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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 13.05.2022
PRONOUNCING ORDERS ON : 01.06.2022

Coram:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.Nos.8522, 8521, 5994, 7681 and 8657 of 2022
and

W.M.P.Nos. 8431, 8432, 8429, 8430, 6074,
6075, 7679, 7681, 8573 & 8574 of 2022

W.P.Nos.8522 and 8521 of 2022

M/s.Starshine Logistics (Regd.Firm)

Rep.by its Partner/Authorised Signatory

Suresh Gatt Reddi, No.6C, Sixth Floor, Gaiety Palace

No.1/L, Blackers Road,Chennai 600 002.

... Petitioner in W.P.No.8522/2022

Ganesan Chandran

... Petitioner in W.P.No.8521/2022

..Vs..

Tamil Nadu Civil Supplies Corporation

Represented by its Managing Director

No.12, Thambusamy Road, Kilpauk

Chennai 600 010.

...Respondent in both W.Ps.

Prayer in W.P.No.8522 of 2022: Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari calling for the records relating to the email confirmation order dated 02.03.2022 bearing R.C.No.BS3/062350/2021-5 on the file of the respondent and quash the same.

Prayer in W.P.No.8521 of 2022: Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari calling for the records relating to the email confirmation order dated 02.03.2022 bearing R.C.No.BS3/062350/2021-2 on the file of the respondent instructing the petitioner to supply an additional quantity of 20,00,000 numbers of RBD Palmolein in 1 litre pouches on or before 03.05.2022 and quash the same.



In W.P.Nos.8522 & 8521 of 2022

For Petitioner: Mr.Mani Sundar Gopal
in W.P.No.8522/2022
and for Mr.Ashok Chakravarthy
in W.P.No.8521/2022

For Respondent : Mr.R.Shunmugasundaram
in both W.P.s Advocate General, Assisted by
Ms.A.G.Shakeenaa, Standing Counsel

W.P.No.5994 of 2022

Arunnachala Impex Private Limited
Represented by its Managing Director
No.192/237, Thambu Chetty Street
Parrys, Chennai 600 001.

..Petitioner

..Vs..

1. The Managing Director
Tamil Nadu Civil Supplies Corporation
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.
2. Tender Sub-Committee
Rep.by its Members
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.
3. Tamil Nadu Civil Supplies Corporation
Represented by its Board of Directors
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.
4. State of Tamil Nadu
Rep.by the Principal Secretary
Cooperation, Food and Consumer Protection
Department, St.George Fort, Chennai.

...Respondents

Prayer: Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari to call for the records culminating in the impugned order namely email confirmation order dated 02.03.2022 bearing Rc.No.BS3/062350/2021-3 sent by the 1st respondent to the petitioner directing it to supply an additional 25 percent quantity of 25,00,000 nos. of RBD Palmolein oil 1 litre pouches, and quash the same.



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For Petitioner : Mr.A.L.Somayaji, Senior Counsel
for Ms.Pushpa Menon

For Respondents 1-3 :Mr.R.Shunmugasundaram
Advocate General, Assisted by
Ms.A.G.Shakeenaa, Standing Counsel

For Respondent No.4: Mr.R.Shunmugasundaram
Advocate General, Assisted by
Mr.D.Ravichander,
Special Government Pleader

W.P.Nos.7681 and 8657 of 2022
M/s.Ruchi Soya Industries Limited
Rep.by its Authorised Signatory
R.Venkatraman, S/o C.Ramalingam
40-41, East Mada Church Road
Royapuram, Chennai 600 013. ...Petitioner in W.P.No.7681 of 2022

M/s.Rasi Nutri Foods India Private Limited
Rep.by its Authorised Signatory P.Mohanraj
Door No.2/205, 2/206, 2/207, R.Puliyampatti
Village & Navani Village, Puduchatram Post
Namakkal, Tamil Nadu 637 018.
...Petitioner in W.P.No.8657 of 2022

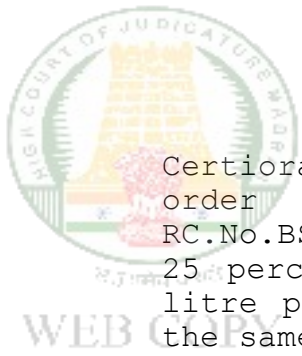
..Vs..

1.State of Tamil Nadu
Rep.by the Principal Secretary
Cooperation, Food and Consumer Protection
Department, St.George Fort, Chennai-9

2. Tamil Nadu Civil Supplies Corporation
Represented by its Managing Director
No.12, Thambusamy Road, Kilpauk
Chennai 600 010. ...Respondents in both W.Ps.

Prayer in W.P.No.7681/2022 : Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of Certiorari calling for the records relating to the relating to the confirmation order by the 2nd respondent dated 02.03.2022 through email for supply of additional 25% quantity of 22,50,000 Nos. of RBD Palmolein Oil 1-litre pouches at the rate of Rs.120.25 net per pouch and quash the same.

Prayer in W.P.No.8657/2022 : Writ Petition under Article 226 of the Constitution of India for the issuance of a Writ of



Certiorari calling for the records relating to the confirmation order by the 2nd respondent dated 02.03.2022 RC.No.BS3/062350/2021-4 through email for supply of additional 25 percent quantity of 16,25,000 Nos. of RBD Palmolein Oil 1-litre pouches at the rate of Rs.120.25 net per pouch and quash the same.

For Petitioner
in W.P.No.7681/2022 : Mr.AR.L.Sundaresan, Senior Counsel
for Ms.A.L.Gandhimathi

For Petitioner
in W.P.No.8657/2022 : Mr.A.Saravanan

For Respondents in both W.Ps:
Respondents No.1 : Mr.R.Shunmugasundaram,
Advocate General assisted by
Mr.D.Ravichander,
Special Govt. Pleader

Respondent No.2: : Mr.R.Shunmugasundaram,
Advocate General assisted by
Ms.A.G.Shakeenaa, Standing Counsel

C O M M O N O R D E R

Tamil Nadu Civil Supplies Corporation issued tender notification dated 20.12.2021 for the supply of 4 Crore nos. of Fortified RDB Palmolein oil pouches. The tender opening date was announced as 06.01.2022. The petitioners herein submitted their tenders in response to the said notification. They emerged as successful tenderers. The offers made by the petitioners were accepted by the respondent Corporation on 13.01.2022. As per the terms of the contract, the tenderers were to supply the following quantities in two spells.

Petitioner in W.P.No.8522 2022	of 65,00,000
Petitioner in W.P.No.8521 2022	of 80,00,000
Petitioner in W.P.No.5994 2022	of 1,00,00,000
Petitioner in W.P.No.7681 2022	of 90,00,000
Petitioner in W.P.No.8657 2022	of 65,00,000



2. Except the writ petitioner in W.P.No.5994 of 2022 (M/s.Arunachala Impex Private Limited) the other tenderers effected supplies under both spells. Clause 17(d) of the tender notification is as follows :

"17(d) : The Tamil Nadu Civil Supplies Corporation reserves the right to vary the quantity finally ordered to be purchased to the extent of 25% either way of the requirement of RBD Palmolein Oil pouches indicated in the e-tender document. The tenderers cannot claim it as a matter of contractual obligation to vary the quantity either way."

3. Invoking the said clause, the impugned communications were issued directing the petitioners to supply the additional 25% quantity. Contending that the market conditions had undergone adverse change, the petitioners claimed impossibility of performance. They sent representations to that effect expressing their inability to supply the additional quantity. Since the respondent Corporation was unrelenting in their stand, these writ petitions came to be filed challenging the additional demand.

4. The learned Senior Counsel appearing for the petitioners reiterated their stand that this is a classic case in which Section 56 of the Indian Contract Act, 1872 deserves to be invoked. They pointed out that when the tenders were finalized, the parties did not envisage that war between Russia and Ukraine would break out. As a result of the outbreak of the war, Palmolein supplies got diverted to Ukraine. Since crude oil prices shot up, freight costs went up and the movement of cargo vessels also got affected severely. To add to their woes, Indonesia imposed a ban order on 27.04.2022. These factors cumulatively broke the back of the petitioners and therefore they could not supply the additional 25% quantity.

5. The learned Senior Counsel took me through various articles and called upon this Court to take judicial notice of the prevailing situation. They pointed out that the changes in the market were perceived by the respondent Corporation themselves as a force majeure event and that is why they themselves cancelled one such tender process in the second week of March 2022. They also pointed out that while the respondent Corporation insisted that the petitioners should supply the oil packets at the negotiated rate of Rs.120.25/-, the respondent Corporation entered into contract with one of the parties on 01.04.2022 for purchase of the very same quantity at a far higher price. The contention of the learned Senior Counsel is that the respondent Corporation being a State instrumentality must adopt a fair approach even in commercial dealings. Since the result of fulfilling the contractual obligations would lead



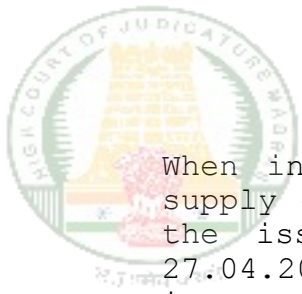
to their commercial insolvency, the learned Senior Counsel wanted this Court to quash the impugned demand and allow these writ petitions. The learned Senior Counsel relied on a catena of decisions.

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6. The respondent Corporation had filed a detailed counter affidavit opposing the writ prayers. The learned Advocate General reiterated the stand set out therein. He pointed out that a pure commercial dispute cannot form the subject matter of writ proceedings. In any event, the contract between the parties provides for an arbitral remedy. There is absolutely no justification for bypassing such remedy. He also pointed out that mere commercial difficulties cannot enable the petitioners to seek exoneration from fulfilment of contractual obligations. He called upon this Court to dismiss the writ petitions.

6. I carefully considered the rival contentions of both sides and went through the materials on record. Let me take up the preliminary objections first. It is true that Clause 23 of the tender notification provides for arbitral remedy. It is again true that the subject matter pertains to a commercial contract. The objections however stand overruled in view of the ratio laid down in "U.P. Power Transmission Corporation Ltd., -Vs- CG Power & Industrial Solutions Limited (2021) 6 S.C.C.15". The Hon'ble Supreme Court categorically held that the existence of an arbitration clause does not debar the court from entertaining a writ petition and that relief under Article 226 of the Constitution of India may be granted in a case arising out of a contract. Of course, the High Courts usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. But in this case, there are no disputed questions of fact. Since the respondent Corporation is a State instrumentality, and since the petitioners complain of violation of statutory procedure, I am inclined to consider the case on merits.

7. I have already noted that the demand by the respondent Corporation for supply of additional 25% is well within the scope of the contract. The Corporation has not made any demand outside its framework. It is true that by the time the impugned demand was made, the market conditions had undergone a change and war between Russia and Ukraine had broken out on 24.02.2022. I carefully went through the contents of the affidavits filed in support of the writ petitions. Nowhere there is any averment that the subject matter of the contract is unavailable in the market. The petitioners in fact cannot be heard to argue so.



When in April 2022, the Corporation issued a notification for supply of Fortified RBD Palmolein, it did evoke response. Till the issuance of ban order by the Indonesian Government on 27.04.2022, there were bidders offering to supply the commodity in question, of course at a higher rate. The contract was concluded on 13.01.2022. The impugned communications for supply of additional quantity of 25% were issued on 02.03.2022.

8. The only reason put forth by the petitioners is that the prices have gone up by 25%. Can this be a ground to plead frustration of the contract is the moot question before me. There is some support in the views expressed by Lord Reid and Lord Horson in the House of Lords decision of Tsakiroglou & Co., Ltd. Vs. Noble Thorl GmbH (1962) AC 93 for the proposition that increased costs might constitute a possible ground for frustration where they were so extreme as to be "astronomical". In an article appearing in (2011) 12 SALAnnRev 92 by Chow Kok Fong and Philip Chan Chen Fye, it is mentioned that, the said view finds favour in Glahe International Expo AG -Vs- ACS Computer Pte Ltd., (1999) 1 SLR(R) 945. But, we are governed by the provisions of the Indian Contract Act, 1872. We have to go only by Section 56 of the said Act which is as follows:

" Section 56 : Agreement to do impossible act

An agreement to do an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise."

9. Tsakiroglou & Co., and the aforesaid statutory provision were considered by the Hon'ble Supreme Court in Energy Watchdog -Vs- CERC (2017) 14 SCC 80. The principles set out therein furnish a complete answer to every contention advanced by the



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learned Senior Counsel appearing for the petitioners. It was held therein as follows:

"36.The law in India has been laid down in the seminal decision of Satyabrata Ghosev.Mugneeram Bangur & Co.[Satyabrata Ghosev.Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

37.In Alopi Parshad & Sons Ltd.v.Union of India[Alopi Parshad & Sons Ltd.v.Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a



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wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522], this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.* [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44]. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH* [Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)], despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape



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of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

40. This view of the law has been echoed in Chitty on Contracts, 31st Edn. In Para 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in Treitel on Frustration and Force Majeure, 3rd Edn., the learned author has opined, at Para 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See Para 15-158.)"

10. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the contract remains unaltered. The escalation of the price of the commodity in the market cannot be a ground to plead frustration. In any event, the escalation is only by 25% or more. The petitioners are seasoned suppliers. With their market experience, they obviously would have foreseen that prices may fluctuate. Price fluctuation cannot be construed as a force majeure event warranting invocation of Section 56 of the Indian Contract Act. The petitioners cannot be said to have been "hindered or prevented" from making the additional supplies. The Indonesian ban came only on 27.04.2022, whereas the impugned demand for additional supply was made on 02.03.2022. The profit calculation originally made by the petitioners might have gone for a toss. That is no reason to permit them to wriggle out of the consequences that flow logically from the contractual arrangements knowingly entered into by them.



11. I do not find any ground to interfere with the impugned communications issued by the respondent Corporation. All these writ petitions stand dismissed. No costs. Consequently connected miscellaneous petitions are also dismissed.

s/d-
Assistant Registrar(Vacation Officer)

True Copy

Sub-Assistant Registrar

To

1. The Managing Director, Tamil Nadu Civil Supplies Corporation
No.12, Thambusamy Road, Kilpauk, Chennai 600 010.
 3. The Members
Tender Sub-Committee
No.12, Thambusamy Road, Kilpauk
Chennai 600 010.
 4. The Board of Directors, Tamil Nadu Civil Supplies Corporation
No.12, Thambusamy Road, Kilpauk, Chennai 600 010.
 5. The Principal Secretary to Government of Tamil Nadu
Cooperation, Food and Consumer Protection
Department, St. George Fort, Chennai.
- +4 Ccs to Mr.K. Ashok Chakravarthy, Advocate sr 31974 & 32068
+2 Ccs to Mr.Mani Sundar Gopal, Advocate sr 32069
+2 Ccs to Mr.T. Sathiyamoorthy, Advocate sr 31972
+1 CC to Mr. Pushpa Menon, Advocate sr 32044
+1 CC to M/s.A.L. Gandhimathi, Advocate sr 32007
+1 CC to Mr.A.Saravanan, Advocate sr 32032
+1 CC to The Government Pleader sr 31549

W.P.Nos.8522,
8521, 5994, 7681 and 8657 of 2022

GSM(CO)
SP(03/06/2022)