

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 06.02.2017
CORAM

THE HONOURABLE MR.JUSTICE B.RAJENDRAN

W.P.No.11796 of 2016
and
W.M.P.No.10178 of 2016

M/s.Orion Ventures
rep. By its Partner
No.15/355-Q, Opposite to Post Office
Tirur Road, Down Hill
Mallapuram
Kerala - 676 519 ... Petitioner

Versus

- 1.The Southern Railway
Rep. By Chief Mechanical Engineer
Park Town
Chennai 600 003.
- 2.The Divisional Railway Manager,
Southern Railway
Park Town
Chennai 600 003.
- 3.The Senior Divisional Mechanical Engineer,
Southern Railway
Park Town
Chennai 600 003. ... Respondents

Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus to direct the respondents herein to forthwith pay a sum of Rs.3,00,98,332.38 (Rupees Three Crores Ninety Eight Thousand Three Hundred and Thirty Two and paise thirty eight only) deducted by the respondents out of the price variation bills submitted by the petitioner for the period under the contract agreement dated 17.05.2011 and forbear the respondents from effecting any deductions in future under vitiation of contract.

For Petitioner	: Mr.AR.L.Sundaresan, SC for Mrs.AL Ganthimathi
For Respondents	: Mr.P.T.Ramkumar, SC

ORDER

The writ petition has been filed to issue a Writ of Mandamus directing the respondents herein to forthwith pay a sum of Rs.3,00,98,332.38 deducted by them, out of the price variation bills submitted by the petitioner for the period under the contract agreement dated 17.05.2011 and forbear the respondents from effecting any deductions in future under variation of contract.

2. The facts leading to the filing of this writ petition are as follows:

2.1 The first respondent Railway issued a tender notification calling for bids for collection of Soiled linen from AC Coaches, washing in mechanized laundry, supply and loading of washed linen into AC coaches at MAS (Central Railway Station) and MS (Egmore Railway Station) including supply and installation of plant/equipment/related infrastructure and operation for a period of 10 years at Basin Bridge Yard and distribution of linen in nominated Trains starting from MAS/MS Stations of Chennai Division under Build-Own-Operate-Transfer (BOOT) basis. It was made clear that after completion of the said period of 10 years, all the machines and plant, ancillary equipment, utilities and fixed assets of the mechanized laundry shall be transferred in good working condition to Southern Railway absolutely without any extra cost/charges and Southern Railway shall be the absolute owner of the same.

2.2 The bid was invited in the form of two packet systems viz., Price bid and Technical bid. On the basis of the quote submitted by the bidders item-wise, the total cost per day, the total cost per annum and total cost for a period of 10 years were arrived at and on that basis, L1, L2 and L3 bidders were determined. The works mainly consisting of two parts, viz., washing related works in the plant and distributing of washed linen in AC coaches. For this purpose, persons were employed to distribute the bed rolls in AC Coaches. Further, they are to be engaged for round trips and their wages have to be paid in accordance with the Minimum Wages Act. Taking note of the rate that is quoted under the head distribution, in case there is any enhancement in the Minimum wages between the date on which the quotation is made and any subsequent enhancement by the concerned State Government, Price Variation is provided for in the Tender under Clause 5.8. Such Price Variation is provided both for washing as well as distribution. It depends upon the variation in the expenditure due to the statutory events like variation in Labour, Material and Fuel Index reflected in RBI Bulletin for the Washing Charges and the variation in

distribution charges due to the enhancement of minimum wages in the Chennai area by the State Government.

2.3 After examining all the bids, the petitioner was found to be L1 and they were given letter of acceptance from the first respondent by letter dated 01.04.2011, whereby, the first respondent herein had unilaterally and arbitrarily included a clause viz., Clause 7.3 under the head "Application of PV Clause/Vitiation", which provides that PV clause as stipulated in the tender conditions will be applied to the rates of L1, L2 and L3 as per PVC Formula throughout the period of contract to ensure that different rates of price variation as applicable on washing and distribution do not vitiate the contract. According to the petitioner, the said clause was vague and did not convey any meaning about the basis on which, it would be applied and the effect that it would have.

2.4 The petitioner under bonafide impression that for the work to be done by them, viz., collecting the soiled linen and washing the same and distributing the same, they would be paid the rates quoted by them and the price variation in the event of variation in the price involving the inputs for washing and variation in wages on account of any increase in the Minimum Wages, accepted the letter of acceptance and entered into a contract agreement with the first respondent herein on 17.05.2011. Thereafter, they were submitting the monthly bills from time to time for payment on the basis of the tender conditions. The respondent Railway was arbitrarily withholding about 10% of the amounts from the bills raised by the petitioner during the period 20.06.2013 to 22.03.2014. Further, they were raising price variation bills on quarterly basis, for which, the respondent railway has arbitrarily, illegally and unilaterally effected deductions of a substantial amount and paid only the balance. Since the respondents have not issued any notice to the petitioner, before effecting such deductions and they have not stated the basis on which, such deduction was done, the petitioner made repeated representations, which were not considered by the respondents. Therefore, the petitioner has no other option except to approach this Court with the present writ petition for the above stated relief.

3. The third respondent has filed a detailed counter affidavit on behalf of himself as well as other respondents, wherein, it has been stated as follows:

3.1 The value of the contract is Rs.78.98 crores. The scope of the work includes washing and supplying of bed sheets, hand towel, pillow cover, blanket, bath towel and curtains to be used in the AC coaches in trains. Apart from washing, it has to be packed and distributed in the AC coaches.

3.2 Clause 7.3 of the letter of acceptance issued to the petitioner would clearly indicate that the Railway Administration is entitled to apply price vitiation clause considering the rates quoted by L2 and L3, in case, for any item of work, if the rate quoted by other tenderer is less. In this case, the petitioner has filed this writ petition only against deduction of amount for distribution of bedrolls in the trains. They have quoted Rs.6.80 per piece for distribution, whereas, the bidder L3 has quoted Rs.1.30 per piece. Hence, invoking the condition mentioned in Clause 7.3, the Railway has rightly made deduction for price vitiation taking into account the rate quoted by L3 for distribution.

3.3 Applying Clause 5.8 of the tender document relating to price variation for distribution, bills were settled to the petitioner considering the minimum wages prevailing at the relevant time of award of the tender on subsequent period.

3.4 According to the respondents, the terms and conditions mentioned in the tender documents, letter of acceptance, contract agreement and General conditions of contract are binding between both the parties and the observation made in the minutes of tender committee meeting is only for the departmental purpose and it has no effect to decide about price vitiation.

3.5 The petitioner did not raise this issue at the time of accepting the letter of acceptance or at the time of signing the agreement. Further, they have not claimed the advantage of the observation recorded in the minutes of tender committee, while executing the work for the period of last three years and they have received the payment from time to time.

3.6 The petitioner has claimed an amount of Rs.3,00,98,332.38 towards vitiation, whereas, as per the records and accounts maintained by the Railway, an amount of Rs.2,66,11,822.34 was only adjusted for vitiation, in accordance with the terms and conditions mentioned in the letter of acceptance, agreement and General conditions of contract.

3.7 Further, if any dispute or issue arises between the parties relating to this contract, they have to only invoke arbitration proceedings as per Clauses 63 and 64 of General conditions of contract. Hence, without invoking arbitration clause, the petitioner cannot file a writ petition before this Court.

By stating so, the respondents prayed for dismissal of this writ petition.

4. Learned senior counsel for the petitioner would contend that the conditions contained in the tender did not provide for any deductions in the monthly bills or on the price variation bills on the basis of the rates that might have been quoted by

other bidders. Further, the contract agreement entered into between the parties did not contain any clause in this regard. Even the clause contained in the Letter of acceptance is vague and does not inform about the basis on which price vitiation would be effected. In the absence of one such clause in either of the documents, the action of the respondents effecting deductions, is arbitrary, illegal and unjust and is in violation of Article 14 of the Constitution of India. Learned senior counsel would further contend that as per the tender conditions and letter of acceptance of the contract agreement entered into between the parties, the petitioner is entitled to be paid at L1 rate, which has also been accepted by the respondent and L1 is determined on the basis of the title of all the item wise rates and multiplying on a daily basis, monthly basis and 10 years basis. Therefore, the respondents are bound to pay at the rates quoted by the petitioner as L1 bidder. Learned senior counsel would also contend that the rate quoted by L3 bidder for distribution is impossible of performance and contrary to the statutory prescription of minimum wages and the same cannot be taken as the basis for calculating the price variation. According to the learned senior counsel, the remedy of arbitration is not an efficacious alternative remedy. Thus, he sought setting aside the impugned proceedings of the third respondent.

5. Learned standing counsel for the respondents reiterated the averments made in the counter affidavit.

6. Heard the rival submissions made on either side and perused the materials placed before this Court.

7. Admittedly, in the tender for collection of soiled linen, washing, packing and distribution of the same to the AC coaches on Build-Own-Operate and Transfer (BOOT) basis, the petitioner was found as L1 and they were given letter of acceptance dated 01.04.2011. Subsequently, they were accepted the letter of acceptance, entered into a contract agreement with the first respondent on 17.05.2011 and commenced the work. In terms of the tender conditions and contract agreement, they started raising bills for the work done by them, for which, the respondents have unilaterally effected deductions of substantial amount and paid only the balance. Further, invoking Clause 7.3 of the letter of acceptance, the respondents have passed the bills for price variation on distribution in respect of enhancement of Minimum wages by the Government of Tamil Nadu by applying the enhanced percentage on distribution rate quoted by L3 bidder. For better appreciation, Clause 7.3 of the letter of acceptance is extracted hereunder:

"PV clause as stipulated in the tender conditions will be applied to the rates of L1, L2 and L3 as per PVC formulae throughout the period of contract to ensure that different rates of price variation as applicable on washing and distribution do not vitiate the contract."

8. It is the specific case of the petitioner that there is no clause for effecting deductions either in the tender document or in the contract agreement. Even the clause in the letter of acceptance is also very vague and does not inform the basis on which price vitiation would be effected. According to them, the respondents have unilaterally and arbitrarily interpreted Clause 7.3 of the letter of acceptance awarded to the petitioner. Apart from that, before making such deduction, no opportunity was given to the petitioner to put forth their contention. The same was denied by the respondents in their counter affidavit. However, they have not specifically stated as to how the said clause was included in the tender conditions. Therefore, there is no clear cut explanation for inclusion and interpretation of the said clause in the documents in question and the same, in my considered opinion, is not correct.

9. Further, as rightly argued by the learned senior counsel for the petitioner, the overall cost of BOOT contract on the basis of the rates quoted by the petitioner calculated for a period of 10 years is a lower, while the rates quoted by other bidders is on the higher side. At the same time, the rate quoted by the petitioner in the break up towards distribution is Rs.6.80, while the rates quoted by L2 and L3 are Rs.5.90 and Rs.1.30 respectively. However, when the rate quoted by L3 bidder for distribution has been recorded as impossible of performance and the same has been declared as unworkable in the tender committee meetings held on 07.02.2011, the same cannot be taken as basis for calculating the price variation. Applying the so called price vitiation clause is totally unfair, arbitrary and unjust and the deduction effected on that basis is liable to be set aside.

10. Insofar as the contention regarding arbitration is concerned, learned senior counsel for the petitioner has brought the attention of this Court to a decision of the Division Bench of this Court in the case of the Union of India owning Southern Railway, Bangalore vs. M/s.Best Cast Construction (P) Ltd and others, wherein it was held that if a question of law is specifically referred and it becomes evident that the parties are desirous to have a decision on the specific question from the arbitrator, rather than one from the Court, then the Court will not interfere with the award of the arbitrator even if the view of law taken by the arbitrator did not accord with the view

of the Court. In the present case, there is no clause for referring the dispute for arbitration and in such circumstances, the decision rendered by the Division Bench of this Court mentioned supra can be made applicable to the facts of this case.

11. Thus for the discussions held above, the respondents are liable to pay the amount deducted by them out of the price various bills submitted by the petitioner. However, with regard to quantum of deduction amount, according to the petitioner, it is Rs.3,00,98,332.38, whereas according to the averments contained in the counter affidavit filed by the respondents, it is only Rs.2,66,11,822.34. Therefore, this Court directs the respondents to pay the amount as quantified in para 9 of the counter affidavit i.e., Rs.2,66,11,822.34 to the petitioner.

12. As the contract period is for 10 years, with regard to the deduction to be made in the future, both the petitioner and the respondents are directed to sit together and set aright all the things. Similarly, if the respondents want to include or interpret any of the clauses in the contract agreement, it is open to them to do the same, after issuing notice and after affording an opportunity of personal hearing to the petitioner.

13. Accordingly, the writ petition is ordered. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar(CSVII)

True Copy

Sub-Assistant Registrar

rk/rsh

To

1.The Chief Mechanical Engineer,
Southern Railway, Park Town
Chennai 600 003.

2.The Divisional Railway Manager,
Southern Railway, Park Town
Chennai 600 003.

3.The Senior Divisional Mechanical Engineer,
Southern Railway, Park Town, Chennai 600 003.

+1 cc to Mr.AL.Gandhimathi Advocate sr 7553
+1 cc to Mr.P.T.Ramkumar Advocate sr 7882

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and
W.M.P.No.10178 of 2016

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