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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.11.2021

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.11117 & 11118 of 2011 and
M.P.Nos.2, 2, 3 & 3 of 2011

M/s.Ultra Tech Cement Ltd.,
Arakkonam Cement Works,
Chitteri Post,
Arakkonam Taluk 631 003,
Vellore.

.. Petitioner in both WPs

..Vs..

1.The Tamil Nadu Electricity Board,
Rep. by its Chairman,
No.800, Anna Salai,
Chennai 600 002.

2.The Chief Engineer,
Civil Designs,
Tamil Nadu Electricity Board,
3rd Floor, NPKRR Maaligai,
No.144 Anna Salai, Chennai 600 002.

3.The Chief Engineer,
Tamil Nadu Electricity Board,
North Chennai Thermal Power Station,
North Chennai - 600 120.

.. Respondents in both WPs

PRAYER in WP.No.11117 of 2011: Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the entire records of the 3rd respondent in Lr.No.CE/NCTPS/SE/M.I/CNTPS/EE/AHP/F.FAM/D-1612/09 dated 14.08.09; Lr.No.CE/NCTPS/SE/M.I/NCTPS/EE/AHP/F.FAM/D.159/10 dated 23.01.10; Lr.No.CE/NCTPS/SE/M.I/NCTPS/EE/AHP/ F.FAM/D2276/10 dated 13.10.10; Lr.No.CE/SE/M.I/NCTPS/EE/AHP/ F.FAM/D2907/10 dated 31.12.10 and the final demand notice in Lr.No.CE/SE/M.I/NCTPS/EE/AHP/F.FAM/D636/10 dated 29.03.11 calling upon the Petitioner to remit immediately the entire penalty amount for the period from 01.04.2008 to 28.02.2011 and quash the same as illegal and arbitrary and consequently direct the 1st Respondent to issue appropriate instructions to the 3rd Respondent to strictly comply with the terms of the agreement between parties and not to levy any penalty for short collection.



PRAYER in WP.No.11118 of 2011: Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the entire records of the 3rd respondent in Lr.No.CE/NCTPS/SE/M.I/NCTPS/EE/AHP/F.FAM/D-1612/09 dated 14.08.09; Lr.No.CE/SE/M.I/NCTPS/EE/AHP/F.FAM/D.162/10 dated 23.01.10; Lr.No.CE/SE/M.I/NCTPS/EE/AHP/F.FAM/D2275/10 dated 13.10.10; Lr.No.CE/SE/M.I/NCTPS/EE/AHP/F.FAM/D2906/10 dated 31.12.10 all of which were confirmed and formed part of the final demand notice in Lr.No.CE/SE/M.I/NCTPS/EE/ AHP/F.FAM/D633/10 dated 29.03.11 of the 3rd respondent calling upon the Petitioner to remit immediately the entire penalty amount for the period from 01.04.2008 to 28.02.2011 and quash the same as illegal and arbitrary and consequently direct the 1st Respondent to issue appropriate instructions to the 3rd Respondent to strictly comply with the terms of the agreement between parties and not to levy any penalty for short collection.

(In both WPs)

For Petitioner : Mr.Rahul Balaji

For Respondents : Mr.Abdul Kalam

Standing Counsel for TANGEDCO

COMMON ORDER

The demand notice issued by the respondent TANGEDCO invoking the terms and conditions of Memorandum of Understanding executed at Headquarters/TNEB with the petitioner company and the TANGEDCO is under challenge in the present writ petition.

2.The petitioner is a company and the manufacturer of cement. The petitioner states that they produce cement of high quality and manufacture of cement involves several raw materials including gypsum and fly ash. In this regard, admittedly, the contract was signed between the petitioner company and the respondent TANGEDCO. Based on the Memorandum of Understanding between the parties, the petitioner was collecting the fly ash and using the same for manufacturing of cements.

3.The respondents also conducted inspection regarding the performance of the terms and conditions of the contract periodically and invoked Clause-5 of the Memorandum of Understanding and issued the impugned demand notice.

4.The learned counsel for the petitioner strenuously contended that no opportunity was provided to the petitioner enabling them to submit their defects in respect of the lapses noticed by the TANGEDCO authorities. Even the nature of lapses,



loss, if any, occurred and its details are absent in the impugned order. Under those circumstances, the petitioner is constrained to move the present writ petition.

5. The learned counsel for the petitioner is of an opinion that the petitioner is entitled for an opportunity of presenting their case and no such opportunity was offered and the demand notice impugned was issued based on the unilateral decision taken by the TANGEDCO authorities.

6. In support of the said contention, the learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court of India in the case of State of Karnataka vs. Shree Rameshwara Rice Mills, Thiruthahalli reported in (1987) 2 SCC 160, particularly paragraphs 7 and 8, which reads as under:-

'.....

7. On a consideration of the matter we find ourselves unable to accept the contentions of Mr. Iyenger. The terms of Clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in Clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and



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equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed."

7. In the case of J.G. Engineers Private Limited vs. Union of India and another reported in (2011) 5 SCC 758 at paragraphs 19 and 20, which reads as under:-

".....

19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.

20. In State of Karnataka v. Shree Rameshwara Rice Mills this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This Court held: (SCC p. 164, paras 7-8)

"7. ... Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach



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as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

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8. Relying on the above judgments, the learned counsel for the petitioner reiterated that the petitioner may be driven to the Civil Court only in the event of permitting him to present their case. The basis on which a decision is taken for issuing an order of demand itself is not explained to the petitioner and under those circumstances, the petitioner has chosen to file the present writ petition. Thus, the order impugned is directly in violation of the principles of natural justice and the present writ petition is to be considered.

9. The learned counsel appearing on behalf of the respondents relying on the counter affidavit made a submission that admittedly, the dispute arises based on the contractual obligation between the parties. The impugned orders are in tune with the contract conditions, specifically condition No.5. Thus, the writ petition is not maintainable, as such disputes are to be adjudicated before the competent civil Court of law and not in a writ proceedings. The respondents filed counter narrating facts and circumstances to establish that the petitioner has violated certain terms and conditions and the manner in which the calculations are made and the impugned demand notices are



issued.

10. However, this Court is of the considered opinion that all such disputed facts cannot be adjudicated in a writ proceedings, as it requires examination of documents in original and evidences and even oral evidences. Prima facie, it is raised that no opportunity was provided to the petitioner, even to present their case, and it is to be considered. In a contractual obligation between the parties, whether such a show cause notice or opportunity is required to be given or not is to be considered. No doubt, it depends on the facts and circumstances and also the terms and conditions agreed between the parties. However, it cannot be concluded by holding that in each and every case, a show cause notice and an opportunity of presenting the case must be provided in contractual obligations. Thus, a writ cannot be entertained merely on the ground that no opportunity to present the case is given in the event of the dispute with reference to the terms and conditions of the contract between the parties.

11. It is needless to state that the terms and conditions agreed are known to the parties. Once agreed to the terms and conditions are violated, the question of further opportunity by any one of the parties would not arise. A dispute arises in the present case, as the petitioner states that an opportunity is to be given to present their case. This Court is of an opinion that such a procedure, which is not agreed between the parties need not be considered, as providing of an opportunity is also a dispute, which is to be considered with reference to the agreed terms and conditions of the contract.

12. The concept of principles of natural justice can be applied in a contract only in certain circumstances and the performance of contractual obligation between the parties cannot be compared with the statutory functions of the authorities. Though in the present case, the Tamil Nadu Electricity Board is a State under Article 12 of the Constitution of India. Thus, a distinction is to be drawn between the contractual obligation between the parties and the statutory functions and the powers to be exercised under the statute by such officials of the State. These distinct factors are to be demarcated when the facts are clear and more so relatable to the terms and conditions of contract.

13. Presuming that a writ Court examines the terms and conditions of the contract, a doubt arises whether it is possible to form an opinion with reference to the factual disputes which is to be adjudicated in an elaborate manner with reference to the original documents and evidences. Undoubtedly, there is a possibility of error, omission, commission or



otherwise, if any such opinion is formed. That is the reason why the Constitutional Courts have taken a consistent view that in the matter of contractual obligations between the parties, they must approach the Civil Court of law as it involves trial nature adjudication, which would provide an opportunity to examine and cross examine the witnesses to cull out the truth and resolve the issues in the manner known to law.

14. Per contra, based on the mere affidavit in a writ petition and relying on certain xerox copies of the documents, which is enclosed in the typed set of papers, such factually disputed issues can never be adjudicated in a concrete manner so as to give complete justice to the parties, who are all approaching the writ Court.

15. With reference to the judgment relied upon by the petitioner, the Hon'ble Apex Court of India in Shree Rameshwara Rice Mills case cited supra at paragraphs-7 and 8 itself held that "the position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12". Therefore, only in the event of no dispute and there is a consensus between the contracting parties, the writ Court may be in a position to take a decision in such nature of issues and not otherwise. Therefore, the Hon'ble Supreme Court entertained the argument in a particular case by distinguishing the facts and ruled that the contractual obligations may be entertained by the writ Court only if there is no dispute between the contracting parties and there is a consensus. Even in paragraph-9, the Hon'ble Supreme Court observed that recovery of the damages will stand confined only to those cases where, the breach of conditions is admitted or it is not disputed.

16. In the present case, the demand notice is disputed by the petitioner, the manner in which the TANGEDCO assessed the damages or otherwise is also questioned by the petitioner, and not providing an opportunity to present the case is also raised. In this regard, examination in detail with reference to the terms and conditions of the contract are imminent and require adjudication. Even in the other case relied on by the petitioner, the proposition laid down by the Hon'ble Supreme Court in J.G. Engineers Private Limited case cited supra is referred and in paragraph-19 the Hon'ble Apex Court observed that "a contract cannot provide that one party with the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a Court or an Arbitral Tribunal".



Admittedly, in the present case, the parties have not agreed for arbitration, thus, necessarily they have to approach the competent Court of law for the purpose of adjudicating issues.

17. Let us look into the reliance placed by the petitioner i.e. Clause-5 of the Memorandum of Understanding. Clause-5 reads as under:-

'5. Performance of the cement company in collecting 100% of Fly Ash will be reviewed for a period of one year and penalty deemed fit will be imposed for the short collection of Fly Ash due to the fault of company after one year of the reviewed period.'

18. The above clause reveals that the collection of fly ash will be reviewed for a period of one year and penalty deemed fit will be imposed for the short collection of fly ash due to the fault of the company. For understanding purposes, this Court is of an opinion that the parties agreed that the performance of the petitioner company will be reviewed and penalty deemed fit will be imposed. Thus, the petitioner was very much aware and agreed regarding imposition of penalty by the TANGEDCO. Question arises whether an opportunity is to be provided prior to issuance of any such demand notice. In this regard, it is stated in the Clause that penalty deemed fit will be imposed for short collection of fly ash due to the fault of the company. This exactly is the dispute to be adjudicated as the short collection of fly ash and the quantum of short collection and the fault of the company or there is no fault of the company and the quantum of penalty to be imposed are disputed facts, which cannot be adjudicated in a writ proceedings.

19. These issues require an elaborate examination of the records and evidences. As far as the opportunity is concerned, no doubt if there is a consensus between the parties or if any doubt arises with reference to the performance or otherwise, it is open to the parties to the contract to negotiate and form an opinion and resolve the issues in an amicable manner. Therefore, it is for the petitioner to approach the competent authorities, if they agree for such consensus or for a negotiation and settlement of issues. However, the impugned order is concerned, it is for the petitioner to initiate appropriate steps for effective adjudication of the disputes for the purpose of redressing their grievances in the manner known to law.

20. The petitioner if chosen to approach the competent Court of law for resolving the issues, the Court shall consider the period in which the writ petition was pending before the High Court for the purpose of condoning the delay, if any petition to condone the delay is filed by the petitioner.



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21. With these observations, the writ petitions stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vs

To

1. The Tamil Nadu Electricity Board,
Rep. by its Chairman,
No.800, Anna Salai, Chennai 600 002.

2. The Chief Engineer,
Civil Designs,
Tamil Nadu Electricity Board,
3rd Floor, NPKRR Maaligai,
No.144 Anna Salai, Chennai 600 002.

3. The Chief Engineer,
Tamil Nadu Electricity Board,
North Chennai Thermal Power Station,
North Chennai - 600 120.

+1cc to Mr.M.Abulkalam, Advocate, S.R.No.61652

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M.P.Nos.2, 2, 3 & 3 of 2011

PL(CO)
SB(13/12/2021)