IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2017

Reserved On 01.11.2017
Delivered On 14.11.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.23750 of 2017

R.Madhusudhanan .. Petitioner

Vs.

1.The Secretary to the Government,
(Handlooms and Textiles Department),
Fort St.George,
Chennai 600 009.

2.The Director,
Department of Handlooms and Textiles,
Kuralagam, II Floor,
Chennai 600 108.

3.The Convenor,
Tender Acceptance Committee for
TANII Scheme,
Office of the Director Handlooms and Textiles,
Kuralagam, II Floor,
Chennai 600 108. .. Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records of the second respondent in impugned proceedings in R.C.No.36042/2015/G3-1 dated 26.04.2016 and R.C.No.36042/2015/G3, 24.11.2016, quash the same and further direct the respondents to pay the petitioner as per purchase order dated 28.01.2016.

For Petitioner : Mr.Raja Kalifullah
Senior Counsel
for Mr.I.Abrar Md Abdullah

For Respondents : Mr.R.Rajeswaran
Special Government Pleader
R1 to R3

ORDER

The petitioner is aggrieved against the proceedings of the second respondent dated 26.04.2016 and 24.11.2016 and consequently, seeking for a direction to the respondents to pay the petitioner, as per the purchase order dated 28.01.2016.

2.Through the proceedings dated 26.04.2016, the supply order placed with the petitioner for supplying Pneumatic Handlooms was cancelled and the entire security deposited was forfeited. Through the other impugned proceedings dated 24.11.2016, the petitioner was blacklisted for one year, thereby making the petitioner ineligible to participate in the Government tenders.

3.The case of the petitioner, in short, is as follows:

The petitioner is doing business of manufacturing various equipments and fabricated products in the name and style of M/s.R.Madhusudhanan and performing contracts with various Government Departments. The second respondent sent a proposal to the first respondent on 04.05.2015 to provide 100 numbers of Pneumatic Handlooms per year for a period of three years. Thus, the second respondent requested the financial assistance of State Government Contribution. Accordingly, the first respondent accepted the proposal and issued G.O.(2D) No.14 dated 14.10.2015, for supply of 300 Pneumatic Handlooms, for a period of three years with supply of 100 for every year. The third respondent, through notification dated 09.11.2015, called for tender from the eligible suppliers. The petitioner participated in the tender and quoted the lowest price. His bid was accepted and a letter of acceptance was issued on 21.01.2016. The petitioner furnished the security deposit and executed the agreement on 25.01.2016. Purchase Order was issued on 28.01.2016 with a condition to comply with the supply on or before 19.05.2016. The third respondent mentioned two types of Pneumatic Handlooms in the tender schedule, purchase order and in the agreement. There was no information in the Beneficiaries List furnished to the petitioner about which type of Pneumatic Handloom to be supplied to the beneficiaries. Therefore, the petitioner made a personal request to provide additional beneficiary list with type of Pneumatic Handloom required to be supplied. The third respondent did not provide the details. However, the petitioner started making the commercial production which took 30 days time. At that point of time, the Election Commission of India announced the State assembly election for the State of Tamilnadu on 05.03.2015 and hence the model code of conduct came into effect. Therefore, the petitioner was told to supply after the election, since it was a beneficiary oriented scheme. However, the petitioner received a show cause notice dated 22.03.2016 from the second respondent, asking him to complete the entire supply by 19.05.2016. In the said notice, though it was stated that the second respondent had already issued an earlier show cause notice dated 04.03.2016, the same was not received by the petitioner. The petitioner gave an explanation on 29.03.2016. The petitioner sent another letter on 03.06.2016, requesting the second respondent to condone the delay in completing with the work. The second respondent did not give any reply. However, the petitioner continued the supply to 71 beneficiaries and obtained acknowledgment from them while the remaining 29 were ready for dispatch. The second respondent issued the third show cause notice on 14.07.2016, which was received by the petitioner on 26.07.2016 along with the impugned order of cancellation of tender. The cancellation order was passed against the purchase order, agreement and the principles of natural justice. After receiving the third show cause notice dated 14.07.2016, the petitioner gave a detailed reply on 09.08.2016. The petitioner had supplied 71 pneumatic handlooms over a period of 70 days in the month of May, June and July 2016 and every fortnight, the second respondent conducted the review meetings and it was informed by the concerned officials to the second respondent about the receipt of the said handlooms. Even though the tenders were floated subsequently for the year 2016-17, till 31st July 2017, the second respondent had not procured even a single machine and he had not taken any action against the supplier, to whom the order was placed. The petitioner sent a letter dated 27.09.2016, requesting to condone the delay in supplying the looms, since a sum of Rs.69 lakhs was blocked. Without considering the same, the impugned orders have been passed, which are illegal, violative of Article 14 and Article 19(1)(g) of the Constitution of India.

4.The respondents filed a counter affidavit, wherein it is stated as follows:

The petitioner executed the agreement on 25.01.2016 and at the time of issuance of the purchase order dated 28.01.2016, a list of 100 numbers looms to be supplied in a phased manner to various circles were given to the petitioner. As per the tender agreement, supply should be fully completed within 120 days from the date of purchase order. The petitioner did not supply even a single machine until the III phase (i.e., 75 units had to be supplied till third phase or upto 26.04.2016). No directions were given to the petitioner from the Department to delay the supply due to the model code of conduct of election. As per the minutes of Tender Acceptance Committee Meeting held on 07.11.2016, it was observed that the model code of conduct of election was not applicable to the existing currency of the contract for the orders, which had already been placed before the commencement of model code of conduct. The first showcause notice dated 04.03.2016 was sent through Registered post with acknowledgment due and another showcause notice dated 22.03.2016 was sent to the petitioner through E-mail and they were received. The petitioner had made false averment as if he had given explanation through the letter dated 29.03.2016. No such letter was received by the third respondent. As per the tender schedule and the clauses contained therein, failure to supply the ordered quantity within the stipulated time would result in blacklisting the tenderer and initiating action for breach of contract. As the purchase order was given to the petitioner on 28.02.2016, which was well ahead of the date of model code of conduct, the same is not applicable to the existing contract. Only after the receipt of the showcause notice dated 14.07.2016, the petitioner sent a letter dated 09.08.2016 stating false reasons. The supply made by the petitioner between the period 23.07.2016 and 27.07.2016 were after the cancellation order dated 26.04.2016. He never supplied 71 pneumatic handlooms as reported by him. Only some parts were received at Weavers Cooperative Societies from the petitioner between the above said dates. Thus, the petitioner has not supplied any loom in full shape. The tender for Electronic Jacquard and pneumatic handloom were floated in the same day and the lowest bidder for electronic jacquard was also given a purchase order dated 28.01.2016 with same phased delivery conditions. The said tenderer of electronic jacquard machine viz., M/s.Shree Tex was also served with a cancellation order on 26.04.2016 due to non supply as per the purchase order. However, the said firm sought extension of time on 05.05.2016 in view of delay in import of certain components and the Chairperson of the Tender Acceptance Committee considered the request of the firm and was given 30 days time to supply and they supplied the equipment in full whereas in the case of the petitioner, he has not responded to the show cause notices dated 04.03.2016 and 23.03.2016 and not made any written request, nor did respond to the cancellation order dated 26.04.2016. The Competent Authority passed the cancellation order and the same was sent by speed post. Show cause notice dated 14.07.2016 has been issued for blacklisting the petitioner. Invoking of the bank guarantee after issuing the cancellation order cannot be questioned by the petitioner. Even in respect of the supply of pedal looms numbering 650 earlier, the petitioner had supplied only 30 handlooms within the time limit and the balance have been supplied beyond the time limit. Therefore, the penalty as per the terms and conditions have been rightly imposed on the petitioner to the tune of Rs.12,23,516/-. Therefore, the averments regarding the pedal looms did not deserve any consideration and also not maintainable.

5.Mr.Raja Kalifullah, learned Senior Counsel appearing for the petitioner submitted as follows:

In pursuant to entering into an agreement between the parties, the second respondent did not give list of beneficiaries, when the tender was floated for supply of type 'A' and 'B' looms. The petitioner did not receive the first showcause notice dated 04.03.2016, alleged to have been sent to the petitioner. However, after receiving a notice dated 22.03.2016, calling upon the petitioner to supply, the petitioner sent a reply on 23.09.2016, explaining his difficulty in not supplying the looms due to the imposition of code of conduct by the Election Commission. Between 05.03.2016 and 25.05.2016, the code of conduct was in force and therefore, the petitioner could not supply. Thereafter, from 01.06.2016 to 14.06.2016, he supplied 71 machineries. Another 18 looms though made ready, were not taken delivery. The petitioner through letter dated 03.06.2016, sought extension of time by 30 days. However, the respondents, without extending the time, issued the cancellation order on 26.04.2016, along with the show cause notice for blacklisting the petitioner. The cancellation order was issued even before the expiry of 90 days as per the terms of the contract. The show cause notice issued for blacklisting the petitioner is not a notice but it is an order by itself. Since the petitioner was under bonafide belief due to the imposition of the code of conduct, he could not make the supply. The respondents have chosen to cancel the penalty in respect of another supplier, who also did not supply during the time when the election code of conduct was in force.

6.Learned Special Government Pleader appearing for the respondents submitted as follows:

The petitioner had to supply 100 numbers of looms in phased manner, 25 each in a month. He has to complete the entire supply before 19.05.2016, but he did not supply even a single machine till 25.04.2016. The supply made by the petitioner was after the cancellation order and therefore, such supply cannot be taken into consideration that too, for escaping from the penal action. The respondents have never given a direction to the petitioner to stop supply during the time when the election code of conduct was in force.

7.Heard both sides.

8.The first respondent issued G.O.(2D)No.14 dated 14.10.2015, accepting the proposal of the second respondent and approving the project for supply of Pneumatic Handlooms to 300 Handloom Weavers at a total cost of Rs.2.25 crore under State Innovation Fund for three years viz., 2015-2016, 2016-2017 and 2017-2018. In the said order, the first respondent, thus authorised the second respondent to draw and disburse the amount sanctioned for the purpose of supplying the pneumatic handlooms to the needy eligible beneficiary of the members of Handloom Co-operative Society. Consequent upon the said order of the first respondent, the second respondent invited tenders for supply of the above said machinery along with the other machineries through Tender Notice No.G3/1/2015 dated 13.11.2015. In the said tender notice, the delivery schedule has been specifically referred to as follows:

"II DELIVERY

1 The delivery schedule shall be as follows:

For Pneumatic Handlooms/Electronics Jacquard operated through Penumatic Drive System/Tub Dyeing Units with 6 Arms Dyeing Machine for Silk Dyeing/Washing cum Rinsing Machine.

Phase No.	Delivery days	No. of Days	% of Quantity ordered to be delivered	% of cumulative delivery to be completed
I	0-15 days	15	Lead time	--
II	16-45 days	25	25	25
III	46-75 days	25	45	70
IV	76-100 days	25	30	100
	TOTAL	90	100	

9.The terms and conditions of tender schedule also clearly stipulated that the Purchase Committee reserves the right to cancel the contract without assigning any reason, if the delivery is not completed within the stipulated period of delivery, notwithstanding the penalty charged on the belated delivery. Clause (5) of the tender schedule reads as follows:

> "5.The Purchase Committee reserves the right to cancel the contract without assigning any reason, if the deliveries are not completed within the stipulated period of delivery notwithstanding the penalty charged on the belated delivery. The decision of Purchase Committee shall be final in all matters relating to the tender."

10.Accepting the above said terms and conditions viz., delivery schedule as well as the right to cancel the contract as stated above, the petitioner participated in the tender and a purchase order dated 28.01.2016, was issued to the petitioner, wherein again, it was specifically referred to that the quantity ordered shall be supplied as per the following schedule:

"f) For Pneumatic Hand Looms:

Supply days & Percentage of supply						Total
No. of days	1-15	16-45	46-75	76-100	101-120	

Supply days & Percentage of supply						Total
% of quantity to be delivered	Holidays	25%	25%	25%	25%	
Number of Units	0	25	25	25	25	
Cumulative Supply	0	25	50	75	100	100

11.Thus, it is crystal clear that the petitioner is well aware of the delivery schedule and more particularly, the condition that the entire quantity ordered should be supplied on or before 19.05.2016. The fact remains that the petitioner did not supply even a single handloom till 25.04.2016, by which time, he should have delivered over and above 50% of the total quantity of such handlooms, as the tender schedule conditions and the period of supply as referred to supra would clearly indicate that such supply should have been made by the petitioner by that time. However, the petitioner, only after receiving the show cause notice dated 22.03.2016, calling upon the petitioner to complete the entire supply on or before 19.05.2016, has chosen to send a reply on 29.03.2016, stating some reasons for the delay. In fact, before issuing the said show cause notice dated 22.03.2016, the second respondent had already issued an earlier show cause notice dated 04.03.2016, stating that the entire quantity should be supplied on or before 19.05.2016 and that the petitioner had not commenced the supply till such time, which ultimately would affect the implementation of the scheme and that as to why the provisions of the tender condition No.XIII (1) and condition No.5 of the Agreement should not be invoked and the penalty be imposed. The issuance of such notice on 04.03.2016 was clearly referred to in the second show cause notice dated 22.03.2016. While replying to the show cause notice dated 22.03.2016 through the reply dated 29.03.2016, the petitioner has not disputed or denied the issuance of previous show cause notice dated 04.03.2016 or the receipt of the same by him. Therefore, it is evident that the first show cause notice dated 04.03.2016 was received by the petitioner and however he has not chosen to make his objection or atleast start the supply of the handlooms and complete the whole supply within the cut off date 19.05.2016. On the other hand, even according to the petitioner, he started the supply only from 01.06.2016. Therefore, the second respondent was left with no other option except to issue the cancellation order dated 26.04.2016. Only after issuance of such cancellation order, the petitioner started to supply to some of the beneficiaries on his own will as if he was not aware of the cancellation order dated 26.04.2016.

12.No doubt, it is sought to be contended before this court that the cancellation order was sent along with the subsequent show cause notice issued for blacklisting the petitioner. In any event, as the fact remains that the petitioner did not make even a single supply till 25.04.2016, by which time, he should have supplied more than 50% of the total requirement, he cannot be heard to say that the action of the respondents in canceling the contract and also blacklisting the petitioner for a period of one year are bad in law.

13.Needless to say that in contractual matters, more particularly, in respect of supply of the machineries to the beneficiaries under Beneficial Scheme, the same has to be done within the time stipulated in the contract and any failure, without having any valid reason, cannot be condoned.

14.No doubt, the petitioner sought to contend that the model code of conduct of the election issued by the Election Commission of India prevented the petitioner from making such supply. Admittedly, the model code of conduct was issued on 05.03.2016 whereas the purchase order dated 28.01.2016 was issued to the petitioner much earlier i.e., two months before such date. Therefore, the petitioner cannot escape by saying that the model code of conduct prevented him from performing his part of the contract.

15.Considering all these aspects, I am of the view that the impugned orders passed against the petitioner need not be interfered with by exercising the discretionary jurisdiction of this court under Article 226 of the Constitution of India, more particularly, when the judicial review of such contractual matters are very limited.

16.However, while considering the other limb of the prayer sought for in this writ petition seeking for a direction to the respondents to pay the petitioner as per the purchase order, it is to be noted that the petitioner claims to have supplied 71 pneumatic handlooms, though by way of belated supply. It is also to be noted that the petitioner claims to have obtained acknowledgment from the beneficiaries for making such supply. It is also to be noted that the respondents, though denied such supply by the petitioner, however, admitted in their counter that only certain parts of such loom were supplied by the petitioner to some beneficiaries. Therefore, the fact remains that there is some dispute with regard to the supply made by the petitioner to some of the beneficiaries. By way of cancellation of the contract, blacklisting the petitioner and forfeiting the security deposit, the petitioner is sufficiently imposed with penalty, with which, this court is not interfering. At the same time, the petitioner cannot be put to double punishment, also by not paying the sum towards the machineries or the parts of the same, which he had claimed to have supplied in the month of May, June and July 2016. At this length of time, it would not serve any purpose in asking the beneficiaries to return the supplied machineries or parts to the petitioner, as, by this time, they would have certainly utilised the machineries or parts. Therefore, the respondents are directed to consider such request of the petitioner by conducting a thorough field inspection and enquiry and pass appropriate order for payment within a period of eight weeks from the date of receipt of a copy of this order. If it is not considered, it would amount to double jeopardy apart from the fact the retention of such sum would have to be construed only as unjust enrichment on the part of the respondents. With the above direction, the writ petition is disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

vri

To

1.The Secretary to the Government,
(Handlooms and Textiles Department),
Fort St.George,
Chennai 600 009.

2.The Director,
Department of Handlooms and Textiles,
Kuralagam, II Floor,
Chennai 600 108.

3.The Convenor,
Tender Acceptance Committee for
TANII Scheme,
Office of the Director Handlooms and Textiles,
Kuralagam, II Floor,
Chennai 600 108.

+1cc to M/s.I.Abrar MD Abdullah, Advocate SR.No.80421
+1cc to Government Pleader SR.No.80959

ORDER IN
W.P.No.23750 OF 2017

RR(CO)
SM:24.11.2017