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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2023

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THE HON'BLE Mr. JUSTICE **C.V.KARTHIKEYAN**

W.P.No.15963 of 2020

and

W.M.P.Nos.19867 & 19868 of 2020

M/s.Ashtech (I) Pvt. Ltd,
Ashtech House,
30, Popotwadi, Kalbadevi Road,
Princess Street,
Mumbai – 400 002.

.. Petitioner

Vs.

1.Tamil Nadu Generation Distribution and
Corporation Ltd.,
Rep.by Chief Engineer / Civil Designs,
3rd Floor, NPKRR Maaligai,
144, Anna Salai, Chennai - 600 002.

2.Chief Engineer,
Ennore Thermal Power Station,
Ennore, Chennai – 600 057.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records and quash the impugned letter dated 26.05.2020 bearing Lr.No.CE/CD/SE/CD&HP/EE-2/AEE-3/F.ETPS Ashtech/D.61 of 2020



issued by the 1st respondent and the impugned demand letter dated 09.06.2020 bearing

No.CE/ETPS/SE/E/EE/PUR/AEE/AHS/F.44/D.269/2020 issued by the 2nd respondent and direct the 1st respondent to refund the excess amount recovered from the petitioner as claimed in its letter dated 17.03.2020.

For Petitioner	.. Mr.V.P.Raman,
For R1	.. No appearance
For R2	.. Mr.P.Wilson, Senior Counsel, for Mr.K.Arun Prasad

ORDER

This Writ Petition has been filed in the nature of Certiorarified Mandamus seeking records relating to a letter dated 26.05.2020 bearing Lr.No.CE/CD/SE/CD&HP/EE-2/AEE-3/F.ETPS Ashtech/D.61 of 2020 issued by the 1st respondent / Tamil Nadu Generation Distribution and Corporation Ltd., Chennai and also to a demand letter dated 09.06.2020 bearing No.CE/ETPS/SE/E/EE/PUR/AEE/AHS/F.44/D.269/2020 issued by the 2nd respondent / Chief Engineer, Ennore Thermal Power Station, Ennore, Chennai and to direct the 1st respondent to refund the excess amount collected from the petitioner as claimed in their letter dated 17.03.2020.



2. Even before entering into any further discussion let me examine the letter dated 17.03.2020 which had been issued by the petitioner herein. A copy of the same had been enclosed as a document along with the writ petition. In that particular letter, the petitioner herein had claimed that a sum of Rs.1,777,318,825.66/- is recoverable by the petitioner herein from the Tamil Nadu Electricity Board. In effect, in the writ petition, a relief sought is to direct the respondents to pay the aforementioned sum of Rs.1,777,318,825.66/-.

3. Let me also digress a little bit and state that the respondents had filed C.S.No.225 of 2021 on the file of the Original Side of this Court against the present petitioner herein. They have claimed in that particular suit a sum of Rs.9,34,79,262.79/-, and have sought a direction that the petitioner herein should pay that sum together with interest at 10.75% per annum. The issues in that suit are intricately connected with the averments raised in the present writ petition.

4. The petitioner had filed his written statement in that suit. I must really appreciate the learned counsel for the petitioner who candidly



admitted that no counter claim was filed. The relief now claimed in this writ petition is a direction to the respondents to pay a sum of Rs.1,777,318,825.66/-. An examination of the two amounts namely, the amount claimed in the Civil Suit and the amount claimed by the petitioner by letter dated 17.03.2020 shows that the petitioner has claimed excess amount than what was claimed in the suit, but they had not claimed that sum in the written statement. Court fees also has not been paid.

5.Be that as it may, now let me examine the facts of this particular writ.

6.The learned counsel for the petitioner stated that the petitioner herein had originally filed W.P.No.6125 of 2011. It appears that with respect to an amount payable by the petitioner towards supply of fly ash, originally, a sum of Rs.60/- was determined and thereafter, that was gradually increased to Rs.350/- and then there was a steep jump to Rs.700/-. That led to the filing of the writ petition. There were also a series of other writ petitions which were filed, but the petitioner did not join in those writ petitions. In that batch, the amount was re-worked by a learned Single Judge



to Rs.540/-. A review was therefore filed. On review the amount was reduced to Rs.410/-. Staying out of zone of consideration from that batch of writ petitions, the petitioner then sought parity claiming the same concession should also be granted to the petitioner. The claim of the petitioner was never tested independently by any Court of law.

7. Thereafter, it is claimed that the petitioner examined the MoU which had been entered into with the respondents. The petitioner found, or rather discovered a new fact, that power and water charges are exempted and that the respondents should bear those charges. Therefore, the petitioner filed another writ miscellaneous petition in W.M.P.No.116 of 2020 in W.P.No.6125 of 2011 seeking clarification. That clarification petition came up before a learned Single Judge on 28.01.2020 and the following order was passed:

“5. In view of the submissions made by both learned counsel appearing for the parties concerned, this Court is inclined to clarify the order of this Court dated 23.02.2017 made in W.P.No.6125 of 2011 as follows:



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“The directions issued by this Court in para 6 of the order are subject to the MoU dated 11.11.2005 entered between the writ petitioner and the respondent board.”

8.It is seen that the order was passed on the submissions made by both the learned counsels. It is not an order laying down any ratio but rather stating what the learned counsels had advanced and thereafter reducing the said statements. The order has no binding precedent at all.

9.At any rate, the learned counsel claims that the respondents will have to now rework the amount payable in accordance with the MoU. The MoU stipulates that water and power charges are exempted to be paid by the petitioner and are to be paid by the respondents.

10.That is an issue of fact. That is an issue which requires examination of that particular MoU. That is an issue which requires examination whether the MoU is binding. It also requires understanding what actually was understood as power charges and water charges and in



what manner exemption was granted. These are all issues which will have to be examined on the basis of determining each and every clause in the MoU and testing them on the touchstones of admissibility, relevancy and proof. There will be witnesses who would speak about the surrounding circumstances at the time of entering into the MoU.

11. Even if the MoU is presented before this Court, this Court cannot come to any conclusion that there was absolute consensus ad idem between the parties when the MoU was executed. Both the executants of the MoU will have to graze the witness box and speak about the terms which compelled them to enter into such MoU. Each individual term will have to be spoken and each statement will have to be tested during cross-examination. To examine all these issues there is already a Civil Suit which is pending, namely, C.S.No.225 of 2021.

12. It is contended by the learned counsel for the petitioner that the writ petition was filed on 28.10.2010 and the Civil Suit was filed on 29.10.2010 a day after.



13. In all fairness, the fact that the suit had been filed should have been informed, subsequently at least by way of filing an additional affidavit in this writ petition and the plaint therein should have been produced before this Court. A categorical statement is made by the learned counsel for the petitioner that neither was set off claimed nor counter claim sought in the written statement filed in the suit.

14. The learned counsel stated that the respondents had mentioned about the filing of the civil suit in their counter to this writ petition. It is for the petitioner to disclose facts whenever known to them. They had taken a conscious decision not to disclose about the pendency of the civil suit.

15. What is now sought from this Court is to enter into a discussion on the calculations and on the period from which interest is payable by the petitioner herein. These aspects turn around to a discussion whether the petitioner admits liability to pay the respondents, whether the petitioner admits interest or principal or reduced principal or excess principal. These are issues which can be worked out only in the civil suit. To repeat no counter claim or set off has been filed in the civil suit. There cannot be two



forums examining the same issues. The Civil Court is the appropriate authority to summon witnesses, call for documents, examine documents and test the documents. None of these procedures are available before a writ court. The writ court can never examine whether documents are binding and whether they had been executed out of free will.

16.The learned Senior Counsel on behalf of the respondents had forwarded four judgments of the Hon'ble Supreme Court, and the same are discussed below.

17.In ***Union of India (UOI) and others Vs. Puna Hinda reported in AIR 2021 SC 4187***. The challenge before the Hon'ble Supreme Court was against an order in an appeal from the Gauhati High Court. The entire issue surrounded payment in terms of Final Joint Survey/Measurement Report dated 24.10.2013. A notice inviting tender has been issued on 22.10.2008 for construction and improvement of road from 26.80 km to 47.850 km. The bid of the writ petitioner was accepted. Thereafter there had been disputes and claims and counter claims were made. In those circumstances, the Hon'ble Supreme Court had held as follows:



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“69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.



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69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”

18.It had been specifically held that a contentious issue cannot be raised in a writ petition on disputed questions of fact. Though, the jurisdiction of the High Court is wide, in respect of contractual matters in the field of private law, the disputes can be better adjudicated by the forum agreed to by the parties. In that particular case the forum agreed between the parties was the arbitration forum and the Hon'ble Supreme Court directed that such forum is the proper forum to examine the issues.

19.In the instant case, there is a Civil Suit pending and it is only appropriate that the parties are relegated to adjudicate all contentious issues there during trial.



20.The learned Senior Counsel then relied on a judgment of the Hon'ble Supreme Court in ***Shubhas Jain Vs. Rajeshwari Shivam and Others*** reported in ***2021 SCC OnLine SC 562***. The appeal before the Hon'ble Supreme Court was against the final judgment in an order dated 24.11.2020 passed by the Bombay High Court. The respondent was the tenant. The Bombay High Court had given liberty to the respondent to remove an adjoining wall with the assistance of architects. The appellant was the owner of the structure. There had been disputes relating to structural repairs and there was a dispute relating to a constructor. In fact there were disputes on every fact. The Hon'ble Supreme Court had held as follows:

“26.It is well settled that the High Court exercising its extraordinary writ jurisdiction under Article 226 of the Constitution of India, does not adjudicate hotly disputed questions of facts. It is not for the High Court to make a comparative assessment of conflicting technical reports and decide which one is acceptable.”

21.The learned Senior Counsel for the respondents the relied on a judgment of the Hon'ble Supreme Court in ***National Highways Authority of***



***India Vs. Ganga Enterprises and Another* reported in (2003) 7 SCC 410.**

Again the issue was with respect to a contract of guarantee and the issue was the scope of judicial interference with enforcement of a contract of guarantee. Again the Hon'ble Supreme had frowned on examination of the contract and specifically placed reliance on earlier judgments of the Hon'ble Supreme Court in ***Veriganto Naveen Vs. Government of Andhra Pradesh*** reported in (2001) 8 SCC 344, and ***Harinder Singh Arora Vs. Union of India*** reported in (1986) 3 SCC 247. It was held that the Writ Court cannot interfere in matters of contract. It was observed that the writ petition should have been dismissed on the ground of maintainability. This observation was made by the Hon'ble Supreme Court when the matter had actually reached the Hon'ble Supreme Court and it was observed that even at the first instance, the writ petition should have been dismissed.

22. The learned Senior Counsel also placed reliance on a judgment of the Hon'ble Supreme Court in ***Jai Singh Vs. Union of India and Others*** reported in (1977) 1 SCC 1. In paragraph 4, it had been stated that once a civil suit had been filed, the High Court in its writ jurisdiction should withdraw itself and permit the parties to adjudicate all issues before the civil court.



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23. The learned counsel for the petitioner however placed reliance on an earlier judgment of a learned Single Judge in the batch matter where an exercise was undertaken to reduce the amount from Rs.700 to Rs.540/- and then when a review was filed to Rs.410/-.

24. I am not entering into the prerogative of the learned Single Judge in examining and reworking the contract between the parties. I am of the firm opinion that this Court while sitting as a Court examining petitions filed under Article 226 of the Constitution of India, cannot and should not enter into a discussion on the terms of any contract. It is for the parties to determine the amounts payable. That is purely an issue between the petitioner and the respondents herein and this Court as a third party to the contract has to restrain itself from imposing fresh terms on the petitioner or on the respondents herein.

25. As repeatedly pointed out, I am not prepared to enter into any discussion on the amount payable by the petitioner or the amount payable by the respondents and I am of the firm view that this Court cannot do so particularly since C.S.No.225 of 2021 is now pending.



26. With the above observations, this Writ Petition stands dismissed.

No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

27. Let me add that whatever has been stated above were for the limited purpose of determining the fact that the writ Court should not enter into any discussion on the disputed questions of facts and that it should be the prerogative of the Civil Court. I am confident that the learned Judge who examines the issues in C.S.No.225 of 2021 would be so doing on the basis of the pleading and evidence presented.

15.02.2023

Index: Yes/No
Internet: Yes/No
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To

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C.V.KARTHIKEYAN,J.

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