

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2020

C O R A M

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

W.P.Nos.23629 to 23632 of 2012 & 30967 & 30968 of 2013

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M.P.Nos.1, 1, 1 & 1 of 2012 and 1 & 1 of 2013

N.V.Baabu ... Petitioner in all W.Ps.

Vs.

1.The Superintending Engineer Highways (H), (O) & (M),
Chennai - 32.

2.The Chief Engineer, (H), (O) & (M),
Chennai - 5.

3.The Divisional Engineer (H), (O) & (M),
Chengalpet.

... Respondents in W.P.Nos.23629 to 23632 of 2012

1.The Superintending Engineer (Highways) (C & M),
Chennai circle,
Chennai.

2.The Divisional Engineer (Highways) (C & M),
Highways Department,
Tiruvannamalai.

...Respondents in W.P.Nos.30967 & 30968 of 2013

PRAYER IN W.P.NO.23629 OF 2012: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of certiorari calling for the records relating to proceedings in letter dated 6.07.2012 in letter No.240/2007/A3 of the third respondent and quash the same.

PRAYER IN W.P.NO.23630 OF 2012: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of certiorari calling for the records relating to proceedings in letter dated 6.07.2012 in letter No.300/2007/A3 of the third respondent and quash the same.

PRAYER IN W.P.NO.23631 OF 2012: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of certiorari calling for the records relating to proceedings in letter dated 6.07.2012 in letter No.240/2007/A3 of the third respondent and quash the same.

PRAYER IN W.P.NO.23632 OF 2012: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of certiorari calling for the records relating to proceedings in letter dated 6.07.2012 in letter No.315/2007/A3 of the third respondent and quash the same.

PRAYER IN W.P.NO.30967 of 2013: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of mandamus directing the respondents herein to forthwith release the payment of Rs.25.32 lakhs to the petitioner in respect of the work "Improvements to Cheyyar - Anaicut Road at Km. 0/0 - 2/0 and 5/0 -7/0" which has already been completed.

PRAYER IN W.P.NO.30968 of 2013: Petition filed under Article 226 of the Constitution of India, for issuance of a writ of mandamus directing the respondents herein to forthwith release the payment of Rs.15.56 lakhs to the petitioner in respect of the work "Improvements to Arcot and Villupuram Road at Km. 34/0 - 40/0" which has already been completed.

For Petitioner : Mr.ARL.Sundaresan, Senior Counsel
in all W.Ps. for M/s.AL.Gandhimathi

For Respondents : Mr.G.K.Muthukumar,
in all W.Ps. Special Government Pleader

COMMON ORDER

W.P.Nos.23629 to 23632 of 2012 have been filed challenging the separate orders all dated 06.07.2012 passed by the third respondent calling upon him to pay the following amounts: (a)Rs.5,01,885/-, (b) Rs.10,24,068/-, (c) Rs.3,68,309/- and (d) Rs.6,55,752/-. W.P.Nos.30967 & 30968 of 2013 have been filed for a mandamus to direct the respondents to release the payment of Rs.25.32 lakhs and Rs.15.56 lakhs respectively for the work done by him under the contract for Improvement of Cheyyar - Anaicut road at Km. 0/0 - 2/0 and 5/0 - 7/0" and Improvement to Arcot and Villupuram Road at Km. 34/0 - 40/0" respectively.

2. The case of the petitioner is that the petitioner has entered into contracts with the respondents as detailed below:

(a) contract for widening from single lane to double lane and strengthening Madurantakam - Vennangupattu Road KM 26/1 - 28/0 vide agreement dated 05.02.2007

(b) contract for widening from single lane to double lane and strengthening Madurantakam - Vennangupattu Road KM 30/0 - 32/2 vide agreement dated 05.02.2007

(c) contract for widening from single lane to double lane and strengthening Madurantakam - Vennangupattu Road KM 32/2 - 34/4 vide agreement dated 11.07.2007

(d) contract for widening from single lane to double lane

and strengthening Madurantakam - Vennangupattu Road KM 34/4 - 36/6 vide agreement dated 11.07.2007

(e) contract for Improvement of Cheyyar - Anaicut road at Km. 0/0 - 2/0 and 5/0 - 7/0" vide agreement dated 16.02.2012

(f) contract for Improvement to Arcot and Villupuram Road at Km. 34/0 - 40/0" vide agreement dated 26.11.2010.

3. According to the petitioner, he performed the contracts diligently. It is his case that the respondents have arbitrarily and illegally terminated the contracts which are the subject matter of W.P.Nos.23629 to 23632 of 2012. It is also his case that before determining the amount towards alleged loss suffered by the respondents, neither notice was given to him nor any enquiry conducted and therefore, according to him, principles of natural justice have been violated. It is also his case that under the respective contracts, there is an arbitration clause and in view of the same, if any amount has to be claimed by the respondents towards alleged loss suffered, the respondents will have to initiate arbitration and only the arbitrator can adjudicate the same. According to the petitioner, under the impugned orders, the respondents have terminated the contracts and awarded the balance work to a third party and determined the amount payable by the petitioner towards damages unilaterally. Aggrieved by the same, W.P.Nos.23629 to 23632 of 2012 have been filed.

4. According to the petitioner, he completed the work of Improvement of Cheyyar - Anaicut road at Km. 0/0 - 2/0 and 5/0 - 7/0" and Improvement to Arcot and Villupuram Road at Km. 34/0 - 40/0" within the time stipulated under the respective contracts. According to the petitioner, the respondents have verified the work done by the petitioner and completion certificates have also been issued by the respondents to that effect. According to the petitioner, though the respondents have issued the completion certificates, they failed to release the full payments for the said works as per the contracts which are the subject matter of W.P.No.30967 & 30968 of 2013. According to the petitioner, the respondents have not released the full payments for the work done by him, in view of the dispute between the petitioner and the respondents in the contracts which are the subject matter of W.P.Nos.23629 to 23632 to 2012. In such circumstances, the petitioner has filed W.P.No.30967 & 30968 of 2013 to direct the respondents to release the payments of Rs.25.32 lakhs & Rs.15.56 lakhs respectively.

5. Separate counter affidavits have been filed by the third respondent in W.P.Nos.23629 to 23632 of 2012. In all the counters, the third respondent has stated that there was an inordinate delay on the part of the petitioner to complete the contract and that is the reason for termination. According to them, under the terms and conditions of the contract, once the contract is terminated, they are entitled to appoint a third

party to complete the balance work under the contract. Further it is their case that under the respective contracts, the respondents are entitled to claim damages for the losses suffered by them on account of the inordinate delay in the execution of the respective contracts by the petitioner. According to them, there is no necessity to go for arbitration as the contract itself enables the respondents to determine the amount of losses suffered by the respondents on account of breach of contract committed by the petitioner. Further it is contended that the details of the losses suffered by the respondents have been furnished along with the impugned orders and therefore, principles of natural justice has not been violated.

6. Heard Mr.ARL.Sundaresan, learned Senior Counsel for the petitioner and Mr.G.K.Muthukumar, learned Special Government Pleader for the respondents.

7. Learned Senior counsel for the petitioner drew the attention of this Court to the order dated 15.07.2009 passed by a learned Single Judge of this Court in W.P.No.13298 of 2009 which was filed by the petitioner herein. In particular, he referred to the operative portion of the said order which reads as follows:

"the learned Government Advocate has contended that the petitioner must approach the Arbitrator even with regard to the order dated 12.06.2009. As far as this argument of the learned Government Advocate is concerned, the grievance of the petitioner is that the particular and how this amount has been quantified by the respondent is also not spelt out in this order. Unless particulars are furnished to the petitioner, the petitioner cannot even make out a contract, to express his grievance or to challenge the order, the petitioner must have the particulars basing on which this amount has been arrived at. Without knowing these particulars, the petitioner will not be in a position to put forth his defence before the Arbitrator also. Consequently, I am not able to accept the stand taken by the learned Government Advocate. In view of the non-furnishing of the particulars as to how the first respondent has arrived at the figure of Rs.41,43,889/-, the impugned order dated 12.06.2009 is set aside and the matter is remitted back to the first respondent with a direction to pass orders after providing reasonable opportunity to the petitioner and also furnish the particulars how the amount of Rs.41,43,889/- has been arrived at."

Referring to the aforesaid order, the learned Senior counsel for the petitioner submitted that the facts of these matters

are also identical and in these cases also, the respondents without giving any prior notice or holding any enquiry have determined the amount towards alleged losses suffered by them on account of breach of contract allegedly committed by the petitioner. According to him, the respondents cannot be a judge of their own cause. It is his contention that it is only for the arbitrator to adjudicate the quantum of compensation if any payable by the petitioner to the respondents. Further, he would submit that even though the respondents are entitled to claim compensation from the petitioner in case he commits breach of contract, the determination of the compensation amount by the respondents can be determined only after affording a fair hearing to the petitioner and adhering to the principles of natural justice. According to him, no hearing was given to the petitioner by the respondents before determination of the compensation towards alleged breach of contract.

8. Learned Senior counsel for the petitioner also drew the attention of this Court to another order dated 06.01.2011 passed by a learned single Judge of this court in W.P.No.21435 of 2010 which was also filed by the very same petitioner, wherein the learned Single Judge of this court passed the following order:

"6.In view of the above, I am inclined to set aside the order dated 12.02.2010, which is impugned in this writ petition and the same is set aside accordingly. The first respondent is directed to provide reasonable opportunity to the petitioner by giving proper particulars as to how they have arrived at the sum of Rs.17,64,629/- and thereafter, proceed against the petitioner on merits, if they are so advised. However, it does not mean that the respondents are curtailed from appointing the Arbitrator to resolve the dispute, which is arising out of the contract."

9. According to the learned Senior Counsel for the petitioner, in the above case also, the respondents without giving any prior notice and without holding any enquiry and without furnishing proper particulars have arrived at the compensation amount allegedly payable by the petitioner to the respondents. According to him, it is made clear in the aforesaid order that the respondents are not curtailed from appointing an Arbitrator to resolve the dispute which arises out of the contracts.

10. Learned Senior counsel for the petitioner also drew the attention of this Court to the impugned orders which are the subject matter of W.P.Nos.23629 to 23632 of 2012 and pointed out that as seen from the impugned orders, the respondents have quantified the amount towards compensation under various heads payable by the petitioner without prior notice and without holding any enquiry and without any basis.

It is also contended by the learned Senior Counsel that the only recourse available for the respondents is to refer the dispute to arbitration in accordance with the arbitration clause contained in the respective contracts for payment of the alleged compensation by the petitioner. According to him, instead of referring the dispute to arbitration, the respondents have arbitrarily and illegally determined the amount by themselves without giving any opportunity to the petitioner and without holding any enquiry.

11. Learned Senior Counsel for the petitioner would also submit that the respondents cannot withhold the amount in a contract, when they have issued the completion certificate for a dispute between the petitioner and the respondents in respect of other contracts. He also submitted that the respondents have arbitrarily and illegally failed to release the amounts of Rs.25.32 lakhs and Rs.15.56 lakhs which are undisputed amounts payable under those contracts.

12. However, learned Special Government Pleader for the respondents would submit that there is no necessity for referring the dispute to arbitration as the contract itself enables the respondents to claim compensation for inordinate delay committed by the petitioner in the execution of the contract. Further, it is his case that since there was an inordinate delay in the execution of the contracts by the petitioner, the respective contracts were cancelled and a third party was appointed who had completed the balance work under the contract and the losses claimed by them are only the difference in bid amount between the value of the contract awarded to the petitioner and the value of the contract awarded to the third party and therefore, according to him, being a quantified amount, there is no necessity to go for arbitration.

13. Learned Special Government Pleader for the respondents submits that under clause 109.09 of the contract, the respondents have got the power to recover losses suffered by them on account of breach of contract committed by the petitioner and they have a right to recover the same from the money due to the contractor in respect of other contracts. Learned Special Government Pleader would further submit that in the event of quashing of the impugned demands for non-adhering to the principles of natural justice, the amount which has already been withheld by the respondents should be allowed to continue until the enquiry proceedings are completed and the result of the enquiry proceedings are declared.

Discussion:

14. Admittedly, as seen from the impugned orders, the amount has been determined by the respondents without hearing the petitioner. Admittedly, no notice was issued nor any enquiry conducted by the respondents before passing the

impugned orders determining the respective amounts towards losses suffered by the respondents on account of alleged breach of contract committed by the petitioner under the respective contracts. As held in the decisions referred to supra in identical matters, compensation cannot be determined by the respondents without issuing prior notice to the petitioner and without holding any enquiry. With regard to the contention of the learned Senior counsel for the petitioner that there is an arbitration clause under the contract and the respondents will have to necessarily claim any amount towards alleged compensation only before the Arbitrator and cannot determine the amount by themselves, the said contention can be considered by the respondents during the enquiry that will be conducted pursuant to this order. Eventhough, the respondents are empowered under the respective contracts to claim compensation, the determination cannot be done by the respondents on their own without prior notice to the petitioner and without holding any enquiry. Being a public authority, it is the duty of the respondents to provide a fair hearing to the petitioner before determining the compensation. In the case on hand, fair hearing has not been afforded to the petitioner as no notice or enquiry was conducted before determination of the compensation amount.

15. The concept of fairness should be in every action whether it is judicial, quasi-judicial, administrative and or quasi-administrative work. The principles of natural justice should be free from bias and parties should be given fair opportunity to be heard and all the reasons for the decision should be informed to the respective parties. The three essential procedure related to the principles of natural justice are (a) No one should be a judge in his own matter; (b) No one can be condemned unheard; and (c) The party is entitled to know each and every reason and the decision taken by the authority. In the case on hand, compensation payable by the petitioner has been determined by the respondents on their own without hearing the petitioner and proper reasons with supporting documentary evidence have also not been referred to in the impugned orders for determining the compensation amount.

16. Clause 109.09 of the contract which the learned Special Government Pleader referred to will not apply, since the amount has not been determined under the impugned orders by adhering to the principles of natural justice

17. Since the impugned orders have been passed by not adhering to the principles of natural justice, the impugned orders which are the subject matters of W.P.Nos.23629 to 23632 of 2012 will have to be quashed. In view of the quashing of the impugned orders, the respondents cannot withhold the undisputed amounts payable to the petitioner in respect of other contracts for non-payment of the determined amount as

per the impugned orders and therefore, W.P.Nos.30967 & 30968 of 2013 will have to be allowed and a direction has to be issued to the respondents in W.P.Nos.30967 & 30968 of 2013 to release the undisputed payments in respect of other contracts.

18. In the result, the impugned orders all dated 06.07.2012 which are the subject matters of W.P.Nos.23629 to 23632 of 2012 are hereby quashed and the matter is remitted back to the Divisional Engineer (H), (O) & (M), Chengalpet, for fresh consideration. The impugned orders which are the subject matter of W.P.Nos.23629 to 23632 of 2012 are treated as show cause notice issued by the respondents and the petitioner is directed to submit his reply within a period of four weeks from the date of receipt of a copy of this order and on receipt of the said reply, the third respondent is directed to pass final orders with regard to the determination of compensation payable by the petitioner within a period of six weeks thereafter on merits and in accordance with law after giving sufficient opportunity to the petitioner to place all his submissions and records including granting him the right of personal hearing. It is also made clear that the third respondent, in the final orders has to consider in accordance with law as to whether determination of compensation can be made when there is an arbitration clause available under the respective contracts.

19. Since the impugned orders which are the subject matter of W.P.Nos.23629 to 23632 of 2012 have been quashed and the matter is remanded back to the third respondent for fresh consideration, the respondents do not have the right to withhold the payments of the petitioner in respect of other contracts. Hence, the relief sought for in W.P.Nos.30967 & 30968 of 2013 has to be granted in favour of the petitioner. Accordingly, this Court directs the respondents to pay the undisputed amounts which are due to the petitioner in respect of other contracts within a period of six weeks from the date of receipt of a copy of this order. However, it is made clear that once the compensation amount is determined in accordance with this order, the respondents are granted liberty to deduct the determined compensation amount from and out of the bills payable to the petitioner in the near future.

20. With the aforesaid directions, W.P.Nos.23629 to 23632 of 2012 are disposed of and W.P.Nos.30967 & 30968 of 2013 are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Superintending Engineer Highways (H), (O)&(M),
Chennai - 32.

2.The Chief Engineer, (H), (O)&(M),
Chennai - 5.

3.The Divisional Engineer (H), (O)&(M),
Chengalpet.

4.The Superintending Engineer (Highways) (C & M),
Chennai circle,
Chennai.

5.The Divisional Engineer (Highways) (C & M),
Highways Department,
Tiruvannamalai.

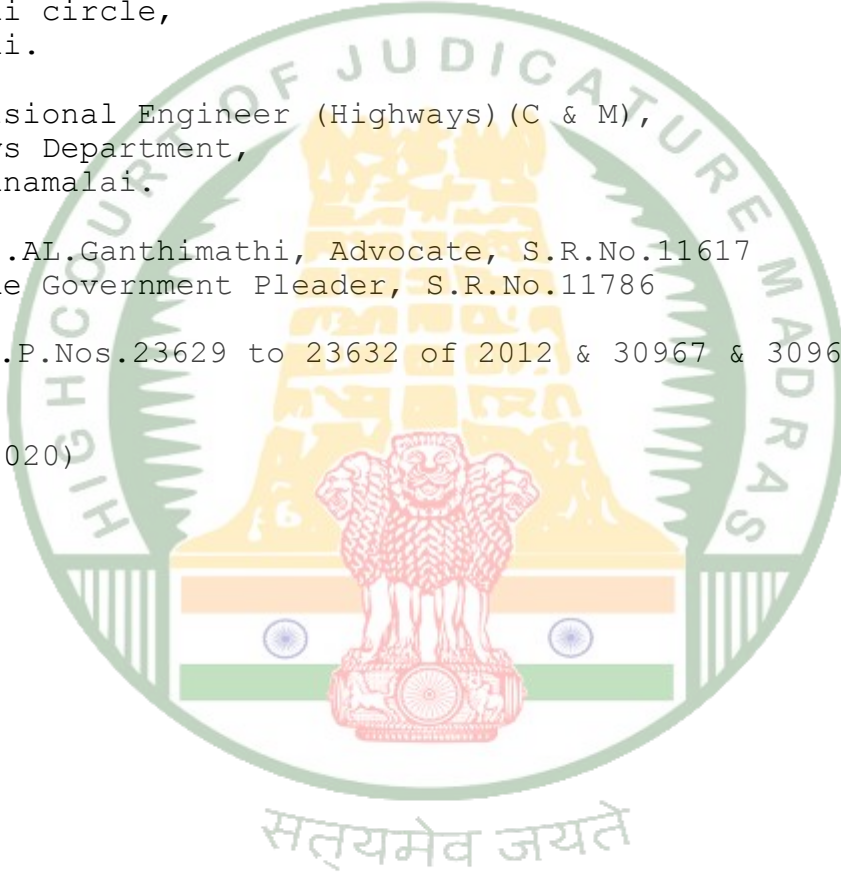
+1cc to MS.AL.Ganthimathi, Advocate, S.R.No.11617

+1cc to the Government Pleader, S.R.No.11786

W.P.Nos.23629 to 23632 of 2012 & 30967 & 30968 of 2013

BP(CO)

CB(16/07/2020)



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