IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2024

CORAM:

THE HONOURABLE MR. JUSTICE **S. SOUNTHAR**

W.P.No.34465 of 2024
and W.M.P.Nos.37348 and 37350 of 2024

National Federation Of Farmers' Procurement,
Processing And Retailing Cooperatives of India Ltd, (NACOF),
A Cooperative Society,
registered Under Ministry Of Agriculture
And Co- Operatives,
Govt Of India,
Represented herein
by Its State Manager
N.Gurusamy ... Petitioner

Vs

1. The Managing Director,
   Tamil Nadu Civil Supplies Corporation, ("TNCSC")
   CMRL Admin Building, Poonamallee High Road,
   Koyambedu, Chennai-107.

2. The Commissioner,
   Commissionerate Of Civil Supplies,
   Ezhilagam, Chepauk,
   Chennai-600 005.

3. The Deputy Secretary (Budget)
   Finance Department,
   Government Of Tamil Nadu,
   Secretariat,Chennai-09. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus, directing the first respondent to Third Respondent, pursuant to the petitioner's representation dated 09.11.2024, to discharge the petitioner from performing its supply obligations under the 3rd spell for supply of 110 lakh numbers of RBD Palmolein oil pouches at Rs.115.20 net per Pouch and not enforce the 3rd spell supply on RBD palmolein oil Pouches in Tender No.BS3/ 028830 / 2024 /TNCSC /24-25 dated 23.08.2024.

For Petitioner	: Mr.S.Mukunth, Senior Counsel for Mr.M.Velmurugan
For R1 and R2	: Mr.J.Ravindran Additional Advocate General assisted by Mr.C.Selvaraj Additional Government Pleader
For R3	: Mr.Abibulla Khan Government Advocate

ORDER

This writ petition is filed seeking direction to the first respondent to consider the petitioner's representation dated 09.11.2024 and discharge the petitioner from performing its supply obligations under the 3rd spell for supply of 110 lakh numbers of RBD Palmolein oil pouches at Rs.115.20 net per Pouch and not to enforce the 3rd spell supply of RBD palmolein oil Pouches in Tender No.BS3/ 028830 / 2024 /TNCSC /24- 25 dated 23.08.2024.

2. According to the petitioner, the first respondent floated a short electronic tender for purchase of 600 lakh numbers of fortified RBD palmolein oil of 1 litre pouches as per BIS specification for special Public Distribution System. The petitioner submitted a bid agreeing to supply 3,30,00,000/- numbers of RBD Palmolein oil of one litre pouches at the rate of Rs.115.20 per pouch. The bid was opened on 10.09.2024 at 11 a.m and the respondents had called the petitioner for negotiation meeting on 14.09.2024. In the meantime, it came to the knowledge of the petitioner that the Government of India, vide Notification No.43/2024 (Customs) dated 13.09.2024, hiked the import duty on RBD Palmolein Oil, resulting in effective price increase at 22%. It is also stated by the petitioner that when the petitioner submitted its bid on 09.09.2024, the market price of the RBD Palmolein was hovering just above Rs.95/-. Taking into consideration the said price and other expenditure and profit margin, the petitioner had quoted Rs.115.20 per pouch. However, due to unforeseen and unexpected exorbitant increase in the duties, the petitioner submitted a representation dated 13.09.2024 to the first respondent, doubting its ability to abide and supply at the quoted price.

3. The representation of the petitioner was not considered and in the light of the severe penal consequences including blacklisting for any failure or refusal to supply, the petitioner participated in the negotiation meeting on 14.09.2024 and agreed to supply 3,30,00,000 numbers of RBD Palmolein oil at the agreed rate of Rs.115.20. The petitioner agreed to supply the above quantities of Palmolein oil at the agreed price on the whole with the hope that the international sellers of RBD Palmolein would reduce the price in the light of the unexpected increase in duty by the Government of India.

4. The petitioner completed the supply of 1,10,00,000 numbers of Palmolein Oil in the first spell and the supply of same quantities of Palmolein oil pouches for the second spell is going on. In view of the adverse impact felt by the petitioner due to unjust increase of customs duty, the petitioner submitted a representation on 25.10.2024 expressing its inability to supply the RBD Palmolein pouches at the offered rate and requested the respondents to discharge him from supply of the Palmolein oil at the agreed rate for the third spell. The said representation has not been considered by the respondents and aggrieved by the same, the petitioner has come before this Court.

5. Mr.S.Mukunth, the learned Senior Counsel appearing for the petitioner submitted that the petitioner has come before this Court with this prayer for discharge from the contractual obligations on the ground of impossibility of performance. He further submitted that the sudden increase in customs duty from 12.5% to 32.5% had put severe strain on the petitioner and it is unable to bear the loss caused by the customs duty increase. He also submitted that the respondents ought to have discharged the petitioner from contractual obligations by taking into consideration the *Force Majeure* circumstances.

6. In support of his contentions, the learned Senior Counsel appearing for the petitioner relied upon the following Judgments:-

(i) Harbanslal Sahnia and another Vs Indian Oil Corporation Ltd and others reported in (***2003) 2 SCC 107.***

(ii) ABL International Ltd and another Vs Export Credit Guarantee Corporation of India Ltd and others reported in (***2004) 3 SCC 553.***

(iii) Unitech Limited and others Vs Telangana State Industrial Infrastructure Corporation (TSIIC) and others reported in (***2021) 16 SCC 35.***

7. Per contra, Mr.J.Ravindran, learned Additional Advocate General, appearing for the respondents 1 and 2 submitted that the writ petition itself is not maintainable in view of the existence of arbitration clause in the agreement between the petitioner and the respondents. He further submitted that though there is a subsequent increase of customs duty by the Government of India, the petitioner agreed to supply the specific quantities of RBD Palmolein Oil at the agreed price and entered into an agreement on 24.09.2024. Therefore, the petitioner is not entitled to go back from his offer and seek discharge from performing its obligations in the agreement. He also submitted that representation of petitioner seeking discharge from supply obligations during 3rd spell was considered and rejected by first respondent by an order dated 20.11.2024 and the same has not been challenged by the petitioner.

8. In the light of the admitted facts narrated above, it is clear that the first respondent invited e-tender for supply of specific quantities of RBD Palmolein oil on 23.08.2024. The petitioner submitted its bid in time before the last date of submission (i.e., 09.09.2024). The bid was opened on 10.09.2024. It is admitted fact that even before the date of negotiation, the Government of India issued notification increasing the customs duty on 13.09.2024. Therefore, in the

light of the admitted facts as seen from the petitioner's affidavit, when the petitioner participated in the negotiation meeting on 14.09.2024, it was aware of the duty increase by the Government of India. In spite of the same, it agreed to supply 3,30,00,000 numbers of RBD Palmolein oil at the rate of Rs.115.20 per one litre pouch and entered into a formal agreement on 24.09.2024. So it is very clear, when the petitioner signed the agreement for supply of specific quantities of Palmolein oil at the agreed rate of Rs.115.20, the increase in customs duty was very well within its knowledge. Therefore, it is not as if the customs duty increase came into picture only subsequent to the agreement.

9. In fact, the petitioner submitted a letter on 16.09.2024 in Letter No.NACOF/TNCSC/Tender/2024-25, agreed to supply specified quantities of RBD Palmolein oil at the agreed rate as per the bid. Whenever the petitioner or other bidder submits its price bid, it is well known that the price of Palmolein oil is subject to the fluctuations by the working of market forces and the prevailing customs duty is subject to upward or downward revision. Therefore, the submissions made by the learned Senior Counsel appearing for the petitioner that upward revision of customs duty by the Government of India shall be treated as intervention of *Force Majeure* and contract should be treated

as frustrated, *prima facie,* not acceptable to this Court. Further, when the petitioner plead frustration of contract, it has to work out its remedy either before the Civil Court or under the arbitration clause existing in the agreement. Alleged frustration of contract is a contentious issue of facts and the same cannot be gone into conveniently by this Court while exercising power of Article 226 of Constitution of India.

10. A perusal of the agreement entered into between the petitioner and respondent would make it clear that there is an arbitration clause (Clause 23 of the agreement) which reads as follows:-

> *" 24. ARBITRATION:*
>
> *In case of any dispute in the short e-tender including interpretation if any on the clauses of the tender or the agreement, the matter shall be referred by the Corporation / supplier to an Arbitrator who shall be selected by the party from the panel of the Arbitrators approved by the Board of Directors of TNCSC and communicate the same within 15 days from the date of receipt of the letter from the Corporation along with the panel of the Arbitrators. If there is no reply from the supplier within 15 days, Corporation shall choose any one of the Arbitrators from the panel of Arbitrators referred to above. The remuneration for the Arbitrator and other expenses shall be shared equally by the TNCSC and the party to the Arbitration.*
>
> *i) The venue of Arbitration shall be at the Head office of the TNCSC, Chennai. The decision of the Arbitrator shall be final and binding on both the parties to the Arbitration.*
>
> *ii) The Arbitrator may with the mutual consent of the parties extend the time for making the award. The award to be passed by the Arbitrator is enforceable.*

iii) Any other disputes arising out of the Arbitration award or any civil remedy for non- fulfillment of any of the terms and conditions of the Tender / Agreement shall be subject to the Jurisdiction of the Civil Courts at Chennai city only."

11. It is a settled law, existence of arbitration clause is a bar for exercise of jurisdiction under Article 226 of Constitution of India, as far as the rights arising out of the agreement containing the arbitration clause. In this regard it would be appropriate to refer to the decision of Apex Court in ***Gail (India) Limited Vs Gujarat State Petroleum Corporation Limited*** reported in (***2014) 1 SCC 329.*** The relevant observation reads as follows:-

" 28. We also agree with Shri Nariman that the remedy of arbitration available to the respondent under Para 15.5 of the GSA was an effective alternative remedy and the High Court should not have entertained the petition filed under Article 226 of the Constitution of India. The contents of the GSA, the price side letters and the correspondence exchanged between the appellant and the respondent give a clue of the complex nature of the price fixation mechanism. Therefore, the High Court should have relegated the respondent to the remedy of arbitration and the Arbitral Tribunal could have decided complicated dispute between the parties by availing the services of the experts."

Now, the representation submitted by the petitioner is rejected by respondent and therefore, a dispute arose between petitioner and respondent with regard to obligations under the agreement. Therefore, it is open to petitioner/supplier to invoke arbitration clause under the agreement and get his grievance redressed.

12. If the petitioner feels the contract is frustrated by intervention of *Force Majeure,* it is for the petitioner to invoke arbitration clause and seek necessary remedy. The petitioner is also at liberty to pursue civil remedies available to him under common law. In such circumstances, the writ petition filed by the petitioner seeking direction to the respondents to discharge the petitioner from contractual obligations, on the ground that the contract got frustrated by upward revision of customs duty by the Government of India is not entertainable one.

13. Further, the learned Senior Counsel for the petitioner relied upon the Judgments referred above for the preposition that the existence of alternative remedy is not a ground for rejecting the writ petition in cases where the writ petitioner seeks enforcement of any of the fundamental rights or there is failure of principles of natural justice or the orders or proceedings are wholly without jurisdiction or ultravires of the Act.

14. In the case on hand, the petitioner seeks discharge from contractual obligations, on the ground that the contract got frustrated. There is no violation

of fundamental rights or principles of natural justice or any order passed by the respondents is challenged on the ground of jurisdiction. In such circumstances, the Judgments relied upon by the learned Senior Counsel appearing for the petitioner are not helpful to the petitioner to advance its case.

15. In view of the above, this writ petition stands dismissed. However, it is made clear, if the petitioner invokes arbitration clause or approaches Civil Court for common law remedy, any observation made by this Court in this order, which is only *prima facie* opinion, will not affect the petitioner's right in any way. Consequently, connected Miscellaneous petitions are closed. There shall be no order as to costs.

29.11.2024

Internet: Yes
Index : Yes/No
Neutral Citation : Yes/No
Speaking/Non Speaking order
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S. SOUNTHAR. J,

mn

To
1. The Managing Director,
   Tamil Nadu Civil Supplies Corporation, ("TNCSC")
   CMRL Admin Building, Poonamallee High Road,
   Koyambedu, Chennai-107.

2. The Commissioner,
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