IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.04.2022

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.34682 and 34687 of 2019

and WMP Nos.6657 and 6660 of 2020, 35434, 35435, 35436 and 35438 of 2019

M/s.P.S.T.Engineering Construction
rep. by its Managing Partner
V.S.Thennarasu ...Petitioner in both W.Ps.

Vs.

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

2. The Tamil Nadu Slum Clearance Board,
rep. by its Chairman, No.5, Kamarajar Salai,
Chennai - 600 005.

3. The Tamil Nadu Slum Clearance Board,
rep. by its Managing Director
No.5 Kamarajar Salai,
Chennai - 600 005.

4. The Superintending Engineer,
Chennai Circle - III,
Tamil Nadu Slum Clearance Board,
No.5 Kamarajar Salai,
Chennai - 600 005.

...Respondents in both W.Ps

Prayer in W.P.No.34682 of 2019:Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records of the 2nd respondent in Resolution No.4.17/487 dated 10.08.2018 culminating in Resolution No.7.03/493 dated 07.06.2019 of the 2nd respondent and Lr.No.SCB/815/HD/SE(CC-III)/2017 dt.19.11.2019 issued by the 4th respondent and quash the impugned resolution dt.10.08.2018 of the 2nd respondent culminating in impugned resolution dt.07.06.2019 of the 2nd respondent and the consequential proceedings dt.19.11.2019 of the 4th respondent and further direct the respondents to release the balance sum of Rs.2,755,44,915/- along with eligible 1% bonus amount to the petitioner herein.

Prayer in W.P.No.34687 of 2019:Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus directing the respondents not to apply G.O.Ms.No.296 Finance (Salaries) Department dated 09.10.2017 issued by the first respondent in respect of the work agreement dated 06.12.2017 entered into between the petitioner herein and TNSCB for construction of 864 EWS multi storied tenements with minimum 400 sq.ft. Of plinth area/unit using Conventional Technology/Alternative Technology of a combination of both on Lumpsum turnkey design & build basis including all services such as internal and external water supply, sanitary, electrification and development works at K.P.Park Scheme in Chennai Corporation Dn.77 under Housing for All (pradhan Mantri Awas Yojana) Scheme.

(In both W.Ps.)

For Petitioner : Mr.M.V.Swaroop

For Respondents : Mr.C.Jayaprakash
Government Advocate - R1
Mr.Silambannan
Additional Advocate General
assisted by
Ms.D.Latha - R2 to R4

COMMON ORDER

The petitioner is an Engineering construction company and has filed these two Writ Petitions, one seeking a direction to the respondents not to apply G.O.Ms.No.296 Finance (Salaries) Department dated 09.10.2017 in respect of the work agreement dated 06.12.2017 qua itself and the Tamil Nadu Slum Clearance Board (in short 'Board') and the second calling for records of the Board culminating in Resolution Nos.4.17/487 dated 10.08.2018 and 7.03/493 dated 07.06.2019 and quash the impugned Resolution dated 10.08.2018, culminating in impugned Resolution dated 19.11.2019 of the Board.

2. The petitioner responded to a tender floated for construction of 864 EWS multi storied tenements on lump sum turnkey design and build basis. The tender was floated on 09.10.2019 and the petitioner was found to be the lowest bidder and was awarded a contract on 06.12.2017. The contract agreement provides, at clause 6.4, that 'the rates and prices quoted by the bidder are not subject to adjustment during the performance of the contract for taxes, duties, cess and any other levies'. It also provided at clause 6.5 that 'notwithstanding anything that is stated the price, once accepted by the Superintending Engineer, Chennai Circle - III shall be final and shall not be subject to any claim on any ground,whatsoever'. Clause 6.6 states that 'all duties, taxes, cess and other levies payable by the contractor as per State/Central Government rules shall be included in the contract value quoted by the bidder'.

3. The contract was entered into during the regime of Goods and Services Tax (GST) that is expected to have been reckoned for the purposes of pricing. In this connection, Special Condition No.6 states as follows:

> 'The payment of Goods and Services Tax (GST) will have to be made by the procuring entity as specified in G.O.Ms.No.264, Finance (Salaries) Department, Dated 15.09.2017 and subsequent amendments, if any, made thereafter by the GOI/GOITN during the currency of agreement'.

4. The parties proceeded on the basis of the contract till, by letter dated 06.08.2018, the petitioner wrote to the respondents seeking re-working of the estimate value. This letter appears to have written on the basis that the contract had been engaged on the basis of 2% Value Added Tax (VAT), whereas, the petitioner would be remitting GST at 12%. Since GST authorities are not arrayed as parties to these Writ Petitions, this Court is unaware as to whether any demand of GST has been raised. However, this is incidental and does not per se concern the Court in this litigation.

5. Suffice it to say that the petitioner proceeded on the basis that the working of the rates under contract was as per the VAT regime, which itself appears to be incorrect based on the contract conditions as seen above.

6. That apart, the respondents are arms of the State and hence would be bound to enter into contracts that are in consonance and in sync with applicable laws. Hence, post

introduction of GST regime on 01.07.2017, there is no question of the rates having been arrived at based on any earlier regime of taxes. Thus the undisputed premise upon which the contract has been entered into by the authorities is that, what is applicable as regards rates and taxes would be GST as far as goods and services are concerned.

7. The communication of the petitioner as aforesaid was acted upon by the respondents, who appointed a consultant to look into the aspect of pricing. The report of the consultant appears to be adverse to the interests of the petitioner insofar as the consultant suggested that the parties negotiate and execute a supplemental agreement to take note of the difference in pricing.

8. In my considered view the reference to a consultant is itself misconceived and ought not to have been done, in light of G.O.Ms.No.296 dated 15.09.2017 read with G.O.Ms.No.264 Finance (Salaries) Department dated 09.10.2017.

9. The aforesaid two Government Orders, in abstract, deal with the payment of taxes on works contract consequent upon the introduction of GST. The thrust of the Government Orders is upon those contracts that straddle the erstwhile regime of VAT and new regime of GST.

10. This is made clear from the first paragraph of G.O.Ms.No.264 and last paragraph of G.O.Ms.No.296, that refer to the cost mechanism that has been taken note of in arriving at the value of contracts that were subsisting as on the date of introduction of GST.

11. Thus, it is very clear and Mr.Silambannan, learned Additional Advocate General assisted by Ms.D.Latha, learned counsel for R2 to R4 would also confirm and concur with the position that both the aforesaid G.Os, i.e., G.O.264 and G.O.296 have been formulated bearing note of the transitional arrangements that were required to be made for re-working the rates and taxes in respect of contracts subsisting as on 01.07.2017.

12. The tender in the instant case was floated on 09.10.2017 and the contract was awarded on 06.12.2017, both dates being subsequent to the introduction of GST. Thus it is inconceivable that the authorities have taken note of any enactment other than the GST Act for the purpose of arriving at the project cost.

13. In light of the discussion as aforesaid, W.P.No.35687 of 2019 is allowed, as G.O.296 is clearly inapplicable to thecontract qua the petitioner and the respondents. Connected Miscellaneous Petitions are closed. No costs.

14. Coming to W.P.No.34682 of 2019, the relief sought for therein is only consequential. With the findings in the preceding paragraphs to the effect that G.O.No.296 is inapplicable to the petitioner, the reference to the consultant and the correspondences qua parties in regard to the re-working of contract pricing would have to go. In my view, the fact that the entire exercise stood triggered by the petitioner would not impact my decision as aforesaid as that was merely a misconceived exercise, and one, that the petitioner expected to derive some benefit from.

15. What binds the parties in regard to the specifications in the contract, including pricing, would be only the contract conditions, i.e., general conditions and special conditions and the clauses in the contract as extracted in paragraph 2 above, make it clear that it is the law as on 01.07.2017 that would be applicable to both parties.

16. Mr.Silambannan then submits that the difference qua the parties in regard to the pricing may be resolved by reference to arbitration. He would have been right had the differences turned on the aspect of quantification. However, the issue arising for resolution is fundamental and goes to the root of the matter.

17. That apart, these matters have been pending since 2019 and no challenge to maintainability has been raised by the respondents in the original counter affidavit. Most importantly, the Clauses in regard to pricing and applicable law as well as the Government Orders referred to supra, are quite categoric in this regard and I thus see no necessity to relegate the petitioner to alternate dispute resolution.

18.Accordingly, W.P.No.34682 of 2019 is also allowed and the impugned resolutions stand quashed. No costs. Connected Miscellaneous Petitions are closed.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

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

2. The Chairman,
Tamil Nadu Slum Clearance Board,
No.5, Kamarajar Salai,
Chennai – 600 005.

3. The Managing Director,
Tamil Nadu Slum Clearance Board,
No.5 Kamarajar Salai,
Chennai – 600 005.

4. The Superintending Engineer,
Chennai Circle – III,
Tamil Nadu Slum Clearance Board,
No.5 Kamarajar Salai,
Chennai – 600 005.

+1cc to M/s.M.V.Swaroop, Advocate Sr.23054
+2cc to M/s.D.Latha, Advocate Sr.22876, 22875

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and WMP Nos.6657 and 6660 of 2020,
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