BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 02.08.2021
CORAM
THE HON'BLE MR.JUSTICE R.SURESH KUMAR
W.P.(MD)No.13220 of 2021

Pudukottai Green Power Pvt Ltd.,
rep. by its Director,
No.34, Swathi Complex, 1st Floor,
Venkatanarayana Road,
Nandanam,
Chennai - 600 035. ... Petitioner

Vs.

1.NHPC Limited,
Branch Office at :
No.13 Sowbakya Nagar
Madurai Road,
Batlagundu,
Dindigul District - 624 202
Registered office at :
NHPC Office,
Complex, Sector-33,
Faridabad - 121 003. (Haryana)

2.Principal Commissioner of GST and Central Excise (Chennai North)
Office of the Principal Commissioner of GST and Central Excise
26/1, Mahatma Gandhi Road
Nungambakkam,
Chennai – 600 034.

3.State Tax Officer
T.Nagar Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028. ... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Mandamus, to direct the first respondent to refund the GST Component of Rs.43,73,269/- to the petitioner pertaining to the period July 2017 to June 2021 along with interest at the rate of 18% per annum and to further direct the first respondent to pay the GST on lease rent along with lease rent.

For Petitioner : Mr.Joseph Prabakar
For 1st Respondent : Mr.N.S.Karthikeyan
For 2nd Respondent : Mr.K.Prabhu
Junior Standing Counsel

For 3rd Respondent : Mr.R.Sureshkumar
Government Advocate (civil side)

ORDER

The prayer sought for herein is for a Writ of Mandamus, to direct the first respondent to refund the GST Component of Rs.43,73,269/- to the petitioner pertaining to the period July 2017 to June 2021 along with interest at the rate of 18% per annum and to further direct the first respondent to pay the GST on lease rent along with lease rent.

2.The petitioner's case is that the first respondent is engaged in business of generation of power and accordingly proposed to set up a 50MW solar power project in Tamilnadu, for which the first respondent was looking for taking contiguous land on long term lease for setting up the power project.

3.For the said purpose, since the first respondent approached the petitioner, the petitioner had, after identifying the lands in Theni and Dindigul District to the extent of 250.18 acres, entered into a lease agreement with the first respondent, by lease agreement dated 26.05.2017, whereby the land has been entrusted to the first respondent for 27 years, that is long term lease, for using it as solar power project to generate 50MW electricity.

4.In this context, it is the further case of the petitioner that, at the time of agreement, there has been a clause in clause 14, whereby it has been agreed by both parties that, payment of taxes, rates, cess and other levy including penalties on Corporation/Municipal/Panchayat property tax, Urban Land tax etc., due to the State and Central Government or other local or other civil authorities including enhancements and new introductions shall be to the account of the First Party ie., the petitioner herein.

5.This agreement was entered into between the petitioner and the first respondent on 26.05.2017, before which, the possession of the land was given to the first respondent on 24.05.2017. While so, the central GST was introduced on 01.07.2017, whereby central GST as a service provider has been imposed in respect of this project, especially on the land lease, for which according to the first respondent, it has to be borne only by the petitioner.

6.However, it is the stand of the petitioner that, by invoking clause 14 of the agreement referred to above, it cannot be stated that the GST component on the land shall be levied on the petitioner. First of all, it is the case of the petitioner that, there shall be no GST on lands and buildings and the said issue, which is a larger controversy, had already been pending before the Hon'ble Supreme Court of India. Unless and until that is resolved, such kind of levy of GST on lands and buildings cannot be made by a parliament legislation, as the said subject is covered under Entry 49 of List II, that is State List of Schedule 7 of the Constitution.

7.It is the further case of the petitioner as projected by the learned counsel appearing for the petitioner that, if at all any taxes, rates or cess and other levy including the penalties to be imposed, that shall be restricted only to Corporation/Municipal/Panchayat tax or Urban Land tax etc., of the State or Central Government or local authorities, as has been pointed out in Clause 14 of the agreement.

8.Therefore, if the GST is introduced subsequent to the agreement, under the guise of the word 'new introductions' as occurred in Clause 14 of the agreement, the GST component, which is a post agreement tax component cannot be expected to be paid by the petitioner. Therefore, in this context, the service Tax if at all to be payable it only shall rest on the first respondent. Therefore, whatever the GST had been collected from the petitioner shall be directed to be reimburseed by the first respondent. Therefore, in this context, the petitioner has moved the present writ petition with the aforesaid prayer.

9.Reiterating the aforesaid facts, learned counsel appearing for the petitioner has further made the submission that, the issue as to whether the levy of central GST as introduced from 01.07.2017 can be made by the central authorities within the meaning of legislation, which was enacted by the parliament under the residual power of Union list under Entry 97 of List I of Schedule 7 of the Constitution of India is an issue pending adjudication.

10. The learned counsel for the petitioner would further submit that, the tax on lands and buildings is covered under Entry 49 of List II, that is State List of Schedule 7 of the Constitution and therefore, if at all any tax to be levied on lands and buildings, that shall be levied only by invoking the power or procedure as contemplated under the Constitution, especially, under Entry 49 of List II of the Schedule 7 by the State. Therefore, the very power of the parliament to enact such a legislation to impose GST on lands and buildings by invoking its legislative power under Entry 97 of the List I of Schedule 7 of the Constitution under residual entry is unconstitutional. This issue, according to the petitioner is concerned, being the larger controversy, had been referred to a larger bench of the Hon'ble Suprme Court in **Union of India vs. UTV News limited** [2018 13 GSTL 3(SC)]. Therefore, unless and until the issue, which is pending before the constitution bench is decided one way or other, the question of imposing any GST component on the lands and buildings, especially in the case of the petitioner that to for a leased out larger extent of lands for a long term lease to the first respondent, does not arise.

11. That apart, assuming that for the time being, if at all GST is to be levied on the land, which has been leased out by the petitioner to the first respondent, the same shall be levied on the first respondent. Therefore, in this context, the interpretation sought to be given by the first respondent by invoking clause 14 of the agreement shall not be in favour of the first respondent and infact, it is in favour of the petitioner, therefore, on that ground also, the prayer sought for in this writ petition can very well be allowed, he contended.

12. Per contra, Mr.N.S.Karthikeyan, learned counsel who takes notice for the first respondent, would submit that, insofar as the prayer sought for in this writ petition is concerned it is only against the first respondent, where, it is the stand of the petitioner that, whatever the GST paid by the petitioner shall be reimbursed by the first respondent and in this context, the petitioner appears to have invoked Clause 14 of the agreement dated 26.05.2017. The learned counsel for the first respondent would further submit that, clause 14 of the agreement is having unambiguous sentence in this regard, which says that, whatever the taxes, rates, cess and other levy including the penalties including the enhancements and new introductions shall be to the account of the first party. Therefore, that kind of imposing of any taxes, rates, cess or levy of penalties shall be borne only by the first party of the contract, who is none other than the petitioner. Therefore, the first respondent can at any point of time never be asked to shoulder the tax components, which is exclusively to be shouldered only by the petitioner.

13. The learned counsel for the first respondent would further submit that, however, what shall be the interpretation to be given on clause 14 of the agreement, whether it is in favour of the petitioner or the first respondent, can only be decided in an arbitration proceedings, as in this regard, Clause 21 of the agreement made it clear that whatever the controversy (ies)/ dispute(s)/difference(s)/claim(s)/claim(s) in tort arising out of in relation to the agreement, the same shall be referred to finally for arbitration of sole arbitrator nominated by both parties mutually under the provisions of the Arbitration and Conciliation Act, 1996.

14. Therefore, by citing these aspects, learned counsel for the first respondent would submit that, since it is a settled legal proposition that where a lis arises out of terms of contract between the parties, where the provision of invoking arbitration clause under Arbitration and Conciliation Act, 1996 is available in writing, where both parties have signed, without invoking the arbitration clause, neither party can be permitted to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution. Hence, the learned counsel for the first respondent would also submit that, whatever be the issue raised in this writ petition, that lis can very well be decided by the Arbitral Tribunal consisting of sole arbitrator within the meaning of Clause 21 of the agreement and therefore, the parties can be relegated to the arbitrator, he submitted.

15. The very same contention as has been stated by the learned counsel appearing for the first respondent has been reiterated by the learned counsel appearing for the second and third respondents also.

16.I have heard the rival submissions of all the parties and perused the materials placed before this Court.

17. Though, Mr.B.Joseph Prabakar, learned counsel appearing for the petitioner has made a detailed submission as to the liability of the parties, both the petitioner as well as the first respondent, to pay GST, which is a post agreement component introduced from 01.07.2017, whereas the agreement had been entered into between the parties on 26.05.2017 and in this regard, the larger issue had been referred to a larger bench of the Hon'ble Supreme Court in the aforecited case in **Union of India vs. UTV News limited** [2018 13 GSTL 3(SC)], those issues are not the subject matters of this Court in this writ petition for the simple reason that, the prayer sought for in this writ petition as couched in the writ petition is to direct the first respondent to refund the GST component of Rs.43,73,269/- to the petitioner pertaining to the period from July 2017 to June 2021 along with interest of 18% per annum and to further direct the first respondent to pay the GST on lease rent.

18. The prime object of the petitioner in moving this writ petition by invoking Clause 14 of the agreement referred to above is that, the GST component if at all to be payable shall be paid only by the first respondent and not by the petitioner. Therefore, it is the *lis* between, primarily, the petitioner and the first respondent. Even though, the argument has been extended by the learned counsel for the petitioner as to the very leviability of GST on lands and buildings in the teeth of Entry 49 of list II of Schedule 7 of the Constitution, those issues cannot be agitated here, as the issue admittedly had been pending before the Hon'ble Supreme Court.

19. As of now, the GST had been in practice from 01.07.2017, and pursuant to which, levy of GST had been imposed against the service provider and in this context, *prima facie*, the taxing authority, that is the revenue has decided that the petitioner is the service provider, on whom the GST has to be imposed.

20. Though a vehement contention has been made by the learned counsel for the petitioner by relying upon Clause 14 of the agreement that the word 'new introductions' shall not include the GST, as the same shall never be thought of by both parties, at the time of entering into the agreement on 26.05.2017, this Court, even though is having an opinion or view to give interpretative answer to such query raised by the petitioner, in view of the conclusion going to be arrived in this order, where the parties are going to be relegated to the arbitration proceedings by invoking Clause 21 of the agreement, this Court has not expressed any view on the interpretation of sentences made in Clause 14 of the agreement, because, if such an interpretative statement is made by this Court, this will hamper the prospects of both parties before the tribunal.

21. As has been rightly pointed out by the learned counsel appearing for the respondents, there is a clear term in Clause 21 of the agreement, which reads thus:

> *"21.Any and all controversy(ies) / dispute(s) /difference(s) /claim(s) /claim(s) in tort arising out of or in connection with or in relation to this agreement, including its existence, validity or termination, shall be referred to and finally resolved by arbitration of sole Arbitrator nominated by the both parites mutually under the Arbitration and Concilliation Act, 1996 as amended upto date. The award so rendered shall be final and binding on the parties. The language shall be English and the venue shall be at Chennai, Tamil Nadu. The Jurisdictional Court of Tamil Nadu alone shall prevail over this agreement including proceedings arising under the Arbitration and Conciliation Act, 1996 as amended upto date."*

Clause 14 of the agreement also reads thus:

> *"14.The payment of all taxes, rates, cess and other levey including penalties, if any, charged thereon I nrespect of the said premises, ushc as Corporation/Municipal/Panchayat Tax, Urban Land Tax etc., due to the State Government, Central*

Government or other Local or other civic authorities, including enhancements and new introductions shall be to the account of the First Party. The Second Party shall be at liberty to pay the above tax, rate or cess or other levy including penalties, if any, charges thereon in case of default or delay by the First Party and consequential demand or distress being raised on the Second Party after giving notice of the said demand to the First Party and adjust the amounts so paid from out of rents in respect of the said premises due immediately after the said payment."

22. Now the question is, whether the word 'new introductions' occurred in Clause 14 would includes the GST, which was introduced on 01.07.2017 or not, and if it includes, the same would be borne by which party is the only question or *lis* to be resolved by the arbitrator before whom the parties can be relegated by invoking Clause 21 of the agreement as referred to above.

23. It is the settled proposition that when there is an arbitration clause in writing, where both parties have signed, without invoking Arbitration Clause, the parties cannot be permitted to come before the High Court, especially by invoking Article 226 of the Constitution.

24. Here, this is a classic case, where, there is a written provision/clause available in the agreement, signed by both parties, where Arbitral Tribunal can be constituted, for which the sole arbitrator can be nominated by mutual consent of both parties, before whom, whatever be the controversy (ies)/dispute (s)/difference(s)/claim(s)/claim(s) in tort in relation to the agreement, the same can be very well referred to.

25. In this case, a clear *lis* has arisen between the petitioner and the first respondent under Clause 14 of the agreement. Therefore, this is a fit case, where, both parties can be relegated to approach the arbitrator to be constituted/nominated in this regard, in the manner provided under Clause 21 of the agreement.

26. Therefore, the present writ petition with the aforesaid prayer as has been sought for by the petitioner cannot be entertained by this Court at this moment. Hence, for all these reasons, this Court is inclined to dispose of this writ petition with the following orders:

that the prayer sought for herein cannot be granted and therefore the writ petition is liable to be rejected and accordingly, it is rejected.

27. As a sequel, the parties are relegated to constitute an Arbitral Tribunal consisting of sole arbitrator to be appointed in this regard with the mutual consent of both parties within the meaning of Clause 21 of the agreement dated 26.05.2017 entered into between the petitioner and the first respondent. If such an exercise is made and Arbitral Tribunal is constituted, whatever be the issues raised in this writ petition can be resolved by the arbitrator before whom such reference can be made by both parties.

28. With these observations and directions, this writ petition is disposed of.

Sd/-
Assistant Registrar (CS II)

// True Copy //

/ /2021
Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.State Tax Officer
T.Nagar Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.

2.Principal Commissioner of GST and Central Excise (Chennai North)
Office of the Principal Commissioner of GST and Central Excise
26/1, Mahatma Gandhi Road
Nungambakkam,
Chennai – 600 034.

+1 CC to M/s.SPL GP (SR-25074[F] dated 03/08/2021)

+1 CC to M/s.N.S.KARTHIKEYAN, Advocate (SR-25014[F] dated 02/08/2021)

W.P.(MD)No.13220 of 2021
02.08.2021

PS(CO)
SB(26.08.2021) 9P 5C