



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P. (MD) No.2477 of 2019

and

W.M.P. (MD) .Nos.1915 & 1916 of 2019

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

... Petitioner

Vs

1. The Chief Engineer,
TWAD Board, Ganesh Nagar,
Near Law College Hostel,
Opposite 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.
3. The Executive Engineer,
TWAD Board,
Project Division,
Jawahar 3rd Street, Nagercoil.

... Respondents

PRAYER: 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 second respondent in his proceedings Lr.No.F.Kovilpatti WSIS/JDO/2016/ dated 24.01.2019 and quash the same as illegal and without jurisdiction.

For Petitioner : Mr.B.Saravanan

For Respondents : Mr.S.Porkodikarnan

ORDER

Heard the learned counsel on either side.

2.The writ petitioner and M/s.Saisudhir Infrastructure Limited entered into a joint venture agreement and bagged a contract with the respondent Board for providing Water Supply Improvement Scheme at Kovilpatti Municipality in Tuticorin District, vide agreement dated 18.03.2013. The said contract work could not be carried out by the writ petitioner and said M/s.Saisudhir Infrastructure Company. Therefore, the respondent terminated the said contract on 30.09.2014.



3. Thereafter, the respondent Board awarded the said contract in favour of one Consolidated Consortium Limited. Since the TWAD Board had to incur extra expenditure in this connection in terms of the agreement dated 18.03.2013, the said excess expenditure was sought to be recovered from the writ petitioner and M/s. Saisudhir Infrastructure Limited. An order dated 11.10.2017 was passed against the writ petitioner for recovery of a sum of Rs.16,56,58,286/-. The writ petitioner filed W.P.(MD).No.12772 of 2018, questioning the said demand.

4. A learned Judge of this Court by an order dated 29.08.2018, allowed the said Writ Petition in the following terms:-

"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 WBIS/JDo/2016 dated 11.10.2017 insofar as the petitioner is concerned, is hereby set aside."

5. Aggrieved by the said allowed Writ Petition, the respondent Board had filed W.A.(MD).No.1627 of 2018. The Writ Appeal filed by the Board was dismissed with liberty to proceed afresh by issuing show cause notice and thereafter, pass appropriate orders after considering all the objections that may be raised by the petitioner herein.

6. In terms of the liberty given by the Hon'ble Division Bench, the respondent Board issued a fresh show cause notice dated 24.01.2019. The petitioner appears to have offered his objections.

7. The learned Standing Counsel appearing for the respondent Board states that the Board is yet to pass the final order pursuant to the show cause notice dated 24.01.2019. In the meanwhile, the first respondent has issued an internal communication dated 24.01.2019, calling upon the Executive Engineers of the Board to withhold the payment if any to be made to the writ petitioner and M/s. Saisudhir Infrastructure Limited, Hyderabad, in their Division until further intimation is received. This communication directing



to withhold all the payment to the writ petitioner, is under challenge in this Writ Petition.

8. The learned Standing Counsel appearing for the Board draws my attention to two clauses viz., Clause 41 and 44.1 in the agreement dated 18.03.2013. The said two clauses would read as under:-

"41. Termination

The Employer may terminate the Contract for any reason that is regarded as breach of the Contract.

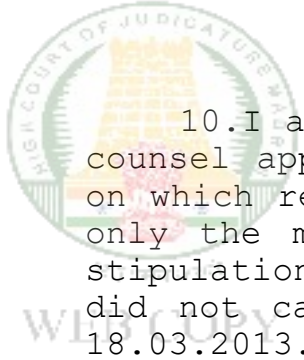
If the contract is terminated, the contractor shall stop work immediately, made the site safe and secure and leave the site as soon as reasonably possible on termination of the contract, the Engineer shall issue a certificate for the value of work done less payments received up to the date of the issue of Certificates, less other recoveries due in terms 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 exceed 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 finalised in the contract for any component or for the whole project, incurred by the Employer due to such termination shall become recoverable from the contractor / 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.

44. Power Supply

The power supply connectin from the TNEB has to be obtained by the contractor himself and the charges shall be borne by the contractor. However, necessary vouchers in original for the payment made to the TNEB shall be produced to the Employer by the contractor which will be reimbursed by the Employer. "

9. The stand of the respondent counsel is that these two clauses empowered the Board to withhold the money that may be payable to the writ petitioner.



10. I am unable to agree with the aforesaid stand of the learned counsel appearing for the respondents. Clause 44 of the agreement on which reliance is placed indicates that what can be recovered is only the money payable to the Board by the contractor under any stipulation in the contract. It is true that the writ petitioner did not carry out the contract works as per the agreement dated 18.03.2013. It is equally true that the said agreement was terminated vide order dated 30.09.2014, passed by the first respondent. On account of the aforesaid termination of contract, the Board was constrained to entrust the balance works to another contractor. The Board is also entitled to recover any extra expenditure that may be incurred by the Board on account of the such entrusted balance works to some other contractors. All these applications are beyond the pale of controversy. What is undisputed is that the Board is yet to pass any final order with regard to the liability of the writ petitioner to pay money to the Board in terms of the aforesaid clauses.

11. Therefore, as on date, the petitioner's liability to pay in terms of the aforesaid clause is still at large. Only when the final order is passed by the Board, the Board would be justified in taking the stand that a certain sum of money is payable by the petitioner / contractor to the Board. Therefore, as on date, the second respondent is not justified in restraining the other executive engineers from making payment of the petitioner which he is otherwise entitled to. It is made clear that it is only the writ petitioner who has come to this Court questioning the impugned communication. Therefore, the order impugned in the Writ petition is set aside in so far as the writ petitioner is concerned.

12. The Writ Petition stands allowed accordingly. No costs. Consequently, the connected miscellaneous petitions are closed.

sd/
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Chief Engineer,
TWAD Board, Ganesh Nagar,
Near Law College Hostel,
Opposite Mattuthavani Bus Stand,
Melur Road, Madurai-625 007.
2. The Executive Engineer,
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Urban Division, 62/8, Second Floor,
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3. The Executive Engineer,
TWAD Board,
Project Division,
Jawahar 3rd Street, Nagercoil.

+1 CC to Mr.B.SARAVANAN, Advocate (SR-48979[F] dated 22/02/2019)
+1 CC to M/s.PORKODI KARNAN, Advocate (SR-49275 dated 22/02/2019)

W.P. (MD) No.2477 of 2019
21.02.2019

tsg

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