

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.07.2015

Delivered on: 03.08.2015

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN

W.P.No.16140 of 2015

P.Arun Kumar

.. Petitioner

Vs.

1.The Government of Tamil Nadu,
Represented by its Principal Secretary,
Highways and Minor Ports,
Chennai.

2.The Chief Engineer,
National Highways,
Chepauk, Chennai.

3.The Superintending Engineer,
National Highways,
Salem.

4.The Divisional Engineer,
National Highways,
Coimbatore.

5.The Chief Accounts Officer,
National Highways,
Kuralagam, Chennai.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the respondents to disburse the admitted dues amounting to a sum of Rs.3,98,90,310/- being the sum lawfully due to the petitioner under the Agreement No.25/2010-2011 dated 23.09.2010 between the petitioner and the respondents, together with cumulative interest at 24% p.a.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.Rm.Muthukumar,
Government Advocate for State Govt.
Mr.P.Tamil Mani for CMDA

O R D E R

The petitioner is the proprietor of M/s.Gowpatt Associates and would state that the respondents had invited tenders for widening

and strengthening (including construction of retaining wall) in Km 18/2-38/2 of Avinashi-Mettupalayam Road and the petitioner has submitted its bid for a sum of Rs.19,68,23,980/- and the tender of the firm, in which the petitioner is the proprietor, was accepted and approved. A written agreement came into being on 23.09.2010 wherein time fixed for completion of work was fixed as 12 months i.e., work ought to have been completed on or before 22.09.2011. The petitioner would further state that however the work was completed on 31.01.2012 for the reason that there is some delay in clearing trees, shifting electric poles and drainage pipes in the project area and in between local body election was held, which also contributed to the said delay. It is also stated by the petitioner that he has incurred expenditure on account of variations in the quality of bitumen and price escalation on account of delay in completing the project. It is the claim of the petitioner that he is eligible for payment of Rs.1,83,23,115.41/- on account of variation in the quality of bitumen and he is entitled for a sum of Rs.2,15,66,195/- on account of price escalation and also drawn the attention of the respondents to the terms of the contract, wherein it has been specifically stated that the contractor would be eligible for payment of cost of bitumen due to variation arising out of the job mix approved by the department. The petitioner would contend that the fourth respondent has also submitted that the petitioner is entitled to the said claim and addressed a letter to the third respondent requesting him to obtain the requisite sum of Rs.3,85,38,990/- being the sum due and outstanding under the said contract and also addressed a letter dated 11.12.2013 on similar lines to the fourth respondent. The petitioner has also followed up the matter by repeatedly sending representations and since he has not been favoured with any kind of response, came forward to file this writ petition.

2. Mr.V.Raghavachari, learned counsel appearing for the petitioner has invited the attention of this Court to the typed set of documents and would submit that the fourth respondent has made positive recommendations and inspite of it, nothing as fructified so far and would further contend that on account of delay in settling the claim, the banker of the petitioner namely South Indian Bank, Regional Office, Chennai, has initiated recovery proceedings under SARFAESI Act, 2002 by issuing notice dated 23.05.2015 and hence, prays for urgent orders directing the respondents to pay the said amount.

3. Per contra, Mr.Rm.Muthukumar, learned Government Advocate appearing for the first respondent would contend that unless and until the quality of work done by the petitioner is certified to be satisfactory, excess payment made by the petitioner cannot be considered.

4. This Court has carefully considered the rival submissions and also perused the materials placed before it.

5. The third respondent, in its letter No.4588/2013/D.O dated 20.11.2013 addressed to the second respondent, has considered the letter of the fourth respondent dated 13.10.2013 and observed that based on factual grounds, completion period has been extended from 22.09.2011 to 22.12.2011 and 01.02.2012 and in the light of the circumstances explained above and on the request of contractors for clearing the price variations, has requested the approval of the second respondent for price adjustment and extra cost incurred for usage of excess bitumen based on the agreement and conditions of the contract.

6. It is relevant to extract the reasons assigned by the fourth respondent in its letter dated 13.10.2013 addressed to the third respondent:

"E.B.Poles shifting & Tree cuttings:

There were many trees were to be removed from the proposed carriage way alignment, the procedure for tree cutting on the strength took substantial time. There were many EB poles on the alignment area of the constructed carriage way, even though we have paid the charges for shifting of EB poles during January 2011 and the entire shifting were been completed few months, with the existence of EB poles and trees the construction activity may not be possible as the one half has to be left for movement of both side non stop thick dense.

Water Main pipe lines:

Due to heavy leakages of Tiruppur Main water pipe line, there was apprehension in carrying out the work, by the severe agitation of General Public of Therampalayam Village, the portion of work was let off in later stage.

Heavy traffic density & limited workable hours:

Because of the very thick Traffic density in this main and important road, the effective construction time is very restricted and the activity can happen with utmost care, even during the day time, as heavy machineries cannot perform, when there are thick flow of traffic in the construction area due to traffic on this stretch leading to Ooty for summer season. The work also got delayed due to local body election conducted during Oct'2011.

Rain and its effect:

Being the entire stretch of the road falls under the foot of Hill, also because of the heavy rain due to Northeast Monsoon during Oct'2011 and Nov'2011 and Southwest Monsoon which affects the road, all the activities right from excavation for box cutting removal of the exciting earth got very much delayed.

Scarcity of river sand: It is fact that Scarcity of river sand from the moth of September'2010 the activity of concrete works also got affected severely.."

7. The second respondent, in his memos dated 06.12.2013 and 09.12.2013 addressed to the respondents 3 and 4, has stated that as per G.O.Ms.No.101, PW(G2) Department dated 10.06.2009, the price variation will be operated by the respective Divisional Engineers and hence, the Superintending Engineer (National Highways)/fourth respondent is requested to decide the matter according to rules in force. The fourth respondent, in-turn, addressed a letter dated 11.12.2013 to the Senior Accounts Officer, National Highways, Chennai-600108, stating that the respondents 2 and 3 had instructed him to decide and operate the request made by the petitioner with regard to price escalation of Rs.2,15,66,194.70/- and usage of excess bitumen in DBM for Rs.1,83,24,115.41/- aggregating to a sum of Rs.3,98,90,310.11/- as per the agreement conditions and the rules in force and hence, requested the said official to open the appropriate account as per the rules in force, so as to enable the above said expenditure after getting necessary funds. The fourth respondent, in his letter dated 12.12.2013, addressed to the third respondent, has requested him to obtain required fund of Rs.3,85,38,990/- and get the same communicated to his office. The fourth respondent, once again addressed a letter to the Senior Accounts Officer, National Highways, Chennai, bringing to his knowledge, the Government Order as well as the guidelines and requested for necessary permission to reopen the compliance report forwarded by him, vide his letter dated 03.12.2013 and furnished the revised completion report. The fourth respondent also addressed a letter No.CRF/2009/740 dated 25.05.2015 to the petitioner stating among other things that under Article 125 local rolling III, special permission/approval has to be obtained from the Government for the purpose of disbursing the said amount and also marked a copy to the respondents 2 and 5. The grievance expressed by the petitioner is that inspite of very many positive recommendations, no orders have been passed by the first respondent, result being he is facing recovery proceedings from his banker, namely South India Bank, Regional Office, Chennai under the provisions of SARFAESI act and hence, prays for appropriate orders.

8. This Court, in the earlier paragraphs, has extracted and referred the positive recommendations made by the respondents 3 and 4 and also justifiability of the claims. It is not in serious dispute that the petitioner is also facing recovery proceedings from his banker, namely South India Bank under the provisions of SARFAESI Act and therefore, the need for release of funds is very urgent; otherwise the properties given by the petitioner as security may be brought to sale and his business may come to a stand still. In the light of the positive recommendations made, it is obligatory on the part of the first respondent to consider the request of the petitioner and pass orders at an earliest.

9. Therefore, in the light of the above facts and circumstances, the first respondent is directed to consider the claim of the petitioner for disbursal of Rs.3,98,90,310/- claimed by him under the Agreement No.25/2010-11 dated 23.09.2010 by taking into consideration the findings/observations made in this writ petition and pass orders as expeditiously as possible and not later than four weeks from the date of receipt of a copy of this order.

10. This Writ Petition is disposed of accordingly. No costs.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

jvm

To

1.Principal Secretary,
The Government of Tamil Nadu,
Highways and Minor Ports,
Chennai.

2.The Chief Engineer,
National Highways,
Chepauk, Chennai.

3.The Superintending Engineer,
National Highways,
Salem.

4.The Divisional Engineer,
National Highways,
Coimbatore.

5.The Chief Accounts Officer,
National Highways,
Kuralagam, Chennai.

svi(co)
pmk.4.8.2015

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