BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.08.2018

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.(MD)No.12772 of 2018
and
W.M.P(MD)Nos.11655, 11656 and 12507 of 2018

M/s Koya & Company Construction Limited
rep. by its Project Manager,
A.Ravikumar,
No.72, MIGH, Mehadipatnam
Hyderabad - 500 028. ... Petitioner

Vs.

1.The Chief Engineer,
TWAD Board, Ganesh Nagar,
Near Law College Hostel,
Opp. Mattuthavani Bus Stand,
Melur Road,
Madurai - 625 007.

2.The Executive Engineer,
TWAD Board,
Urban Division,
62/8, Second Floor,
New Road,
Kovilpatti - 628 501. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records relating to the impugned order passed by the 2nd respondent in his proceedings Lr.No.F.Kovilpatti WSIS/JDO/2016/ dated 11.10.2017 so for as this petitioner is concerned and quash the same.

For Petitioner : Mr.K.Vijayan
Senior Counsel for
Mr.B.Saravanan

For Respondents : Mrs.Porkodi Karnan

O R D E R

The petitioner is a company incorporated under the Companies Act. The petitioner company has necessary expertise in the field of water supply project work. According to the petitioner, the petitioner company has participated in several tenders notified by the respondent board relating to water supply scheme and the petitioner company has successfully executed all the projects without any adverse remarks.

2.In 2013, the respondent board had notified a tender calling for eligible applications for providing water supply improvement scheme to Kovilpatti Municipaltiy in Tuticorin District including maintenance for a period of 12 months. For the purpose of participating the tender, the petitioner company entered into a joint venture agreement with another company viz., M/s Saisudhir Infrastructure Limited on 25.08.2012 by reducing various terms and conditions in writing. The share and responsibility of the petitioner company as well as other contract company was in the ratio of 30:70 and as per the agreement, it was agreed that M/s Saisudhir Infrastructure Limited will be lead partner in the joint venture for the purpose of executing the project in the event of tender being granted to them.

3.In pursuance of the joint venture agreement, lead partner M/s Saisudhir Infrastructure Limited participated in the tender called for by the respondent board and ultimately, the said company was awarded the contract by the respondent board, vide proceedings dated 18.03.2013. Thereupon, the lead partner had commenced its work and was in the process of executing the project in terms of the tender conditions.

4.While so, all of a sudden, the first respondent, by proceedings dated 30.09.2014, terminated the contract awarded to M/s Saisudhir Infrastructure Limited and it was informed that the remaining contractual work to be done through some other agency and additional cost involved for engaging third party contractor could be recovered from the company as per clause No.41 of the agreement. Clause 41 is the termination clause entered into between the M/s Saisudhir Infrastructure Limited and the respondent board, which reads as under:-

> "41.Termination
> The Employer may terminate the Contract for any reason that is regarded as breach of the Contract.
> If the contract is terminated, the contractor shall stop work immediately, make the site safe and secure and leave the site as soon as reasonably possible on termination of the contract, the Engineer shall issue a certificate for the value of work done less payments received upto the date of the issue of certificates, less other recoveries due to interms of the contract, less taxes due to be deducted at source as per applicable law and less the percentage to apply to the work not completed. If the total amount due to the Employer exceeds any payment due to the Contractor the difference shall be treated as debt payable to the Employer and can be recovered from any amount due or may become due to the contractor.

> In the case of termination, works that are pending for the proper completion of the project, shall be carried out by the Employer either by themselves or through any other agency. Any additional expenditure over the value finalized in the contract for any component or for the whole project, incurred by the Employer by the Employer due to such terminaion, shall become recoverable from the contract/firm whose contract stands terminated, from the money due or may become due to him/them. All materials on the Site, Plant, Equipment, Temporary Works and Works are deemed to be the property of the Employer, if the Contract is terminated because of Contractor's default."

5.Pursuant to the cancellation of the contract, it appears that the second respondent, by his proceedings dated 19.05.2016, directed the said M/s Saisudhir Infrastructure Limited to pay Rs.16,56,58,286/- being the extra cost involved for engaging third party agency for completion of the project in respect of the Kovilpatti Municipality Water Supply Scheme. Though the petitioner company is the part of the joint venture agreement, no notice was served individually to the petitioner company. Subsequently, it appears that several communications addressed to only M/s Saisudhir Infrastructure Limited demanding the payment of the above said amount towards the differential costs involved for completion of the contract project by relying upon Clause 41 of the agreement. According to the petitioner company, they were not aware of such action being initiated on behalf of the respondent board.

6.While matter stood thus, the second respondent has passed an order on 11.10.2017 directing both the petitioner as well as the said M/s Saisudhir Infrastructure Limited to remit a sum of Rs.16,56,58,286/- being the extra cost in carrying out the balance work by awarding the scheme to one M/s.Consolidated Construction Consortium Limited, Chennai. Being aggrieved by the communication dated 11.10.2017, which is impugned in this writ petition, the petitioner is before this Court.

7.Mr.K.Vijayan, learned Senior Counsel appearing for the petitioner company would, at the outset, submit that no prior notice has been issued to the petitioner by the respondent board with any details as to how the quantum has been arrived at in respect of the claim made by the respondent board against the petitioner under the impugned communication dated 11.10.2017. According to the learned Senior Counsel, unless the actual loss suffered by the respondent board while terminating the contract is established with materials and factual details, the amount as claimed by the respondent board cannot be countenanced both in law and on facts.

8.The learned Senior Counsel would submit that the petitioner is entitled to put on notice about the actual loss suffered by the respondent board in view of termination of contract and it is imperative on the part of the respondent board to disclose the details of the remaining work entrusted to the M/s Consolidated

Construction Consortium Limited and what cost, which was agreed upon for engaging the said agency. Only if the notice containing such details, is issued to the petitioner, the petitioner would be in a position to come up with their point of view and contest the claim on factual basis. But unfortunately, in the present case, the respondent board has straightaway issued the demand notice, as if, it was the admitted amount without disclosing the basis of such demand in clear terms.

9.According to the learned Senior Counsel, it is the rudimentary principle of law that if any adverse action is taken, the same has to be preceded by show cause notice. Particularly, in this case, when the petitioner is confronted with civil consequences, the petitioner is entitled to be put on notice in compliance with established principles of natural justice. However, the impugned action by the respondent board is in complete negation of such principles of natural justice and therefore, the action of the respondent board is liable to be interfered with as being illegal and unsustainable.

10.Per contra, Mrs.Porkodikarnan entered appearance on behalf of the respondent board and a detailed counter affidavit has also been filed on behalf of the respondent board.

11.The learned counsel appearing for the respondent board would vehemently oppose grant of any relief to the petitioner, since according to her, the writ petition lacks bona fide and cannot be entertained at the instance of the petitioner, who has belatedly approached this Court, without any explanation, when the action was initiated as early as on 19.02.2016 and several communications were addressed to its partner company M/s Saisudhir Infrastructure Limited, which was admittedly a lead company. The learned counsel would refer to various communications addressed to the said Saisudhir Infrastructure Limited on 19.05.2016, 30.01.2017 and 22.03.2017. In all such communications, M/s Saisudhir Infrastructure Limited was informed about the demand of the respondent and being a partner company, the petitioner was deemed to be aware of the developments and the demand by the respondent board. It is not open to the petitioner company to feign ignorance about the action being initiated against its partner company. Even otherwise, the learned counsel would submit that the impugned notice was issued on 11.10.2017 and after lapse of several months, the petitioner has chosen to approach this Court in 2018. Therefore, she would submit that the intention of the petitioner is to delay in remitting the amount as demanded by the respondent board under some pretext or the other. In any event, the petitioner cannot escape from the liability, since the petitioner company did not complete the project and violated Clause 41 of the agreement, which Clause was very much binding on the petitioner.

12.The learned counsel would further emphasise the fact of the earlier communications dated 19.05.2016, 30.01.2017 and 22.03.2017 were to be treated as show-cause notice, as there was no response from the said M/s.Saisudhir Infrastructure Limited, finally the impugned communication was issued on 11.10.2017 both to the petitioner company as well its partner company. Therefore, according to the learned counsel, it cannot be gainsaid by the petitioner that there was no notice issued prior to the impugned communication, dated 11.10.2017.

13.The learned Senior Counsel appearing for the petitioner company in support of his contention, relied on the decision reported in 1969(2) SCC 554 [Maula Bux vs. Union of India]. He would draw the attention of this Court to the observation made by the Hon'ble Supreme Court of India, which is extracted hereunder:-

> "6............. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

14.The above decision was relied on by the Hon'ble Supreme Court in its subsequent decision reported in 2016(10) SCC 571 [Mahanadi Coalfields Limited and others vs. Dhansar Engineering Company (P) Ltd.]. The learned Senior Counsel would once again draw the attention of this Court to the observation made by the Hon'ble Supreme Court of India as found in paragraph 23 of the judgment, which is extracted hereunder:-

> "23.The respondents, would then contend that, the appellants without giving any opportunity to the respondents unilaterally imposed penalty and despite the noting of the General Manager that there was no loss of production to the appellants. Similarly, a doubt was expressed by the Project Officer regarding giving extra work to the respondents at the fag end of the contract period. The respondents have relied on the decision of this Court in Maula Bux vs. Union of India[1], in which it has been held that (SCC p.559, para 6)
>
> "where a sum is named in the contract in the nature of a penalty, where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by it."
>
> It is, however, indisputable that financial loss was suffered by the appellants on account of assigning the unfinished work to a third agency (contractor) at a higher rate. In that, the contract rate for the same work to be

done by the respondents would have been at Rs. 17/- per cubic meter, which the appellants were required to get it executed at the rate of Rs. 31.50 per cubic meter through a third agency. The fact that no loss of production was suffered by the appellants cannot relieve the respondents of that liability. It is a different matter that the respondents were not put to notice before the final decision was taken by the appellants to recover the financial loss along with penalty."

15.The learned Senior Counsel would further rely on yet another decision of the Hon'ble Supreme Court of India reported in 1987 0 AIR(SC)20 [M/s Lakshmichand and Balchand vs. State of A.P] and he would draw the attention of this Court to paragraph 8 of the decision, which is extracted hereunder:-

"8. In regard to the claim to adjustment on the second count the position is more controversial. The claim is founded in the doctrine of equitable set off, but we do not find evidence before us to bring the case within the operation of the doctrine. It is not a case where cross demands rise out of the same transaction or the demands are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Nor can assistance be derived from Clause 71. The benefit of that provision can be claimed only if the amount sought to be retained is an ascertained sum, an amount which can be readily adjusted against the amount payable under the other contract. Here, the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly, Clause 71 cannot be invoked. In the result, the decision of the High Court in respect of the adjustment of Rs.12,69,532/- cannot be sustained."

16.According to the learned Senior Counsel, his contention regarding the entitlement to prior notice before claiming demand is fortified by the above decision of the Hon'ble Supreme Court and therefore, he would submit that the plea of the petitioner is squarely covered by the said judgment, as laid down by the Hon'ble Supreme Court of India.

17.This Court has given anxious consideration to the submission made on behalf of the learned Senior Counsel appearing on behalf of the petitioner as well as the learned counsel appearing for the respondents and perused the materials and pleadings placed on record.

18.Clause 41 of the agreement entered into on behalf of the petitioner and the respondent board provides for payment of differential amount, in case of termination of contract. The respondent board has only relied upon the said Clause as the basis of the demand as against the petitioner. There cannot be two opinions about the fact that the Clause 41 is binding on both parties, namely, the petitioner as well as the respondent board. Therefore, the invocation of Clause 41 by the respondent board cannot be faulted per se. However, what is to be seen in the present writ petition is whether is it right on the part of the respondent board to demand a particular amount without providing actual basis of the claim in clear terms. Unless and until the respondent board is able to establish what actual loss suffered by them in view of the termination of the contract, the demand as made by the respondent board cannot be countenanced both in law and on facts.

19.As rightly contended by the learned Senior Counsel appearing for the petitioner, the least that could be expected from the respondent board is proper notice to the petitioner company justifying the demand on disclosing the details of the work entrusted to the third party agency and the work order in relation to the same project. In fact, the petitioner has factually disputed the claim of the petitioner in paragraphs 12 of the affidavit in support of the writ petition, which reads as under:-

> "12. I respectfully submit that it is the impugned order dated 11.10.2017 informs the petitioner that the value of agreement concluded in favour of M/s Saidudhir Infrastructure Ltd., was Rs.57,44,19,443/- and the value of the work executed was the sum of Rs.68,81,441/-. The value of the agreement concluded with M/s. Consolidated Construction Consortium Ltd., Chennai, is Rs.75,55,41,061/- and the net balance extra cost to be recovered from this petitioner under the said M/s.Saisudhir Infrastructure Ltd., is the sum of Rs.16,56,58,286/-."

20.From the above, it appears that some discrepancy is in the contractual amount payable to the third party agency and from the averments, there could be a valid presumption that the respondent board might have awarded additional work to the third party company, for which, the petitioner cannot be held liable at all. In such scenario, it become, all the more reason that the petitioner is entitled to proper notice before the final demand is made vide impugned communication dated 11.10.2017. Although the learned counsel appearing for the respondent board has drawn the attention of this Court to the communications issued on 19.05.2016, 31.01.2017 and 22.03.2017, which communications preceded the final impugned notice, dated 11.10.2017, but from the contents of such communications, it could be seen that the petitioner's partner company was not asked to give any explanation, by disclosing any basis of the claim, but the company merely was directed to remit the amount as mentioned in those communications. Therefore, the learned Senior Counsel has rightly submitted that by no stretch of legal standard, such communications could be construed as show-cause notice.

21.This Court is in agreement with the submission made by the learned Senior Counsel appearing for the petitioner that all the communications, which preceded the impugned order are only in the nature of directing the partner company of the petitioner to pay the amount. Though the communications had mentioned about the details of the damage suffered by the respondent board on reading such communications, this Court is of the view that the communications lack specific details and the Tabular column as incorporated in the communications is rather cryptic and this cannot be construed as a show-cause notice containing specific details with clear term of the actual loss suffered by the respondent board to the tune of Rs.16,56,58,286/-.

22.In the above said circumstances, this Court is in agreement with the legal submission made on behalf of the petitioner that the petitioner herein is entitled to proper notice by the respondent board disclosing the details of the new award of contract given to the Consolidated Consortium Limited and the details of the work executed by them in completion of original project envisaged in the agreement between the petitioner and the respondent board. Unless such details are furnished, the demand as such made by the respondent board cannot be sustained both in law and on facts.

23.For the above said reasons, the petitioner is entitled to succeed in this writ petition. Therefore, the impugned order passed by the second respondent in his proceedings Lr.No.F.Kovilpatti WSIS/JDO/2016/ dated 11.10.2017 insofar as the petitioner is concerned, is hereby set aside.

24.Accordingly, this writ petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar(CS-IV)

To

1.The Chief Engineer,
TWAD Board, Ganesh Nagar,
Near Law College Hostel,
Opp. Mattuthavani Bus Stand,
Melur Road,
Madurai - 625 007.

2.The Executive Engineer,
TWAD Board,
Urban Division,
62/8, Second Floor,
New Road,
Kovilpatti - 628 501.

+1CC TO MR.B.SARAVANAN, ADVOCATE IN S.R.NO.81394.
+1CC TO M/s. POLAX LEGAL SOLUTIONS IN SR.NO.80816.

SKN
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W.P.(MD)No.12772 of 2018
and
W.M.P(MD)Nos.11655, 11656 and 12507 of 2018

29.08.2018