IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 07.06.2019

CORAM
THE HONOURABLE DR. JUSTICE VINEET KOTHARI
and
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.A. No.1753 of 2019
and
C.M.P. No.11875 OF 2019

Elekta Limited,
A Company duly registered
under the laws of United Kingdom,
Having its address at Linac House,
Fleming Way,
Crawley, West Sussex,
RH10 9 RR, United Kingdom,
Rep. by its authorised representative
Mr.Chandrashekhar,
office at 12 th Floor,
Vatika Professional Point,
Sector 66, Golf Course,
Extension Road,
Gurgaon, Haryana 122 001. ..Appellants

Vs

1.The Government of Tamil Nadu,
Department of Health and Family Welfare,
Secretariat, Chennai 600 009,
Rep. by its Principal Secretary.

2.Tamil Nadu Medical Services Corporation Limited,
A Government of Tamil Nadu Undertaking,
with its registered office at
417, Pantheon Road,
Egmore, Chennai 600 008,
Rep. by its Managing Director.

3. Varian Medical Systems Intl. AG,
A company duly incorporated
under the laws of Switzerland,
Hinterbergstrasse 14 CH 6330,
Cham, Switzerland.

4.Varian Medical Systems,
International (India) Private Limited,
A Company incorporated under the Companies Act, 1956,
Kalpaturu Square, Unit No.33,
2nd Floor (Level 3), Off Andheri Kurla Road,
Andheri (East), Mumbai 400 059.

5.Elekta Medical Systems India Private Limited,
A Company incorporated under the Companies Act, 2013,
having its registered office at
6/41, Sunder Kiran Building,
209 WEA Karol Bagh,
New Delhi 110 005. ..Respondents

PRAYER: Appeal is filed under Clause 15 of Letters Patent Act, to set aside the order dated 12.04.2019 passed by the learned Single Judge in W.P. No.1193 of 2019 and consequently forbear the respondent No.2 from proceeding under any order of contract awarded to or placed on the Respondent No.3 or Respondent No.4 under tender No.246/LINAC/TNMSC/ ENGG/2017 dated 12.12.2017, including LOAs (Letter of Awards) said to have been placed on 27.11.2018 and 30.11.2018 and the order said to have been placed on 05.12.2018.

For Appellant : Mr.Satish Parasaran
Senior Counsel
for M/s.Bharadwajaramasubramaniam

For Respondents : Mr.Vijay Narayan for R1 and R2
Advocate General

Mr.P.S.Raman for R3 and R4
Senior Counsel
for M/s.Abishek Jenasenan

JUDGMENT

[Judgment of the Court was delivered by DR.VINEET KOTHARI, J.]

The appellant, Elekta Limited, a Company registered in United Kingdom, has filed the present intra court appeal aggrieved by the order of the learned Single Judge dated 12.04.2019, dismissing the writ petition in W.P.No.1193 of 2019 on the ground of availability of alternative remedy by way of appeal available to the appellant under Section 11 of the Tamilnadu Transparency in Tenders Act, 1998.

2.The facts giving rise to the present appeal, in brief are hereunder:

The respondent State through its Undertaking, Tamilnadu Medical Services Corporation Limited (TNMSC) invited Tenders for import and purchase of "Linear Accelerator", the medical equipment to diagnose and cure the dreaded disease of cancer and for the import and purchase of various such machines of different versions, the tenders were floated on 12.12.2017. Since there are only two manufacturers of these equipments in the world presently viz., the present appellant M/s. Elekta

Limited, UK and the respondent, Varian Medical System International AG, Switzerland, both the said parties gave their tenders for the said machines to the Respondent No.2.

3.The dispute which in narrow compass, for the purpose of the present case, arose is that according to the present appellant, the Company, which lost in the tender process and the contract was awarded in favour of Varian Medical Systems is that upon the bids being opened by the Respondent No.2 for the equipment in the category of Schedule IV, which is manufactured by the Respondent M/s.Varian Medical Systems under the brand name "True Beam" whereas the same machine of version Schedule IV is manufactured as "Versa HD" by the present appellant, the bid of the present appellant was lower and thus, the appellant, being the L-1 Tenderer for the said equipment was entitled for the contract for the said Schedule IV machine or atleast a prior right for further negotiations for the supply of other versions of the machines along with the said version 'Versa HD' but the Respondent No.2, TNMSC, without informing the appellant/petitioner and inviting them for such further negotiations, awarded the contract of the said Schedule IV version of the said machines in favour of the Respondent No.3 Company, M/s.Varian Medical Systems, Switzerland and therefore, a challenge was laid to the same before the learned Single Judge by way of the present writ petition, which came to be dismissed by the learned Single Judge by the order impugned before us.

4. Learned Senior counsel for the appellant/petitioner, Mr.Satish Parasaran, taking us through the provisions of the aforesaid Transparency Act of 1998, submitted that since no order while awarding the contract to the Respondent No.3 was passed and served upon the appellant/petitioner, there was no question of the appellant/petitioner availing the alternative remedy of appeal under Section 11 of the Act and and even though the learned Single Judge from the material placed on record found that the appellant was the lowest bidder for the 'Versa HD' Schedule IV item, the said contract for all the versions was awarded in favour of the third respondent and the same was upheld by the learned Single Judge leaving the appellant/petitioner to avail the remedy which was not at all efficacious in facts of the present case. He submitted that had the petitioner/appellant been called in the further negotiations process held by the 2nd Respondent for Schedule IV equipment, the petitioner/appellant could have offered further lower price for the said machine as well as for other machines, but only the Respondent No.3 was allowed to negotiate with the Respondent No.2, TNMSC and therefore, the contract awarded in favour of the third respondent Company deserves to be set aside.

5. Per contra, the learned Advocate General Mr.Vijay Narayan, appearing for the State justified the said action of

the Respondent TNMSC and urged that it is for the first time in the history of country that the State of Tamilnadu was able to persuade the only two manufacturers of these advance technology machines for treatment of the cancer to provide free treatment to the cancer patients in the State of Tamilnadu and therefore to buy the said machines at the best possible price, they floated the said tender in question and both the manufacturers gave their tenders of their respective rates for all the four versions of the said machines. He submitted that State is to import and purchase about 9 such machines to be placed in 8 Government Hospitals throughout the State so that the free of cost treatment could be given by the Government to the cancer patients in the State. He submitted that in view of the overiding public interest, no interference be made with the said contract under Article 226 of the Constitution of India, the scope of which as per the settled legal position, is otherwise also very narrow and limited.

6. The learned Advocate General further submitted that it is not at all correct to say that the present appellant/petitioner was not informed about the lowest bid given by the Respondent No.3 company. While it was called for negotiations with respect to first three Schedule items under the process of the said negotiations, the third respondent had even offered to give a lower price for Schedule IV equipment known as 'True Beam', which fact was duly informed by email to the appellant by TNMSC email dated 29.09.2018 at 05.48 p.m. addressed to one Mr.Muralidharan, Rajaram, Santhosh, Regi, etc., who were negotiating on behalf of the appellant company in India. The said email was not responded by the appellant company for quite long and the first communication, which is available on record after that is the letter dated 05.12.2018 after 2 months of so written by the appellant company to the second respondent TNMSC, which refers to a meeting of the representative of the appellant Company and TNMSC on 28.11.2018 in paragraph 2 of the said letter. It also refers to an earlier letter dated 09.10.2018, which is not available on record and was not placed from either side and some subsequent discussions held on 28.11.2018, in which the appellant company expressed its desire of a long term partnership with TNMSC in cancer treatment across the State. In the said letter, it also offered a special bulk price for 8 Units of "Versa HD" with accessories in Schedule 4 @ US$ 17.088 million against an earlier price of US$ 17.728 million. The contract in favour of the third respondent company was however awarded by TNMSC on 30.11.2018 after the meeting of the appellant representatives of TNMSC on 29.11.2018 and before the communication dated 05.12.2018. The learned Advocate General also pointed out that vide communication dated 12.12.2018, the Respondent No.2 TNMSC informed the appellant Company in India office at Gurgaon, Haryana that the contract has been awarded in favour of the third respondent Company but

notwithstanding the same to ensure maximum value for money for the public funds, the final offer given by the appellant company on 06.12.2018 was compared with the offer of the Respondent No.3 company, but that too was still found to be on the higher side. The learned Advocate General submitted that this communication was nothing but could very well be treated as an order under Section 10(6) of the Act, against which an appeal clearly lies under Section 11 of the said Act and therefore, the learned Single Judge was justified in relegating the appellant/petitioner to the alternative remedy of appeal under Section 11 of the Act by way of the impugned order dated 12.04.2019.

7. Mr.P.S.Raman learned Senior Counsel appearing for the Respondent No.3 Company submitted that after due negotiations with the Respondent Company, which lowered its price in all the version of the equipment and gave a package deal collectively at lesser price to the State for supply of machines of all versions for treatments of cancer, the contract was awarded in favour of the respondent company and in pursuance of the said purchase orders, the machines have already landed in India and subject to customs clearance, they are likely to be released and installed in specified places in Government Hospital in the near future. Learned Senior Counsel emphasized that the price of the "True Beam" Schedule IV equipment was also made known to the appellant company in the communication of the Respondent No.2, TNMSC through its email dated September 29.11.2018 at 05.48 p.m., wherein in the first paragraph itself, it is stated that Respondent No.3 has offered the model 'True Beam' at their basic equipment rate of the Schedule I and further discounts in their quoted rates for other accessories required for using 'True Beam', and since the price for Schedule I item was known to the appellant/petitioner Company as well, upon opening of the bids therefore, in pursuance of the communication of TNMSC dated 29.09.2018, the appellant/petitioner Company, if at all, it was interested, could very well offer a lower price than the said basic equipment rate of Schedule I equipment for 4th Schedule item "Versa HD". The bid price for Schedule IV equipment could also be compared with the successful bidder Respondent No.3 but the petitioner/appellant Company maintained a silence and did not respond to the mail of the Respondent No.2 for a quiet long time and the only communication after the said email dated 29.9.2018, appears to be the letter of the Company dated 05.12.2018 which also refers the meeting dated 29.11.2018, for the first time viz., after two months. Even though the said mail dated 05.12.2018 refers letter dated 09.10.2018 purportedly by the appellant/ petitioner company to the Respondent No.2 but that is mysteriously not placed on record. The entitlement of the appellant/petitioner Company to be invited for further negotiations for Schedule IV item being L-1, was very well satisfied. Learned Senior Counsel contended that upon the mail

dated 29.09.2018 of TNMSC, it was open to the appellant/petitioner to enter into further negotiations with the Respondent No.2 with or without the presence of the Respondent No.3, but it did not choose to do so and even the bulk offer of price in the communication dated 05.12.2018 i.e, after about two months, was found by the Respondent No.2 TNMSC to be higher than the offer of the successful bidder Respondent No.3. Therefore, there is nothing wrong in the Respondent No.2 TNMSC, accepting offer of the Respondent No.3 company.

8. Having heard the learned counsel for the parties, we are of the considered opinion that the present appeal of the appellant does not merit acceptance and the same deserves to be dismissed. The reasons are as follows:

i) In the narrow and limited jurisdiction of this Court under Article 226 of the Constitution of India, the hair splitting exercise as is canvassed to be undertaken by the court in the said tender process, cannot be so undertaken in view of the settled legal position in the catena of judgments and we do not reiterate the same here.

ii) The only point and thing which requires our consideration is as to whether a remedy by way of appeal left open for the appellant/petitioner under section 11 of the Act was adequately efficacious remedy, available to the appellant Company or not. We find it to be there as available to the appellant Company.

9. We refuse to express any opinion on the merit of the contentions raised before us. The communication of Respondent No.2 TNMSC dated 12.12.2018 is nothing, but as rightly contended by the learned Advocate General, the said communication to the Appellant Company not only conveys the decision of the said Respondent No.2 to award the contract in favour of Respondent No.3 Company but also assigns reasons for the same. The revised or lowered price offered by the appellant/petitioner in its communication dated 06.12.2018, in pursuance of the meeting held on 29.11.2018, was compared with the offer of Respondent No.3, even after the award of the contract in favour of the Respondent No.3, for ensuring value for money of the the public funds, for which there is no doubt that the State is supposed to ensure and safeguard, ex-post facto, in terms of the total life cycle cost, but revised and reduced price offered by the Appellant was found to be on the higher side. In view of this, in the wisdom of Respondent No.2, it was felt that the contract already awarded on 30.11.2018 was justified. If at all the appellant/petitioner Company was aggrieved by the said decision, even then, it had the remedy by way of appeal against the said communication dated 12.12.2018 before the competent Court under Section 11 of the Act. The Rules appended to Act of 1998 do not

prescribe any particular format for the order under Section 10 (6) of the Act. Section 10(6) of the Act provides that the Tender Accepting Authority proposing to accept the tender as per the provisions of section, shall pass orders accepting the tender together with reasons for such acceptance. The communication dated 12.12.2018 precisely contains the reasons for such acceptance in favour of the third respondent Company. Therefore, we are of the opinion that the said communication dated 12.12.2018, duly constituted an order under Section 10(6) of the Act, which if the appellant/petitioner Company chose, could have appealed against before the competent authority.

10. We need not reiterate the settled legal position that the remedy under Article 226 of the Constitution of India cannot be availed, if there is an adequate alternative and efficacious remedy available to the petitioner, who approach the Court under Article 226 of the Constitution of India.

11. We do not therefore propose to discuss the case of either side on merits and details, lest, we are conscious, that even now, if the appellant/petitioner Company chooses to avail the remedy under Section 11 of the Act, our observations may affect the same adversely. Therefore, whatever the observations or contentions of parties noticed hereinabove are just for the purpose of upholding the operative portion of the order of the learned Single Judge and to clarify that the communication dated 12.12.2018 constitutes an order under Section 10(6) of the Act. We do not propose to say anything beyond that.

12. In view of the aforesaid, we do not find any merit in the present appeal. With the aforesaid reasons, the present appeal is liable to be dismissed and the same is dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

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+2ccs to Mr.Abishek Jenasenan, Advocate, S.R.No.45986
+1cc to M/s.Shivakumar, Advocate, S.R.No.45699
+3ccs to M/s.Bharatwaza Ramasubramaniam, S.R.No.45917

W.A.No.1753 of 2019

KAN(CO)

RRS(26/06/2019)