(2010) 02 MAD CK 0239

In the Madras High Court

Case No : Writ Petition No. 4855 of 2003

Vaishnavi Metals	APPELLANT
Vs	
The Chairman, The Superintending Engineer, Thiru Albert Executive Engineer and The Chief Stores Officer Tamil Nadu Electricity Board	RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2010) 02 MAD CK 0239

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : C.S. Krishnamoorthy, for the Appellant; A. Selvendran, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The petitioner has filed this writ petition praying for issuance of a writ of certiorarified mandamus, in calling for the records of the second respondent in letter No. Lr. No. SE/GCC/CNI/MM/SDM/F.TS.001/02-03/D.1129/02 Dt.17.9.2002 and to quash the same and also to direct the respondents to refund a sum of Rs. 1,52,500/- with interest at the rate of 18% from 2.8.2002, the date of payment of value of the tender.

2. The petitioner/Firm commenced business with the respondent Board for the past two years, for nearly Rs. 2 Crores of business was done with them. The second respondent had floated the tender on 15.5.2002 in regard to the disposal of scrap materials and condemned transformers (without oil) and M.S. Channels to Tender Specification No. TS001/2002/ 2003. The petitioner''s partner D. Thangaraj, who sworn the affidavit in this writ petition, had participated in the tender and offered Rs. 22,31,826/- (Exclusive of taxes) for the aforesaid materials and paid a sum of Rs. 2,75,000/- towards Earned Money Deposit charges. The second respondent by its letter dated 8.7.2002 accepted and

confirmed the tender and directed the petitioner to deposit remaining sum of Rs. 19,56,826/- within 21 days. On 2.8.2002, the petitioner paid the entire balance amount of Rs. 19,56,826/- to the second respondent and requested him to issue delivery order immediately.

3. On 9.8.2002, the petitioner''s partner D. Thangaraj proceeded to the stores of the second respondent for the purpose of taking delivery of materials and during the process of taking delivery of five condemned transformers, in one of the transformers in Sl. No. 4 and lot No. 12 "one core along with the copper was missing". On an enquiry, the partner of the petitioner firm D. Thangaraj, came to know that sometime back "the core was taken for repair and sent to stores" and he had mentioned the details of the Sl. No. and capacity of the transformer to the second respondent.

4. The case of the petitioner is that third respondent, Thiru Albert, Executive Engineer of the first respondent Board, Transformer Repair Bay, Ambattur Industrial Estate, Chennai-58, who was in charge of Stores/Transformer Repair Bay and he was accountable for missing copper core in the transformer and during the time of inspection and on the date of participating in the tender and on the date of remitting the entire contracted value of the tender, the petitioner''s firm partner D. Thangaraj found the copper core in both the condemned transformers, but to his shock and surprise, on 9.8.2002, when he was taking delivery of the other materials, he was found that the copper core was removed in one of the transformers.

5. Added further, it is the case of the petitioner that at the time of taking delivery of the materials on 12.8.2002, the petitioner''s firm partner D. Thangaraj had given an intimation to the second respondent in regard to the missing of copper core in one of the 2 MVA of transformers which covers 1/3 of the contracted value and the contracted value of the transformers amounts to Rs. 14,31,666/- etc and on the same date itself, he had requested the second respondent and third respondent to inform the fourth respondent for giving the removed copper core to the petitioner from the stores and in case the same was not possible to return the removed copper core then, a sum of Rs. 1,52,500/- being the 1/3rd value of the removed copper core has to be refunded and only with the aforesaid conditions, he had removed the transformers from the Repair Bay. According to the petitioner, the transformer with the copper core weighs 19 tonnes 890 kilograms whereas the other transformer in which the copper core was missed weighs 18 tonnes 670 kilograms and therefore, the shortage of copper core was worked out 1 tonne 220 kilograms and the value being Rs. 1,52,500/- at the rate of Rs. 125/- per kilograms. The remainders were also sent to the second respondent on 16.8.2002 and 7.9.2002 to return the missing copper core or in the absence the value of the copper core was to be refunded. However, the second respondent by its letter dated 17.9.2002 informed the petitioner that its claim cannot be feasible and complaints, since it had taken delivery "AS IS WHERE IS CONDITIONS".

6. The learned Counsel for the petitioner urges before this Court that the order of the second respondent dated 17.9.2002 is contrary to law, arbitrary and illegal in the eye of law and nowhere in the tender condition, it was mentioned that there was no copper core at all in the transformers and in the tender condition itself in Sl. No. 4 lot No. 12, it was clearly mentioned condemned transformer 10 MVA (without Oil) and therefore, it would be stated that there was a copper coil and on the date of tender, the copper core was available in both the transformers and since the copper core was the main part of any transformer and but for the copper core the value offered of condemned transformer would not be Rs. 7,15,833/- and more over, ''as is were condition'' does not mean that removing of copper core from the transformer in the absence of specific condition in the tender and subsequent to the sale order and there was no dispute in regard to other items and the value of the tender was about Rs. 23 lakhs and in regard to other items, the petitioner had taken delivery of the entire materials and therefore, prays for allowing the writ petition.

7. Expatiating his submissions, the learned Counsel for the petitioner contends that the term ''as is where condition'' and significantly, refers to the condition available at the time of inspection and quoting the value of the price towards materials and not at the time of taking delivery of the materials.

8. Per contra, the learned Counsel for the respondents submits that the petitioner participated in the Tender Specification No. TS(S)01/2002-03 was floated by Chief Engineer/Distribution/Chennai EDC (South) for the sale of ferrous and non ferrous scrap, M.S. Rod/Plates Channel. R.S. Joints, M.S. Angles, M.S. Barrels, power, Transformers and other absolute items available at Chennai Stores/GCC/Ambattur with due date and time of opening tender on 15.5.2002 at 2.00p.m and the rates quoted by the petitioner was accepted and sale order was issued vide Lr. No. SE/GCC/CNI/MM/SDM/F.Scrap/D.862/2002 dated 8.7.2002 and on remittance of the sale amount the release order was issued vide Memo No. SE/GCC/CNI/MM/SDM/F.TS 001/2002-2003/D.983/2002 dated 3.8.2002 and the petitioner had taken delivery of the said transformer on 12.8.2008 and the copper in the transformer was removed and transported for official technical use by the Engineers working in the Transformer Repair Bay during the month of July 1996 itself and that the officials have devaluated the said copper to the TNEB stores on 22.7.1996 and the stores had received and and acknowledged in the received book 14912 dated 22.7.1996 and in fact in paragraph 4 of the affidavit filed in support of the writ petition, the partner of the petitioner firm had mentioned as "one of the transformers in Sl. No. 4 and Lot No. 12" and the petitioner points out that it was a "10" MVA transformer and in paragraph 5, the petitioner was contradicting its own statement that the core was missing in one of the "2" MVA transformer and therefore, the petitioner is contradicting its own statement and technically one copper coil will weigh only about 900 kilograms and the cost of one kilogram was Rs. 125/- and it depended on the following conditions in the market and in the tender specification No. TS(S)01/2002-2003, TNEB had clearly stated that "AS IS WHERE IS CONDITION" contained in the

tender form(Covering letter)signed by the tendered, the first para reads as follows:

I/We agree to purchase the following materials at the rates quoted against each (in the enclosed abstract) Ex Board stores premises under "AS IS WHERE IS CONDITION" and transformers were auctioned in "number" basis and not on weight basis and in the instant case on hand, the Electricity Board had auctioned on number basis viz., "AS IS WHERE IS CONDITION" and not weight basis. After six years, the Tamil Nadu Electricity Board had processed this auction procedure for the transformers during 04/2002 and release order issued on 3.8.2002 and the petitioner was informed by the respondent that it was his own choice either to take delivery or not and since the petitioner had already made payment of Rs. 22,31,826/- it was the urge for the petitioner to take delivery of the transformers and nobody compelled him to take delivery of the same.

9. Countering the submissions of the learned Counsel for the respondents, the learned Counsel for the petitioner submits that in the sale order of the second respondent dated 8.7.2002 in Sl. No. 4 Lot No. XII a) Condemned Power Transformer (10MVA) without oil and there was no reference to the word ''copper'' and therefore, only oil was excluded and it goes without saying that there was copper coil and further nowhere in the tender condition, it was mentioned that there was no copper coil at all in the transformers.

10. The third respondent in his counter had stated that as per sale order dated 8.7.2002, totally five transformers were purchased by the petitioner at a total cost of Rs. 20,38,406/- and each transformer was having three copper coils/ limbs (R, Y, B phases) and hence all the transformers would be having total 15 (5 x 3) copper coils/Limbs and out of 15 copper coils, one coil was removed and officially handed over by the then Engineers to the stores during 1996 and an erstwhile Engineers have devaluated the copper in the Tamil Nadu Electricity Board stores on 22.7.1996 vide folio No. 18358 dated 22.7.1996 and the stores authorities have officially received the copper, acknowledged the same and the entries recorded in the Stores Receipt Book on the same date and as per Clause 11(1) tenderers were advised to inspect the scrap materials and quote their rates to lift the materials ''AS IS WHERE CONDITION'' and the petitioner had admitted in his affidavit that he inspected the same and at the time of inspection all tenderers were informed that one number coil was removed during 1996 itself and only after knowing the same, the petitioner quoted comparatively higher rates than other tenderers and therefore his claim for refund of Rs. 1,52,500/- is not lawful and as per Electricity Board tender notice, transformers were auctioned on the basis of number and not on weight basis.

11. It is useful to refer that in the sale order dated 8.7.2002 in Sl. No. 4 Lot No. XII (a) points out to ''condemned Power Transformer (10MVA) without oil two numbers amounting to Rs. 14,31,666/- and this does not any where expressly or impliedly refer to any coil in the considered opinion of this Court. However, at this juncture, the contention put forward on behalf of the petitioner is that the

condemned power transformer 10 MVA without oil in Sl. No. 4 Lot No. XII(a) goes to show that there was copper coil and nowhere in the tender condition, it was mentioned that there was no copper coil at all in the transformers.

12. In this connection, this Court has perused the entire files produced by the Tamil Nadu Electricity Board in respect of the petitioner''s firm where from it transpires that in the Stores Received Book on 22.7.1996, there was a reference to the following:

Tamil Nadu Electricity Board 22.300 GCC/MDS Electricity System 8/96 Stores custodian GCC/Central Stores Ambattur, Madras-80 Date:22.07.96 Stores Received Book No. 14912 -- Year In From Particulars Quantity Weight A/c to be Bin Stores Remarks month & voice whom charged card ledger received or No. Folio Date or credited Devolution No. -- 22/18538 AE/TRB Copper Scrap 74-100 039/ 10146.800 07/-------ABT 872 Kg 7 96 68 (eight hundred & seventy two only) 25467 AE/THE/-------- Athipattu RSJ Calbits 69 scrap 175Kg (One hundred 436101/039/191 5520 & Seventy five 211/ Only) 94-95 A.M. Soundarajan Sd/- 22.7.96 Stores Supervisor Stores Custodian Central Stores/ GCC GCC/Central Stores TNEB/Ambattur Estate Ambattur Madras-58 Madras-58 --

and also a certificate shows that the source of receipt was mentioned as Released from 10 MVA "IGE'' make Sl. No. 551359 and the condition of the coil was mentioned ''burnt copper'' and under the scrap, it was described as scrap value. Therefore, it is quite candidly clear that the officials had devaluated the copper to the Tamil Nadu Electricity Board on 22.7.96 vide 18358 dated 22.7.1996 and stores were received and acknowledged the said vide stores received book 14912 dated 22.7.96 and the categorical stand of the Electricity Board was to the effect that the copper in the transformer was removed and transported for certain technical use by the Engineers working in the Transformer Repair Bay during the month of July 1996 itself.

13. It is to be borne in mind that if a disputed fact is involved, it cannot be investigated under Article 226 of the Constitution of India as per decision of the Hon''ble Supreme Court in Union of India''s case AIR 1961 SC 1926. Moreover, the petitioner can get an adequate remedy by filing of the suit as per the decision of the Hon''ble Supreme Court in The Regional Manager and Another Vs. Pawan Kumar Dubey, , Para 15.

14. On a careful consideration of respective contentions and in view of the fact that the parties have taken a divergent stand in the matter in issue, especially when the petitioner had taken a specific stand that nowhere in the tender condition, it was mentioned that there was no copper oil at all in the transformers and that the transformers were removed and transported for official technical use by the Engineers working in the Transformer Repair Bay during the month of July 1996 itself and the officials have devaluated the said copper to the

Tamil Nadu Electricity Board Stores on 22.7.1996 etc which was duly acknowledged in the Stores Received Book dated 22.7.96 No. 14912, this Court is of the considered view that the issue involved in the writ petition not only revolves mainly upon disputed question of facts and when the disputed question of facts are involved in the matter, then it is not for the petitioner to approach this Court under Article 226 of the Constitution of India, to seek the relief as prayed in the writ petition, claiming the refund of a sum of Rs. 1,52,500/- along with interest at the rate of 18% p.a. from 2.8.2002 and therefore, the best course open to the petitioner is to approach the competent Court of Civil jurisdiction to thrash out all the issues involved in the matter in a complete and in a comprehensive way by filing a necessary civil suit by paying necessary court fee so as to put at rest the controversies/disputes once and for all and in that view of the matter, this Court dismisses the writ petition to subserve the ends of justice

15. In the result, the writ petition is dismissed leaving the parties to bear their own costs. However, the dismissal of the writ petition will not preclude the petitioner to approach the competent civil Court/forum to redress its grievance, if any, in the manner known to law, if so advised. Equally, permission is granted to the parties to raise all factual and legal issues involved in the mater by adducing oral and documentary evidence through examination of necessary witnesses including the officers either retired or in service, to seek appropriate remedy in accordance with law and the competent civil forum/Court is directed to provide an adequate opportunity to the parties to put forward their respective stand only in the event of the petitioner approaching the civil forum.

