



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P(MD)No.19880 of 2019

WEB COPY

M.Ramakrishnan

... Petitioner

vs.

1.The Chief Engineer,
Public Works Department,
Water resources Development, by
Madurai Region, Madurai.

2.The Superintending Engineer,
Public Works Department,
Water resources Development,
Thamirabarani Basin Circle,
Tirunelveli.

3.The Executive Engineer,
Public Works Department,
Water Resources Development,
Kodayar Basin Division,
Nagercoil.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus directing the respondents to pay the interest at the rate of 8% per annum for the belated payment of Final bill amount of Rs.48,51,695/- from 26.01.2013 to 14.02.2018, 8% interest per annum for the escalation amount of Rs.17,69,305/- for the period from 26.01.2013 to 14.02.2018 and to pay the remaining escalation amount of Rs.60,92,413/- and the interest at the rate of 8% per annum till date, in lieu of the tender for rehabilitation of Anaicuts, supply channels and tanks in alanthuraiyar Division scheme in Hanumanadhi Sub basin. In package No.01/1AMWARM/WRD/HMD/Works/III/2009-10, based on the representation of the petitioner dated 03.05.2018, 29.05.2018 and 18.07.2018.

For Petitioner : Mr.S.Ram Sundar
for M/s Veera Associates
For Respondents : Mr.K.Mu.Muthu
Additional Government Pleader

ORDER

Mr.S.Ram Sundar of M/s Veera Associates (law firm), on behalf of writ petitioner and Mr.K.Mu.Muthu, learned Additional Government Pleader, who has accepted notice on behalf of all three respondents are before this Court.



2. With consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

3. Writ petitioner is a contractor under State 'Public Works Department' ('PWD' for brevity).

4. It is not in dispute that writ petitioner has entered into a contract (hereinafter 'said contract' for clarity and convenience) with PWD for execution of work adumbrated in said contract.

5. This writ petition now turns on a very narrow compass as it is the case of writ petitioner that there was belated payment of final bill and therefore, writ petitioner is entitled to interest at the rate of 8% per annum for what according to writ petitioner is belated payment of final bill. While this is one limb of the prayer, second limb of the prayer pertains to 8% per annum interest on the escalation amount and the third limb is one seeking payment of remaining escalation amount. While the first and second limbs of the prayer are predicated on Clause - 43 (captioned 'Payments') of said contract, third limb of the prayer is predicated on Clause - 47 (captioned 'Price Adjustment'). Clauses 43 and 47 of the said contract read as follows:

"43. Payments:

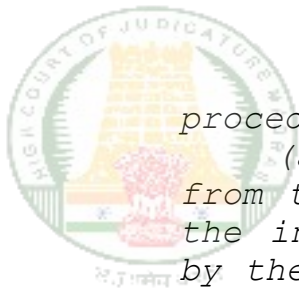
43.1 Payments shall be adjusted for deductions for advance payments, retention, other recoveries in terms of the contract and taxes, at source, as applicable under the law. The Employer shall pay the Contractor the amounts certified by the Engineer within 14 days of the date of each certificate. If the Employer makes a later payment, the Contractor be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made upto the date when the late payment is made at 8% per annum.

43.2 If an amount certified is increased in a later certificate or as a result of an award by the Adjudicator or an Arbitrator, the Contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute.

43.3 Items of the Works for which no rate or price has been entered in will not be paid for by the Employer and shall be deemed covered by other rates and prices in the Contract."

"47. Price Adjustment:

47.1 Contract price shall be adjusted for increase or decrease in rates and price of labor, materials, fuels and lubricant in accordance with the following principles and



procedures and as per formula given in the contract data:

(a) The price adjustment shall apply for the work done from the start date given in the contract date upto end of the initial intended completion date of extensions granted by the engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the contractor

(b) The price adjustment shall be determined during each quarter from the formula given in the contract date.

(c) Following expressions and meanings are signed to the work done during each quarter:

R= Total value of work done in the quarter. It would include the amount of secured advance for materials paid for (if any) during the quarter, less the amount of the secured advance recovered, during the quarter. It will exclude value of works executed under variation for which price adjustment will be worked separately based on the terms manually agreed.

47.2 To the extend that full compensation for any price or fall in cost to the contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs."

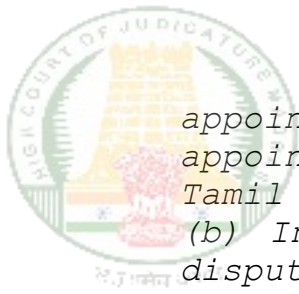
6. It is also not in dispute that the 'General Conditions of Contract' (GCC) will apply to said contract. To be noted the contract as well as relevant clauses of GCC have been placed before this Court by writ petitioner as part of the typed set of papers forming part of the case file.

7. Learned State Counsel, who has accepted notice on behalf of all three official respondents, drew the attention of this Court to Clause 25.3 of GCC (captioned 'Arbitration') which reads as follows:

"4. Arbitration (GCC Clause 25.3)

The procedure for arbitration will be as follows:

25.3 (a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator



appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman, The Institution of Engineers, Tamil Nadu State Centre, Chennai.

(b) In the case of dispute with a Foreign contractor the dispute shall be settled in accordance with provisions of UNCITRAL Arbitration Rules. The Arbitral Tribunal shall consist of three Arbitrators one each to be appointed by the Parties, and shall act a presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman, The Institution of Engineers, Tamil Nadu State Centre, Chennai.

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Chairman Tamil Nadu state centre, Chennai/President of the Institution of Engineers (India) shall appoint the arbitrator. A certified copy of the order of the Chairman, The Institution of Engineers, (India) Tamil Nadu State Centre, Chennai making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held at Tirunelveli, Tamil Nadu, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Where the value of the contract is Rs.50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties, falling such agreement, by the appointing authority, namely the President of the Institution of Engineer, Chennai (India).

(g) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of arbitration proceedings.'



8. There is no disputation or disagreement that GCC applies to said contract from which aforesaid three limbs of prayers that have now been made arise. The nature of the three limbs would also reveal that they turn on breach of certain conditions of said contract. Therefore, the three limbs of prayer are clearly disputes arising out of said contract. Saying so, learned State Counsel submitted that if the writ petitioner has any grievance, all these three limbs have to be canvassed only by invoking the arbitration clause and the Arbitral Tribunal has to decide on the same on merits.

9. From the narrative thus far, it emerges with clarity that Clause 25.3 of GCC provides for arbitration and applicable statute is Arbitration and Conciliation Act, 1996. To be noted, Clause 25.3 of GCC is a arbitration agreement within the meaning of Section 7 of Arbitration and Conciliation Act, 1996. To be noted arbitration within the meaning of Section 7 of said Act can either be by way of a separate agreement or by way of Clause in the contract governing the parties. Judicial intervention in such matters is minimal. Under these circumstances, this Court is inclined to accept the submission made by State Counsel that the prayer of the writ petitioner can be adjudicated only by the Arbitral Tribunal, if the writ petitioner chooses to invoke the arbitration clause. Considering the fact that judicial intervention is bare minimum whenever there is an arbitration agreement ie., whenever parties have agreed for resolution of disputes by arbitration, in the light of the fact that instant writ prayers are clearly disputes arising out of said contract (covered arbitration clause / agreement) this Court deems it appropriate to dismiss this writ petition, albeit making it clear that it is open to the writ petitioner to invoke arbitration clause and if the writ petitioner chooses to invoke the arbitration clause, all questions raised in the instant writ petition will be left open.

10. Writ Petition is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-III)

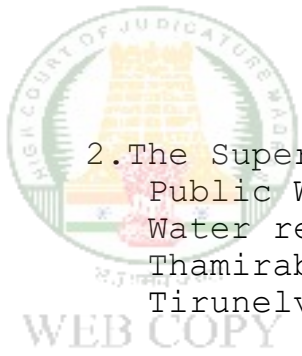
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Sub Assistant Registrar(CS)

To

1.The Chief Engineer,
Public Works Department,
Water resources Development, by
Madurai Region, Madurai.

<https://hcservices.madurais.gov.in/Reservicesh>



2.The Superintending Engineer,
Public Works Department,
Water resources Development,
Thamirabarani Basin Circle,
Tirunelveli.

3.The Executive Engineer,
Public Works Department,
Water Resources Development,
Kodayar Basin Division,
Nagercoil.

+1 CC to M/s.VEERA ASSOCIATES, Advocate (SR-87461[F] dated
18/09/2019)

+1 CC to SPL GP (SR-87589[F] dated 18/09/2019)

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