IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 08.11.2016

Coram

The Honourable Mr.Justice HULUVADI G.RAMESH
and
The Honourable Mr.Justice V.PARTHIBAN

W.A. Nos.107 & 807 of 2016
CMP No.1300 of 2016

M/s.Electronics Corporation of
Tamil Nadu Limited,
692, Anna Salai, Nandanam,
Chennai-600 035. .. Appellant in
WA 107 of 2016 &
Respondent/ Respondnet in
WA 807 of 2016

Versus

ICMC Corporation Limited,
rep. by its General Manager,
36, Ambttur Industrial Estate,
Chennai-600 035. .. Respondent in
WA 107 of 2016 &
Appellant/ Petitioner in
WA 807 of 2016

Prayer: These Writ Appeals are filed under Clause 15 of Letters Patent, against the order dated 4.1.2016 passed in W.P.No.9151 of 2015.

W.P.No.9151 of 2015:- 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 representation dt 17.2.2015.

Appellant in
WA 107 of 2016 &
Respondent in
WA 807 of 2016 : Mr.R.Muthukumarasamy, SC
for Mr.M.Vijjayan for
M/s.King & Patridge

Respondent in
WA 107 of 2016 &
Appellant in
WA 807 of 2016 : M.S.Krishnan, SC
for Mr.J. James

COMMON JUDGMENT

These Writ Appeals are directed against the order of the learned single Judge passed in W.P.No.9151 of 2015 dated 4.1.2016, in and by which, while directing the respondent herein to pay a sum of Rs.25,63,00,055/- which was withheld by the respondent towards liquidated damages, rejected the claim of interest made by the respondent at 15% p.a.

2. M/s.Electronics Corporation of Tamil Nadu (ELCOT), the appellant herein, floated international competitive bidding tender, for supply 7,84,000 of laptops, for which, ICMC Corporation Ltd., the respondent herein, stood lowest bidder. Price of each laptop was fixed at Rs.16,789.50/- including TNVAT at 5%. Accordingly, the appellant issued Letter of Intent dated 17.12.2012 for supply of 3,00,000 laptops. Pursuant to the said Letter of Intent, the respondent entered into a contract with the appellant on 14.12.2013. As per Clause 4 of the terms of the contract, the appellant has to pay 97% of payment of each bill submitted by the respondent and the remaining 3% will be retained by the appellant towards fulfillment of the warranty obligation for one year from the date of supply and will be refunded after one year and that apart liquidated damages for the delay in supply, is applicable at 1% per week delay subject to a maximum of 5% of the bill value as per Clause 15 of the terms of the contract and Clause 3.32 of the tender document. In other words, the appellant will deduct liquidated damages for delay in supply automatically while settling 97% value of the bills.

3. It appears that the respondent had supplied 3,00,000 laptop computers and the payments thereof were also made by the appellant to the extent of 97% of the value. While so, the appellant, vide letter dated 28.6.2013 again requested the respondent for further supply of another 26,000 nos. of laptops on the same terms and conditions of previous contract. Pursuant to the same, the respondent entered into another contract on 23.7.2013 by offering irrevocable bank guarantee for 3% value of 26,000 laptops towards security deposit. Therefore, the respondent had entered two different contracts for supply of 3,00,000 and 26,000 laptops respectively by entering into two different agreements by furnishing two separate security deposits.

4. After completion of supply of 26,000 laptop computers, the respondent raised 106 bills on different dates and the appellant paid totalling a sum of Rs.16,71,31,078/- and out of 97% value for the supply of 26,000 laptop computers, i.e. Rs.42,34,31,189/- the appellant retained 25,63,00,055/-, which, according to the appellant, was towards liquidated damages since the respondent did not supply the laptops within the prescribed time schedule.

5. Aggrieved by the same, the respondent approached this Court by way of filing a writ petition in W.P.No.9151 of 2015, seeking for Writ of Mandamus to pay Rs.25,63,00,055/-, which was recovered by the appellant herein towards liquidated damages.

6. During the pendency of the writ petition, it appears that the appellant herein invoked arbitration clause, however, it was stayed by interim order of this Court.

7. The learned single Judge, after adverting to the contentions put forth by the parties, had come to the conclusion that there were two separate contracts entered into by the parties and the liability in one contract cannot be read into another after successful completion of earlier one and therefore, having accepted the completion of the first tender, it was not open to the appellant to withhold the amount due under the subsequent one, seeking to deduct the liquidated damages of the earlier one. The learned Judge was of the view that the conduct of the appellant in having complied with condition Nos.3.26, 3.31 and 5 of the terms of the tender document and Clause 17 of the contract agreement, denial of payment due to the petitioner would be hit by extreme arbitrariness and total unreasonableness. Having come to such a categoric conclusion, the learned Judge directed the appellant to pay the amount as claimed by the respondent at Rs.25,63,00,055/-, however, rejected the claim of interest at 15% p.a. thereon made by the respondent as there was no agreement governing the parties on this issue.

8. Aggrieved by the same, both the appellant, seeking to quash the entire order of the learned Judge and the respondent, seeking to grant the interest over the retained amount, have come forward with the present writ appeals.

9. Since common facts and issues are involved in these two appeals, the same are taken up together for final disposal.

10. The following two main issues arise for consideration in these appeals, viz.,

i) Whether there was delay in supply of the laptops and the appellant is justified in retaining the amount towards liquidated damages?

ii) Whether the respondent is entitled to interest as sought for?

11. Mr.R.Muthukumarasamy, learned senior counsel appearing for the appellant, at the outset, would contend that in respect of disputes falling within domain of contractual obligations, the scope of judicial review is very limited and in doubtful cases, the parties are to be relegated to adjudication of their rights and that the writ jurisdiction under Article 226 cannot be invoked. He would further contend that though there were two separate contracts, but the same had arisen out of the same

contract, i.e. supply of laptop computers and the second contract was in continuation of the earlier one and that the terms and conditions of both the tenders are identical and therefore, the view of the learned Judge that it is two different contracts and the rights and liabilities of one agreement cannot be imported to the other, is contrary to law and facts. He would further contend that towards first letter of intent, the appellant had with it 3% security deposit and 3% warranty cost, totally 6% value of the supply, which was more than the maximum liquidated damages limt of 5% and the total liquidated damages amounting to Rs.26,37,07,807.55, of which, already a sum of Rs.25,63,00,000 was already recovered from the bills and balance amount to be recovered was Rs.74,07,807.55 and that the appellant still retained warranty cost of Rs.1,30,95,810/- in respect of 26,000 laptop computers, which would be payable after the completion of warranty period and therefore, the balance amount of Rs.74,07,807 has to be still recovered. Learned senior counsel also contended that the learned Judge has not even dealt with the issue as to whether there was delay in supply of the laptop computers and whether the levy of liquidated damages is justified, but only on technical ground alone, the learned Judge has directed return of the retained amount. He relied upon Clause 3.32 of the tender condition, which provides that in case of delay or 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 subject to maximum of 5% of the undelivered of the quantity. Therefore, having accepted the terms and conditions of the tender, the respondent cannot raise objection regarding the levy of liquidated damages when admittedly, the respondent caused delay as having failed to supply the laptop computers as per the delivery schedule. Therefore, the appellant had rightly levied the liquidated damages and retained the amount which is payable to the respondent. He would further contend that since the respondent disputed the matter, by invoking Clause 3.35 of the terms and conditions of the tender and contract, the appellant referred the matter to sole Arbitrator to adjudicate the dispute, however, by order dated 30.10.2015 of this Court, the proceedings before the Arbitrator had been stayed. Learned senior counsel would further contend that though two separate letters of intent dated 17.12.2012 and 28.6.2013 were issued for procurement of laptops of 3,00,000 and 26,000 respectively, it should be construed as one since the terms and conditions are identical and it was only an additional quantity allotted to the respondent and if the contention of the respondent that they are two different, distinct and separate contracts is accepted, then under the Tamil Nadu Transparency in Tenders Act, 1998, the appellant had to float a fresh tender. Therefore, when without floating fresh tender for further supply of 26,000 laptop computers, allotted the same to the respondent based on the same terms and conditions, it has to be construed that the contract is one and the same and hence, retaining the amount towards liquidated damages from the amount payable as regards second contract, is fair and no interference is required. He would further contend that by letter dated 6.11.2014, the appellant has intimated the details of liquidated damages recovered.

12. Learned senior counsel also contend that though there is absolutely no bar to the maintainability of writ petition even in contractual matters where there are disputed questions of fact or even when monetary claim is raised, however, at the same time, the High Court, while exercising discretionary power under Article 226, would not exercise such discretion when it may not examine the issue unless the action has some public law character attached to it and whenever a particular mode of settlement of dispute is provided in the contract. He relief upon a decision reported in "Joshi Technologies International Inc. versus Union of India (2015) 7 SCC 728". With these contentions, the learned senior counsel sought for setting aside the order of the learned Judge.

13. On the other hand, Mr.M.S.Krishnan, learned senior counsel appearing for the respondent/writ petitioner while reiterating the contentions that were raised before the learned Judge, contended that there were two contracts entered into between the parties in respect of supply of 3,00,000 and 26,000 computers respectively vide letters of intent issued by the appellant,dated 17.12.2012 and 28.6.2013 and they are separate and distinct and in respect of first contract, the respondent had successfully completed the transaction and having satisfied and accepted the same without raising any issue of delay and also having made 97% of the payment in respect of first contract, the appellant had again awarded contract for further supply of 26,000 laptops and after completion of the same, when the respondent sought for payment, the appellant retained the amount of Rs.25,63,00,055/- towards liquidated damages. He pointed out that if at all any liquidated damages are required to be deducted, it has be deducted from and out of 97% value of the bills and not from and out of 3% which was retained only towards warranty obligations and this amount cannot be retained towards liquidated damages, but can be retained only if there is any non-fulfilment of warranty obligations. He would contend that there was absolutely no delay in finalizing the contract so as to attract levy of liquidated damages and having kept quite for long time without raising any issue of delay, for the first time, at the time of payment of dues in respect of second contract, the appellant has retained the amount, which is unfair and contrary to the terms and conditions of the contract. He also pointed out that consequent upon the fulfillment of contractual obligations, pursuant to Clauses 3.26 and 3.31 of the tender, the appellant on 12.11.2014 had also refunded the security deposit to the respondent by returning the original irrevocable bank guarantee furnished by them. The learned counsel also contended that no details regarding the delay were intimated to the respondent and for the first time, only during

the hearing of the writ petition, two internal communications were produced, stating that there was sanction document on 6.11.2014 after deducting liquidated damages, which were not furnished to the respondent. Learned senior counsel pointed out that the learned Judge had rightly come to the conclusion that there were two separate contracts entered into by the parties and the liability in one contract cannot be read into another after successful completion of earlier one and therefore, having accepted the completion of the first tender, it was not open to the appellant to withhold the amount due under the subsequent one, seeking to deduct the liquidated damages of the earlier one. However, having ordered payment of retained amount, the learned Judge ought to have granted the interest since the appellant retained the amount despite the successful completion of the assigned work by the respondent. With these contentions, the learned senior counsel sought for ordering the writ appeal.

14. It is the specific case of the appellant that the respondent did not supply within the time schedule referred above and as per Clause 3.32 of the tender condition provides that in case of delay, liquidated damages at the rate of 1% per week on the value of undelivered quantity subject to maximum of 5% of the undelivered quantity will be levied. According to the appellant, the total liquidated damages was quantified at Rs.26,3707,807.55 and the details of which are given below:

Sl.No.	Quantity	Delay	Liquidated Damages
1.	2,61,539 Nos.	5 weeks	Rs.21,95,55,452.03
2.	27,527 Nos.	4 weeks	Rs. 1,84,86,582.66
3.	1,000 Nos.	3 weeks	Rs. 5,03,685.00
4.	9,934 Nos.	2 weeks	Rs. 33,35,737.86
5.	26,000 Nos.	5 weeks	Rs. 2,18,26,350.00
		Total:	Rs.26,37,07,807.55

15. According to the appellant, during October, 2014 only, it was found that there was delay and accordingly, by order dated 31.10.2014, it was decided to levy the liquidated damages and as such, after retaining the liquidated damages, the balance amount of Rs.13,90,70,731 was paid during November, 2014. However, according to the learned senior counsel for the respondent, there was absolutely no delay and that there were two separate contracts entered with the respondent in respect of supply of 3,00,000 and 26,000 laptop computers vide two letters of intent dated 17.12.2012 and 28.6.2013 and they are separate and distinct and in respect of first contract, the respondent had successfully completed the transaction and having satisfied and accepted the same without raising any issue of delay and also having made 97% of the payment in respect of first contract, the appellant had again awarded contract for further supply of 26,000 laptops and after completion of the same, when the respondent sought for payment, it was not open to the appellant to withhold the amount due under the subsequent one, seeking to deduct the liquidated damages of the earlier one. It

is to be noted that if at all there was delay in respect of first contract, the appellant would have fortified liquidated damages at the earliest point of time and there was also delay on the part of the appellant in raising the claim towards liquidated damages. The respondent has seriously objected the same and disputed and contended that it had not committed any breach of contract in not supplying the material within the stipulated time. Therefore, having regard to the various contentions of both the appellant and respondent and the stand of the respondent in disputing and denying the same, we are of the view that such disputed facts cannot be dealt with by this Court in writ proceedings, since the same are required proper adjudication. In this regard, it is relevant to note that Clause 3.35 of the tender document provisdes Arbitration that, any dispute or difference whatsoever arising between the parties to the agreement out of or relating to the construction, meaning, scope, operation or effect of the agreement or validity of the breach thereof, which cannot be resolved through negotiation process, shall be referred to sole Arbitrator. In the circumstances, we are of the view that the order of the learned Judge is required to be modified to that extent. We advise the parties to resolve their dispute by approaching the Arbitrator and get adjudicated their claims, viz., i) whether there was delay in supplying the laptop computers by the respondent? ii) whether the appellant Corporation is justified in withholding the amount payable to the respondent? iii) whether the appellant has rightly quantified the liquidated damages? iv) whether the time is the essence of the contract? iv) whether the respondent is entitled to the retained amount with interest?, etc. In view of this, we are not inclined to consider the issues that were raised in these appeals as stated supra.

16. In view of the above, the respondent is directed to take appropriate steps in the manner known to law, seeking appointment of the Arbitrator afresh in the place of erstwhile Arbitrator already appointed by the Appellant and after appointment of the Arbitrator, the parties are at liberty to get their disputes resolved. However, it is made clear that we have not made any observation as regards the merits of the disputes raised by the parties and we left the same for adjudication by the Arbitrator.

With the above direction, this Writ Appeal is disposed of. No costs. Consequently, connected CMP is closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

Suk

1 cc to Mr.J. James, Advocate, Sr. 64246
2 ccs to King and Partridge, Sr. 64016

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PK (CO)
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