IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2019

CORAM:

THE HON'BLE MR. JUSTICE T.RAJA

W.P.No.8911 of 2014

M/s.Himachal Aluminum and Conductors,
A Partnership Firm,
Rep. By its Partner Mrs.Sharada Mahajan,
GT Road, VPO Mohtli (Near Pathankot),
Kangra District, Himachal Pradesh - 176 404. .. Petitioner

Vs

1. The Chairman & Managing Director,
   Tamil Nadu Generation and Distribution
   Corporation Limited,
   6th Floor, Western Wing,
   NPKRR Maaligai, 144,
   Annasalai, Chennai - 2.

2. The Superintending Engineer,
   Tamil Nadu Electricity Board,
   6th Floor, Western Wing,
   NPKRR Maaligai, 144,
   Annasalai, Chennai - 2.

3. The Chief Manager,
   Materials Management,
   6th Floor, Western Wing,
   NPKRR Maaligai, 144,
   Annasalai, Chennai - 2. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus to call for the records pertaining to the order passed by the third respondent on 17.12.2013 in Lr.No.CE/MM/SE/MMI/EEC/AEE6/F, RC No.52, dated 06.08.2011/D.214/13 and quash the same and consequently direct the respondents to reimburse the forfeited bank guarantee dated 24.08.2011 vide Bank Guarantee No.0645ILG00341 along with an interest of 24% p.a. from the date of bank guarantee.

For Petitioner : Mr.A.Abdul
for M/s.Nathan and Associates
For Respondents: Mr.P.R.Dhilipkumar, Standing Counsel

ORDER

The present writ petition is directed against the impugned letter dated 17.12.2013 issued by the third respondent / the Chief Manager, Material Management, Chennai, short-closing the Contract No.52, dated 06.08.2011, assigned to the petitioner and imposing the penalty to the tune of Rs.2,19,32,458/.

2. Learned counsel appearing for the petitioner submitted that the petitioner Company was incorporated in the year 2008 vide a partnership deed dated 20.09.2008 duly executed between the partners and thereafter, they have commenced their business from the said date itself as they have business expertise in the field of manufacturing of Aluminum Conductors, Aerial Bunched Cables, Electrical Cables, Earth Wires and Allied Produced, and they have been engaging themselves in several Governmental contracts.

3. Whileso, the respondents 2 and 3 have issued a tender for procurement of 7/3.15mm AAA Conductor under specification M51/2010-11. Subsequently, as the petitioner Company has expertize in such filed, they have participated in the tender process and became successful and thereby the contract was also signed on 06.08.2011. Finally, as per the terms and conditions of the contract, the petitioner had produced a Bank Guarantee to the tune of Rs.45,68,000/- from Punjab National Bank, Damtal, Himachal Pradesh, on 24.08.2011, as the value of the materials was to the tune of Rs.9,13,59,713/- and the receipt of such Bank guarantee was also confirmed by the third respondent.

4. Continuing further, learned counsel for the petitioner argued that the petitioner was also asked to give the schedule for the supply of the above said materials and the petitioner, vide letter dated 19.09.2011, stated that they would commence supply of materials within 15 days from the date of receipt of Purchase Order and complete the delivery in 12 equal monthly installments and the delivery of materials will be effected on time provided TNEB release the payment on time and on priority basis. It is also further stated in their reply that since they are covered under the Micro, Small and Medium Enterprises Development Act (in short “MSMED Act”), the maximum period of payment for MSME is 45 days. Therefore, after delivering the materials as per the terms and conditions of the tender, on 22.11.2012, the petitioner had sent the payment schedule for the supply made, however, the TNEB had failed to make the payment in time and they have made the payment only after a period of 4-5 months from the date of supply, as a result, they were put to financial hardship and thereby they

were not able to purchase the raw materials to run the Unit. Thereafter, although the petitioner took various steps to carry forward with the contract, the monetary crisis had arisen like a boulder for procuring the raw materials and finally, the third respondent, vide communication dated 21.03.2013, stated that the Conductor supplied earlier was urgently required for effecting agriculture and LT improvement works and thereby the petitioner was also directed to comply with the supply of materials within 15 days, failing which, the respondent would terminate the contract without notice. On receipt of the same, the petitioner, vide letter dated 06.04.2013, setting out the grievances faced by their firm, sought for release of payment. However, the third respondent, without considering the plight of th petitioner, indiscriminately short closed the contract on 17.12.2013 and the respondents had also calculated the recovery to the tune of Rs.2,19,32,458/-. This apart, the petitioner was also banned from participating in the tender conducted by the respondents for a period of three years for no fault of them.

5. Concluding his argument, learned counsel for the petitioner argued that the petitioner is governed under the MSMED Act and therefore, the delay in making payment would attract interest as adumbrated in Clause 16 of the MSMED Act, however, the respondents have never responded to the communication sent by the petitioner and therefore, without giving any such reply to their various representations, the third respondent ought not to have short closed the contract.

6. A detailed counter affidavit has been filed by the third respondent. Learned Standing Counsel appearing for the respondents submitted that after the petitioner took part in the tender, it was finalized and Rate of Contract (RC) order had also been issued to the petitioner Company vide letter dated 06.08.2011, for supply of 3750 Kms. of 7/3.15 mm AAA Conductor to the tune of Rs.9,13,59,713/-. As per the terms and conditions of the Purchase Order, the Company had also submitted its Bank Guarantee towards Security Deposit for an amount of Rs.45,68,000/-, executed by the Punjab National Bank, Himachal Pradesh, valid upto 22.08.2013. As per the schedule of supply of Conductors, the petitioner Company had to supply the Conductor as stated below:-

> "Commencement period 15 days from the receipt of P.O. and completion in 12 equal monthly installments.
>
> In the terms & conditions of the P.O., it had been mentioned that after receipt of materials at respective field stores, the payment will be made within reasonable time provided the Company furnished the relevant documents (Invoice,

SDBG, etc.).”

After reading the terms and conditions, the petitioner Company had accepted the purchase order, as per which, they should supply 3750 Kms within 30.08.2012 at the rate of 312.500 km per month. But, the petitioner had supplied only 497.096 km belatedly against the RC order issued by the respondents. Therefore, the respondents wrote letters on 17.11.2012, 14.02.2013, 21.03.2013 and 16.05.2013 requesting to supply the balance km of materials immediately, but, the petitioner Company had failed to supply the materials thereafter. Although there was no violation of contractual conditions at any point of time by the respondents, the petitioner had violated the same and not supplied the materials in time and thus, it has caused loss to TANGEDCO in view of purchase of Conductors at a higher rate during the subsequent tenders. Without event supplying the materials as agreed, they have insisted the respondents to release the payment before supply of materials by invoking the provisions under the MSMED Act. Their right to seek payment will arise only after supply of materials as per the delivery schedule, therefore, the impugned order passed by the third respondent short-closing the contract given to the petitioner Company is perfectly valid in law as they have admittedly violated the terms and conditions of Purchase Order.

7. Adding further, it is submitted that since the petitioner Company had not taken any step for supplying the materials, final show cause notice dated 16.05.2013 was also issued stating that (a) short closing of the RC order for non-execution of the contract; (b) levy of suitable penalties as per the terms and conditions of the Rate of Contract Order; (c) banning of the firm for a period of 3 years from participating in future tenders of TANGEDCO, TANTRANSCO and TNEB Ltd. Moreover, as per the Payment Clause 5.0 of Section V, 95% of payment for the supply of 497.096 kms of 7/3.15mm AAA Conductor has been made to the Firm, and the balance 5% will be paid only after closure of the Rate of Contract Order and after deciding the price variations. Therefore, taking note of the fact that the petitioner Company did not supply the materials within the delivery period as stated in the Purchase Order, the TANGEDCO had terminated the Rate of Contract Order on 17.12.2013 as per Clauses 12.0, 13.0 & 14.0 of Annexure-I. Consequently, penalty was also imposed on them to the tune of Rs.2,19,32,458.07/- as per the LD clause of the Purchase Order. The above terms and conditions have been accepted by the petitioner Company before receiving the Purchase Order, therefore, now, they cannot question the same.

8. Continuing further, learned Standing Counsel argued that as per Clause 8.0 dealing with Raw Materials, the supplier/petitioner shall make their own arrangement to purchase

the necessary raw materials required for the manufacture of the Conductors ordered and Aluminium Alloy Rod used for the manufacture of Conductor shall be purchased/bought from M/s.Bharat Aluminium Company Limited and M/s.HINDALCO Industries Limited. But, they have failed to comply with the said condition and on the contrary, they have purchased the same from M/s.NALCO and this was their first breach of condition. As the petitioner had accepted to supply 312.500 km. per month, at no point of time, they had executed that work in any one of the month. Therefore, the impugned order has been rightly passed short-closing the contract assigned to the petitioner Company.

9. This Court also is able to see that the petitioner Company had entered into the Contract with the respondents/TNEB on 06.08.2011 with a condition that they should make their own arrangement to purchase the necessary raw materials required for the manufacture of the Conductors ordered and the Aluminium Alloy Rod used for the manufacture of Conductor shall be purchased only from M/s.Bharat Aluminimum Company Limited and M/s.HINDALCO Industries Limited. But, in breach of the said condition, the petitioner Company had purchased those materials from M/s.NALCO.

10. Yet another violation of the condition imposed on the petitioner was that they should supply 3750 kms of 7/3.15 mm AAA Conductor at the rate of 312.500 km per month, but, on perusal of the records available before this Court, it is seen that the petitioner has not supplied any such quantity in any one of the months. On the contrary, all the time, the petitioner Company was asking the respondent/TNEB to release the payment. For better appreciation, Clause 8.1 of the Purchase Order is extracted below:-

> "8.0 Raw Material:
>
> 8.1. The supplier shall make their own arrangement to purchase the necessary raw materials required for the manufacture of the conductors ordered. The Aluminium Alloy rod used for the manufacture of conductor shall be purchased/brought from the following primary producers:
>
> 1.M/s.Bharat Aluminium Company Limited
>
> 2.M/s.HINDALCO Industries Limited
>
> Invoices for the purchase of raw materials from the above primary producers shall be furnished for each consignment of conductor to be supplied along with the manufacturers test report for verification."

11. A bare reading of Clause 8.1 of the Purchase Order makes it clear that the petitioner Company shall make their own

arrangement to purchase the necessary raw materials required for the manufacture of the Conductor ordered and therefore, without complying with such condition for supply of materials, it is not open to them to say that the petitioner Company is covered under the MSMED Act and hence, on receipt of payment only, the petitioner Company will execute the contract. To substantiate such contention, they have not placed any such proceeding before this Court. Therefore, when the petitioner repeatedly violated the conditions of contract, I do not find any merit in this writ petition.

12. Thus, for the reasons stated above, the writ petition fails and the same is dismissed. No Costs. M.P.No.2 of 2014 is closed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To

1. The Chairman & Managing Director,
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   6th Floor, Western Wing,
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   Annasalai, Chennai - 2.

+1 CC to M/s. Nathan & Associates sr 97897
+1 CC to Mr.P.R.Dhilipkumar, Advocate sr 97270.

W.P.No.8911 of 2014

RP(CO)
SP(26/02/2020)