

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE **N.SATHISH KUMAR**

O.P.No.373 of 2012

M/s.Lalitha Impex,
represented by its Proprietrix,
V.S.Lalitha,
No.68/5, Acharappan Street,
Chennai- 600 001.

... Petitioner

Vs.

1.Tamil Nadu Civil Supplies Corporation,
(at the Head Office, TNCSC Ltd),
represented by its Managing Director,
No.12, Thambusamy Road,
Kilpauk, Chennai-600 010.

2.S.Viswanathan,
District Revenue Officer (Retd.) and Arbitrator,
No.474S, Ponnusamy Nagar,
Thiruvannamalai.

... Respondents

PRAYER: Original petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 06.03.2012 passed by the Learned Arbitrator and allow this petition.

For Petitioner : Mrs.Nalini Chidambaram
Senior Counsel
for Ms.C.Uma

For R1 : Mr.S.T.S.Moorthy
Additional Advocate General -IV

ORDER

This petition has been filed challenging the award passed by the Sole Arbitrator.

2.The petitioner has entered into an contract with the first respondent for supply of 400 Metric Tonnes(MT) of Toor Dhall at the rate of Rs.44,300/- net per M.T. It was agreed that the entire quantity should be supplied before 13.12.2018. The undisputed facts are that except 50 metric tonnes of Toor Dhall, remaining 350 tonnes have not been supplied. However, the petitioner sought extension of time for supplying the remaining Toor Dhall at the same rate. Despite, grant of four times extension, supply has not been effected, which resulted in issuing the show cause notice. Ultimately, an order has been passed for forfeiting the security deposit and also seeking compensation for the loss sustained by the first respondent on account of non supplying of the remaining 350 tonnes of Toor Dhall. The Department has invoked the terms of the contract to claim compensation. Aggrieved over the same, the matter has been referred to the Sole Arbitrator in case No.01/2011 dated 06.03.2012. The Arbitrator also considered the issue and in fact passed an Award against the petitioner which has been put into challenge.

2.The learned Senior Counsel appearing for the petitioner mainly contended that having entered into a contract to supply Toor Dhall on or before 13.12.2008, the Department has kept silent and extended the period for supplying the goods, without any reason.

3.The very object and purpose of the contract is to supply the Toor Dhall in a Public Distribution System in an urgent basis. The moment the contractor failed to perform his part of contract, the Department ought to have called for new tender for purchase of the quantity to supply the public, whereas they remained silent during 2008 and till 2009 they granted extension of time to the petitioner to supply the goods as per the contract. The Department has not taken any steps to mitigate the damages.

It is the contention of the learned Senior counsel for the petitioner that if the Department has gone for fresh tender immediately after the contractor failed to supply as per the contract, they would not have been sustained the loss. Therefore, when the Department failed to take any steps to mitigate the damages, the Arbitrator ought not to have held the petitioner solely liable for the entire loss and to that effect the award cannot be sustained in the eye of law. She further submitted that the award

4. Whereas the learned Additional Advocate General-IV contended that the contractor agreed to supply the Toor Dhall within a specific period and failed to do so. The extension was granted only at their request. The Department has granted extension only on condition that the Toor Dhall would be supplied at the same rate. Therefore, merely because extension was granted, it cannot be said that the damages cannot be levied.

5. In order to analyse the above submissions, it is relevant to extract clause-10(i) of the contract, which reads thus:

"10(i). The supplier agrees to complete the supply of 400 M.Ts. of Toor Dhall(Fatka quality) as per Agmark specification [40 M.Ts. at the T.N.C.S.C.godowns in Chennai Region (South) and the balance 360 M.Ts. at the T.N.C.S.C.godowns in Chennai Region (North)] in single spell at any cost within the period as stipulated in conditions 6(iii) of this agreement. The supplier is aware that the purchaser will not consider any extension of time to complete the supply beyond the date of original schedule and the supplier is also not entitled to claim for any extension of time. If the supplier fails to supply the agreed quantity of 400 M.Ts. of Toor dhall (Fatka quality) as per Agmark specification [40 M.Ts. at the T.N.C.S.C. godowns in Chennai Region (South) and the balance 360 M.Ts. at the T.N.C.S.C. godowns in Chennai Region (North)] as per the time schedule fixed under clause 6(iii), it shall be open to the corporation

to cancel the orders for the unsupplied quantity and to purchase the said quantity through limited tender system or purchase the said quantity through any other sources at the prevailing market rates at the risk and cost of the supplier and to claim the financial loss sustained by the corporation in the transaction besides forfeiting the Security Deposit. The supplier agrees to make good the loss and allow the corporation to forfeit the Security Deposit and to terminate the contract due to the failure of the supplier to supply the agreed quantity of 400 M.Ts. of Toor Dhall (Fatka Quality) as per Agmark specification within the stipulated time schedule and to claim consequential loss."

6.The above condition makes it clear that it is open to the first respondent to purchase the quantity through any other sources at the prevailing market rates, at the risk and cost of the supplier, besides forfeiting the security deposit. The petitioner himself is bound to pay the compensation in the event of any loss sustained by the Department.

7.Admittedly, in this case, the first respondent had to purchase the Toor Dhall in open tender in the year 2009 for different value. Such purchase was a result of breach of contract by the petitioner. Though it is submitted by the learned Senior Counsel that the respondent has not taken any steps to mitigate the loss by inviting the tender immediately, it is not in dispute that the petitioner committed breach of contract.

8.It is to be noted that the petitioner himself has sought an extension of time, not once, but four times, undertaking to supply the Toor Dhall at the same rate as agreed in the contract. When the petitioner himself sought extension of time and agreed to abide by the terms of the contract, including the rates fixed in the contract to supply Toor Dhall even on subsequent dates, the question of taking steps by the respondent to invite the tenders from the outsiders, does not arise at all. Therefore, the contention of the learned Senior Counsel in this regard cannot be countenanced. If extension of time is not sought and the petitioner committed breach of the contract, it can be said that the first respondent ought to have taken some steps to mitigate the damages. However, that is not the case of the petitioner, in this case whereas he himself sought extension of time on same terms.

9.Therefore, I find no ground to interfere with the Award passed by the Arbitrator in Case No.01 of 2011 dated 06.03.2012 and, accordingly, this Original Petition is dismissed. No costs.

11.07.2019

Index : Yes/No
Internet : Yes/No
Speaking order / Non-Speaking order

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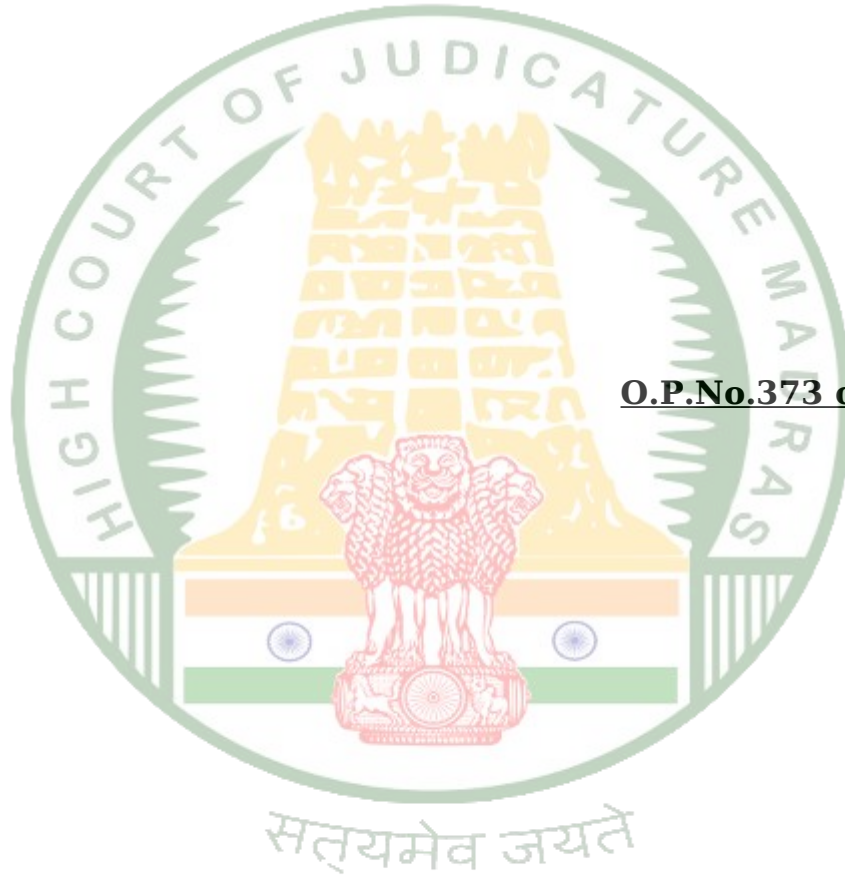
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N.SATHISH KUMAR, J.

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