IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on 12..12..2018 Orders Pronounced on:28..01..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition No.2307 of 2018
and
W.M.P.No.2823 of 2018

M/s.The Indian Hume Pipe Co. Ltd.,
Rep. by its Deputy General Manager,
Mr.S.Arunachalam,
No.8, First Floor,
Gopalapuram,
Chennai 600006.

... Petitioner

-Versus-

1.The Government of Tamil Nadu,
Rep. by its Additional Chief Secretary,
Finance (Salaries) Department,
Fort St. George, Chennai.

2.The Managing Director,
TWAD Board, Chennai 600005.

3.The Joint Managing Director,
TWAD Board, Chennai 600005.

4.The Chief Engineer,
TWAD Board,Western Region,
Coimbatore.

5.The Executive Engineer,
TWAD Board, RWS Division, Tiruppur.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned Government Order passed by the 1st respondent in G.O.Ms.No.296 Finance (Salaries) Department dated 09.10.2017 and the consequential impugned order passed by the 2nd respondent in Letter No.F.Circular/ SDO IV /Com/2017 dated 13.11.2017 and the consequential impugned order passed by the 3rd respondent in

Lr.No.F.81171/Audit/SDO I/COM/2017 dated 19.12.2017 and quash the same as illegal arbitrary and without jurisdiction in so far as the work awarded to the petitioner namely providing improvements to water supply distribution in Tiruppur District by work order No.F.Tiruppur WSIS /SDO(T3)/CE/CBE/2017 dated 16.06.2017 and for a consequential direction to the respondents to make payment of the outstanding due payable to the petitioner as per the agreement/terms and conditions of bid document and in compliance of B.P.Ms.No.23 dated 31.03.2017 issued by the 2nd respondent within a time frame to be fixed by this court with interest at the rate of 12% p.a. and for costs

For Petitioner	:	Mr.R.L.Ramani, Senior Counsel for Mr.V.Anand
For Respondent(s)	:	Mr.P.H.Arvindh Pandian, Addl. Advocate General for R1 to R5

ORDER

Challenging the validity of the Government Order passed by the 1st respondent in G.O.Ms.No.296 Finance (Salaries) Department dated 09.10.2017 and the consequential impugned order passed by the 2nd respondent in Letter No.F.Circular/ SDO IV/Com/2017 dated 13.11.2017 and the consequential impugned order passed by the 3rd respondent in Lr.No.F.81171/Audit/SDO I/COM/2017 dated 19.12.2017 in so far as the work awarded to the petitioner namely providing improvements to water supply distribution in Tiruppur District by work order No.F.Tiruppur WSIS /SDO(T3)/CE/CBE/2017 dated 16.06.2017 and for a consequential direction to the respondents to make payment of the outstanding due payable to the petitioner as per the agreement/terms and conditions of bid document and in compliance of B.P.Ms.No.23 dated 31.03.2017 issued by the 2nd respondent within a time frame to be fixed by this court with interest @ 12% p.a. the petitioner is before this court with this writ petition.

2. The case of the petitioner in brief is as follows:- The petitioner company is a contractor and engaged in the business of water supply distribution to the Tamil Nadu Water Supply and Drainage Board (in short, "the TWAD Board"). He was awarded with a contract by the TWAD board for providing improvements to water supply distribution to the added areas of Tiruppur Corporation in Tiruppur District. Earlier tender notification was issued on 19.09.2016. As the tender notification was issued prior to the introduction of GST regime, there was confusion regarding the differential tax payable between the existing tax

and proposed GST and hence, the contractors quoted bids by taking into account of the impact of implementation of GST. As the amounts quoted by the bidders were on the higher side, all the bids were rejected by the board. Then, a fresh tender notification was issued on 20.03.2017. Thereafter, several rounds of discussions were held with the bidders and the board and finally, the Board had issued proceedings in B.P.Ms.No.23 dated 31.03.2017 amending the various clauses in the bid document relating to the payment of taxes. One of the amendments to the bid document is as follows:-

> "In case during the execution of works GST is implemented the difference between GST paid and the sum of all the taxes subsumed under GST applicable at the time of bidding shall be absorbed by the TWAD board on production of payment receipt of GST towards the goods and services on the respective item executed under the tender. The rate difference absorption mechanism will require additional payment or recovery as the case may be."

3. The aforesaid amendment was also incorporation in the bid document as a condition under Clause 48.1. Based on the above said condition, the petitioner had participated in the tender and he was declared as successful bidder and the work was awarded to him on 16.06.2017. Thereafter, GST regime was brought into force w.e.f. 01.07.2017 fixing the rate of tax on basic price at 18% which was subsequently reduced to 12% for the work awarded to the petitioner. All the taxes applicable at the time of bidding have been subsumed under GST. After the commencement of work, the petitioner had raised bills as per Clause 48.1 of the bid document.

4. In the mean time, the 1st respondent had issued the impugned Government Order in G.O.Ms.No.296, Finance (Salaries) Department, dated 09.10.2017. stating that in view of the introduction of the GST regime, in respect of existing contract, procuring entities shall negotiate the existing agreements with the works contractor and enter into supplemental agreements with revised agreement value fixed as the original contracted value minus the value of subsumed tax arrived and, thereafter, arrive at the tax amount as per G.O. plus GST and the procuring entities shall make payment of final bills accordingly in cases where 'on account' payment has been made as per GO in G.O.Ms.No.264 Finance (Salaries) Department, dated 15.09.2017 and if any excess payment is made through on account, the same shall be adjusted from out of 5% amount retained by the procuring entities. Based on the above GO, the 2nd respondent had issued a circular to all the Chief Engineers and Superintending Engineers in and by his proceedings dated

13.11.2017 directing them to enter into a supplemental agreements and the 5th respondent, in turn, by his letter dated 12.12.2017, revised the bills raised by the petitioner in terms of the above said impugned GO and later on, the 3rd respondent had passed the consequential impugned order dated 19.12.2017 directing the 5th respondent to implement the GO and enter into supplemental agreement as per the GO. It is these orders which are now under challenge in this writ petition.

5. The 2nd respondent has filed a detailed counter affidavit for himself and on behalf the respondents 3 to 5 wherein it is inter alia contended that that work order was awarded to the petitioner before the implementation of the GST on 01.07.2017 and in and by board proceedings in BP Ms No.23 dated 31.03.2017 it has been resolved that during the execution of work, if GST is implement, difference between the GST paid and the sum of all the taxes subsumed under GST applicable at the time of bidding shall be absorbed by the board on production of payment receipt of GST towards the goods and services on the respective item executed under the tender. The rate difference absorption mechanism will require additional payment or recovery as the case may be. Thereafter, the Government had issued Government Order in G.O.(Ms) No.264, Finance (Salaries) Department, dated 15.09.2017, for payment in works contract consequential to the introduction of GST wherein it has been stated that pending notification of guidelines, all departments and procuring entity shall make "on account" payment of bills presented by the contractors restricting the payment to the value due as per the existing contract agreements and any difference on account of final payment due based on the guidelines to be issued, and the on account payment made alone may be adjusted out of the 5% amount retained with the procuring entity. Subsequently, in G.O.Ms.No.296 dated 09.10.2017, guidelines have been issued regarding implementation of GST. In and by the said GO, instructions have been issued to negotiate with work contractors and enter into a supplemental agreements with revised agreement value fixed as the original contracted value minus the value of subsumed tax arrived plus the GST applicable. In case, if on account payment is made as in G.O.Ms.No.264 dated 15.09.2017, the excess payment may be adjusted in the 5% amount retained by the procuring entities. Following the above said GO, the other two impugned proceedings have been issued by the 2nd and 3rd respondents respectively for executing the supplemental agreement.

6. It is further contended that the above said GO has been issued as per the power conferred under Section 21 of The Tamil Nadu Transparency in Tenders Act, 1998 (Tamil Nadu Act 43 of 1998) which empowers to issue necessary Government Order for removing any difficulties in giving effect to the provisions of

the said Act. So as to remove the difficulties in implementing the said Act arises due to the introduction of GST in all types of works contracts entered into by all departments under Tamil Nadu Government. Therefore, the GO is binding on the works contractors entering into contracts with the procuring entities of Government of Tamil Nadu. Insofar as G.O.Ms.No.296 dated 09.10.2016 is concerned, tax component already quoted by the contractor has been taken into consideration and the taxes subsumed under GST has to be separated to arrive at the value of supply or work after deducting the taxes quoted at value at the time of submission of tender. It also provides that the procuring entities shall negotiate the existing agreements with works contractors and enter into supplemental agreement with revised agreement value fixed as the original contract value minus the value of subsumed taxes arrived as mentioned in GO plus GST applicable and the bills will be made accordingly. The board proceedings in BP NO.23 dated 31.03.2017 did not say that the tax assumed by the contractor will be considered for GST and it states that only the taxes subsumed under GST applicable at the time of bidding shall be absorbed by the Board on production of receipt for payment of GST.

7. It is further contended that as per the GO, in the final bill, the tax difference will be paid to the contractor after preparation and signing of supplemental agreement with the contractor for additional amount of work due to introduction of GST. Apart from that, under Clause 48.1 , it has been clearly mentioned if the GST is implemented during the execution of works, the different between GST paid in the sum of all the taxes subsumed under GST applicable at the time of bidding shall be absorbed by the Board on production of receipt for payment of GST. The impugned GO clearly guides implementation of GST in respect of works contracts which were entered before the implementation of GST and the GO has to be necessarily followed.

8. Mr.R.L.Ramani, the learned senior counsel appearing for the petitioner would contend that the Government Orders impugned in the instant writ petitions which compel the petitioner to execute supplemental agreement are not at all valid in the eye of law and it cannot be made applicable to the existing contractors, like the petitioner and the parties are bound by the earlier contract. That apart, the petitioner also cannot be compelled to execute supplemental agreement which would cause total uncertainty as the petitioner has acted upon as per the terms and conditions of the original agreement. Further, according to the learned senior counsel, the Government Order impugned in the writ petition has also given unfettered power to deduct the differential amount of the tax from the bills raised by contractors without obtaining any consent from them. At any rate, before issuing the impugned Government Orders, the board

ought to have given notice to the petitioner and as such the impugned Government Orders, which have been issued without hearing the petitioner, are contrary to the principles of natural justice and the same are therefore, liable to be quashed.

9. Per contra, Mr.P.H.Arvindh Pandian, the learned Aditional Advocate General contended that the impugned GO has been issued only due to the implementation of GST regim pending works contracts for which the 1st respondents has got power under Section 21 of The Tamil Nadu Transparency in Tenders Act, 1998. According to him, the impugned GO would no way cause any prejudice to the petitioner as it only seek for negotiation to get a supplemental agreement executed with the contractors consequent upon the implementation of GST regime and the supplemental agreements will be entered into between the petitioner only after due negotiations. The learned Additional Advocate General further contended that even as per the agreement between the parties, the petitioner is bound to execute supplemental agreement.

10. I have considered the rival submissions and also perused the records carefully.

11. The Government Order impugned in the writ petition has been issued pursuant to the introduction of GST regimne. The petitioner had entered into a contract with the respondents Board before the GST regime came into force. Therefore, a specific clause has been inducted in the bid document under clause 48.1, as referred to supra. In the said circumstances, the GO impugned in this writ petition has been issued taking into consideration of the implementation of GST and directing the procuring entities to enter into supplemental agreements after negotiating with the existing works contractors, which in the considered opinion of this court would no way cause any prejudice to the petitioner. As the tax component already quoted by the respective contractors has been taken into consideration and the taxes subsumed under the GST has to be separated to arrive at the value of supply or work after deducting the taxes quoted at the time of submission of tender. As the interests of the contractors are fully protected under the impugned GO and supplemental agreements will be entered into only after a negotiation with the existing contractors and as such no prejudice would be caused to the petitioner.

12. So far as the power to issue such GO is concerned, the tender notification issued by the 2nd respondent is governed by the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and Section 21 of the said Act empowers the authority to issue any Government Order for the purpose of removing any difficulties in the implementing the Act and in view of the

introduction of GST, in order to remove the difficulties, the impugned GO came to be issued and hence, it cannot be contended that the 1st respondent had no jurisdiction to issue such a GO.

13. The next contention of the learned senior counsel is that the impugned order has been issued in violation of the principles of natural justice is also cannot be countenanced for the simple reason that, it is only a general GO issued in respect of the existing contractors who have entered into agreements prior to the implementation of GST. As already held, the impugned Go has been issued only to remove the difficulties in implementing the GST regime. Now, it is also made clear that by way of impugned GO, the respondent board was directed to initiate the negotiation with the existing contractors before entering into supplemental agreements and hence, it is always open to the petitioner to appear before the respondent concerned and submit his objection before entering into any supplemental agreement.

14. For the foregoing discussions, this court finds no merit in the writ petition and the same deserves only to be dismissed.

15. In the result, this writ petition is dismissed. No costs. Consequently, connected WMP is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kmk

To

1.The Additional Chief Secretary, Finance (Salaries) Department,
Fort St. George, Chennai.

2.The Managing Director,
TWAD Board, Chennai 600005.

3.The Joint Managing Director,
TWAD Board, Chennai 600005.

4.The Chief Engineer,
TWAD Board,Western Region,
Coimbatore.

5.The Executive Engineer,
TWAD Board, RWS Division,
Tiruppur.

+1cc to Mr.M.Arokiyaraj, Advocate Sr.7095
+1cc to Mr.B.Raveendran, Advocate Sr.7097
+1cc to the Government Pleader Sr.8800

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