IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.08.2024

CORAM:

THE HON'BLE MR.JUSTICE **M.DHANDAPANI**

W.P.No.3244 of 2020

Contimeters Electricals Pvt. Ltd.,
Rep. by its Managing Director S.C.Kathuria,
Works and Regd. Office at,
31, SSI Co-operative Industrial Estate,
G.T.Karnal Road, Opp. Jahangirpuri, Delhi – 110 033. ...Petitioner

Vs.

1. The Chairman,
M/s.Tamil Nadu Generation and Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai, 144, Anna Salai, Chennai – 600 002.

2. The Director – Distribution,
M/s.Tamil Nadu Generation and Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai, 144, Anna Salai, Chennai – 600 002.

3. The Chief Engineer/MM(Materials Management),
M/s.Tamil Nadu Generation and Distribution Corporation Ltd.
10th Floor, NPKRR Maaligai, 144, Anna Salai, Chennai – 600 002.

4. Central Power Research Institute,
Rep. by its Joint Director,
Instrumentation Division,
Prof.Sir.C.V.Raman Road, Sadashivanagar PO,
PB No.8068, Bangalore – 560 080. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records in Lr.No.CE/MM/SE/ MM-II/EEM/A2/F.RC6/ dated 16.04.09/ D.09/15. dated 23.01.15 on the file of the 3rd respondent and quash the same with respect to the deduction of Rs.20,97,341/- and return the said amount with interest @ 22% p.a and further to direct the 3rd respondent to issue closure letter for the Purchase order Lr.No.SE/MM-II/EEM/A2/M.36/2008-09/RC.No.6/D.46/09 dated 16.04.09 based on the letter dated 14.12.2019.

For Petitioner : Mr.S.C.Vishwanth

For Respondent : Mr.D.R.Arun Kumar, for R1 to R3
: No Appearance, for R4

ORDER

The petitioner has filed this Writ petition seeking quashment of the proceedings in Lr.No.CE/MM/SE/MM-II/EEM/A2/F.RC6/ dated 16.04.09/ D.09/15. dated 23.01.15 on the file of the 3rd respondent, with respect to the deduction of Rs.20,97,341/- and return the said amount with interest @ 22% p.a and to consequently direct the 3rd respondent to issue closure letter for the Purchase order Lr.No.SE/MM-II/EEM/A2/M.36/2008-09/RC.No.6/D.46 /09 dated 16.04.09 based on the letter dated 14.12.2019.

2. The case of the petitioner is that based on the petitioner coming out successful in the tender floated by the respondents for purchase of AC I-

Phase and 3-Phase High Quality electromechanical energy meters, work order was placed with the petitioner and as per the work order, the petitioner manufactured the meters and informed the same to the respondents for the purpose of testing and acceptance. Inspite of the communication, the respondents delayed the testing and after prolonged delay, the testing was done by the respondents by taking random samples from the meters and many a times, after the test, it was informed to the petitioner by the respondents that the meters were not proper and in many cases it was alleged that there was delay in supply of meters for which the respondents penalised the petitioner, though the delay was on the part of the respondents and the said fact, though was taken to the knowledge of the respondents, however, the penal action was meted out to the petitioner only inspite of the fact that delay was attributable to the respondents. Further, the respondents had picked up certain sample meters for testing which were forwarded to CPRI, Bangalore for conducting tests and after the tests conducted on the said meters, it was informed that the meters were defective in certain tests done by CPRI, Bangalore and for the defective vibration test, which was not properly done by CPRI, Bangalore, amount was deducted from the petitioner inspite of there being no such provision for deduction. Though the meters supplied by the petitioner were in conformity with IS standards, however, the testing done by CPRI, Bangalore were not as per IS standards and, therefore, there were errors, which were put against the petitioner. It is pertinent to note that, the actual test details were not divulged to the petitioner either by the respondents or by CPRI, Bangalore and for the wrong tests done by the 4th respondent, the 3rd respondent had deducted a sum of Rs.20,97,341/- from the pending bills of the petitioner pertaining to RC No.6-1 and RC-224 in and by the present impugned order. There are no provisions for making such deductions in the terms and conditions of the agreement entered into between the petitioner and the respondents. Though several objections were raised by the petitioner and several representations were given to respondents 1 to 3 along with the copies of letters dated 25.5.2012 and 11.6.2012 sent by the 4th respondent stating that the test was not done in accordance with IS standard, the respondents 1 to 3 had not considered the issue and had kept the same pending for a long time abd though at the time of entering into the contract, security deposit bank guarantee and performance bank guarantee were submitted, however, only the security deposit bank guarantee was returned to the petitioner while the performance bank guarantee was not released to the petitioner by the respondent despite of change of policy decision to use digital meters. Against the action of not releasing the performance bank guarantee, the petitioner filed W.P.No.33833 of 2019 in which this Court granted an order of interim direction to the board not to encash the performance bank guarantee and if the Board is inclined to encash the same, the same to be deposited in a fixed deposit in the name of the Registrar General of this Court, vide order dated 4.12.2019. Though the petitioner was supplying the stocks, but the cost towards the said was not paid by the respondent and it was kept pending without any valid reasons. Though the petitioner supplied rolling stocks to the extent of 2% free of cost to compensate the delay, if any, occurring in returning the defective meters, however, the meters supplied though were condemned, the free meters were not returned or paid accordingly, the value of which is Rs.8,46,977.76/- with interest at 22% p.a., which was also demanded vide the letter dated 14.12.2019 of the petitioner, however, no answer was forthcoming. It is the further averment of the petitioner that there is no reason whatsoever for the respondents to keep the purchase order without issuing the closure letter, which act of the respondents is legally invalid. Inspite of very many representations sent to respondents 1 to 3, no orders were passed and the respondents remained silent. Hence, left with no other option, the present petition has been filed seeking the relief supra.

3. Learned counsel for the petitioner submitted that, the petitioner's goods were subjected to tests by CPIR, Bangalore, wherein a clearance certificate has been given in respect of the goods supplied to 3rd respondent and, therefore, no recovery can be made for the units supplied by the petitioner, however, without conducting any proper enquiry, the respondents have unilaterally arrived at a conclusion that there materials supplied were defective and had deducted a sum of Rs.20,97,341/- from the pending bills, inspite of the fact that the terms and conditions of the purchase order does not provide for such deductions. Taking this Court to the various provisions in the terms and conditions, it is submitted by the learned counsel for the petitioner that in the absence of any provision in the terms and conditions to make such deduction, the deduction made by the respondents to the tune of Rs.20,97,341/- is wholly

arbitrary, perverse and illegal and, therefore, the order passed deducting the said amount, which is impugned herein, deserves to be quashed.

4. Per contra, the learned counsel appearing for the respondents 1 to 3 submitted that, the petitioner supplied goods but the goods, which were sent for testing at the CPRI, Bangalore did not pass the test results, as has been communicated by the CPRI, Bangalore as there were lots of defect in the meter and, therefore, invoking the provisions contained in the terms and conditions, a sum of Rs.20,97,341/- which is 10% has been recovered from the pending bills payable to the petitioner. It is the further submission of the learned counsel that when the petitioner had accepted to the terms and conditions in the purchase order dated 16.4.09, the petitioner cannot now turn back and claim that such deduction cannot be made and the same is illegal. It is the further submission of the learned counsel that even otherwise, the petition is hit by delay and laches, as the impugned order was passed in the year 2015, but the petitioner had kept silent and had come before this Court only in the year 2020, which is after a lapse of five years, for which there is no explanation offered by the petitioner. The delay is fatal

to the case of the petitioner and, therefore, no interference is warranted with the order impugned herein.

5. Though notice was served and the name of the 4th respondent was printed in the cause list, none appeared on its behalf. Considering the period of pendency of this Writ petition, this Court is inclined to dispose of the same based on the materials available on record.

6. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents 1 to 3 and perused the materials available on record.

7. The whole case of the petitioner is premised on the terms and conditions of the contract, which, according to the petitioner, does not provide for any deduction of amount from the pending bills towards defective meter. For better appreciation, the relevant portion of the terms and conditions of the purchase order as well as the technical specifications for I-Phase and 3-Phase meters are quoted hereunder :-

PURCHASE ORDER:

10.0. DELIVERY :

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10.8. The actual date of receipt of each material with all accessories will be reckoned as the date of delivery for the purpose of calculation of liquidated damages in respect of that material.

10.9. It is the responsibility of the supplier to give 15 days advance information on inspection, despatch of materials and other obligations under the terms and conditions of this specification in order to deliver the units within the contractual delivery period quoted/agreed.

10.0. LIQUIDATED DAMAGES :

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12.2. If the contractor fails to deliver the equipment / materials within the time specified in the contract or any extension there of, the purchaser shall recover from the supplier as liquidated damages, a sum of half a percent (0.5%) of the all inclusive price of the undelivered equipments/materials for each completed week of delay. The total liquidated damages shall not exceed Ten percent (10%) of the all inclusive price of the items/ materials so delayed. The actual date of delivery of materials at destination stores will be reckoned as date of delivery for this purpose. Liquidated damages will also be recovered for the quantity not supplied as is done for the belated supply. It is the responsibility of the suppliers to arrange for inspection, dispatch etc., in time to keep up the delivery schedule.

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12.12. The board has the right to recover the liquidated damages from the retention amount/balance amount besides Security Deposit.

12.0. GUARANTEE:

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14.4 Any defects or failure occurring within the guarantee period shall be replaced free of cost within seven days with sufficient rolling stock of meters. on receipt of intimation from the purchaser on such defects of failures. If they are not replaced within this period the contractor shall pay the liquidated damages as per the liquidated damages clause in the contract for the delay from the date of receipt of intimation for the defects or failures. A guarantee certificate in the above form shall be submitted along with the 95% bills themselves. Any expenditure incurred in the transportation towards rectification or replacement will be to the suppliers account.

13.0. PERFORMANCE GUARANTEE:

15.1. Option – I. :

15.1.1. The supplier should furnish a performance guarantee in the form of irrevocable bank guarantee for 5% of the total accepted value of the contract and shall be valid for a period of 10 years from the anticipated date of receipt of last consignment of goods / materials at site in good condition. In case of delay in supply, the performance Bank Guarantee should be extended suitably.

15.1.2. The performance Bank Guarantee will be released on expiry of guarantee period after ensuring the defects/darnages during the guarantee period or rectified / replaced. In case of delay in supply, the performance Bank Guarantee should be extended suitably.

14.0. REPLACEMENT OF DEFECTIVE / DAMAGED MATERIALS:

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16.5. Notwithstanding any other remedies available, the purchaser shall be entertained to dispose off the defective / damaged materials in "as is where is condition" without further notice, if the contractor / supplier fails to rectify the defect and / or replace the damaged materials and / or fails to remove defective / damaged materials within seven days period as per PO terms, from the date of receipt of intimation from the purchaser, Board reserves right to dispose of such materials. <u>This is without prejudice to the imposition of Liquidated Damages, Ground rent, forfeiture of security deposit etc.,</u>

21.0. JURISDICTION FOR LEGAL PROCEEDINGS:

23.1. No suit or any proceedings in regard to any matter arising in respect of this contract shall be instituted in any Court save in the High Court, aty Civil Court at Chennal or at the Court of Small Causes at Chennal. It is agreed that no other Court shall have jurisdiction to entertain any suit or proceedings, even though, part of the cause of action might arise within their jurisdiction. In case any part of the cause of action arises within the Jurisdiction of any of the courts in Tamil Nadu and not in the Court of Chennal City, then it is agreed to between parties that such suits or proceedings shall be instituted in a Court within Tamil Nadu and no other Court outside Tamil Nadu shall have jurisdiction even though any part of the cause of action might arise within the jurisdiction of such courts.

23.0. TESTS AT SITE :

25.1.1. The Purchaser reserves the rights of having such tests or he may decide upon being carried out at site at his own expenses to satisfy himself that the materials have not suffered any damage during transit.

25.1.2. If necessary, random samples of materials supplied will be tested (both Routine & Type tests and any other special test) departmentally or through approved Govt Laboratory at Purchasers cost and for any non-conformity to relevant IS and Board's specification, full supplies will be rejected. If initial payment had already been made, the balance payment will be forfeited and any other losses or damages including testing charges will also be claimed. Future supplies in such case will be accepted and paid for only after the results of the samples tested are satisfactory. In addition, the guarantee period will also be extended for subsequent supplies at the direction of the purchaser.

ANNEXURE-I (TECHNICAL) TECHNICAL SPECIFICATION FOR SINGLE PHASE FOUOR WIRE 5-20 AMPS HIGH QUALITY METERS:

22.3. STRIP TEST:

22.3.1. Strip test will be done on one meter from each consignment (offer) of the purchase order. The cost of arranging strip tests and cost of the meters are to be borne by the supplier.

22.3.2. Hence the supplier should supply one meter extra in each consignment.

22.3.3. It may be noted that for any non conformity to relevant ISS and deficiency in quality disclosed in such test results, the entire supplies will be liable to be rejected and the bad performance of the firm will be recorded. In such cases, initial payment made will be recovered and the balance payment made will be forfeited and any loss or damage occurred due to the defective supply will be claimed apart from recording the poor performance of the firm.

8. A careful perusal of the above provisions in the terms of the contract, including technical specifications reveal that the petitioner has accepted to the drawal of random samples of materials for testing, which will be done either as per relevant IS and Board's specifications and any non-conformity with the specification will lead to rejection of the entire supply and that any initial payment made, the balance payment will be forfeited and any other loses or damages including testing charges will be claimed. Therefore, the petitioner has accepted the terms and conditions with regard to forfeiture of the amount and also the tests that would be done.

Further, clause 22.3 relating to Strip Test as provided in the technical specification provides for provision of one additional extra meter by the supplier for the purpose of strip test from each consignment and in such a backdrop, the additional meters supplied by the petitioner cannot be said to be additional meters, but would only be relatable to meters, which are to be supplied by the petitioner for the purpose of carrying out the test.

9. The contractual terms are clear and unambiguous and the petitioner having accepted the terms and conditions cannot now try to wriggle out of it by claiming that the deduction made from the bill towards wrong test cannot be claimed at the hands of the petitioner. The petitioner, having accepted with open eyes to the tests that would be conducted as per IS and Board's specifications, cannot now turn back and say that the tests conducted are wrong, which alone was the cause for the erroneous results and, therefore, the cost towards the same is not deductible from the petitioner. When the petitioner had accepted that it is open for the respondents to conduct tests as per IS and Board's specification, any tests, that is conducted as per Board's specification, the petitioner cannot have any quarrel and the tests having

been conducted by CPRI, Bangalore, being as per IS and Board specification, the said tests cannot be said to be not as per ISS as the tests include even tests as per Board's specifications.

10. The terms and conditions of the contract have been rightly interpreted by the respondents and the impugned order had come to be passed deducting the amount of Rs.20,97,341/- from the bills of the petitioner, which is as per the accepted terms and conditions and, therefore, the said order does not require any interference at the hands of this Court.

11. For the reasons aforesaid, this writ petition fails and the same is dismissed. No costs.

06.08.2024

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Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No

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   144, Anna Salai, Chennai – 600 002.

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M.DHANDAPANI, J.

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