

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.07.2019

PRONOUNCED ON : 17.07.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.11575 of 2019 and
W.M.P.No.11818 of 2019

M/s.Current Electricals Limited,
Represented by its Director - Operations,
Mr.Hiren M.Botadra
Survey No.184/2 & 213,
Thirumudivakkam Village,
(NEAR SIDCO), Sriperumbudur,
Kanchipuram District,
Chennai - 600 044.

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Petitioner

Vs

1.The Chief Engineer/Transmission,
Tamil Nadu Transmission Corporation Ltd.,
6th Floor, Western Wing,
144, Anna Salai,
Chennai - 600 002.

2.M/s.Axis Bank,
Corporate Banking Branch,
Second Floor No.3 (Old No.2),
Club House Road,
Chennai - 600 002.

...

Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of prohibition prohibiting the first respondent from undertaking any coercive action in relation to the purchase orders in CE/TR/SE/TR.II/ET/A2/ T-1921 /PO. TR:2900 / D.168 /17 / DATED 28.06.2017 CE/TR/SE/TR11/ET/R2/T1989/PO TR: 29 18/D259/17 dated 23/10/17 AND CE/TR/SE/TR.II/ET/A2/T-1993/PO.TR:2949/D.012/18 DATED 04.01.2018 with respect to the petitioner.

For petitioner

:Mr.R.Sivaraman

For 1st Respondent

:Mr.Abdul Saleem, Standing Counsel

For 2nd Respondent

:Mr.V.V.Sivakumar

ORDER

The writ petition filed by M/s.Current Electrical Limited, a small scale industrial unit, against the Tamil Nadu Transmission Corporation Ltd., arise under following facts matrix:-

(i)The petitioner being in the manufacturing and supply of transformers, participated in the tender process floated by the first respondent and was the successful bidder in the 3 tenders for supply of 15, 8 and 30 numbers of transformers of the type 8 MVA,33/11KV. The purchase orders for these three tenders were executed between the petitioner and the first respondent on 28/06/2017, 23/10/2017 and 04/01/2018 respectively. The petitioner has executed Performance Bank Guarantee for two of these contracts. The petitioner has completed the supply of the first purchase order dated 28/06/2017 and 15 transformers supplied by the petitioner has been fully erected and commissioned. The payments for these supply ought to have been made within 30 days from the date of invoice. However, despite commissioning of 15 numbers of transformers on supply of transformers, as per the first purchase order dated 28/06/2017, the first respondent has not paid fully the agreed amount. Still Rs.3,43,12,091/- pending towards the first purchase order. Due to belated payments and failure to pay the balance amount, the petitioner company being a small scale unit, unable to undertake and complete the second and third purchase orders. Since, the first respondent did not pay its due towards first purchase order, the execution of the activities in respect of 2nd purchase order dated 23/10/2017 was affected. The petitioner has informed the first respondent through letters dated 13/02/2019, 01/03/2019, and 22/03/2019 about the unnecessary delay on the part of the first respondent in disbursing the amount of Rs.3,43,12,091/- which has affected their execution of 2nd and 3rd purchase orders.

(ii)In response to these letters, the first respondent has stated that the bills for the 1st purchase order would not be processed at their end as the units ordered (8 and 30 transformers) in the 2nd and 3rd purchase orders dated 23/10/2017 and 04/01/2018 not supplied.

(iii)On receipt of the above response, the petitioner has replied that each purchase order has to taken individually and not collectively as a composite agreement and requested to release the balance amount due under the first purchase order. The first respondent has declined the said request through its letter dated 27/03/2019. Further, the first respondent has also invoked the Performance Bank Guarantee in relation to the 2nd

purchase order lying with the second respondent bank.

2. Under the above circumstances, the petitioner has filed the present writ petition to prohibit the first respondent from taking any coercive action in relation to the second and third purchase orders dated 23/10/2017 and 04/01/2018 respectively.

3. The respondents have filed counters individually in response to the averments made in the petitioner's affidavit.

4. In the second respondent counter, it is stated that, the petitioner has executed the Bank Guarantee No.11650100012928 on 27/12/2017 in favour of the Tamil Nadu Transmission Corporation Ltd., (first respondent) for Rs.21,14,506/- with expiry/claim date as 30/01/2023. The Bank Guarantee was invoked by the first respondent through notice dated 05/04/2019. Accordingly, the amount was paid to the first respondent by the second respondent bank on 12/04/2019. Since, the Bank Guarantee was an unconditional guarantee, the bank is obliged to honour it under law.

5. In the counter affidavit filed by the first respondent, it is stated that, the petitioner has not disclosed the prompt payments made by the first respondent for the proper supply made by the petitioner. The delay in payment was due to non supply of entire accessories for the transformers by the petitioner. The supplies for the first purchase order was done after considerable delay. The petitioner has completed the supply of 15 transformers under the first purchase order only on 22/10/2018. Whereas, as per the contract, the petitioner should have completed the supply within three months from the date of purchase order i.e., before 27/09/2017. While the petitioner has completed the first purchase order with inordinate delay and not commenced the second and third purchase orders even after the time prescribed, action is contemplated as per the terms of the contract. Whereas, the payment for the supplies made by the petitioner under the first purchase order as per the terms of contract, so far payment for 10 transformers paid and payment for the rest of the 5 transformers supplied by the petitioner, the process is underway. Same will be paid immediately after clearances are received.

6. The 3 purchase orders placed by the first respondent with the petitioner, on different dates, are independent to each other. The petitioner by inter connecting the first contract with the rest of the contracts, trying to mislead the Court. The purchase orders grants power to the first respondent to initiate action for recovery from other contracts also, in case of

default by the petitioner, in effecting the supplies. The action of the first respondent enforcing the bank guarantee submitted for the second purchase order for non performance of contract is, perfectly legal and valid.

7.As per the purchase orders, the petitioner has to submit 5% of the order value as security deposit cum performance guarantee (SDPG) within 15 days from the date of receipt of the purchase orders. The writ petitioner has submitted Security Deposit cum Performance Guarantee as per the terms of the contract only, for the first and second purchase orders. For the third purchase order, the petitioner has not submitted the Security Deposit cum Performance Guarantee and had violated the terms of contract.

8.In the counter, the first respondent has pointed out the lapses of the petitioner in honouring the supply in time prescribed and contended that, the issue of disputed facts arising out of contract being involved in this case, the petitioner cannot resort to writ jurisdiction.

9.The petitioner as a rebuttal to the counter has filed a rejoinder. In the rejoinder, it is reiterated that the delay in timely payment by the first respondent for the supplies made by the petitioner has caused the delay in completing the first purchase order, within the time prescribed. The first respondent has paid payment belatedly at an average of 120 days, while, it is expected to be paid within 45 days. Since, the payment for first purchase order was drastically delayed, the completion of supply also proportionately delayed. Also, the delay in commencement of supply for the second purchase order and inability to give Security Deposit cum Performance Guarantee for the third purchase order was only on account of the first respondent. For this, the petitioner alone cannot be blamed and penalised by invoking the bank guarantee given for the second purchase order. The respondent cannot trifurcate and unify the 3 purchase orders according to their convenience. For delay in supplies, the first respondent has collected liquidated damages as per the contract by deducting the liquidated damages from the bills. The petitioner has accepted the same without protest. When the first respondent has deducted liquidated damages for late supply, it is bound to pay interest for belated payment beyond 45 days as per Micro Small and Medium Enterprises Development Act, 2006 (In short, 'MSME act').

10.The first respondent cannot withhold the payment beyond 45 days and deprive interest to the petitioner by taking advantage of the ambiguous clause in the contract that they have

to pay the bills "within reasonable time". Therefore, the petitioner pray for immediate clearance of the pending bills, return of retention amount and interest for the delayed payment beyond 45 days and has placed its wish not to continue with supplies for 2nd and 3rd purchase orders. Hence, to prohibit the first respondent from taking any coercive steps against the petitioner in respect of second and third purchase orders, the petitioner is before this Court, with this writ petition.

11. Heard the learned counsel for the petitioner; learned Standing Counsel for the first respondent and the learned counsel for the second respondent. Affidavit, counter-affidavits, rejoinder and records annexed as typed set by the respective parties, perused.

12. The petitioner being the successful bidder, had entered into agreement with the first respondent on three different dates detailed as under:-

S.No	Purchase Order ("PO")	Specification No.	Description	Quantity	Date of Purchase Order
1	CE/TR/SE/TR.I I/ET/A2/T- 1921/PO.TR:29 00/D.168/17	T-1921	8MVA, 33/11KV Power Transformer	15	28.06.20 17
2	CE/TR/SE/TR.I I/ET/A2/T- 1989/PO.TR:29 18/D.259/17	T-1989	8MVA, 33/11KV Power Transformer	8	23.10.20 17
3	CE/TR/SE/TR.I I/ET/A2/T- 1993/PO.TR:29 49/D.012/18	T-1993	8MVA, 33/11KV Power Transformer	30	04.01.20 18

13. As per the contract, the time prescribed for completion of contract was 3 months. Whereas, admittedly, the petitioner has completed the first purchase, dated 28.06.2017 only on 22/10/2018. For the second purchase order dated 23/10/2017, it has executed security deposit cum performance guarantee (SD cum PG) but not commenced supply. For the third purchase order dated 04/01/2017, the petitioner has not even executed Security

Deposit cum Performance Guarantee (SD cum PG).

14. Accusation of serious breach of contract is made between the parties for the delay in executing the contract and delay in payment. As per clause 9 of the contract, the time limit for completion of supply is prescribed as 3 months. Clause 9.4 says, the delivery period will not normally be extended. Clause 9.6 says, in case of delivery of main equipment and accessories in piecemeal, for delayed delivery, liquidated damages will be levied.

15. In case of failure to execute the contract, clause 15.0 of the contract, TANTRANSCO can impose liquidation damages and forfeit the security deposit:-

"15.0. FAILURE TO EXECUTE THE CONTRACT:

Suppliers failing to execute the order placed on them to the satisfaction of the TANTRANSCO under terms and conditions set forth therein will be liable to make good the loss sustained by the TANTRANSCO, consequent to the placing of fresh orders elsewhere at higher rate, i.e., the difference between the price accepted in the contract already entered into and the price at which fresh orders have been placed. This is without prejudice to the imposition of liquidated damages and forfeiture of security deposit."

Clause 27.0 empowers the TANTRANSCO recoveries of due in the following manner:-

"27.0. RECOVERIES OF DUES:

The TANTRANSCO is empowered:

(a) To recover any dues against this contract is any bills/security deposit/earnest money deposit due to the suppliers either in this contract or any other contracts with TANTRANSCO/TANGEDCO.

(b) To recovery any dues against any other contract of the suppliers with TANTRANSCO/TANGEDCO with the available amount due to the suppliers against this contract."

In case of dispute, clause 28.0 fixes the jurisdiction as under:-

"28.0.JURISDICTION FOR LEGAL PROCEEDINGS.

No suit or any proceedings in regard to any matter arising in respect of this contractor shall be instituted in any court, save in the High Court, Madras, City Civil Court at Chennai or at the Court of small causes at Chennai. It is agreed that no other court shall have jurisdiction to entertain any suit or proceedings, even though, part of the cause of action might arise within their jurisdiction. In case, any part of cause of action might arise within the jurisdiction of any of the Courts in Tamil Nadu and rest within the jurisdiction of courts outside the Tamil Nadu, then it is agreed between the parties that such suits or proceedings shall be instituted in a court within the State of Tamil Nadu and no other Court outside the state of Tamil Nadu, shall have jurisdiction even though any part of the cause of action might arise within the jurisdiction of such courts.

The supplier shall furnish an undertaking in a non-judicial stamp paper of value not less than Rs.80/- agreeing to the above condition."

16. When the disputed facts are brought to the notice of this Court in the course of submission through counter affidavit and rejoinder, it is appropriate to direct the parties to agitate their respective grievances before the Civil Court which the parties have explicitly agreed.

17. As far as the payment due towards supply under first purchase order, the first respondent has given undertaking in the counter that, it will be paid in due course, after receiving clearance. So far as invocation of the bank guarantee executed by the petitioner for the performance of 1st purchase order, it has been already encashed by the first respondent. Hence, nothing survives. Regarding the performance of 2nd and 3rd purchase orders, the petitioner has expressed its intention to

rescind the contracts and seeks protection of cocercive action by the first respondent.

18.Taking into consideration of the rival submissions and the terms of contract, since, the matter involves disputed facts and requires adjudication by trial, the relief sought in the writ petition cannot be granted. In the said circumstances, to arrive at amicable settlement without resorting to adversarial adjudication, the petitioner is given liberty to give a representation for recession of contract and other reliefs as mentioned in his rejoinder. The first respondent on receipt of representation from the petitioner, shall consider the same and take decision. If, the parties fail to arrive at amicable settlement, then both are at liberty to proceed as per clause 28 of the contract. The petitioner shall give his representation within 10 days from the receipt of a copy of this order. Thereafter, within 2 months, the first respondent shall take decision and communicate the same to the petitioner, till such decision, the respondents shall not resort to any coercive action against the petitioner.

19.With the above observations, the writ petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

सत्यमेव जयते

jbm

To

1.The Chief Engineer/Transmission,
Tamil Nadu Transmission Corporation Ltd.,
6th Floor, Western Wing,
144, Anna Salai,
Chennai - 600 002.

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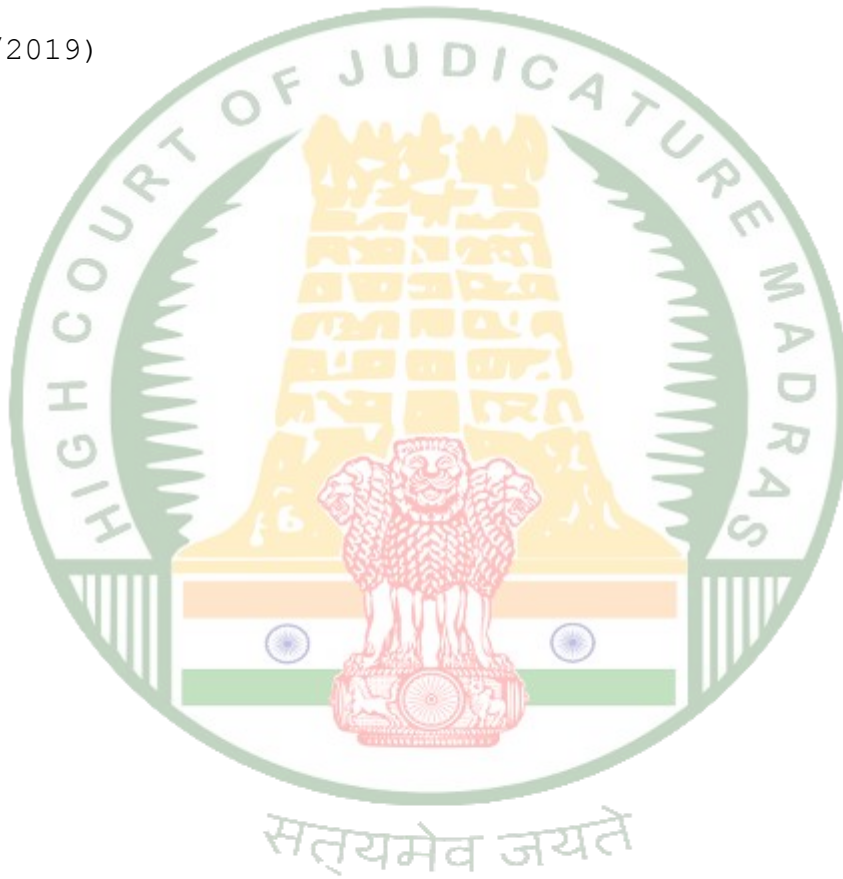
2.M/s.Axis Bank,
Corporate Banking Branch,
Second Floor No.3 (Old No.2),
Club House Road,
Chennai - 600 002.

+1cc to Mr.V.V.Sivakumar, Advocate SR.No.61680

+1cc to Mr.Abdul Saleem, Advocate SR.No.61743

W.P.No.11575 of 2019

PP (CO)
GMY (07/08/2019)



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