

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2017

CORAM

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
And
THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.A.No.215 of 2013

And

M.P.No.1 of 2013

1. The Superintending Engineer (Highways),
Projects Circle,
Thiagaraja Road, (Opp:Alaiamman Kovil),
Teynampet, Chennai - 600 018.
2. The Divisional Engineer (Highways),
Projects, Division I,
110, G.S.T.Road,
Chromepet, Chennai - 600 044. ... Appellants/Respondents

Vs.

- 1.M/s.East Coast Constructions and Industries Limited,
Represented by its Director,
Mr.S.A.Mohammed Mohideen. ... Respondent/Petitioner

Prayer:

Writ appeal filed under Clause 15 of Letters Patent
praying to set aside the order dated 07.11.2012 passed in
W.P.No.29671 of 2011.

Prayer in W.P. 29671 of 2011:

Writ of Certiorarified Mandamus to call for the records
of the second respondent in Lr no 10/2008-2009/LC 26/A1 dated
04.03.2011 and quash the same and further direct the 1st &
2nd respondents herein to make the payment in accordance with
G.O.(MS) No.60 dated 14.03.2008 for a sum of Rs.1,83,01,136/-
which was illegally retained by the 2nd Respondent.

For Appellants : Mr.K.Dhananjayan
Special Government Pleader

For Respondent : Mr.P.J.Rishikesh

J U D G M E N T
(Order of the Court was made by M.DHANDAPANI,J.)

The writ appeal is filed against the order dated 07.11.2012 in W.P.No.29671 of 2011, wherein, the learned Single Judge allowed the writ petition filed by the respondent herein.

2.The facts of the case are as follows: The respondent is one of the leading civil engineering contractors and they entered into an agreement with the appellant for construction of a road over-bridge in Pallavaram - Thoraipakkam radial road connecting NH-45 near Vaishnava College.

3.The respondent submitted its price bid by furnishing a tender dated 16.07.2008 to the appellant. Accordingly, the tender was accepted and an agreement was entered into with the first appellant setting out the terms and conditions of the contract. After completion of the contract, the respondent raised bills at various stages and the payments were also made by the appellant. However, a sum of Rs.1,83,01,136/- has been illegally recovered from the bills of the respondent by the second appellant. The said recovery was made by relying on the G.O.Ms.No.101 PW (G2) dated 10.06.2009. However, the respondent claimed that the recovery is wrong since only G.O.Ms.No.60 dated 14.03.2008 is applicable. The claim of the respondent was rejected. Aggrieved by the same, the respondent filed the writ petition.

4.The main contention raised by the respondent is that for escalation of price, G.O.Ms.No.101 PW (G2) dated 10.06.2009 is not applicable at all and G.O.Ms.No.60 dated 14.03.2008 alone is applicable. However the second appellant without examining the issues raised by the appellant in true perspective of the contract conditions, rejected the claim for refund of the amounts recovered on the following stand:

"(i)The Full Price adjustment is for all the components other than cement, steel, bitumen and POL means "including cement, steel, bitumen, POL, General materials and Labor etc., which applies for works contract for 12 months and above. Price adjustment is for special materials only viz., Cement, Steel, Bitumen for the works contract for 12 months and below. The difference between full price adjustment and price adjustment is only for General materials, Labor etc.,

(ii)The Period of contract is for 12 months and below, price adjustment only for special materials, (i.e.) Cement, Steel, Bitumen and POL including General materials, Labor etc are allowed. The above have been confirmed by the Government in G.O.Ms.No.101 PWD (G2) dated 10.06.2009.

(iii)As per the agreement, Section - III, Commercial condition clause 7.3 - Price variation clause states that the price variation clause will be applicable as per the G.O.Ms.No.60 PW(G2) department dated 14.03.2008 para 3(1)(a), ©, (d) & (e). Further as per the agreement, Section - III, clause 7.4.2, 7.4.3, 7.4.4 and 7.4.5 price variation formula for special materials viz., Cement, Steel, Bitumen and POL have been incorporated in the agreement. Further, as per the agreement condition 13.4.8, it is clearly stated that the above clause is operative both ways, (i.e) if the price variation as calculated above is on the plus side, payment on account of the price variation shall be allowed to the contractor and if it is on the negative side, the employer shall be entitled to recover the same from the contractor and the amount shall be deductible from any amount due and payable under the contract."

5.The appellants filed counter affidavit in the writ petition stating that the contractor has executed the work and got the final payment for an amount of Rs.24,07,62,942/-. The adjustment of contract price were done under price variation clause of the agreement vide clause No.7.3, 7.4., to the contractors in the interim monthly work bills. During execution of work, the rates for special materials viz., cement, steel, bitumen etc., have come down constantly every month from their price during the submission of the tender proposals. With the result, the escalation claims are on the minus side of the contract price and deduction of escalation amount made every month in their work bills as per agreement condition 13.4.8. Consequent on this, minus escalation amount of Rs.1,83,01,136/- were deducted from the work bills of the respondent. The adjustment of escalation claims were authorized to the contractor as per accepted agreement in CR.Agt.No.10/ 2008-2009/ dated 03.10.2008.

6.The appellants disputed the claims by relying clause 51 of the general condition of contract deal with 'Resolution of Disputes (Settlement of claims by Arbitration), which states that 'All disputes (or) differences in respect of which the decision is not final and conclusive, if the claim's monetary value is less than Rs.2.00 lakhs (Rupees two lakhs) shall be referred for arbitration to a sole arbitrator "The Superintending Engineer (H), Projects, Madurai Circle (or) his successor in his office".'

7.The appellants further contended that the arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 (or) any statutory modifications thereof. The decision of the sole arbitrator shall be final and binds on the parties thereto. The arbitrator shall determine the amount of arbitration to be awarded to either parties. Performance under the contract shall continue during arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings. All awards shall be in writing and such award shall state reasons for the amounts awarded. Neither party is entitled to bring a claim to arbitration if the Arbitrator

has not been appointed before the expiration of thirty days defect liquidity period. If the claims exceed monetary value of more than Rs.2.00 Lakhs (Rupees two lakhs), the same shall be referred to the civil court having jurisdiction for decision.

8.The learned counsel for the respondent in support of his submissions relied upon the decision of the Hon'ble Supreme Court reported in (2011) 5 SCC 697 (Union of India and Others Vs. Tania Construction Private Limited). The relevant portions of the same reads as follows:

"33.Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr.Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the

authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34. We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits."

9. Heard the learned Special Government Pleader appearing for the appellants as well as the learned counsel appearing for the respondent.

10. It is well settled legal position that when there is a dispute with regard to the parties, normally invoking the inherent jurisdiction

under Article 226 of the Constitution of India is not permissible unless and otherwise there is error on the face of record.

11. The appellants raised several factual disputes regarding the contractual aspects. The appellants also raised several disputes regarding the price escalation and application of the Government Orders without any adjudication either before the Arbitrator or before the Civil Court of law and further submitted that interfering by invoking the discretionary jurisdiction under Article 226 is not permissible.

12. It is useful to extract the relevant portion of the decision of the Supreme Court reported in (2015) 9 SCC 433 (State of Kerala and Others Vs. M.K. Jose), hereunder:

"21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a public interest litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for

school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse etc in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest."

13. In addition, writ petition shall not be entertained if there is a breach of contract. The present case clearly indicates that factual disputes are involved.

14. The appellant raises several disputes regarding the legal position in entertaining the writ petitions in the contractual matters and in the arbitration matters. The legal principles regarding the maintainability of the writ petition has been categorically discussed by the Hon'ble Apex Court in the judgment reported in (2004) 3 SCC 553 (ABL International Ltd. vs. Export Credit Guarantee Corporation of India Limited). For the sake of convenience, the relevant portion is extracted hereunder:

"28. 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 Corpn. v. Registrar of Trade Marks.) 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."

15. The said principle is also reiterated in the decision reported in (2015) 7 SCC 728 (Joshi Technologies International Inc. Vs. Union of India and others), the relevant portion of which reads as follows:

"69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction."

16. For the reasons stated above and on perusal of the above said judgments, it is crystal clear that the writ

petition is not the remedy in the contractual matters, especially, when huge disputed questions are involved. Moreover in the subject case, the parties have agreed for a dispute redressal mechanism. There is no question of judicial review in such matters, merely because the other party to the contract is the State. We are therefore, of the view that the learned Single Judge was not justified in exercising the discretionary and equity jurisdiction under Article 226 in a pure contractual matter.

17. For the reasons aforesaid, we are inclined to quash the order of the learned Single Judge directing the appellants to settle the amount of Rs.1,83,01,136/- to the respondent. Accordingly, the writ appeal is allowed. The order dated 07.11.2012 passed in W.P.No.29671 of 2011 is set aside. The parties are directed to bear the costs. Consequently, the connected miscellaneous petition is also closed.

-s/d-

Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

Copy to

1. The Superintending Engineer (Highways),
Projects Circle,
Thiagaraja Road, (Opp:Alaiamman Kovil),
Teynampet, Chennai - 600 018.
2. The Divisional Engineer (Highways),
Projects, Division I,
110, G.S.T.Road,
Chromepet, Chennai - 600 044.

+1 CC to Mr.P.J. Rishikesh, Advocate sr 45148

+1 CC to Govt. Pleader sr 45730

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W.A.No.215 of 2013

And

M.P.No.1 of 2013

SP(25/07/2017)