IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.06.2019

Coram

The Honourable Mr. Justice M.DHANDAPANI

W.P.No. 34658 of 2004
and WMP No.41831 of 2004

Essar Constructions Ltd.,
15, Duraiswamy Iyer Street,
Melapudur,
Usilampatti ... Petitioner

vs.

1. Tamil Nadu Water Supply and Drainage Board,
Chennai - 600 005

2. The Executive Engineer,
TWAD Board, Project Division,
Theni ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari to call for the records in B.P.Ms.No.72 dated 14.08.2003 of the first respondent and quash the same.

For Petitioner : Ms.Mallika Srinivasan

For 1st respondent: Ms.S. Thamizharasi

For 2nd respondent: Ms.Sudharshana Sundar

ORDER

The petitioner has filed the present writ petition challenging the proceedings of the first respondent in B.P.Ms.No.72 dated 14.08.2003.

2. The case of the petitioner is that the petitioner is the Joint General Manager of the Petitioner Company and the Company is registered under the Companies Act and engaged in the business as contractors with expertise in executing turnkey jobs for laying pipe lines, implementation of water supply and sewerage works including supply and installation of materials, machinery, equipment etc., The petitioner participated in the

tender promoted by the Tamil Nadu Water Supply and Drainage Board for the work comprising water supply and sewerage Madurai-Theni District CWSS to Habitations in Sedapatti T. Kallupatty, Usilampatty Unions and Andipatti, Peraiyur, T.Kallupatti Town Panchayats and Usilampatti Municipality from Vaigai River.

3. The above said work was a turnkey contract and the contractor is responsible for execution of the water supply and sewerage works including supply and installation of all materials, machineries, equipments etc., in accordance with the specification stipulated in the bid documents and in conformity with the specified quality parameters and completing the entire works in all respects satisfactorily and commissioning within the stipulated period and maintaining the Scheme for the specified period.

4. Pursuant to the bid made by the petitioner, the work was awarded to the petitioner and the petitioner commenced the work in accordance with the order of the first respondent. In terms of the contract, the petitioner periodically submits bill for the work done and the bill is to be settled by the 2nd respondent. The various terms of the contract between the petitioner and the first respondent would clearly show that the price indicated for the agreed total performance of the contract is fixed throughout the period of the contract and no price variation would be entertained on either side. The contract specifically provided that the price accepted for the contract was including the materials and the services and inclusive of all taxes and duties and no variation thereon would be permissible during the period of the contract under any circumstances. During the performance of the works under the contract, there has been variation in the cost of materials, cost of labour, taxes and duties, but no variation in price was claimed or allowed by either side in view of the specific Clause contained in the Contract.

5. While such being the position, on 06.09.2002, the Government of India, Ministry of Company Affairs Department of Revenue issued a Notification No.47/2002-Central Excise, amending Notification No.6/2002 dated 01.03.2002 to the effect that NIL rate of duty shall be charged on all items of machineries, including instrument, apparatus and appliances, auxiliary equipment and components/parts required for setting up of Water Treatment Plants.

6. Pursuant to the said Notification, excise duty was not leviable in respect of pipes needed for delivery of water from its source to the plant and from there to the storage facility as more particularly stated in the said Notification. Similarly,

all items of machinery required for setting up Water Treatment Plant were also eligible for exemption from excise duty. The petitioners were exempted for payment of excise duty and the first respondent also ensured for exemption for paying excise duty and the petitioner is entitled to avail the benefit of such notification.

7. Contrary to the said assurance, the second respondent, vide its communication dated 30.07.2004, informed the petitioner that in terms of the Resolution of the first respondent in B.P.Ms.No.72 dated 14.08.2003, the petitioner has to pay Excise Duty. Challenging the Resolution in B.P.Ms.No.72 dated 14.08.2003, the petitioner has filed the present Writ Petition.

8. The learned counsel for the petitioner submits that the said issue is already covered by the decision of this Court in W.P.No.28539 of 2004 dated 23.11.2018 and the relevant paragraph is extracted hereunder:

> " 10. I find some force in the above contention. In the contract entered into, it was specifically agreed that the price is a fixed price and any variation in the tax is to be paid by the contractor, and there is
>
> no agreement between the parties that any duty exemption granted to the contractor should be passed on to the respondent Board. The parties are bound by the contract. Merely because a duty exemption was availed by the petitioner pursuant to the notification issued by the Government of India, subsequent to the contract, the respondent cannot insist the duty of exemption should be passed on to them."

9. Learned counsel for the respondents did not dispute the facts, submitted by the petitioner. Further, the Department has taken steps to file an Appeal before this Court, but, till date, it is not numbered. He further concedes that the said issue is covered by the decision of this Court in W.P.No.28539 of 2004 dated 23.11.2018.

10. In view of the above, I am inclined to extend the benefits granted to the petitioner therein, to the writ petitioner herein as well.

11. Accordingly, the Writ Petition is allowed and the respondents herein are restrained from withholding any amount, payable to the petitioner on account of the duty exemption availed by the petitioner. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Joint Chief Engineer (Cosm)
   Tamil Nadu Water Supply and Drainage Board,
   Chennai - 600 005

2. The Executive Engineer,
   TWAD Board, Project Division,
   Theni.

+1 cc to M/s.Mallika Srinivasan, Advocate, Sr.No. 44724

W.P.No.34658 of 2004

CSL/03.07.2019