

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.21515 of 2012

and

M.P.No.1 of 2012

Kannappan Iron and Steel
Company Pvt.Ltd.,
Rep by its Managing Director,
Mr.T.S.P.Kannappan
No.9/111, Kalidoss Road,
Ramnagar, Coimbatore-641 009.
(also at RS No.10/1, Nagoor Road, Melavanjore,
TR Pattinam, PO Karaikkal-609 608. ... Petitioner

Vs

- 1.The Secretary-cum-Commissioner,
Rural Development Department,
Government of Tamil Nadu,
Secretariat, Chennai-600 009.
- 2.The Collector,
Thanjavur District, Thanjavur.
- 3.The Project Director,
District Rural Development
Agency (DRDA),
Collectorate of Thanjavur,
Thanjavur. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to the impugned order passed by the 1st and 2nd respondents in proceedings Na.Ka.No.1701/2010/A4 dated 20.06.2012, cancelling the entire contract awarded in favour of the petitioner Company, forfeiting the entire security deposit and blacklisting the petitioner Company in participating the contract for the next 3 years in any of the Government project and quash the same.

For Petitioner : Mr.K.V.Babu
For Respondents : Mr.T.M.Pappiah,
Special Government Pleader for RR 1 & 2
: Mr.V.Jayaprakash Narayanan for R3

O R D E R

Heard Mr.K.V.Babu, learned counsel for the petitioner and Mr.T.M.Pappiah, learned Special Government Pleader appearing for the respondent Nos.1 and 2 and Mr.V.Jayaprakash Narayanan, learned counsel appearing for the third respondent.

2. The petitioner has approached this Court, seeking the following relief,

"To issue a Writ of Certiorari, to call for the records relating to the impugned order passed by the 1st and 2nd respondents in proceedings Na.Ka.No.1701/2010/A4 dated 20.06.2012, cancelling the entire contract awarded in favour of the petitioner Company, forfeiting the entire security deposit and blacklisting the petitioner Company in participating the contract for the next 3 years in any of the Government project and quash the same."

3. The case of the petitioner is as follows:-

The petitioner is a Company involved in the Manufacture of Steels, TMT Rods and CTD Rods, having its Factory at Karaikkal. According to them, the Company is also an ISO 9001-2000 certified Company. The third respondent invited tenders for the supply of steel for the year 2011-12 to all the Block Offices and other designated places for the welfare schemes in Thanjavur District. In response to the tender notification dated 04.02.2011, the petitioner submitted the tender documents for the supply of steel rods RTS 10mm, 8mm, 12mm, 16mm, 20mm and 25mm for all the 14 Blocks in Thanjavur District vide Tender Ref. Na.Ka.No.1701/2010/A4. Along with the tender documents, the petitioner Company has also deposited earnest money to the tune of Rs.12,25,000/-.

4. In view of the petitioner Company fulfilling all the tender conditions, the third respondent eventually awarded the contract to the petitioner vide proceedings dated 28.02.2011. In pursuance thereof, an agreement was executed and the agreement was also submitted to third respondent along with the additional security deposit of Rs.12,37,000/- by way of Demand Draft as required by the third respondent. The petitioner has thus paid a total sum of Rs.24,62,000/- as security deposit. Subsequently, on 05.05.2011, supply of steel to an extent of 5.500 tons for the Orathanad Taluk was ordered to be supplied under the agreement.

5. According to the petitioner, the required steels were supplied and payments were also received on 22.06.2011. Thereafter, the second order was received from the Pattukottai Block on 15.06.2011, for supply of certain quantity of tons and the same was also supplied as per the requirement. According to the petitioner, despite supply of required steels, the payment was not made to the petitioner under the terms of the agreement.

6. The petitioner had received a further communication dated 27.01.2012, from the authority, directing them to supply steels for a total requirement of 427.95 MT for the eight blocks in Thanjavur District for the rural housing Scheme. The specific condition imposed for the supply of steel as per the order dated 20.01.2012, was that the entire steels have to be supplied within 15 days, failing which, the contract would stand terminated and the security amount deposited will be forfeited. According to the petitioner, unfortunately the petitioner could not fulfill its commitment, in view of the huge power shortage the State was going through and the contract became impossible of performance.

7. In the said circumstances, by notification dated 19.03.2012, the second respondent was directed to show cause as to why the supply of steel to an extent of 427.910 MT could not be supplied and only an extent of 116 MT alone supplied. In response to the show cause notice, an explanation was submitted by the Company on 30.03.2012. In the explanation, the petitioner pointed out that due to huge power shortage, the steels could not be supplied in time and requested that in the event of any improvement in the power supply, the required materials would be supplied at the earliest.

8. However, without appreciating the legitimate explanation offered by the petitioner and without calling the petitioner for any personal hearing, the second respondent by his proceedings dated 20.06.2012, cancelled the contract awarded to the petitioner by blacklisting the Company for a period of three years and also ordered forfeiture of the entire security deposit. The said proceedings is put to challenge in the present writ petition.

9. The learned counsel for the petitioner would submit that as per the terms of the agreement that the parties are not liable to each other if the contract becomes impossible of performance due to certain contingencies like earthquakes, floods and epidemics etc. One such contingencies prescribed in the agreement was power shortage. Clause 9 which was relied on by the petitioner Company, for not supplying the materials in time is reproduced hereunder:-

"9. Neither the purchaser nor the supplier shall be liable to the other for any delay or failure in performance of their respective obligations due to causes/contingencies beyond their reasonable controls such as:

a. Natural phenomenon including but not limited to earthquakes, floods and epidemics.

b. Acts of any Government authorities domestic or foreign including but not limited to war declared or undeclared, priorities and guarantee restrictions.

c. Accidents or disruptions including but not limited to explosion, break down of essential

machinery or equipment, power and water shortage." Therefore, the learned counsel would submit that in view of the specific contingencies provided in the agreement itself, the action of the respondents as conveyed to the impugned proceedings, cannot be sustained both in law and on facts.

10. The learned counsel for the petitioner would further submit that the established principle of natural justice has been violated, since the petitioner was not given adequate opportunity to explain the circumstances under which the materials could not be supplied in time. No personal hearing has been afforded to the petitioner before the impugned order came to be passed. This fact of not affording personal hearing to the petitioner has not been disputed by the respondents in the counter affidavit.

11. In these circumstances, learned counsel would contend he would not press any relief as regards the blacklisting of the Company for a period of three years is concerned, since it had worked itself out, as the impugned proceedings was passed as early as on 20.06.2012. The learned counsel would also submit that in view of the fact that no adequate opportunity was given to the petitioner and the contingencies as provided for under Clause 9 of the contract, has not been appreciated in proper perspective by the authority while passing the impugned order, forfeiture of security deposit as ordered is without any justification.

12. Upon notice, learned Special Government Pleader appearing for the respondents, entered appearance and filed a detailed counter affidavit. In the counter affidavit, two reasons have been stated which formed the basis of passing the impugned order, as follows:-

1. The petitioner had supplied sufficient materials to other districts during the relevant period and chosen not to stick to the time line prescribed by the authority in respect of supply to the Thanjavur District alone. In view of non-supply of adequate material viz., steel rods, the Government had suffered huge financial loss as the project could not be completed in time.

2. As per Clause 11 of the agreement, it was mandatory that the contractor must stick to the delivery schedule and the reasons like lockout, power cut etc., cannot be accepted as a valid reasons for delay in supply of goods intended.

13. According to the learned Special Government Pleader appearing for the respondents, by applying Clause 11, the explanation offered by the petitioner viz., power shortage, cannot be accepted as valid reason and therefore, the second respondent rightly passed the order of blacklisting the Company in addition to ordering forfeiture of the entire security deposit. Therefore, the learned Special Government

Pleader would submit that the petitioner is not entitled to any relief as prayed for in the writ petition.

14. This Court has considered the rival submissions of the learned counsel and perused the relevant materials and pleadings placed on record. As per Clause 9 of the agreement, it is clearly mentioned that neither the party is liable to each other, in case certain contingencies happen during subsisting contract including the power shortage. As far as the petitioner is concerned, in his explanation he has given a reason of power shortage for not supplying the required materials in time. In which case, the authority ought to have given a personal hearing to the petitioner before taking an extreme action to cancel the contract itself. The reasons said forth in the counter affidavit viz., that the petitioner had supplied adequate quantity of steels to other places during the relevant time, has been disputed by the petitioner and also so called loss suffered by the Government due to non-supply of adequate materials in time.

15. The learned counsel for the petitioner would also submit that Clause 9 shall take precedence over Clause 11, as Clause 9 of the agreement provides no liability for both the purchaser and the supplier to each other and if that position is accepted, the impugned proceedings of blacklisting and ordering forfeiture of security deposit would not have arisen and the so called violation of the contractual terms by the petitioner as pointed out by the authority would become untenable and unsustainable in terms of the mutual obligation and rights of the parties as provided in the agreement.

16. This Court finds some force in the contention putforth by the learned counsel for the petitioner that Clause 9 is very clear and unambiguous and despite the contradiction which is found in Clause 11 of the agreement, this Court is of the considered view that in such circumstances, this Court has to hold that the petitioner is entitled to the benefit of grant of relief that Clause 9 will have precedence over Clause 11.

17. The learned counsel for the petitioner during the course of the arguments, has conceded that as far as the punishment is concerned, viz., the blacklisting of the Company for a period of 3 years is not pressed and he only pray for return of security deposit which was ordered to be forfeited under the impugned proceedings.

18. In the above said circumstances, this Court is of the considered view that while cancelling the contract as contended by the learned counsel for the petitioner, no personal hearing afforded to the petitioner in order to ascertain the veracity of the explanation. In the absence of personal hearing to the petitioner, this Court has to infer that the petitioner had come up with valid explanation and as

the protection to Sub Clause 'C' of Clause 9 of the agreement is to be extended to the petitioner. Moreover, due to passage of time, the punishment of blacklisting has worked itself out. Therefore, this Court need not go into the issue of penalty. What remains to be considered by this Court is whether the petitioner is entitled to return of the security deposit to the tune of Rs.24,62,000/-.

19. For all the above circumstances, this Court is of the view that the ultimate cancellation of the contract passed by the second respondent vide impugned proceedings appears to be a colourable exercise of power, in view of the non grant of personal hearing to the petitioner, in order to ascertain the veracity of the explanation offered by the petitioner. In view of the same, forfeiture of the amount therefore cannot be countenanced both in law and on facts.

20. In the said circumstances, the impugned order passed by the 1st and 2nd respondents in proceedings Na.Ka.No.1701/2010/A4 dated 20.06.2012 is set aside to the extent that it orders forfeiture of the security deposit to the tune of Rs.24,62,000/-. The respondents are directed to refund the earnest money deposit as well as the security deposit to the tune of Rs.24,62,000/- to the petitioner. This direction shall be complied with by the respondents, within a period of twelve weeks from the date of receipt of a copy of this order. It is also made clear that the petitioner is not entitled to any interest for the payment, since the writ petition is only partially allowed by upholding the penalty of blacklisting of the Company as ordered in the impugned proceedings.

21. With the above direction, the writ petition stands partially allowed. No costs. Consequently connected miscellaneous petition is closed.

Sd/--

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Secretary-cum-Commissioner,
Rural Development Department,
Government of Tamil Nadu,
Secretariat, Chennai-600 009.

2.The Collector,
Thanjavur District,
Thanjavur.

3.The Project Director,
District Rural Development
Agency (DRDA),
Collectorate of Thanjavur,
Thanjavur.

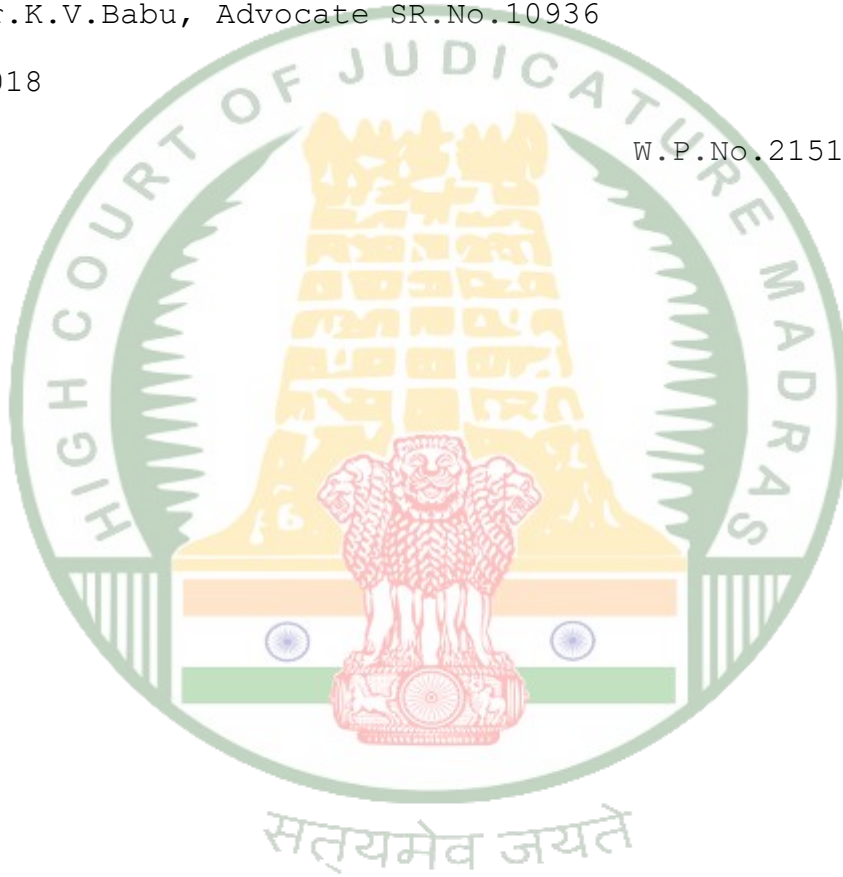
+2cc to Government Pleader SR.No.11737

+1cc to Mr.V.Jayaprakash Narayanan, Advocate Sr.No.11042

+1cc to Mr.K.V.Babu, Advocate SR.No.10936

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