



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

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W.P(MD)No.14096 of 2009 and
MP(MD) No.1 of 2009

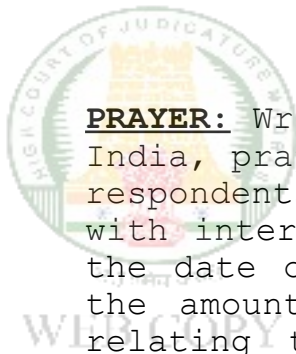
M/s.Koya & Company Construction Private Ltd.,
Rep by its Project Manager,
Sri.A.Ravikumar,
12-2-831/38, 72 MIGH,
Mehidipatnam,
Hyderabad - 500 028
Rep. By its power of attorney Mr.A.Ravikumar

...Petitioner

Vs.

- 1.The Executive Engineer,
TWAD Board, Urban Division,
1-C, Thiruvalluvar Salai,
Bangaru Mansion,
Opp to Bus Stand,
Dindigul - 624 001.
- 2.The Chief Engineer,
TWAD Board,
Southern Region,
Ganesh Nagar,
Melur Road,
Opp to Matthuthavani Bus Stand,
Madurai - 625 007.
- 3.Assistant Executive Engineer,
TWAD Board,
Maintenance Sub Division,
Dindigul.
- 4.Tamil Nadu Water Supply & Drainage Board,
Head Office,
31, Kamaraj Salai,
Chepauk,
Chennai.
- 5.The Deputy Chief Accounts Officer,
TWAD Board,
Head Office,
Chepauk,
Chennai.

...Respondents



PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, to direct the respondents to pay to the petitioner a sum of Rs.41 Lakhs together with interest thereon from the date of settlement of the bill till the date of payment and forbearing the respondents from recovering the amount from the petitioner on account of the alleged demand relating to the damage on account of the flash floods in the Amaravathi River.

For Petitioner : Mr.B.Saravanan

For Respondents : Mr.R.Satheesh

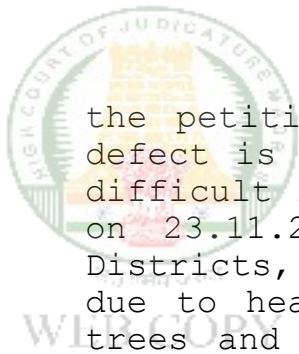
O R D E R

This writ petition has been filed for a Mandamus, to direct the respondents to pay the petitioner a sum of Rs.41 Lakhs together with interest from the date of settlement of the bill, till the date of payment and also forbearing the respondents from recovering the amount from the petitioner on account of the damage due to flash floods in River Amaravathi.

2.The cause of action in this writ petition is based on the communication sent by the Executive Engineer, dated 16.12.2009, directing all the Executive Engineers of TWAD Board to recover a sum of Rs.12,00,000/- from the petitioner towards flood damages at the pipe carrying bridge at Amaravathi River.

3.The case of the petitioner is that the petitioner Company is registered under the Companies Act, having its registered office at Mahdipatnam, Hyderabad. The petitioner entered into several contracts with the Tamil Nadu Water Supply and Drainage Board, for laying of water lines and sewage lines and has vast experience in this field. One such agreement was entered between the petitioner and the Tamil Nadu Water Supply and Drainage Board on 16.10.2003, for the execution of a turnkey contract for combined water supply scheme to Dindigul District - CWSS to Dindigul Municipality, Thadicombu, Vadamadurai, Agaram etc., including maintenance of the scheme for a period of 12 months. According to the petitioner, on completion of the work on 15.06.2005, the entire project was handed over to the respondent Board and the respondent Board has also issued a certificate of completion on 16.11.2005. The petitioner submitted a bill for a sum of Rs.2,15,68,814/-, out of which, the respondent Board settled only a sum of Rs.1,74,68,814/- and the balance amount of Rs.41,00,000/- is yet to be settled by the respondent Board, which was retained by them, on account of loss incurred due to the flash flood occurred in the State of Tamil Nadu during November 2005. Hence, the petitioner has filed the writ petition in the year 2009.

4.The learned counsel appearing for the petitioner submits that the entire work as per the contract has been completed and handed over to the respondent Board and the acknowledgment in the form of certificate was also issued by the authorities concerned to



the petitioner. He further submits that if any short fall or any defect is pointed out, the petitioner is responsible and it is not difficult for the petitioner to rectify the same. But in this case, on 23.11.2005 and 24.11.2005, in the State of Tamil Nadu, two Districts, namely, Dindigul and Karur have witnessed a flash flood due to heavy rain. Such unprecedented flood carried many uprooted trees and branches and rubbish materials and consequent to which, the flood water raised above the deck slab and PSC pipes, which impacted in the damage of the construction made by the petitioner. He further submits that the Bridge was constructed as per the terms and conditions and in terms of specifications of the agreement. The learned counsel also brought to the knowledge of this Court that in the year 1977, in River Amaravathi, there was over water flow, which was measured as 1.77 lakh cusecs. But the flash flood occurred in River Amaravathi during November 2005 was to an extent of 2.80 cusecs. According to the learned counsel for the petitioner, damage caused to the bridge due to sudden flash flood is only an act of God and in order to substantiate his contention, he relied on Clause 63 of the Agreement entered between the parties, which is extracted as under:-

"63. Force Majeure

Neither party shall be liable to the other for any loss or damage occasioned by a arising out of Acts of God, such as unprecedented flood, volcanic eruptions, earthquake or other special risks referred above, which prevent the performance of the contract and which could not have been foreseen or prevented by the prudent person."

5.The learned counsel further submits that the collapse/damage in the construction made by the petitioner due to the unprecedented flood in River Amaravathi during November 2005 was also admitted by the respondent Board in their counter affidavit. The construction work was carried out and completed only as per the specifications of the Agreement. After full satisfaction of the authorities of the respondent Board alone, the bridge was handed over to them. He has also drawn the attention of this Court that a sanction order was issued by the Government of India, Ministry of Rural Development, Department of Drinking Water Supply Rajiv Gandhi National Drinking Water Mission on 07.02.2006, releasing a sum of Rs.960.32/- Lakhs to the Tamil Nadu Water Supply and Drainage Board, Chennai towards additional Central assistance to meet out the rural drinking water supply requirement arising due to flood situation in the State during 2005-2006 and those funds were released on 100% central share basis in relaxation of ARWSP guidelines. Based on the sanction order of the Government of India, the Managing Director of TWAD Board, Chennai addressed a letter No.4250/SDO.II/O & M/2005/ dated 10.03.2006 to the Superintending Engineers of TWAD Board, stating that the Government of India has sanctioned 960.32 lakhs for the restoration of flood affected schemes under ARWS programme and they were requested to complete the restoration works immediately and the amount for Dindigul Region alone was Rs.167.96 lakhs.



Therefore, the Department must be aware that there was unprecedented flash flood in River Amaravathi, which resulted in the damage of bridge constructed by the petitioner and however the Board withheld a portion of the bill amount, on the ground that the petitioner is held responsible for the damages so caused.

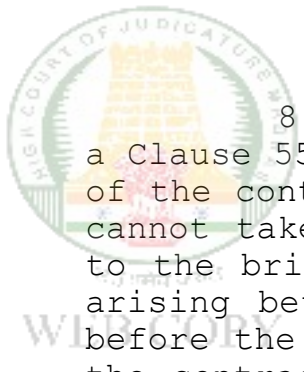
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6.The learned senior counsel appearing for the respondent Board submits that pursuant to tenders floated by the respondent Board, the project was issued to the petitioner, being a successful bidder on 14.08.2003 and an agreement between the petitioner and the respondent Board was entered on 16.10.2003, for the purpose of execution of C.W.S.S (Comprehensive Water Supply Scheme) and its value was Rs.49,83,17,756/-. The agreement period was fixed as 18 months from the date of commencement of work ie. on 29.08.2003. Since the work as agreed could not be completed, the agreement period was extended upto 30.10.2005. According to the respondent Board, completion certificate was issued to the petitioner on 01.01.2006. Though, the period of maintenance for one year as agreed was completed on 01.01.2007, as per clause 49, the defects liability period extends upto 31.12.2007.

7.The learned senior counsel further submits that the work executed by the petitioner for construction of dam in River Amaravathi is purely based on the terms of agreement executed by him with the respondent Board on 16.10.2003. Clause 46 of the contract reads as follows:-

"46.Recovery of money payable to the TWAD Board:-

46.1.All losses, costs, damages and expenses and other money payable to the Board by the contractor under any stipulation in the contract, may be retained out of any money due or which may subsequently become due from the Board to the contractor under any contract or otherwise whatsoever and in case such money then due or to become due to the contractor by the Board shall be insufficient to pay such losses, costs, damages, and other money payable to the TWAD Board by the contractor, it shall be lawful for the Engineer in charge without any further consent on the part of the contractor to sell or dispose of any or all the government promissory notes for the securities deposited in the Board by the contractor as aforesaid and with and out of the proceeds of such sale, after payment of all expenses connected therewith or reimburse and pay to the Board all such losses, cost, damages and expenses and other money payable to the contractor. And in case such proceeds of sale of the said government promissory notes or securities shall be insufficient for such purpose then and in that case it shall be lawful for the Board to recover the residue thereof, if necessary by legal proceedings and or by resorting to revenue recovery act against the contractor."



8.The learned senior counsel further emphasis that there is a Clause 55, which deals with the risk insurance that it is the duty of the contractor to take risk insurance at the time of work and he cannot take advantage by referring the flood for the damage caused to the bridge. As per Clause 67 of the Agreement, if any dispute arising between the parties in the contract shall be settled only before the Competent court having jurisdiction, i,e the place where the contract was awarded and agreement is concluded. Therefore, the respondent Board is not at all liable to pay any further amount to the petitioner.

9.This Court considered the rival submissions made on either side and perused the materials placed before this Court.

10.This writ petition has been filed based on the communication of the Executive Engineer, dated 16.12.2009, directing all the Executive Engineers of TWAD Board to recover a sum of Rs.12,00,000/- from the petitioner towards flood damages at the pipe carrying bridge at Amaravathi River. The project of construction was awarded to the petitioner by way of an agreement, dated 16.10.2003 and it was executed and completed in the year 2005. The respondent Board also accepted the bridge with full satisfaction on 16.11.2005. The bridge got damaged on 25.11.2005 due to a flash flood in Tamil Nadu. It is the contention of the respondent Board that the petitioner/contractor is liable to maintain the bridge for a period of one year. Moreover, since the petitioner failed to take risk insurance, he is liable even for the damages caused on account of flood.

11.As rightly contended by the learned counsel appearing for the petitioner that there is force majeure clause under Clause 63 and as per the said clause, neither party shall be liable to the other for any loss or damage arising out of Acts of God such as, unprecedented flood, volcanic eruptions, earthquake etc., In this case, there was unprecedented flood and flow of water in the River Amaravathi was 2.80 cusecs. This according to the petitioner, is the highest unprecedented flood in river Amaravathi. He further submits that either before 2005 or after 2005, there was no such flood flown in the river Amaravathi. The previous highest water flow in river Amaravathi was 1.77 cusecs in the year 1977 and considering that as a bench mark, the contract was awarded to the petitioner and the specifications were given in the contract. The petitioner has also completed the contract in accordance with the specifications of the contract and also the work of the petitioner was monitored and supervised by the experts of the respondent Board. The respondent has never raised any dispute with regard to the quality of the work being carried out by the petitioner, during the course construction of the bridge. After completion of the work, the bridge was also accepted by the respondent Board with full satisfaction on 16.11.2005.



12. In view of the foregoing discussions, this Court is inclined to dispose of this writ petition as follows:-

"The petitioner is permitted to submit a fresh representation to the second respondent/the Chief Engineer, TWAD Board along with all the materials of specifications and the second respondent shall consider the same within a period of four weeks from the date of receipt of a copy of this order, by taking into account Clause 63 of the Agreement entered between the petitioner and the respondent Board and other relevant provisions of Agreement and to pass an order on the claim of the petitioner."

13. With the above directions, this writ petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (C.O)

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/06/2022

Sub Assistant Registrar(CS)

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To

1. The Executive Engineer,
TWAD Board, Urban Division,
1-C, Thiruvalluvar Salai,
Bangaru Mansion, Opp to Bus Stand,
Dindigul - 624 001.
2. The Chief Engineer,
TWAD Board, Southern Region,
Ganesh Nagar, Melur Road, Opp to Matthuthavani Bus Stand,
Madurai - 625 007.
3. Assistant Executive Engineer,
TWAD Board, Maintenance Sub Division,
Dindigul.
4. Tamil Nadu Water Supply & Drainage Board,
Head Office, 31, Kamaraj Salai,
Chepauk, Chennai.



5.The Deputy Chief Accounts Officer,
TWAD Board,
Head Office,
Chepauk, Chennai.

+1 CC to M/s.B. SARAIVANAN, Advocate (SR-21986[F] dated 28/04/2022)

ORDER MADE IN
W.P (MD) No.14096 of 2009
27.04.2022

SS (22/06/2022) 7P 7C