



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED ON : 08.06.2022

ORDER PRONOUNDED ON : 23.06.2022

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

W.P. (MD) .No.10263 of 2010

and

MP(MD) .No. 1 of 2010

M/s.The Indian Hume Pipe Co.,Ltd.,
No.8, First Street
Gopalapuram
Chennai 600 006

....Petitioner

Vs

1.TWAD Board, Urban Division
No.7/33, Rajappa Nagar, 4th Street
M.C.Road, Thanjavur

2.The Executive Engineer
TWAD Board, Urban Division
No.7/33, Rajappa Nagar, 4th Street
M.C.Road, Thanjavur

...Respondents

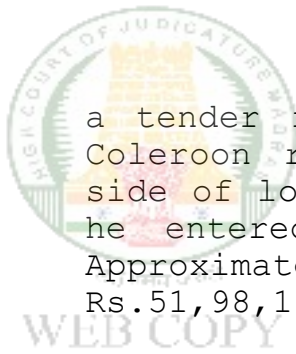
Prayer: This Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the proceedings in F.CWSS to 890-habs/A2/10 dated 23.07.2010 on the file of the respondent and directing the second respondent not to recover from the petitioner the amount referred to in the impugned proceedings.

For Petitioner	: Mr.B.Saravanan
For R1	: No Appearance
For R2	: Mr.B.Vijaykarthikeyan

ORDER

The writ petition has been filed challenging an order passed by the TWAD Board under which a sum of Rs.32,24,219/- is sought to be recovered from the bill of the writ petitioner who was a contractor of the Board.

<https://hcservices.courtsofmadras.org/> The petitioner had contended that the TWAD Board has floated



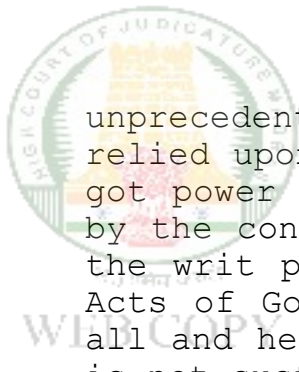
a tender for construction of collector wells and foot bridges in Coleroon river near Ammayapan and Vandayarirrupu in the upstream side of lower anticut. The petitioner was the successful bidder and he entered into an agreement with TWAD Board on 27.01.2004. Approximate value of the work as per the scheme is Rs.51,98,11,690/-.

3. According to the writ petitioner, he commenced the work as per terms of the contract on 09.01.2004. When the work was almost completed, there were unprecedented rain on 24.10.2005 resulting in heavy flow of water causing erosion. In view of unprecedented floods, sand was washed away and eddies at the foundation of the pier in the foot bridges of collector well I and II damaged the structure severely and washed away one deck slab. Though flood receded after a week's time, again there was unprecedented heavy flood of water into the Coleroon river on 24.11.2005. According to the writ petitioner, one component of work completed by the writ petitioner was washed away and four numbers of deck slab of foot bridge in Collector well-I at Vandayariruppu and in Ammaiyappan five numbers of deck slab of foot bridge in collector well II were washed away and two numbers of deck slabs were misplaced and 12 piers got collapsed.

4. The petitioner had further contended that the respondent has assessed the damage and thereafter changed the entire design of the work. The respondent TWAD Board had created a new design as against the pile foundation with additional depth and pile foundation of larger diameter with MS encasing pipe with additional depth. Thus, according to the writ petitioner, major changes were effected by the respondent Board in the design of the foot bridge. In view of these major structural changes, the original contract with regard to this component got substantially modified. However, the petitioner had completed the rest of the works in time and the entire work was handed over to the respondent.

5. According to the petitioner, the work was completed in time and possession was also taken over by the TWAD Board. However, certain bills to a tune of about Rs.1.5 crores were still due to the writ petitioner. By way of impugned order dated 23.07.2010, the respondent TWAD Board had sought to recover a sum of Rs.32,24,219/- from the writ petitioner company on the ground that since the petitioner company had refused to carry out the redesign work, it was carried out by a third party agency. Since the petitioner company had committed the breach of contract, the said amount was sought to be recovered from the writ petitioner. This order is under challenge in the present writ petition.

6. The learned counsel for the writ petitioner referred Clause -63 of the contract which is a Force Majeure Clause and contended that neither party shall be liable to the other for any loss or damage sustained by or arising out of Acts of God such as



unprecedented flood, volcanic eruptions earthquake etc., He further relied upon Clause 46 of the Contract to contend that the Board has got power to retain the money only when a loss has been occasioned by the contractor under any stipulation in the contract. Therefore, the writ petitioner had contended that the loss has been caused by Acts of God and there is no role on the part of the petitioner at all and hence, the order of recovery passed by the respondent Board is not sustainable.

7.The learned counsel appearing for the writ petitioner had further contended that the respondent Board redesigned the washed away portion and directed the petitioner company to carry out the said work as per the rates agreed in the original agreement. Since major structural changes were made to the original contract, the petitioner could not comply with the said request of the respondent Board. Hence, this cannot be construed to be a refusal on the part of the petitioner company to carry out the work as per the contract. The respondent Board has entrusted the said portion of the work to a third party on payment of charges. The said charges are sought to be recovered from the petitioner company. Hence, the recovery of the amount is not legally sustainable. The learned counsel for the writ petitioner had pointed out that the petitioner has completed the entire work and the amount now sought to be recovered from the petitioner is relatable only to the washed away portion of the project. The petitioner had put in his money and completed the portion of the contract. When the completed portion had been washed away by Acts of God, the said amount cannot be recovered from the writ petitioner. Hence, he prayed for allowing the writ petition.

8.Per contra, the learned counsel appearing for the TWAD Board contended that some portions of the completed work was washed away due to unprecedented floods and hence, the TWAD Board was constrained to redesign the work only to have good stability, to withstand the unprecedented flood in future. Hence, he relied upon Clauses 34 and 35 under which the TWAD Board was having power to vary the work by even altering or increasing the work other than the work actually done. As per Clause 34 rates have to be calculated according to the prices tendered and accepted in the contract. He had further pointed out that Clause 35 of the Contract under which any unforeseen additional work is to be carried out and the same can be measured and rates would be paid as per the original contract. He had further contended that if the rates do not apply to the additional works ordinarily to be carried out, then the rates of such work shall be agreed upon and entered into supplementary. In the present case, the petitioner company had refused to undertake the redesign work. Hence, the respondent Board was constrained to appoint a third party agency to do the work. Since there is a breach of contract on the part of the petitioner, amount paid to the third party agency was sought to be recovered from the writ petitioner. He



relates to the nature of work that was allotted to the writ petitioner which was interrupted by unprecedented floods and thereafter, a redesign was proceeded by the respondent Board which was refused to be executed by the writ petitioner. Since there are serious disputes with regard to the interpretation of the terms of contract and liability of the petitioner to do additional work and the context of the breach of contract is involved, the same cannot be decided under Article 226 of Constitution of India. Hence, he prayed for dismissal of the writ petition.

9.I have given anxious consideration to the submissions made on either side.

10.Admittedly, the writ petitioner is the successful bidder for carrying out certain project work for the respondent Board. Some portion already constructed by the writ petitioner was washed away due to unprecedented floods on two occasions separated by a months time. According to the petitioner, he had suffered huge loss.

11.It is settled position, if there are factual disputes especially in contractual matter, this Court cannot exercise its jurisdiction under Article 226 of Constitution of India. The present impugned order has been passed to recover certain amount from the writ petitioner on the ground that he has committed breach of contract by refusing to execute the work as per agreement. But the petitioner had strenuously contended that since redesign and additional work were directed to be completed by the Board under the old rates, they were not willing to execute the said work.

12.There is no dispute that a component of the work done by the writ petitioner company was washed away due to unprecedented flood. In fact, immediately, the petitioner company has informed about the said damages caused to the completed structure to the respondent Board. On 27.11.2005, the petitioner company has addressed a letter to the second respondent quantifying the damages incurred by the petitioner company due to unprecedented food. In the said letter, the petitioner company has requested to consider redesigning the foot bridge foundation considering location of collector well, sand bed depth, depth of scouring, velocity of flow, maximum flood level, soil bearing capacity etc., in order to have stable foundation at all conditions. The said request of the petitioner after due deliberations within the Board, has been accepted by the Board. The Board has issued a communication to the petitioner company on 21.12.2005 along with necessary plan details and depth of the earth foundation to be provided with necessary reinforcement details. Hence, it is evident that the Board has requested the petitioner company to commence the construction work based upon the redesign. For the said communication, the petitioner company has responded on 30.12.2005 refusing to execute the work contending that the major changes have been done for the design of the foot bridge and they



Contract.

13.A perusal of Clauses 34 and 35 of the Contract clearly indicates that the respondent Board has got power to vary works and contractors shall not have any claim for any variation or alteration or increase other than for the work actually calculated according to the prices tendered and accepted in the contract. As per Clause-35, if any unforeseen additional work becomes necessary and the same is carried out under the contract on proper written orders, the rates will be paid to the contractor as per the rates specified in the contract. In case, if the rates do not apply to the additional works ordered to be carried out, then a rate could be agreed between the parties by way of supplemental schedule should be signed by the parties. Hence, it is evident that due to unforeseen situations, variation was made in the design in public interest by the respondent Board which was sought to be executed through the petitioner company. In fact, in view of Clauses 34 and 35 of the Contract, the petitioner company was duty bound to carry out the additional work and in case, if there is escalation of cost, they were always at liberty to enter into a supplemental agreement with the TWAD Board. However, they have refused to carry out the work.

14.The learned counsel for the writ petitioner had contended that the redesign provided by the TWAD Board has completely changed the structure and it was not a mere variation, but a complete change of project warranting additional work with additional cost. Hence, redesign provided by the Board would not fall within Clauses 34 and 35 of the Contract. Therefore, the petitioner company cannot be blamed for not executing the said work.

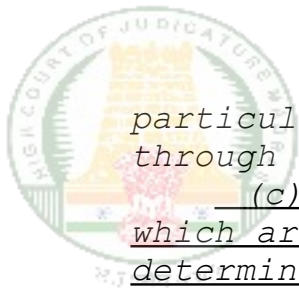
15.The Hon'ble Supreme Court of India in a judgement reported **in 2015(7) SCC 728 (Joshi Technologies International Inc. Vs. Union of India (UOI) and others)** in paragraph No.68 has held as follows:

"68.The

position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a)the Court may not examine the issue unless the action has some public law character attached to it.

(b)Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement,



particularly when settlement of disputes is to be resorted to through the means of arbitration.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances"

16. In view of the contention of both the parties, it is clear that there is a serious dispute whether the redesign provided by the respondent Board would fall within Clause 34 of the contract or not. In case, if it falls within Clause 34, the petitioner company was duty bound to execute the said work. On the other hand, if the redesign provided by the TWAD Board is a completely different one, then the petitioner would be at liberty to withdraw himself from executing the said work. Whether redesign was a mere variation or it was a completely different design is a matter which could not be decided in the present writ petition. This factual dispute warrants oral evidence and expert opinion to find out the veracity of contention of the either parties. Hence, in view of the Supreme Court judgment cited supra, this Court feels that it would not be appropriate to invoke Article 226 of Constitution of India to arrive at a finding whether the refusal of the petitioner to carry out the work is breach of contract or not.

17. In view of the above said discussion, the writ petition stands dismissed. However the petitioner is at liberty to approach the competent Civil Court to redress his grievance by letting in oral and documentary evidence along with expert opinion to vindicate his grievance. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/07/2022

Sub Assistant Registrar (CS)

Msa

+1 CC to M/s.B. VIJAY KARTHIKEYAN, Advocate (SR-27597[F] dated 23/06/2022)

+1 CC to M/s.B. SARAVANAN, Advocate (SR-28068[F] dated 24/06/2022)
W.P. (MD).No.10263 of 2010 and
MP (MD).No. 1 of 2010

23.06.2022

RD(01.07.2022) 6P 3C

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