

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 11.04.2019

Delivered on : 22.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.33465 of 2006

M/s.Nandini Medical Laboratories Pvt Ltd.,
No.221/5, Bicholi Hapsi Kanadia Road,
Indore - 452 016.
Madhya Pradesh. Petitioner

Vs.

Tamil Nadu Medical Services Corporation Ltd.,
Rep. by Managing Director,
No.417, Pantheon Road,
Egmore, Chennai - 600 008. Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the proceedings in Ref.No.10586/TNMSC/CS/2005, dated 10.10.2005, on the file of the Respondent, quash the same and direct the Respondent to pay the sum of Rs.13,11,074/- together with interest at 18% per annum, which amount was deducted as unpaid Excise Duty.

For Petitioner : Mr.N.Viswanathan

For Respondents : Mr.K.Balamurali
for M/s.Shivakumar & Suresh

O R D E R

The issue that arises for consideration in this case is whether the order dated 10.10.2005 of the Respondent refusing to pay the sum of Rs.13,11,074/- to the Respondent is liable to be quashed by issuing a Writ of Certiorari and, consequently, whether the Petitioner is entitled to be paid the said sum with interest thereon at 18% per annum.

2.The Petitioner is a manufacturer of drugs with a valid drug license. The Respondent floated a tender in the year 2004 for supply of veterinary drugs and the Petitioner was the successful bidder. As per the terms of the tender, the rate

quoted per unit for landed price, i.e. the total price to be paid by the buyer, shall be inclusive of excise duty, freight, insurance, customs duty, etc., but exclusive of sales tax. In addition, it was specified that the rate per unit (landed price), which is quoted in column eight of Annexure 10, would be the criteria for determining the L1 rate. It was further specified that the tenderers are required to furnish the break-up details of landed price in Annexure XI, specifying separately all the components of the landed price, such as base price, excise duty, etc. The tender conditions further provided for increase in price or decrease in price on account of changes in law after the submission of the bid, i.e. during the contract period.

3. Upon execution of the contract, the Petitioner supplied drugs pursuant to purchase orders placed on the Petitioner by the Respondent. Along with such supplies, the Petitioner issued invoices and claimed payment from the Respondent. While making payments, the Respondent deducted the excise duty component of each invoice, on the basis of the break-up provided in the bid document, and, in this manner, deducted the aggregate sum of Rs.13,11,074/- while making payments to the Petitioner. Upon request for such payment, the Respondent, by letter dated 10.10.2005, refused to make payment on the basis that the Petitioner had not paid excise duty on the supplies made to the Respondent and that, therefore, the Respondent was entitled to make the deduction. In this connection, the Respondent cited Clause 19 of the tender conditions. The said order dated 10.10.2005 is impugned in this Writ Petition.

4. At the hearing on 26.03.2005, the learned counsel for the Petitioner submitted that this Court has jurisdiction even in contractual matters. In order to substantiate this submission, the learned counsel relied upon the judgment of the Hon'ble Supreme Court in ABL INTERNATIONAL LIMITED Vs. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LIMITED, in C.A.No.5409 of 1998, wherein the Hon'ble Supreme Court held as follows:

"From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against the State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c)A writ petition involving a consequential relief of monetary claim is also maintainable.”

5.The learned counsel, thereafter, referred to Clause 14 of the tender and pointed out as to how the landed price is inclusive of excise duty. He also pointed out as to how the price quoted by the tenderers should not exceed the controlled price fixed by the Central Government. He also adverted to Clause 19 and contended that it would only apply if there is an increase or decrease in taxes on account of changes in law after the submission of the bid and during the contract period. He also referred to Clause 47 which states that payments will be made strictly as per the rules of the Tamil Nadu Medical Services Corporation Ltd.

6.Thereafter, the learned counsel submitted that the Petitioner is a Small Scale Industry and is, therefore, entitled to excise duty exemption up to a specified limit. He further submitted that the said exemption benefit need not be passed on to the Respondent because the landed price is inclusive of excise duty. In other words, he submitted that it is a fixed price contract, except for sales tax, and that, therefore, the excise duty benefit need not be passed on to the Respondent. In this connection, he also submitted that the contract did not require the Petitioner to submit proof of payment of excise duty and that excise duty was not shown as a separate component in the invoices submitted by the Petitioner.

7.He referred to a Division Bench judgment of the Delhi High Court in MODI RUBBER LTD. Vs. UNION OF INDIA AND OTHERS reported in 1978 (2) ELT 127, wherein it was held that excise duty is a tax on manufacture and that the duty is imposed either on an ad valorem basis or according to weight or measurement. In effect, the Delhi High Court held that, as per the charging provision, excise duty is imposed on manufacture whereas the manner of levy of duty could be on the selling price of goods. The learned counsel relied upon this judgment in order to contend that the selling price of the Petitioner cannot be the basis for deriving the excise duty component in order to make the deduction.

8.In reply, on 11.04.2019, the learned counsel for the Respondent submitted that the Respondent was entitled to deduct the excise duty component from the price paid to the Petitioner in view of the fact that the Petitioner, admittedly, did not pay excise duty on the supplies made to the Respondent. In support of this submission, the learned counsel referred to the judgment of the Hon'ble Supreme Court in KHAZAN CHAND AND OTHERS Vs. STATE OF JAMMU AND KASHMIR AND OTHERS reported in (1984) 2 SCC 456 wherein, at paragraph 17, Section 64 A of the Sale of Goods

Act was referred to and it was held, in relevant part, as follows:

"That section also gives a corresponding right to the buyer to deduct so much from the contract price as will be equivalent to the decrease of duty or tax or remitted duty or tax where any decrease or remittance in duty or tax takes place after the making of the contract of sale."

9. He further submitted that the Petitioner would be unjustly enriched if it was permitted to avail excise duty exemption and, thereafter, claim the full price, including the excise duty component, from the Respondent. In order to substantiate this contention, the learned counsel referred to the counter affidavit at paragraph 10 (a) wherein the break-up of the total landed price quoted by the Petitioner is set out showing the excise duty component separately. According to the learned counsel, the Petitioner should have indicated that it was not liable to pay excise duty, up to a limit or otherwise, in its bid document. In such event, the Respondent would not have reckoned the excise duty component in the landed price while evaluating and determining the L1 price. Instead, this fact was not disclosed by the Petitioner at the time of bid submission and, therefore, a higher price was accepted by the Respondent. In order to fortify the submission with regard to unjust enrichment, the learned counsel referred to the judgment of the Hon'ble Supreme Court in SAHAKARI KHAND UDYOG MANDAL LTD Vs. COMMISSIONER OF CENTRAL EXCISE, Civil Appeal No.6832 of 1999, wherein all the leading judgments on the doctrine of 'unjust enrichment' were considered and the Court concluded that the appellant therein was not entitled to a refund on account of the fact that it had passed on excise duty to its consumers/customers. In addition, the learned counsel also relied upon the judgment of the Hon'ble Supreme Court in JAY VEE RICE AND GENERAL MILLS Vs. STATE OF HARYANA AND OTHERS, Civil Appeal No.8236 of 2010, wherein it was held that the payment made to the appellants included the element of purchase tax. Accordingly, if such tax was not legally payable after collection thereof from the purchaser, it either had to go back to the purchaser or it had to be surrendered to the state exchequer. If not, it would amount to unjust enrichment, which is legally impermissible. In this connection, the learned counsel for the Respondent also relied upon the judgment of the Division Bench of this Court in TAMIL NADU NEWSPRINT AND PAPERS LTD Vs. THE COMMERCIAL TAX OFFICER AND OTHERS in Writ Petition Nos.9869 and 9870 of 2000, wherein it was held that both deferral of sales tax and waiver result in increased money in the hands of the industry. He also relied upon the judgment of

the Hon'ble Supreme Court in the MAFATLAL INDUSTRIES case, wherein the law on unjust enrichment was elucidated and authoritatively pronounced.

10.He, thereafter, concluded his submissions by referring to paragraph 11 of the counter affidavit wherein it is stated that "one of the conditions of the purchase orders is each supply should be accompanied with the Excise Invoice/Delivery chellan..." Accordingly, he submitted that the Petitioner is not entitled to payment of the deducted amount and that the Writ Petition is liable to be dismissed.

11.By way of rejoinder submissions, the learned counsel for the Petitioner reiterated that it is a fixed price contract and that the excise duty component is included in the fixed price. He further submitted that the format of the bid document required the Petitioner to provide the break-up of base price, excise duty and other components of the landed price and that these details were provided for that limited purpose. With regard to Clause 19, he submitted that it can be relied upon only if there is a change of law after the submission of the bid. In the instant case, there was no change in law. He further submitted that Section 64-A of the Sale of Goods Act also applies only to a change in law scenario. With regard to the judgments on unjust enrichment, he submitted that these judgments only applied when refund was claimed after taxes were passed on to consumers. By contrast, the learned counsel for the Petitioner submitted that the Petitioner did not specify the excise duty component in the invoices that were issued to the Respondent and, therefore, it cannot be said that the Petitioner had passed on excise duty to the Respondent. As a result, there is no unjust enrichment, in this case, according to the learned counsel for the Petitioner.

12.The affidavit, counter affidavit, documents on record and oral submissions were carefully considered.

13.It is necessary to first consider the maintainability of the Writ Petition. In this regard, the judgment of the Hon'ble Supreme Court in the ABL INTERNATIONAL case is squarely applicable to the instant case. There are no disputed questions of fact in this case and the only question to be decided is whether the Respondent is justified in making the deduction based on the tender conditions and the contract. Secondly, there is no arbitration clause. In effect, the parties have not agreed to an alternative remedy. Moreover, the Writ Petition was admitted on 15.11.2006 and Rule Nisi was issued. For all these reasons, the preliminary objection is overruled.

14.As regards the merits, it is the undisputed position that the Petitioner did not disclose that it was entitled to excise duty exemption on account of its status as a small-scale industry either at the time of bid submission or when the contract was signed. The justification or explanation, in this regard, by the learned counsel for the Petitioner is that there is a limit to the exemption. Accordingly, it was submitted that if the Petitioner had disclosed that it had exemption, the Petitioner would have been required to bear the excise duty component once the limit was breached. However, this explanation is not acceptable because the Petitioner could have disclosed the fact that it had exemption and also specified the limit of such exemption. If the Petitioner had disclosed its entitlement to excise duty exemption, the excise duty component would have been omitted from the landed price of the Petitioner in the break-up provided in the bid and, consequently, the landed price would have been lower. In the alternative, the Petitioner could have specified a higher base price if the intention was to submit a higher price bid notwithstanding the exemption. Instead, the Petitioner failed to disclose that it had excise duty exemption. In this connection, it is also relevant to refer to the requirement in the purchase order that the Petitioner was required to enclose the excise invoice with its supplies.

15. In effect, the Petitioner charged a higher landed price on account of not disclosing the excise duty exemption. The learned counsel for the Petitioner is correct in contending that Clause 19 of the tender condition applies only to a change in law that came into force after the bid was submitted. Nevertheless, Clause 19 evidences the intention of the parties to vary the fixed or landed price if the tax components thereof increase or decrease. Equally, Section 64-A of the Sale of Goods Act enables the seller or buyer, as the case may be, to increase or decrease the price if the taxes specified therein are increased or decreased after the execution of the contract. Once again, this provision does not directly apply in this situation. Nevertheless, by analogy, in view of the non-disclosure of excise duty exemption by the Petitioner, from the perspective of the Respondent, it is a remission in excise duty. Consequently, the Respondent reduced the price paid for the goods. In this connection, it is also relevant to bear in mind that the Respondent is a Government undertaking and it would not be just and equitable to mulct the Respondent with a higher price because of the non-disclosure of the excise duty exemption by the Petitioner. The judgments on 'unjust enrichment' are in the factual context of refund claims. Nonetheless, in principle, in the instant case also, if the Petitioner is paid the excise duty component of the landed price, it would be unjustly benefiting from the non-disclosure of this fact at the time of bid submission or execution of the contract.

16. Therefore, the Impugned Order is not liable to be interfered with in the exercise of supervisory jurisdiction. Therefore, this Writ Petition is liable to be dismissed.

17. In fine, the Writ Petition is dismissed but there should be no order as to costs.

Sd/-
Assistant Registrar (CS-V)

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Sub Assistant Registrar

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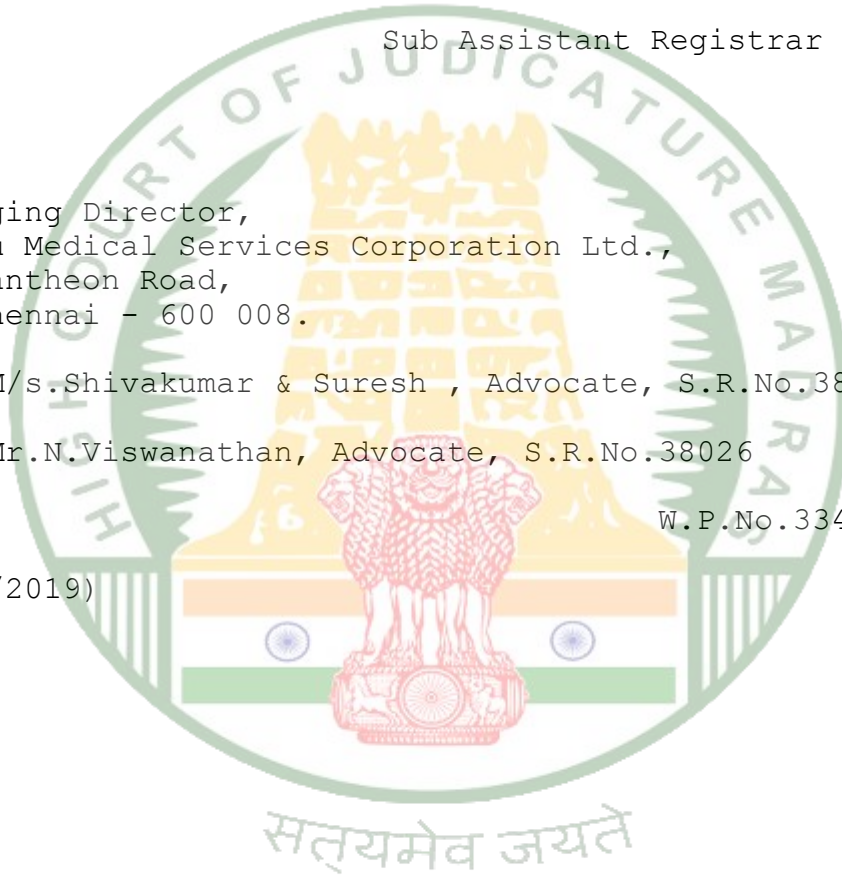
The Managing Director,
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W.P.No.33465 of 2006

SSD(CO)
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