attention of the Court

to the judgment of the Apex Court in the case of **Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.** reported in **AIR 2007 SC 2563** to buttress his arguments and in support of his submissions.

6. Having heard the learned counsel appearing for appellant, we are of the considered view that there is no need or necessity to issue notice on this appeal, since order passed by the learned trial Judge is well considered and contentions of the appellant which has been urged herein has also been considered in a proper perspective keeping in mind the authoritative pronouncements of the Apex Court and as such, it has rightly dismissed the petition and for the reasons indicated hereinbelow, it would not call for our interference:

7. There is no dispute to the fact that agreement dated 28.02.2014 was entered into between appellant and respondents which was pursuant to a tender floated by first respondent which was on account of two tier system followed by first respondent was changed to three tier

system which also underwent change and was reverted back to two tier system of management. In order to facilitate the collection of bus fares, a system was introduced to issue smart card to passengers/traveling public. It was this software and issue of such smart cards which was required to be provided by the petitioner and for implementation of the work as provided in the tender notification issued in this regard, appellant was said to have been selected on the basis of tender notification. In the statement of objections which has been filed in detail before the trial Court, the reasons for terminating the contract of appellant has been indicated. The learned trial Judge has also noticed that there were several correspondences which took place between the parties including e-mails which ultimately culminated in issuance of a show-cause notice on 19.07.2019 whereunder it was alleged that appellant had failed to deliver Smart Card Based Fare Collection System Project as per the agreement and not being satisfied with the reply submitted by the appellant, the contract came to be terminated on

22.08.2019. On 17.09.2019, the appellant has invoked Clause-1.15 of the Master Service Agreement and on 11.11.2019, respondent has sent a communication to the appellant calling upon the appellant to refund the amount that has been topped up by the commuters to the card if any and has also called upon the appellant to furnish all the data regarding the number of smart cards that are in circulation and the details of top-up amount. On termination of contract, the respondent has also requested the appellant to refrain in future from issuing any cards upon which BMTC Logo is embossed and to return unused cards. In fact, the Bank guarantee furnished by the appellant has also been forfeited on 21/24.12.2019.

8. The fact remains that Master Service Agreement was terminated by the respondent on 22.08.2019. The issue relating to termination of agreement as rightly observed by the learned trial Judge would not be in the scope of proceedings under Section 9 of the Arbitration Act and any misadventure made by the learned Judge in that

regard would have definitely prejudiced the rights of the parties and rightly so, learned trial Judge has not taken to said course. On the other hand, it has opined that it can only be decided by the Arbitral Tribunal and even if the termination is held to be erroneous in law in the arbitral proceedings, the appellant would have adequate remedy of claiming damages. It would be apt and appropriate to notice observation made by the learned trial Judge in this regard and it reads as under:

"30. So far as the contentions of the learned Advocate for the petitioner that the Respondents terminated the contract without considering the Replies given by the Petitioner to Notice and that the question whether the contract has been illegally terminated or not can only be decided by the Arbitral Tribunal and is not in the domain of this Court. Even if the termination is ultimately held to be bad in law, in the Arbitration Proceedings before the Tribunal, the petitioner would have an adequate remedy of claiming damages. As far as the arguments of the Respondent that the petitioner is guilty of the breach of the

conditions of the contract, suffice would it be to state that this question would be decided by the Arbitral Tribunal or the Project Management Committee as per Clause-1.15(a) of the Master Service Agreement, as and when constitution, while deciding the question of legality or otherwise of the termination of the contract. Therefore, it is clear that in law, once termination of contract takes effect the operation of the said termination and the taking further actions cannot be stayed by an interim injunction. Therefore, I answer this Point in the "Negative".

9. Though a prayer was made by the appellant before the trial Court to injunct BMTC from appointing any financial institution or any service provider for Smart Card Based Fare Collection System Project till an Arbitrator is appointed and to direct the respondents for continuation of use of smart cards by the customers of the petitioner on the premise that termination has not taken place, the learned trial Judge has rightly refused to grant the said

prayer on the ground that after termination takes place, such injunctive reliefs cannot be granted.

10. Clause (h) of Section 41 of the Specific Relief Act, 1963 would clearly bar an injunction being granted namely, where equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. Thus, where the appellant is entitled to claim damages for termination, grant of relief of perpetual injunction would not arise. As regards, direction sought to the respondent to give Bank guarantee amount of Rs.75,00,000/- in a Fixed Deposit, the learned trial Judge has taken note of the well recognized law with regard to grant of injunction in case of an unconditional Bank Guarantee by relying upon decisions of the Apex Court in the cases of ***U.P.State Sugar Corpn. Vs. Suman International Ltd.*** reported in ***AIR 1997 SC 1644*** and ***Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd.*** reported in ***AIR 1997 SC 2477*** whereunder it has been held that exceptional case

wherein injunction can be granted is where it is proved that bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent or in other words, where the fraud has been alleged and that too established fraud are extrinsic fraud and even in case of intrinsic fraud, grant of injunction in the matter of an unconditional Bank Guarantee would not be called for.

11. In fact, we may notice with benefit clause-1.17 of the agreement dated 28.02.2014 under the head 'Warranties', appellant in unequivocal terms has stated that in the event the Bank is unable to meet the obligations pursuant to the implementation of the assignment, operations and other services and any related scope of works as stated in the agreement, the respondent would have option to invoke the Security Deposit after serving a written notice of 15 days on the appellant.

12. It is this precise clause which has been invoked by the respondent while issuing show-cause notice on

19.07.2020 and the termination order dated 22.08.2019. It is thereafter, the performance Guarantee which had been offered by the appellant has been invoked and encashed. As such, we are of the considered view that the learned trial Judge has not committed any error either on facts or in law calling for our interference. Insofar as the judgment of the Apex Court in the case of **Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.** reported in **AIR 2007 SC 2563**, the Hon'ble Apex Court itself noticed that grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and relevant provisions of Specific Relief Act cannot be kept out of consideration. In the instant case, we have noticed that by virtue of Section 41 of the Specific Relief Act, appellant is having an alternative and efficacious remedy to seek for award of damages if being able to prove and establish the termination of agreement was illegal and as such, the question of granting any interim injunction on the ground that petitioner and respondent were partners in the venture of providing

smart cards does not arise. The appellant was selected by the respondent by virtue of tender floated and as such there existed privity of contract between the parties under the agreement dated 28.02.2014. According to respondent, it has stood terminated by virtue of the termination notice dated 28.02.2019 and issue regarding whether it is valid termination or would not be in the domain of Arbitral Tribunal and as such, question of examining the said aspect or expressing any opinion in this regard would definitely prejudice the rights of the parties. Hence, we are of the view that finding recorded by the learned trial Judge to the effect that validity of termination cannot be gone into in a proceeding under Section 9 of the Arbitration Act is a well reasoned order which would not call for any interference.

For the reasons aforesaid, we proceed to pass the following:

ORDER

- (i) Appeal is ***dismissed***;

- (ii) The order dated 30.06.2021 passed in Com.AA.No.6/2020 by LXXXII Additional City Civil and Sessions Judge, Bengaluru, stands affirmed.

In view of writ appeal having been dismissed, IA.No.1/2021 for temporary injunction does not survive for consideration and it stands consigned to record.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

LB