



WP.No.16384 of 2017

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.10.2022

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

WP.No.16384 of 2017 & WMP.No.17005 of 2017

R.Selvam

... Petitioner

Vs

The Divisional Engineer [Highways]
Constructions and Maintenance,
Thiruvarur – 610 001.

... Respondent

Prayer:- This Writ Petition is filed, under the Article 226 of Constitution of India, to issue a Writ of declaration to declare that the deduction of Rs.93,07,633/- towards escalation for package 57 in the Bill dated 10.03.2017 issued for package 89 is one without jurisdiction and null and void.

For Petitioner : Mr.A.Muthukumar

For Respondent : Mr.K.M.D.Mukhilan,
Government Advocate



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ORDER

This Writ Petition has been filed challenging the impugned Order for recovering a sum of Rs.93,07,633/- towards escalation for package 57 in the Bill dated 10.03.2017 issued for package 89.

2. The brief facts leading to filing of this Writ Petition is as follows :

A tender was called for package No.57 in the year 2014 and the same was finalized on 03.03.2015. The agreement for the above work was executed on 16.03.2015. In the month of September 2015, work under package 57 was completed on 30.09.2015 and Quality Control Certificate was issued on 11.01.2016 and Completion Certificate for package 57 was issued on 07.03.2016. Thereafter, final bill for a sum of Rs.40,05,535/- was paid to the petitioner. It is the further case of the petitioner that he is also a successful bidder for package No.89 and work was completed in respect of the said contract. When the petitioner demanded completion certificate and payment due for the package 89, the respondent has deducted a sum of Rs.93,07,633/- towards escalation for package 57 from the package No.89 and the amount due and payable under the package No.57 was deducted



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while issuing third bill on 10.03.2017 regarding package No.89. When information sought in this regard under the Right to Information Act, the petitioner came to know that Rs.93,07,633/- was deducted in package 89 towards escalation charges in package in 57. Hence, it is his contention that once the contract was completed in the year 2015 and the amount has been paid, without any valid reasons, the respondent cannot deduct the amount in respect of another contract. There was no notice, whatsoever, issued in respect of such deductions or price escalation. Therefore, seeks to quash the impugned Order.

3. Admitting the work that was completed on 24.12.2015 and the completion certificate was issued on 11.01.2016, it is the case of the respondent that only after the final bill is paid, the Chief Engineer, Highways, Construction and Maintenance, Chennai by a letter dated 06.07.2016 issued directions to calculate the escalation of prices between estimate rate and the rates during the period under consideration citing G.O.No.60 PW [G2] dated 14.03.2008 and G.O.No.101/PW[G2] dated 10.06.2009. Hence, as per the guidelines of the Chief Engineer, price variation has been calculated based on the estimate rate to the tune of



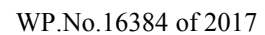
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Rs.93,07,633/- which has to be recovered from the contractor. Hence, prayed to dismiss the writ petition.

4. The learned counsel appearing for the petitioner would submit that the Order impugned does not even show the nature of calculation as to how such calculation has been arrived. It is his further contention that the petitioner was not put in notice. Therefore, the price variation calculation has been adopted mechanically. Such an Order is not sustainable in the eye of law. In a similar Writ Petition in W.P.No.8235 of 2015, this Court has set aside the Order of the respondent and remanded the matter for fresh consideration. Hence, submitted that the impugned Order is liable to be set aside.

5. Whereas the learned counsel appearing for the respondent would submit that the price variation clause is binding on the parties. Though the work was completed in the year 2015, price variation clause has been invoked based on the Government Orders and the calculation has been arrived. According to him, the question of issuing notice to the petitioner will not arise at all since contractual terms are binding on the parties.



6. I have perused entire materials. It is not disputed the completion of work under the package No.57, as per the agreement. Work was completed as per as the contract in September 2015 and the final bill has also been settled in the year 2016. Thereafter, a sum of Rs.93,07,633/- said to be price variation amount was arrived and deducted from the other contract namely package No.89 on 10.03.2017. It is relevant to note that the price variation clause in the contract reads as follows :

The contract price shall be adjusted during the execution subject to the terms conditions set out below as per G.O.Ms.60PW (02) Dept Dat 14.03.2008 and [G.OMs.No. 101 PW\(C2\) Dept Dated 10.06.2009](#).

1. Contracts of more than 12 months Pull price adjustment on all the components including cement, steel, bitumen and petroleum, Oil and lubricants (POL) shall be applicable to the works with contract period of more than 12 months instead of the present system of 18 months.

2. Contracts of 12 months and below:



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In respect of contracts of 12 months and below, price adjustment shall be applicable in respect of cement, steel, bitumen and petroleum, oil and lubricants (POL) only.

3. Price adjustment clause will be applicable for all works where value of work put to tender costing Rs.100 lakhs and above. However, No price adjustment will be applicable for maintenance and repair works.

4. Price adjustment will apply only when the rates exceed or decrease by 3% or more as compared to the estimate rates (RBI Index price).

5. The price adjustment shall be calculated only on the departmental estimated cost of the work

6. In respect of bitumen and POL, it may be considered on Pass through basis with payment of actual rate/price at the rates charged by Indian Oil Corporation.

7. Price variation/escalation will be applicable for those quantities actually used by the contractor including additional quantities, if any used or achieved ahead of the time-line. However, if the contractor does a certain quantity of the work in the third quarter which ought to have been done in earlier quarter. price variation/escalation will still be applicable on the quantity at the rates applicable in the relevant quarter as per time-line or period of actual use whichever is less.

8 Liquidated damages will be imposed on the contractor for lapses/shortfall in achieving the rate of progress as per



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existing schedule.”

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7. As per the above clause, to calculate price variation, the variation should to calculated once in quarter if the contract is for a period of 12 months. Admittedly, in this case, price variation bill has been deducted on 10.03.2017 and instructions has been issued only on 11.07.2016 to calculate the price variation as per the proceedings of the Divisional Engineer. Prior to that whether there was proper calculation as per the clause or not, the Order is totally silent. The contractor is to be put on notice to arrive at proper calculation. Whereas, the impugned Order does not speak about the manner in which such huge price variation is calculated. In such view of the matter, impugned Order suffers from serious infirmity and cannot stand in the eye of law. In a similar issue in the Writ Petition in W.P.No.823 of 2017 this Court in para 6 has held as follows :

“The Orders are laconic in the sense there is no determination of the price variation in a manner known to law. In order to decide the price variation, the authority deciding on the price variation show show that was the price at which the material was available in the market on the relevant date and what was the price charged by the contractor. The difference



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between the two would be recoverable from the Contractor, if the Contractor has made a higher claim, no such attempt has been made. The Divisional Engineer has chosen to pass an order directing recovery without giving the details.

by holding so, this Court has set aside the impugned Order and remanded the matter back for fresh consideration by the respondent after giving proper opportunity to the petitioner. Considering the above and also the fact that the price variation has to be arrived on the basis of either increase or decrease of rates and the petitioner has to be given proper opportunity, the Order impugned is set aside and the matter is remanded to the respondent for considering the issue afresh after giving opportunity to the petitioner.

8. With the above direction, this Writ Petition is disposed of. Consequently, connected miscellaneous petition is closed. No costs.

18.10.2022

vrc

Index:Yes/No

Web:Yes/No



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Speaking/Non Speaking

To,

The Divisional Engineer [Highways]
Constructions and Maintenance,
Thiruvarur – 610 001.



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N.SATHISH KUMAR, J.

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