THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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WRIT PETITION No.8801 of 2011

ORDER:

This Writ Petition, under Article 226 of the Constitution of India, is filed by the petitioner seeking the following relief/s:-

> **"….to issue an appropriate writ, order or direction more particularly one in the nature of a writ of Mandamus declaring the action of the respondents in deducting the amounts from the running bills of the petitioner company towards price adjustment of materials in express violation of the contractual terms in respect of Agreement No. 8/E.O/2009-10 dated 07-08-2009 between the first respondent and the writ petitioner, as being illegal, irrational, arbitrary and in violation of the terms of the contract, and consequently direct the respondents not to deduct any sums from the running bills of the petitioner in pursuance of the agreement No.8/E.O./2009-10, dated 07-08-2009 by adopting the price adjustment formula and pass such other order or orders as this Hon'ble Court deem fit and proper in the circumstances of the case."**

(Reproduced Verbatim)

2. I have heard the submissions of the learned counsel for the writ petitioner, the learned standing counsel appearing for the respondents 1 and 2 and the learned Government Pleader for the Endowments (AP) appearing for the third respondent. I have perused the material record.

3. The case of the writ petitioner, as set out in the writ petition, in brief, is this:-

The petitioner company, which is engaged in execution of civil contract works and which is a special class contractor, had emerged as a successful tenderer in response to the tender notice in Rc.No.Q1/1259/2007 dated 06.11.2008 issued by the first respondent Devasthanam for construction of a VIP guest house at Kanipakam at an estimated cost of rupees 8.35 crores. Thereafter, the petitioner company had entered into an agreement under exhibit P1 bearing No.8/E.O./2009-10 dated 07.08.2009 with the first respondent for execution of the contract work. The said contract does not provide for price adjustment or alteration of agreement rates. The contract also provides that the first respondent will not take any responsibility in regard to the fluctuations in the market in regard to the cost of the materials, charges of transport and loss of material. The contract also restricts the contractor/the petitioner-company from claiming any compensation towards price escalation. As per the terms of the contract, the first respondent is obliged to make payment for completed works on the basis of the sanctioned estimated rates and the bills of quantities for each item plus or minus tender premium. While so, the Government have issued G.O.Ms.No.94, Transport, Road & Buildings (R.I.) Department, dated 16.04.2008 allowing adoption of price adjustment for steel and cement every month. The Government have also issued G.O.Ms.No.35, Transport, Road & Buildings (R.I.) Department, dated 30.01.2009 allowing adoption of price adjustment for all other materials, labour and machinery in building works subject however to the terms of the contract. The present agreement in exhibit P1 was executed after the issuance of the aforementioned Government orders. In that agreement, the procedures stated in the Government orders are not adopted, but, the procedure which is contrary to the terms of the Government Orders was incorporated. Contrary to the terms of the agreement between the parties and purporting to act under the said Government Orders, the first respondent had deducted a sum of rupees ten lakhs from the running bills of the petitioner company on 05.03.2011 on the ground that the price of certain material had gone down. The petitioner, having protested the same, had brought to the notice of the first respondent that there is no mention in the contract/agreement between the parties in regard to any price adjustment and as such the action of the first respondent in making the said deduction towards the price adjustment unilaterally is illegal. The petitioner-company by a letter dated 05.02.2011, requested for dropping the said action. However, the first respondent did not accept the request of the petitioner in the said letter and was bent upon implementing the same course even in respect of the future bills and had thus, forced the petitioner to initiate legal action. Hence, the present writ petition is filed.

4. The defence of the first respondent Devasthanam, as set out in the counter and additional counter affidavit filed on its behalf, in brief, is this:-

The rights and the contractual obligations between the parties to the contract cannot be questioned under Article 226 of the Constitution of India. The appropriate remedy, therefore, for the petitioner is to approach the competent civil Court by way of a regular civil suit as the rights and the obligations of the parties to the contract are to be determined as per clause 23 of the General Conditions of the Contract, whereunder, the petitioner had agreed to resolve the disputes before the competent civil Court in case the subject matter of the dispute exceeds rupees 50,000/-. Hence, the writ petition is not maintainable. The Devasthanam is legally right and is empowered to make necessary deductions from the bills of the petitioner as and when the current rates of cement and steel come down and are less than those mentioned in the tender documents. G.O.Ms.no.94 issued after superseding G.O.Ms.no.35 is clearly applicable to the facts of the case. It deals with adoption of price adjustment for steel and cement for all ongoing works of Bridges, Roads and Buildings and other civil works of all departments. The G.O authorizes price adjustment even in regard to ongoing works. As the price variation is more than 5%, the action of the Devasthanam in withholding the bills on pro-rata basis by applying price adjustment is perfectly valid. Since the approved rates are more than 10%, the executive decision squarely covered by Article 166 of the Constitution of India amounts to 'law'. The Devasthanam is bound by the terms of G.O.Ms.no.94, which is part and parcel of the tender document. The terms in the contract referred to by the petitioner impose restrictions upon the petitioner and disentitle him to make any claim on the basis of price escalation, i.e., increase in prices. The word 'escalation' cannot be equated to the word 'adjustment'. Though the agreement between the parties was executed after the issuance of the Government Orders, the G.O.Ms.No.94 dated 16.04.2008 applies to all the works taken up by all the Government Departments of the State including the TTD. Thus, the first respondent is not debarred from applying the terms of the said G.O. in regard to the price adjustment to the present contract. Clause 12 of the bid offer of the agreement authorises this respondent to modify, alter, deduct or to reduce the bill quantities shown as schedule A of the agreement. In view of the said clause, the petitioner is estopped from contending that the price adjustment is not applicable and to urge that the first respondent has no right to implement the price adjustment terms of the aforementioned Government Orders. The petitioner had entered into supplemental agreement dated 11.02.2013 under the revised estimation of the entire work done according to the price adjustment mechanism contained in G.O.Ms.No.94 dated 16.04.2008 and has completed the work and received final bill as per the rates provided under the revised estimate of the work. Thus, this writ petition questioning the payment made at the stage of initial bills is infructuous. The petitioner had also withdrawn the earnest money deposit. In the present contract, there are terms authorising this respondent to modify, alter, deduct or reduce the bill quantities shown as schedule A of the agreement. G.O.Ms.No.94 dated 16.04.2008 refers to G.O.Ms.No.35, Transport, Roads & Buildings Department, dated 28.02.2006 which is prior in point of time. In the tender notice, which is the second tender notice dated 21.04.2008, it was specifically mentioned that G.O.Ms.No.35 will be implemented and that the said G.O. will be read as a part and parcel of the contract that would be entered into pursuant to the second tender notice dated 06.11.2008. G.O.Ms.No.94 dated 16.04.2008 superseded G.O.Ms.No.35 dated 28.02.2006. G.O.Ms.No.94, with all its terms, formed an integral part of the contract dated 07.08.2009 entered into between the parties and the supplemental agreement dated 11.02.2013. The Writ Petitioner agreed for payment of the escalated amount on other items of contract like income tax and value added tax, even though there is no clause in the said contract. As per clause 9 of the contract, the petitioner agreed for deduction of income tax at the rate of 2.24% and payment of value added tax at the rate of 4% from the gross bills. Even during the contract period, income tax and value added tax were increased respectively to 2.26% and 5% and the increased rates were adopted. <u>Therefore, the parties have always understood that the fluctuations of prices, though not mentioned in the contract, the contract is subject to such fluctuations</u>. After entering into the contract, the plan for construction of the VIP Guesthouses underwent a complete and a sea change. Instead of constructing five independent blocks as envisaged in the tender notice, it was decided by the Chief Engineer of the Endowment Commissionerate that it would be more suitable if two blocks with same number of rooms are constructed. Therefore, the estimation went upto Rs.8,18,69,076/- from Rs.6,46,48,602/-. This fact establishes that the contract is flexible. An amount of Rs.58,95,725/- was deducted on account of the fall of prices of steel and cement during the contract period. Hence the writ petition may be dismissed.

5. In the reply affidavit, the writ petitioner inter alia contended as follows:

The issue involved in the writ petition does not boarder upon any disputed facts and the only question is as to whether the contract provides for price adjustment or alteration of agreed rates. The clause (12) of the bid offer of the agreement authorizes modification, alteration, deduction/reduction of the bill of quantities shown as ‘A’ schedule is not correct and the said clause is not in regard to price adjustment. The supplemental agreement was entered into in respect of additional items of work carried out by the petitioner during the execution of the work. G.O.Ms.no.94 has nothing to do with the said supplemental agreement. The terms and conditions, which applied to the work under the original agreement, also apply to the work in respect of the supplemental agreement. There is no mention about G.O.Ms.no.94 in the original agreement. The clauses/terms in the contract have to be interpreted after reading the contract as a whole. Since there are no defects in the work done, the EMD was returned after completion of the defect liability period. The work was completed after the revised estimates were made. Admittedly, the terms of the GO are not adopted in the contract, which was entered into subsequent to the Government Orders. Deductions towards price adjustment unilaterally is illegal and contrary to the binding terms of the agreement/contract. There is no specific mention of G.O.Ms.no.35 in the tender notice. There is no identity of minds between the parties as stated by the respondent. Acceptance of deduction of income tax and value added tax at enhanced rates does not entail the petitioner to support the illegal deductions on the ground of price adjustment as there is no specific provision regarding deduction of difference in prices.

6. The learned counsel for the parties made submissions in line with the pleadings, which are stated supra. I have gone through the material papers. The running account bill “C” (at page no. (119) of the material papers enclosed to the writ petition) in respect of construction of AP Guest House at Kanipakam, on a careful perusal would make it manifest that the said bill signed by the Executive Engineer, representative of the Devasthanam and the Assistant Officer, State Audit (Temples) in March 2011 would show that measurements were made, recorded and certified and that total amount for the execution of the work is Rs.83,97,675/-. The forwarding slip which is supposed to accompany the L.S agreement shows that the rates in the agreement are at (+) 1.08% excess over the estimate rates and the L.S provisions are likely to be sufficient. The tender document clauses 12.2, 12.3 and 12.5 under the sub-head ‘12-Bid Offer’ make manifest the following.

> **12.2** The Schedule – A (or price bid) contains not only the quantities but also the rates worked out by the

department and the amount for each item and total value of the estimated contract. The tender should workout his own rates keeping in view the work, site conditions and quote his overall tender percentage with which he intends to execute the work.

12.3 The bid offer shall be for the whole work and not for individual items/part of the work.

12.5 The tendered contract amount as computed based on overall tender percentage is subject to variation during the performance of the Contract in accordance with variation in quantities etc.

The conditions of Contract, which are relevant, read as under:

> “I/We hereby distinctly and expressly, declare and acknowledge that, before the submission of my/our tender I/We have carefully followed the instructions ain the tender notice and have read the MoRT & H (4th revision)/A.P.S.S and the preliminary specifications therein and the A.P.S.S. addenda volume and that I/We have made such examination of the contract documents and the plans, specifications and quantities and of the location where the said work is to be done, and such investigation of the work required to be done, and in regard to the material required to be furnished as to enable me/us to thoroughly understand the intention of same and the requirements, covenants, agreements, stipulations and restrictions contained in the contract, and in the said plans and specifications and distinctly agree that I/We will not hereafter make any claim or demand upon the Devasthanam based upon or arising out of any alleged misunderstanding or misconception/or mistake on my/or our part of the said requirement, covenants, agreements, stipulations, restrictions and conditions.”

It is agreed between the parties as under:

> I/We hereby declare that I/We will not claim any price escalation.

Regarding Cost Control and bill of quantities, the relevant terms are as under:

37. Bill of Quantities:

37.1 The Bill Quantities shall contain items for the construction work to be done by the Contractor.

37.2 The Contractor is paid for the quantity of the work done at the estimate rate in the Bill of Quantities for each item plus or minus Tender percentage.

38 Changes in the Quantities:

38.1 The contractor is bound to execute all supplemental works that are found essential, incidental and inevitable during execution of main work.

38.2 The payment of rates for such supplemental items of work will be regulated as under:

Supplemental items directly deducible from similar items in the original agreement.

The note appended reads as under:

Note: It may be noted that the terms Estimate rate used above means the rate in the sanctioned estimate with which the tenders are accepted, or if no such rates is available in the estimate, the rate derived will be with reference to the Standard Schedule of Rates adopted in the sanctioned estimate with which tenders are accepted.

7. I have gone through the preamble of Bill of Quantities. Term 5 of the said preamble reads as under:

5. The whole cost of complying with the provisions of the Contract shall be included in the estimated rates for items provided in the Bill of Quantities and where no items are provided in the Bill of Quantities, their cost shall be deemed to be distributed among the estimate rates entered for the related items of work.

Terms 21, 25 and 33 of the preamble of Bill of Quantities read as under:

21. The contractor shall himself procure the steel, cement, Bitumen, Blasting materials, sand, metal, soils etc., and such other materials required for the work well in advance. The contractor has to bear the cost of materials for conveyance. The Devasthanam will not take any responsibility for fluctuation in market in cost of the materials, transportation and for loss of materials etc.

25. The estimate rates for items shown in the Schedule "A" include all construction materials. No escalation in rates will be paid unless specified in the tender document. The tenderer has to quote an overall tender percentage considering all the aspects of the tender to complete the finished item of work as per the APSS/MoRT&H/B.I.S specifications, the special specifications appended, Drawings etc.

33. For all items of work in excess of the quantities indicated the rates payable for such excess quantities will be tendered rates i.e., estimate rates plus or minus tender percentage.

7.1 It is not in dispute that both the parties agreed for settlement of disputes as per the tender conditions. The said fact is evident from the conditions of the contract. As contended by the Devasthanam, it is also true that all claims above Rs.50,000/- are to be settled by a Civil Court of competent jurisdiction by way of a civil suit and not by way of arbitration. It is also not in dispute that deduction of income tax @ 2.24% and also 4% of sales tax from the gross payment from each bill is to be made as per the agreed terms, but such deductions and payments were made at the increased rates. I have also gone through the G.O.Ms.no.94 and the G.O.Ms.no.35.

7.2 Clauses 21 and 25, which are extracted supra, indicate that the contractor shall himself procure the steel, cement, Bitumen, Blasting materials, sand, metal and soils etcetera, and such other materials required for the work well in advance and that the contractor has to bear the cost of materials for conveyance and that the Devasthanam will not take any responsibility for fluctuation in market in cost of the materials, transportation and for loss of materials etcetera and that the estimate rates for items shown in the Schedule "A" include all construction materials and that no escalation in rates will be paid unless specified in the tender document and that the tenderer has to quote an overall tender percentage considering all the aspects of the tender to complete the finished item of work as per the APSS/MoRT&H/B.I.S specifications, the special specifications appended, Drawings etcetera. The clauses clearly indicate that there is no provision for changes on the ground of escalation of prices or fluctuation in cost of materials and transportation. Therefore, the subject work is governed by the terms of the contract by which the parties are bound and the terms of any Government Order, which is not made as part of a contract, cannot override the terms of the contract, which are specifically agreed upon. That on the increase of the rates of the income tax and the sales tax, the income tax was deducted from the amounts of bills at the increased rate and that the sales tax was also paid at the increased rate and that the said course adopted suggests that the parties have always understood that the contract is subject to fluctuation of prices is a contention without merit and cannot be countenanced as the parties are statutorily obliged to deduct income tax and pay sales tax at the enhanced rates and hence, on the ground that the income tax was deducted and the sales tax was paid at the enhanced rates is no ground to hold that the Devasthanam is entitled to resort to price adjustment in regard to materials like cement and steel and make adjustments, from the bills of the contractor. No new terms contrary to the specific agreed terms can be introduced into the contract to the disadvantage of one of the parties. When the estimated rates for items shown in the Schedule "A" include all construction materials and when no escalation in rates is payable unless specified in the tender document and when the contractor is restrained from claiming higher amounts or compensation on account of price escalation by specific exclusion clauses and when the rates are not made subject to escalations and fluctuations, the Devasthanam cannot claim that it is entitled to make price adjustment and deductions on the ground that prices of cement and steel have come down. Any such price adjustment contrary to the express terms of the contract is impermissible. In the pleadings, the Devasthanam has stated as follows: "*Therefore, the parties have always understood that the fluctuations of prices, though not mentioned in the contract, the contract is subject to such fluctuations*." Thus, it is evident that there is no term in the contract enabling the Devasthanam to withhold any amount on the ground of price adjustment. On a careful analysis of the contents of the material documents and considering the facts of the case, this Court is of the considered view that there is no justification in the stand taken by the Devasthanam and in withholding the amounts in running bills of the petitioner company and continuing the same stand contrary to the contractual terms. Viewed thus, this Court finds that the writ petitioner is entitled to the relief claimed. The view of this Court finds support from the ratios in the following decisions:

(i) **Gammon India Limited, Mumbai v. Government of A.P and others**

(ii) **M/s. Descon Engineer, Engineers & Contractors v. The Engineer in Chief, Public Health, A.C. Guards, Hyderabad and others.**

In this decision (2nd supra), this Court while considering a question similar to the one involved in the *lis* held that the respondents therein are under an obligation to pay the bills strictly in accordance with the measurements without taking into account the upward and downward fluctuation in the cost of materials and that though a reference was made to G.O.Ms.no.94 dated 16.04.2009, it cannot be applied to the facts of the case for the reason that the agreement did not provide for any changes on the ground of fluctuation of rates and that a general G.O cannot govern the situation and that the grounds urged by the respondents in effecting deductions are equally untenable.

7.3 Before parting, it is necessary to deal with the contention in regard to the maintainability of the writ petition. The learned Standing Counsel representing the 2nd respondent Devasthanam would contend that in view of the fact that the claim is more than Rs.50,000/-, only a civil court is competent and that the writ petition is not maintainable. In the decision in **Gammon India Limited, Mumbai** (1 supra), this Court considered the maintainability of the writ petition wherein the issue was in regard to withholding of amounts towards EMD and retention of amounts contrary to the terms envisaged in the contracts entered into with the petitioners therein and held that the writ petition is maintainable. In this cited decision, this Court had referred to and followed the ratios in the decisions in **ABL International Limited v. Export Credit Guarantee Corporation of India Ltd**; **United India Insurance Company Limited v. Manubhai Dharmasinhbhai Gajera;** and, **Excise Commissioner v. Issac Peter** and had negatived the contentions of the Government regarding the non-maintainability of the writ petition as on facts of the cited decision, it was found that the State and its officers are acting contrary to the specific terms of the contracts and such an action undoubtedly constituted arbitrariness. It is necessary to mention that in the common orders dated 23.07.2008 made in W.P.Nos.12979 of 2008 and 13034 of 2008 **(Between M/s. Sushee Hitech Constructions Limited and another vs. State of A.P., rep. by its Superintending**

Engineer, HNSS Circle, Anantapur and others), this court having referred to the relevant principles elucidated on the aspect of public law jurisprudence in the decision of the Supreme Court in **ABL International Limited** (3rd supra) had held as follows:

> **The principles have been summarized in paragraph no.53 of this judgment and the Apex Court has held that "<u>when an instrumentality of the State acts contrary to the public good and public interest unfairly, unjustly and unreasonably in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution</u>" and is thus amenable to scrutiny under Article 226 of the Constitution of India. Earlier in this judgment, the Apex Court has held that once the State or an instrumentality of the State is a party to the contract, it is an obligation in law to act fairly, justly and reasonably as a concomitant of its obligation under Article 14 of the Constitution of India."** (Emphasis as supplied in the cited decision).

In the decision in **State of Kerala & Ors v. M. K. Jose,** while referring to its earlier decision in **ABL International Ltd.** (3rd supra), the Supreme Court had noted the following legal principles as to the maintainability of the writ petition as against a State or instrumentality of the State in cases arising out of a contractual obligation:

> **(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.**
>
> **(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.**
>
> **(c) A writ petition involving a consequential relief of monetary claim is also maintainable.**

While referring to the above principles, a reference was also made by the Court to the word of caution that was sounded and which is as under:

> **However, while entertaining an objection as to the maintainability of a writ petition Under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs Under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corporation* v. *Registrar of Trade Marks*: (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.**

In this cited decision, it was held that in ABL International Limited (3rd supra), there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. It was also held that under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court depends upon facts of each case. Following the ratios and having regard to the facts of the instant case, this Court finds that there are no disputed questions of fact in the case on hand, but the adjudication required interpretation of terms of the contract between the parties without entering into the realm of any disputed questions of fact; therefore, this Court accordingly holds that the writ petition is maintainable in view of the facts peculiar to this case.

8. In the case on hand, the action of the respondents in deducting amounts from the running bills of the petitioner company towards price adjustment of materials due to reduction of prices on account of market fluctuations is not in accordance with any express contractual terms and is, therefore, in violation of the terms of the contract agreed to between the parties. Therefore, the action impugned is not an action *qua* the contract between the parties. There is no price adjustment clause; and, there is no term in the contract justifying the deduction and the course adopted by the Devasthanam. Therefore, the objection of the official respondents to the maintainability of the writ petition is untenabale; and the said objection is accordingly rejected.

9. In the result, the Writ Petition is allowed. No costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

M. SEETHARAMA MURTI, J

20th January, 2016

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