

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.12.2015
DATE OF DECISION : 04.01.2016

CORAM :

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

W.P.No.9151 of 2015
and
M.P.No.1 of 2015

M/s.ICMC Corporation Limited,
rep.by its General Manager,
36, Ambattur Industrial Estate,
Chennai - 600 058. ... Petitioner

Vs.

M/s.Electronics Corporation of
Tamil Nadu Limited (ELCOT),
represented by its Managing Director,
MHU Complex, II Floor,
692, Anna Salai,
Nandanam,
Chennai - 600 035. Respondent

Prayer: Writ Petition filed under Article 226 of the
Constitution of India seeking for the relief of issuance of writ
of mandamus to direct the respondent to pay the sum of
Rs.25,63,00,055/- with interest @ 15% p.a. from the due date to
the petitioner based on petitioner's representation dated
17.2.2015.

For Petitioner : Mr.M.S.Krishnan,
Senior Counsel
for Mr.J.James

For Respondent : Mr.Vijayan
for M/s.King & Partridge

ORDER

The writ petition is filed seeking a writ of mandamus to
direct the respondent to pay the sum of Rs.25,63,00,055/- with
interest @ 15% p.a. from the due date to the petitioner based on
petitioner's representation dated 17.2.2015.

Background facts:-

2. The respondent herein floated a tender in tender ref. ELCOT/PID/ ICB/LTC/PII/2012-13 dated 22.2.2012 for supply of 7,84,000 Laptop Computers with Laptop Backpack. The petitioner is one of the tenderers giving its offer for 3,00,000 Laptop Computers. It became a successful tenderer and accordingly a letter of acceptance was issued by the respondent on 17.12.2012 for supply of 3,00,000 Laptop Computers by the petitioner. The total requirement was divided among L1, L2 and L3 - the successful tenderers, who quoted the lowest price. The following is the letter of acceptance dated 17.12.2012 issued by the respondent to the petitioner:

''.... With reference to the above, we are happy to inform you that we have decided to allot a quantity of 3,00,000 number of Laptop Computers with Laptop Backpack @ Rs.15,990.00 (inclusive of all duties) Plus TNVAT at 5% totalling Rs.16,789.50 (Rupees Sixteen thousand and Seven hundred and Eighty Nine and Paise Fifty Only) per Laptop Computer with Laptop Backpack with one Year comprehensive Warranty including battery as per the Technical Specifications enclosed. You shall have to complete the supply of 3,00,000 number of Laptop Computers with Laptop Backpack as per the tender conditions and Delivery Schedule.

As per the Tender clause, you are hereby requested to submit 3% (Three Percent) of the Purchase Order value as Security Deposit and execute supply agreement on Rs.20/- Non-Judicial Stamp paper bought in Tamil Nadu as per the Tender Document within one week from the date of issue of Letter of Acceptance.''

3. Thereafter, one of the tenderers was unable to make the supply and therefore the quantity was reduced from 3,60,000 to 1,30,000 Laptop Computers. Accordingly, the quantity of 2,30,000 Laptop Computers was bifurcated between the petitioner and other tenderer viz., Acer India Private Limited. Thus, the petitioner was allotted additional quantity of 26,000 number of Laptop Computers by the letter of acceptance dated 28.6.2013 in the following manner:

''.... With reference to the above, we are happy to inform you that we have decided to allot an additional quantity of 26,000 number of Laptop Computers with Laptop Backpacks in addition to

3,00,000 numbers allotted vide LOA third cited @ Rs.15,990.00 (inclusive of all duties) Plus TNVAT at 5% totalling Rs.16,789.50 (Rupees Sixteen Thousand and Seven Hundred and Eighty Nine and Paise Fifty Only) per Laptop Computer with Laptop backpack with one year comprehensive warranty including battery as per the Technical Specifications enclosed. You shall have to complete the supply of 26,000 number of Laptop Computers with Laptop Backpacks as per the tender conditions and delivery schedule.

As per Tender Clause, you are hereby requested to submit 3% (Three Percent) of the Purchase order value as Security Deposit and execute supply agreement on Rs.20/- Non-Judicial Stamp paper bought in Tamil Nadu as per the Tender Document within one week from the date of issue of Letter of Acceptance.'

4. The terms and conditions of the Tender document speaks about the security deposit, refund of earnest money deposit, refund of security deposit, liquidated damages for non-fulfilment of delivery schedule and payment terms. The petitioner has complied with the conditions at the time of executing the two agreements.

5. As per Condition No.3.26, the Successful Bidders will be required to remit the Security Deposit equivalent to 3% (Three percent) of the value of the Purchase Order inclusive of EMD amount. Condition No.3.26(b) states about refund of the security deposit, which would come only after a successful completion of the purchase order. Such a security deposit will not earn any interest till the refund is complete. It will be retained till the completion of supply and commissioning as per the delivery schedule. Thus, the said condition makes it very clear that on successful completion to the satisfaction of the respondent alone the security deposit is liable for refund. Condition No.3.26(c) deals with forfeiture of security deposit when a successful bidder fails to perform as per the contract. For better appreciation, condition No.3.26 of the Tender document is extracted hereunder:

'3.26 Security Deposit (SD)

a) The Successful Bidders will be required to remit the Security Deposit equivalent to 3% (Three percent) of the value of the Purchase Order inclusive of EMD amount. The SD should be paid by way of Demand Draft drawn in favour of "Electronics Corporation of Tamil Nadu Limited"

payable at Chennai or in the form of unconditional and irrevocable Bank Guarantee valid till the completion of the work. The SD shall be paid within one week from the date of issue of Letter of Acceptance by ELCOT.

b) The Security Deposit will be refunded to the Successful Bidders only after successful completion of the Purchase Order. The Security Deposit held by ELCOT till it is refunded to the Successful Bidder will not earn any interest thereon. The Security Deposit will be retained till the completion of supply and commissioning as per the delivery schedule.

c) The Security Deposit will be forfeited if the Successful Bidder fails to sign the Contract Agreement and /or fails to perform as per the contract.'

(emphasis supplied)

6. The condition No.3.26(b) has to be read along with condition No.3.31, which specifically deals with refund of security deposit. In clear terms, it states that the Security Deposit of the Successful Bidder will be refunded on successful execution of the contract to the satisfaction of respondent as per conditions of the Contract Agreement as well as the purchase order. The said condition is also extracted hereunder:

''3.31 Refund of SD

The Security Deposit of the Successful Bidder will be refunded on successful execution of the contract to the satisfaction of ELCOT and as per conditions of the Contract Agreement and as per the purchase order issued by ELCOT.'

(emphasis supplied)

7. Therefore, there is no difficulty in appreciating the said term that the petitioner is entitled to refund of security deposit only on the successful execution of the contract to the satisfaction of the respondent, which has to be seen in terms of the conditions of the Contract Agreement and the Purchase Order. To put it in converse, the refunding of the security deposit by the respondent to the petitioner would vouch for successful execution as indicated above.

8. Condition No.3.32 deals with Liquidated Damages. As per the said condition, for non-fulfillment of delivery schedule, liquidated damages at the rate of 1% per week on the value of the undelivered quantity of the order will be levied with the maximum cap of 5% of the undelivered quantity. Sub-clause (b)

thereof speaks about automatic deduction from the bill submitted by the supplier. Therefore, when the supplier makes a bill towards supply of the Computers belatedly, deduction would be made while making payment for the same at that point of time. The said clauses (a) and (b) of Condition No.3.32.1 are apposite and are extracted hereunder:

'3.32 Liquidated Damages (LD)

3.32.1 LD for non-fulfilment of Delivery Schedule

a) In the event of non-fulfilment of delivery schedule, a Liquidated Damages at the rate of 1% per week on the value of the undelivered quantity of the order will be levied subject to a maximum of 5% of the undelivered quantity.

b) The Liquidated Damages amount will be automatically deducted from the Bills submitted by the Supplier. Further if the delivery is not completed, ELCOT will purchase the remaining laptop computers at the risk and cost of such defaulting supplier.'

(emphasis supplied)

This condition also forms part of the agreement signed between the parties. Clause 15.1(a) and (b) deals with the liquidated damages, which is mutatis mutandis the same as condition No.3.32.1(a) and (b) of the tender Document.

9. Condition No.5 of the Tender Document prescribes payment terms. As per condition No.5.3, 97% of payment will be released after successful completion of supply and acceptance by the respective institutions. Condition No.5.4 speaks about the remaining payment of 3%, which would be done after successful completion of warranty period of one year from the date of supply and acceptance by the respective institutions. The very same payment terms are reiterated in Clause 17 of the Contract signed between the parties. Thus, it is clear that the petitioner, being the successful bidder, is entitled to 97% of payment only after successful completion of supply and acceptance by the respective institutions and the remaining 3% would be paid after successful completion of warranty period of one year from the date of the supply and acceptance by the respective institutions. It is apposite to extract the above said two conditions:

'5. Payment Terms

5.1.

5.2.

5.3 97% payment will be released after successful completion of supply and acceptance by the respective institutions.

5.4 3% payment will be released after successful completion of warranty period of one year from the date of supply and acceptance by the respective institutions.''
(emphasis supplied)

Therefore, once, the 97% percent and the remaining 3% payment are made, it can be safely concluded that there is a successful completion of supply and acceptance by the respective institutions.

10. In respect of the first letter of acceptance, an agreement was entered into between the parties on 14.2.2013 and similarly for the second one, another agreement was entered into on 15.7.2013. Both the agreements are obviously independent of each other, as only for that purpose they were executed. They contain the very same clauses.

11. The records would reveal that the petitioner started supplying Laptop Computers and payments have been made on the bills at 97% of the value. There appears to be some delay in supply covering both the agreements. According to the petitioner, it was condoned pursuant to the meetings held between the parties, which is disputed by the respondent. The typed set of papers filed by the respondent along with the third counter affidavit signed on 14.12.2015 would vouch for the payment made without deduction of liquidated damages till 12.11.2014. The typed set of papers filed on 18.12.2015 states about the withholding of liquidated amount. However, the said document dated 6.11.2014 has not been served on the petitioner, being internal communication. The said document and the details payments made to the petitioner have also been filed for the first time along with the additional counter affidavit signed on 14.12.2015 and filed on 18.12.2015, after filing of the last typed set of papers by the respondent and the same is also not communicated to the petitioner.

12. The petitioner completed the supply of 3,00,000 laptop computers covered by the first letter of acceptance dated 17.12.2012. Letters have been sent on 1.7.2013, 14.8.2013, 2.9.2013, 8.11.2013 and 30.12.2013 seeking payment. On 22.12.2013, 97% of the payment for 3,00,000 computers was released by the respondent with the exact amount. On 31.7.2014, supply of 26,000 laptops was completed by the petitioner. Thereafter, on 12.11.2014, the security deposit furnished for

3,00,000 Laptop Computers was released by the respondent. On 21.11.2014, the 3% amount for the first lot of 3,00,000 computers was also paid. The security deposit for remaining 26,000 Laptop Computers was also paid. The security deposit for remaining 26,000 Laptop Computers was also released by the respondent on 22.11.2014. Further part payments of Rs.16.71 Crores was made on 13.11.2014 and 5.12.2014 towards the 97% value of 26,000 Laptop Computers supplied. For the remaining payment, the petitioner sent letters on 19.12.2014 and 17.2.2015 and thereafter filed the present writ petition. These are all the background facts governing the case.

Subsequent Events:-

13. The matter was heard by this Court on 19.8.2015 fully giving due opportunity to the learned counsels. However, the matter stood adjourned at the time of delivering the judgment to enable the counsel for the respondent to get further instructions. In fact, this Court has started dictating the judgment. Thereafter, the matter was adjourned on countless occasions, mostly at the instance of the respondent's counsel. Adjournments have been made from 9.9.2015 till the date on which the judgment was reserved after hearing the counsels fully. Suffice it is to state that the adjournments are far too many despite the recordings made.

14. During the hearing, the respondent also invoked the arbitration clause. The said clause has been invoked, though the petitioner has not asked for it. Condition No.3.35 of the Tender document dealing with the Arbitration speaks about a reference to a sole arbitrator to be appointed by the respondent when there is inability to resolve the dispute through the negotiation process. The respondent, though has not replied to the various representations of the petitioner till now, has invoked the said arbitration clause by appointing a sole arbitrator during the writ proceedings without making an attempt through negotiation, though not asked for by the petitioner. On the submission made by the learned Senior counsel for the petitioner, it was also stayed.

15. The respondent has also signed three counter affidavits filed before this Court. In the first counter affidavit, signed on 30.6.2015 and filed on 17.8.2015, a stand has been that the return of the security deposit was in accordance with the terms and conditions of the contract, but the same cannot be construed as a fulfillment of the contractual obligation to the satisfaction of the respondent. It has also been stated that in effect there is only one contract for the supply of 3,26,000 laptops. In the additional counter affidavit signed on 21.9.2015

and filed on 12.10.2015 it has been stated that at the time of recovering the liquidated damages during October 2014, the respondent had the 3% of security deposit and 3% of warranty cost totaling 6% of the contract price, which is more than the maximum liquidated damages limit of 5%. Thus, after recovering the said 5% from the contract price, the security deposit bank guarantee and the balance of 3% was released. It has also been stated that the transactions are not independent and are connected to each other and the writ petition is not maintainable in view of the arbitrator having been appointed and the contract being non-statutory. The following passages of the above said counter affidavits are relevant:

Counter affidavit signed on 30.06.2015:

"..... 12. I strongly deny the allegation in paragraph 18 and submit that the sum of Rs.25,63,00,055 has been retained towards the liquidated damages payable in respect of 3,26,000 laptop computers ordered to the petitioner.

13. With regard to paragraph 19, it is submitted that the return of security deposit furnished by way of irrevocable bank guarantee was in accordance with the terms and conditions of the contract and the same cannot be construed as the fulfillment of the contractual obligation to the satisfaction of the respondent. It is pertinent to note that the respondent has performed all its obligations in accordance with the terms and conditions of the contract such as return of the bank guarantee, recovery of liquidated damages, etc....."

Counter affidavit signed on 21.09.2015:

"..... 4. As per clause 5.3 of the payment terms, 97% of the payment will be released after successful completion of supply and acceptance by the respective institutions. As per clause 5.4 of the payment terms, 3% of the amount will be released only after completion of the one year warranty period. At the time of recovering liquidated damages during October 2014, the Respondent had the 3% Security Deposit and 3% warranty cost totaling 6% of the contract price in its hand, which is more than the maximum liquidated damages limit of 5%.

After recovery of the liquidated damages from the contract price, the security deposit bank guarantee was returned to the petitioner. The balance 3% payment was released only after recovery of the liquidated damages. Similarly for the 26,000 laptop computers also we have recovered part of the liquidated damages. The total amount of liquidated damages is Rs.26,37,07,807.55 in which a sum of Rs.25,63,00,000 was already recovered and the balance amount to be recovered is Rs.74,07,807.55. As on today ELCOT still retain warranty cost of Rs.1,30,95,810/- in respect of the 26,000 laptop computers, which will be payable after the warranty period is over and the balance amount would be recovered while making payment.

5. I further submit that the Respondent is entitled to recover the liquidated damages either from the security deposit, retention money or any other amount due and payable arising out of tender floated on 22.5.2012. The two LOA and contracts were arising out of one tender floated, the terms and conditions of the contract, delivery period, etc., are identical. As such they are not independent transactions and are connected to each other. It is therefore submitted that the writ petition is liable to be rejected on this ground also.'

Submissions of petitioner:-

16. Learned Senior Counsel appearing for the petitioner submits that both the contracts are distinct and separate. The petitioner's tender was only for 3,00,000 Laptop Computers. It is only for the non-fulfillment of the other tenderer, the subsequent letter of acceptance was given. When there are two agreements signed, one cannot be made applicable to the other. For the first contract, the petitioner made the supply and thereafter received 97% of the value apart from return of security deposit, bank guarantee and the remaining 3% payment. Thus, the said contract on the successful completion is over. The mere fact that the entire payment has been made for the first contract, as seen from the understanding of the conditions mentioned above, would show that the respondent does not have the power or authority to club the same with the subsequent one. Even for the subsequent contract, 3% payment has been made.

Further, a liquidated damage cannot be levied unilaterally. At best, it will give a right to the respondent to seek an adjudication. Even the document filed by the respondent would show the payment of 97% has been made and completed for the first contract. The other formalities have also been completed. The respondent, for the reasons known, is taking an unnecessary aggressive stand. His action is totally arbitrary and wholly unreasonable. The documents relied upon for the first time at the fag end of the hearing cannot be accepted. Even otherwise, they are internal communications not served on the petitioner, apart from having no consequences. The petitioner has not asked for the appointment of arbitrator. Having not replied to any of the representations of the petitioner, the respondent cannot take a stand subsequently. There is no dispute actually in the eye of law. Mere fact that the respondent has completed the first contract would show that it has agreed for the modified supply of laptop computers. The petitioner is almost ruined by the inaction of the respondent. What is required is the element of fairness. The mere existence of an alternative remedy and the contract, being private, would not debar the petitioner from getting the relief. It is not a money claim based upon disputed facts under the contract. It is a case of entitlement of the petitioner to get its money. In support of his contentions, the learned Senior Counsel has made reliance upon the following decisions:-

- '1. Union of India Vs. Raman Iron Foundry ((1974) 2 SCC 231);
2. M/s.H.M.Kamaluddin Ansari and Co. Vs. Union of India and others, ((1983) 4 SCC 417);
3. State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, ((1987) 2 SCC 160);
4. Inder Singh Rekhi Vs. Delhi Development Authority, ((1988) 2 SCC 388);
5. Hindustan Petroleum Corporation Ltd and another Vs. Dolly Das, ((1999) 4 SCC 450);
6. Pragathi International Vs. Projects & Equipment Corporation of India Ltd. And others, ((2007(1) R.A.J 315 (Del) Delhi High Court;
7. Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. & Others, ((2010) 11 SCC 186).
8. Union of India and others Vs. Tania Construction Pvt.Ltd., ((2011) 5 SCC 697).
9. Deutsche Post Bank Home Fin. Ltd. Vs. Taduri Sridhar and another, ((2011) 11 SCC 375) and
10. M/s.Shree Construction Vs. State of Chattisgarh and others, (AIR 2012 Chattisgarh 139).'

Submissions of Respondent:-

17. The two contracts awarded are in effect one. No specific tender has been called for subsequent letter of acceptance. The respondent is entitled to deduct the liquidated damages till the return of 3% withheld as per clause 5.4 of the payment terms. As the 6% of amount is available with the respondent - 3% of the security deposit and 3% of amount withheld, they have been released, being more than the maximum liquidated damages limit of 5%. Thus, the balance of 3% was released only after the recovery of the liquidated damages.

18. Learned counsel further contended that the contract, being private, as against statutory, the writ petition is not maintainable. The respondent has also invoked the arbitration clause. A money claim cannot be adjudicated in a writ proceedings. There is no public law element involved. The power of this Court, being discretionary, is not required to be exercised in this case. To buttress his submissions, reliance has been made on the following decisions:-

1. M.Radhakrishna Agarwal and Others Vs. State of Bihar and others ((1977) 3 SCC 457);
2. M/s.H.M.Kamaluddin Ansari and Co. Vs. Union of India and others, ((1983) 4 SCC 417);
3. Bareilly Development Authority and another Vs. Ajai Pal Singh and others, ((1989) 2 SCC 116);
4. State of U.P and others Vs. Bridge & Roof Company (India) Ltd., ((1996) 6 SCC 22);
5. Sant Ram & Co. Vs. State of Rajasthan and others, ((1997) 1 SCC 147);
6. Kerala State Electricity Board and another Vs. Kurien E.Kalathil and others, ((2000) 6 SCC 293);
7. CDC Financial Services (Mauritius) Ltd. Vs. BPL Communications Ltd. And others, ((2003) 12 SCC 140);
8. Empire Jute Company Limited and others Vs. Jute Corporation of India Limited and another, ((2007) 14 SCC 680);
9. Rajasthan State Industrial Development and Investment Corporation and another, ((2013) 5 SCC 470) and
10. Joshi Technologies International Inc. Vs. Union of India and others, ((2015) 7 SCC 728).

19. On the question of maintainability, arguments have been made by both sides at length. Ultimately, the question of granting a relief under Article 226 of the Constitution of India, is a matter of discretion to be exercised by this Court

on the facts and circumstances of each case. The entire issues governing the statutory contract, pendency of contract or concluded contract, money claim, disputed facts, existence of arbitration, adjudication of right under a contract and fairness in action have been dealt with by the Apex Court in *Joshi Technologies International Inc. Vs. Union of India and others*, ((2015) 7 SCC 728) after a thorough analysis of the earlier decisions. Thus, suffice it is to place the principle as summarized in the said decision:

'69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further legal position which emerges from

various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law

or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes....''

20. Keeping the said principle in view, this Court will have to see as to whether the relief sought for is one within the contract or outside of it. In other words, it has to be seen as to whether the facts involved in the case would warrant interference by this Court by exercising the power under Article 226 of the Constitution of India in the light of the principles enunciated in the decision of the Apex Court referred to supra.

21. Admittedly, two agreements have been entered into between the parties. Thus, when there are two distinct and separate agreements, one cannot be made related to another. The petitioner made an offer for only 3,00,000 laptop computers. Firstly, allotment for the petitioner is for the said 3,00,000 laptop computers, being the L1. The subsequent allotment was made in view of the failure of one of the successful tenderers in making the adequate supply. Therefore, it is clear that the petitioner has not offered at the first instance more than 3,00,000 Laptop Computers. That is the reason why two agreements have been entered into between the parties. Merely because there was only one tender, it cannot be presumed that notwithstanding two distinct and separate agreements signed on different dates by the parties, both are to be construed as a single one. In other words, the rights and liabilities of one agreement cannot be imported into the other.

22. In the case on hand, the petitioner was given the payment of 97% as per condition No.5 of the tender document and clause 17 of the agreement signed. Condition Nos.3.26 and 3.31 make the position abundantly clear that a successful bidder is entitled for refund of security deposit only on the successful execution of the contract to the satisfaction of the respondent. This is in accordance with the conditions of the contract and the purchase order issued. The said satisfaction is also required for the payment of 97%. Therefore, the said provisions make it crystal clear that the first contract for 3,00,000 Laptop computers has been successfully concluded. Even the documents filed by the respondent would show that there was no withholding of any liquidated damages at the time of 97% of payment. Apparently, it was done by clubbing both the contracts into one. It is to be seen that the petitioner has been renewing

his fervent plea before the respondent for remaining payment through various letters. There was a conspicuous silence on the part of respondent. Only at the later stage of hearing, two communications have been provided, which are also internal stating that there was a sanction document on 6.11.2014 after deducting liquidated damages. Even assuming the said document dated 6.11.2014 is true, for the reason aforesaid the same cannot be accepted, as the liability in one contract cannot be read into another, after successful completion of earlier one. Therefore, looking from any angle, the earlier contract having been successfully completed, it is not open to the respondent to withhold the amount due under the subsequent one seeking to deduct the liquidated damages of the earlier one.

23. The stand taken in the counter affidavits as recorded above does not stand to reason. On the one hand, the petitioner has been making request after request. On the other hand, the respondent is following his own mechanism de hors the provision contained in the Purchase Order and the contract agreement. There is no power or authority for the respondent to withhold the 3% of the security deposit and the remaining payment for supply after making the said payments. When the respondent has been making 97% payment for the supply, the unilateral decision taken subsequently would not bind the petitioner. It is clearly an afterthought. Though the learned counsel appearing for the respondent at the time of concluding hearing on 19.8.2015 submitted that the decision was taken to deduct the liquidated damages later, a different stand is sought to be taken in the counter affidavit. Perhaps, the statement made by the learned Senior counsel for the petitioner is correct, since there is no explanation for the belated decision, apart from being not in consonance with condition No.5 of the Purchase Order read with Clause 17 of the contract agreement.

24. Even for the second contract also, the same procedure has been adopted. The entire supply has been made. The security deposit was also released. Therefore, what is applicable to the first contract would apply to the second one as well. One thing is clear that is the respondent has woken up from slumber and unilaterally denied the payment to the petitioner.

25. Considering the above, this Court is of the considered view that the conduct of the respondent in having complied with condition Nos.3.26, 3.31 and 5 of the Tender document and Clause 17 of the contract agreement, denial of the payment due to the petitioner would be hit by extreme arbitrariness and total unreasonableness. The said action is not the one emanating in the contract but outside of it. In other words, when the facts

are not in dispute along with the interpretation of the terms and conditions governing the parties, a writ petition would certainly lie. It is to be seen that even according to the respondent, it has complied with the terms of the contract by releasing the security deposit apart from payment of 97% of the value and the subsequent 3%, which are meant to be complied with after due successful completion of the contract from the point of view of the respondent. Thus, once there is a successful completion of the contract, there is no question of withholding any money. In that context, condition No.3.32.1 of the Tender Document read with Clause 15.1 of the Contract Agreement, cannot be enforced against the petitioner. In such view of the matter, this Court is of the considered view that the petitioner is entitled to succeed and the question of maintainability would not arise since it is a case of undue enrichment on the part of the respondent after the successful completion of the contract. There is also no dispute that the petitioner has supplied all the Laptop Computers.

26. Therefore, this Court is of the considered view that the issue of maintainability is answered in favour of the petitioner, notwithstanding the nature of the contract, existence of an arbitration clause and the relief sought for, being a money claim. Certainly, in such an eventuality, the element of fairness would come into play with the respondent, being an authority under Article 12 of the Constitution of India. It is further to be noted that there was an unexplained and continued silence on the part of the respondent till the filing of the counter affidavit before this Court. For the aforesaid reasons, this Court is of the view that there is no disputed questions of fact involved. There is also no dispute on the entitlement of the petitioner. For the reasons above stated, the arbitration clause sought to be pressed by the respondent also would not stand in the way of the petitioner in getting the relief. Suffice it is to state that the said clause has been invoked by the respondent on its own without even making an endeavour to go through the negotiation process as mandated under Condition No.3.35 of the Tender Document. Further, the said clause also would be applicable when the dispute is within the contract. Similarly, there cannot be a dispute raised merely to deny the lawful entitlement of the petitioner. The dispute has to be within the contract, apart from being classified as such. In other words, anything raised belatedly and unilaterally by way of defence before this Court would not partake the character of dispute. Thus, there being no dispute in law, the entitlement of the petitioner cannot be denied.

27. Learned Senior Counsel appearing for the petitioner made a further submission on the scope and applicability of condition No.3.32.1, which speaks about liquidated damages for non-fulfillment of delivery schedule as well as clause 15 of the contract agreement. This Court is not willing to go into the same, in view of the findings rendered on the prime issue discussed above. The said issue, if one goes into, would be one within the contract and therefore may not be available for exercise of judicial review. Hence, the said issue is not adjudicated upon, though the learned counsel for respondent has sought to distinguish the decision relied upon by the learned Senior Counsel for the petitioner.

28. For the foregoing reasons, the writ petition stands allowed. However, this Court is not inclined to award interest considering the facts and circumstances of the case and as there is no agreement governing the parties. The respondent is directed to make payment as prayed for by the petitioner within a period of eight weeks from the date of receipt of copy of this order. However, there is no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

The Managing Director,
M/s.Electronics Corporation of
Tamil Nadu Limited (ELCOT),
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692, Anna Salai,
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Chennai - 600 035.

+1cc to Mr.J.James, Advocate, S.R.No.9
+1cc to M/s.King & Partridge, Advocate, S.R.No.21

W.P.No.9151 of 2015

PUR(CO)
CA(12/01/2016)