IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30..09..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition No.16945 of 2008
and
M.P.No.1 of 2008

M/s.Tamil Nadu Telecommunications Ltd.,
Rep. by its Managing Director,
E18B-E24, CMDA Industrial Complex,
Maraimalai Nagar 603209.

... Petitioner

-Versus-

1.The Chief General Manager,
Southern Telecom Projects,
No.25, Greenways Lane,
R.A.Puram, Chennai 600028.

2.The Accounts Officer (Plg & CA),
Office of The Chief General Manager,
Southern Telecom Projects,
No.25, Greenways Lane,
R.A.Puram, Chennai 600 028.

3.Chairman and Managing Director,
Bharat Sanchar Nigam Ltd.,
Harish Chandra Mathur Lane,
Janpath, New Delhi 110 001.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned communication of the 2nd respondent in No.BSNL/CGMP/PLG/TTLtd/2007-08/13 dated 31.07.2007 and to quash the same and consequently direct the respondents to apply the amendment effected by the Head Quarters of BSNL, with effect from 01.08.2004 to the "Fall Clause" of the Tender at Para 24 of Section III of the Tender dated 01.10.2005 involved in the present case and make the payment for the supplies made during the scheduled period of tender at the rate of Rs.54,050/- fixed at the time of awarding contract which amounts to Rs.1,39,91,251/- with interest at the rate of 24% p.a. till date of payment of the said amount.

For Petitioner : Mr.T.Ramesh

For Respondent(s) : Mr.S.Udayakumar, Standing Counsel for RR1 to 3

ORDER

Challenging the order passed by the 2nd respondent refusing to settle the bill amount to the petitioner company based on the 'fall clause' in the bid document and seeking a direction to the respondents to settle the bill amount of Rs.1,39,91,251/- with interest @ 24% p.a. till date of payment in full, the petitioner company is before this court with this writ petition.

2. The facts leading to the filing of the writ petition are as follows:- The petitioner is a Joint Venture of TCIL, a Government of India Enterprises and TIDCO, Government of Tamil Nadu Enterprises engaged in manufacturing of Optic Fiber Cable used for Telecommunication and in Information Technology sectors. The 1st respondent on behalf of Bharat Sanchar Nigam Limited (in short "the BSNL"), a Government of India Enterprises, invited tenders for supply of 24F Optical Fiber Cable for 847 KMs. According to the petitioner company, the tenders floated by the 1st respondent are governed by the guidelines and clarifications issued by the BSNL Head Quarters and if any general amendment is issued by the Head Quarters, it should be carried out in the tenders. There is one general 'fall clause' at para 24 in III Section of the Tender Document in dispute to the effect that if during the period of contract any vendor reduces the sale prices, sells or offers to sell the same or similar equipment/services to any person or organization, the purchaser would determine and intimate the new reduced price and for the remaining quantity of supply, the BSNL would pay only the reduced price. However, w.e.f. 01.08.2005, the above said "fall Clause' was amended by the 3rd respondent. As per the amendment, the price fixed would remain the same till the scheduled delivery period fixed in the tender and the said fall clause would be applicable only during the extended period of delivery schedule. The above said clarification with regard to amendment was brought in the web-site of BSNL w.e.f. 01.08.2005 and all the constituent units were required to incorporate the amendment to the tender clauses. But, the above said amended clause was not included in the present tender notification, instead, tenders were invited with 'fall clause' condition.

3. Further, according to the petitioner, tender notification was issued on 01.10.2005 which was subsequent to the amendment dated 01.08.2005. Therefore, it is a purely a fault on the part of the respondents in not incorporating the amendment in the

tender document therefore, they cannot reduce the price placing reliance on the unamended fall clause. Now the respondents taking into consideration the rate quoted by the petitioner in respect of a contract entered into with Kerala Telecom Circle on 12.10.2006 the respondents by letter dated 06.08.2006 intimated the petitioner that the respondents would pay the reduced price for the balance supply of cables during the scheduled period of supply specified in the purchase order issued pursuant to the tender / bid dated 01.10.2005. In the above circumstances, the petitioner company made a representation to the 2nd respondent to pay the price as per the rate quoted by them in the contract. But, the 2nd respondent rejected the claim made by the petitioner. Challenging the same, the petitioner is before this court with the present writ petition.

4. The respondents filed counter affidavit inter alia alleging that based on the experiences of various procurement issues the BSNL HQ issueing guidelines and clarifications to the procurement process. Then instructions are basically broad guidelines and each circle incorporates the guidelines in their tender to suit its need as the problem faced by each region of BSNL is different. The Southern Regional Telecom Projects (in short "the STP"), as a major procurer of pipes, cables and other equipments, fix tender clauses according to its past experiences in the tendering processes in the best interest of BSNL. The procurements are decentralized and each circle is allowed to procure its stores by floating independent tenders. Therefore, the amendments issued by BSNL Corporation Office are only general guidelines.

5. It is further contended by the respondents that it has been generally observed by BSNL that bidders quote different rates to different circles even though the specification of the product is same. On many occasions this has raised audit objections by C & AG Audit and the Department was put to embarrassment on this count. Therefore, in order to avoid such price variations from circle to circle, BSNL has introduced a new "fall clause 24" to the tender. It was also proved that the petitioner company themselves quoted Rs.33,368 / km to Kerala Circle which was less than the STP rate by Rs.20,682 / km. The petitioner company participated in the tender having fully known that the "fall clause 24" has not been amended as per the guidelines dated 01.08.2005 issued by the BSNL HQ. Having agreed to comply with all the tender conditions and accepted the advance purchase orders unconditionally, it is not now open to the petitioner to raise objection when they were paid at the reduced rate. That apart, provisions in clause 4.2 of the tender require the bidders to examine all instructions, forms, specifications, terms and conditions in the bid documents before

finalizing the tender. Clause 5 of the tender states that if the bidders require any clarification on the bid documents, they shall notify the purchaser in writing 21 days prior to the date of opening of the tenders and if any such clarification is sought for, then, it is for the STP to issue necessary clarification in the bid documents. The petitioner did not raise any such objection or require any clarification before participating in the tender. Therefore, now, it is now not open to them to raise such objection. The petitioner company had quoted much lesser amount in a tender to Kerala Telecom Project and therefore applying the "fall clause", the rate per kilo meter for the quantity of cables supplied on or after 27.06.2006 has been restricted to Rs.37,994.45 / km which was the rate approved by Eastern Telecom Projects Circle vide ref. ETP/MM/24F OFC/06-07/Um dated 24.07/2006.

6. The respondents filed additional counter affidavit inter alia contending that the tender was invited for supply of 4315 kms of 24F OFC on 01.10.2005. The petitioner offered Rs.54050/- per km and the same was approved. As per the original clause 24 of the tender document, namely, 'fall clause', the purchaser is empowered to pay lower cost to the tendered item than the rate originally approved, in case, a similar item has been purchased by any other Government Department / Public Sector Units at a lower cost during the contract. On 05.01.2006, the petitioner quoted Rs.54050/- per km for STP and in the very same calendar year, on 12.10.2006, the petitioner company had quoted Rs.33368/- per km for Keral Telecom Project. After having accepted the tender conditions and entered into the agreement and also completed the work, it is not now open to the petitioner company to challenge the fall clause stating that there is an amendment to the fall clause and the respondent did not carry out the amendment issued by the BSNL HQs in this regard and as per the amendment, the fall clause would apply only to the extended period of delivery schedule. So far as the notification issued by the BSNL HQs is concerned, it is contended by the respondents that the BSNL Corporate Office has an intranet in which the internal circulars are uploaded which can be accessed only by the Telecom Circles and not by the public. The Telecom Circles have their own websites on which Tenders are floated and the same is accessible to the public. The petitioner has downloaded the Tender document from STP circle's website and therefore, the amendments, if any, given in the STP Circle website only are applicable for the tenders floated by STP Circle. The amendment to "fall clause" was not uploaded in the STP website. The petitioner company is bound by the contractual agreement and in any event, the petitioner company cannot invoke Article 226 of the Constitution of India to resolve the dispute arising out of the contract.

7. The petitioner filed rejoinder inter alia stating that the respondents are bound to carryout the amendment issued by the BSNL HQ. The tender in the instant case was invited subsequent to the amendment and therefore, the "fall clause", which was amended by a circular issued by the BSNL HQ is applicable to the present tender and the petitioner is entitled for the rate quoted in the tender to the STP. The petitioner company entered into the bid with an understanding that the amendment made to "fall clause 24" would be part of the document though it has not been specifically incorporated in the tender. The amendment would override the bid documents issued subsequent to the amendment. In view of the specific clause contemplating referral of dispute to the judicial court, this court has got jurisdiction to decide the correctness of the impugned order.

8. I have heard the learned counsel appearing for the petitioner and the learned standing counsel appearing for the respondents and also perused the records carefully.

9. The learned counsel appearing for the petitioner would contend that the amendment issued by the BSNL Corporation Office dated 01.08.2005 amending the "Fall Clause" under Clause 24 of the Tender Document came into being with immediate effect and all the Regional Directors were directed to follow the same. The above said Notification binds on the respondents also. But, without following the Notification regarding amendment to the fall clause in the tender document, the 1st respondent invited tenders for supply of OFC cables based on the unamended false clause. It is only a mistake on the part of the 1st respondent and it is a legal issue. In view of the amended notification, the petitioner is entitled to get the amount as per the rate offered by them. Therefore, the respondent ought not to have refused to admit the claim of the petitioner for their fault in not amending the relevant conditions in the tender document.

10. The learned counsel for the petitioner would further contend that for the same tender period various tender notifications were issued by the different telecom circles wherein the amendeded fall clause has been introduced and the 1st respondent (STP) alone has deliberately ommitted to include the new false clause which caused a serious prejudice to the petitioner company.

11. The learned standing counsel appearing for the respondents would contend that the amendment notification was issued by the BSNL Corporate Office and it was only an internal circular between the Head Quarters and the Regional Telecom Circles. It is only in the nature of guidelines and it is not mandatory for the Regional Telecom Circles to follow and issue tender notification in accordance with the amendment

notification. So far as the amendment or clarification is concerned, Clause 5 of the Tender Notification clearly stated that if at all the bidder wants any clarification, they can make a representation 21 days prior to the opening of the tender document. But, the petitioner company had deliberately kept quiet. When they entered into an agreement agreeing for the "fall clause" and completed the contract work, they cannot later on seek for payment as per the original contract. Therefore, the 2nd respondent rejected the petitioner's request based on the rate quoted by the petitioner to Kerala Telecom Circle. But, that order was not challenged. Subsequently by another communication dated 22.08.2006, the petitioner's further request was also rejected. Even that order was also not challenged. Without challenging those orders, the consequential order passed by the 2nd respondent alone is challenged in this writ petition.

12. The learned standing counsel further contended that it is purely a contract between the parties and if at all any dispute regarding contract, the only remedy available to the petitioner is to seek to refer the dispute for arbitration under clause 20 of the tender condition and the petitioner cannot invoke Article 226 of the Constitution of India. Therefore, the learned counsel prays for dismissal of the writ petition.

13. I have considered the rival submissions carefully.

14. The primordial contention of the learned counsel for the petitioner is that the BSNL Head Quarters had issued an amendment as early as on 01.08.2005 amending the 'Fall Clause' in the tender notification under clause 24, whereby the prices are fixed one and no no price variation. Even though the present tender notification was issued subsequent to the amendment, the respondents failed to incorporate the amended fall clause in the bid document and they have proceeded with the old clause for variation of price. It is only a mistake committed by the respondents and it should be rectified. The above said contention of the petitioner cannot be countenanced for the simple reason that even though the notification dated 01.08.2005 amending the fall clause came into force immediately and the petitioner was also fully aware of the fact that the tender notification has been issued with the unamended fall clause in respect of price variation, the petitioner had not chosen to seek any clarification regarding price variation.

15. As per clause 5 of the Tender conditions, if any clarification was required to be made, the petitioner could have notified the same to the purchaser within 21 days prior to the opening of the bid. Clause 5 of the Tender document reads as follows:-

> "5.1. Bidders requiring any clarification on the Bid Documents shall notify the Purchaser in writing or by FAX at the Purchaser's mailing address indicated in the Invitation to Bid. The Purchaser shall respond in writing to any request for the clarification on the Bid Documents, which it receives not later than 21 days prior to the date of opening of the Tenders. Clarification issued by the purchaser on such queries sought for by the prospective bidders shall be conveyed to all the bidders who have received the bid documents from the purchaser including the prospective bidder who has raised the clarification.
>
> 5.2. The clarifications made as above shall form part of the Bid document and will be treated as amendment to the relevant clauses of the Bid document. These clarifications will also be made available in the web site and prospective bidders who have down loaded Bid document from the purchaser's web side, are to submit the bid document accordingly after taking into account all the clarifications issued."

Knowing fully well that the bid document contain unamended fall clause, the petitioner participated in the tender and entered into the agreement with the respondents and and completed the work.

16. It is an admitted fact that during the course of the contract in respect of similar work for Kerala Telecom Circle, the petitioner quoted less price. In the said circumstances, the respondents reduced the price as per the latest offer made by the petitioner and an order to that effect was also passed on 08.08.2006 followed by another order dated dated 22.08.2006. But, the petitioner did not choose to challenge those orders. Thereafter, when the petitioner approached the respondents with a claim for payment of difference amount, the 2nd respondent has rejected the same by way of impugned order and it is only a consequential order which is now put under challenge in this writ petition.

17. Apart from the above, it is purely a contract between the parties and they are bound by the terms of the contract. If at all the petitioner had got any grievance in respect of tender / bid document, the petitioner could have sought for clarification before opening of the bid as required under clause 5 or at least during the course of contract or else and they

could have invoked the arbitration clause. But, the petitioner did not do so. Now, after completion of the contract, the petitioner cannot seek for variation or modification in the bid document invoking Article 226 of the Constitution of India, that too, challenging the consequential orders passed by the Accounts Officer of the Southern Telecom Projects, it is nothing but an after thought. Without challenging the orders passed by the 1st respondent in respect of price variation, the petitioner cannot challenge the consequential order passed by the 2nd respondent.

18. For the foregoing discussions, this court do not find any merit in the writ petition and the same deserves only to be dismissed.

In the result, this Writ Petition is dismissed. No costs. Consequently, connected WMP is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

kmk

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Writ Petition No.16345 of 2008

A.SK(11/12/2019)