



W.P.(MD).No.15101 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

ORDER RESERVED ON : 16.11.2022

ORDER PRONOUNCED ON : 18.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

W.P.(MD).No.15101 of 2013

and MP(MD).No.1 of 2013

M/s.Asiatech Engineering Associates
111A, Court Road
Nagercoil 629 001
Kanyakumari District
Represented by its Power of Attorney Holder
Mr.S.Joneslight

...Petitioner

Vs

1.The Superintending Engineer
(Highways) Construction and Maintenance
Tirunelveli Circle
Palayamkottai
Tirunelveli 2

2.The Divisional Engineer
(Highways) Constructions and Maintenance
Nagercoil Division, P.W.D. Campus
Nagercoil 629 001
Kanyakumari District

3.The District Collector
Kanyakumari District at
Nagercoil 629 001

....Respondents

Prayer: This Petition filed under Article 226 of the Constitution of India, to
issue a writ of Certiorarified Mandamus, calling for the records pertaining to



W.P(MD).No.15101 of 2013

the proceedings of the second respondent in his proceedings letter No. 7/2010-11/A2 dated 16.07.2013 and quash the same and consequently direct the respondents to accept the foreclosure letter dated 25.01.2013 made by the petitioner and to refund the E.M.D, Security Deposit, Additional Security Deposit and Retention amounts due to the petitioner.

For Petitioner : Mr.G.Sankaran
For Mr.F.Deepak

For Respondents : Mr.M.Lingadurai
Special Government Pleader

ORDER

The present writ petition has been filed by a Contractor challenging an order passed by the second respondent herein under which the contract awarded to him was terminated and E.M.D, Security Deposit, Additional Security Deposit were forfeited. Under the impugned order, the petitioner was also informed that the additional expenditure incurred by the Government for executing the contract through a different Contractor would also be recovered from him.

2. According to the petitioner, the first respondent had called for public tender for improvement to Kulithurai-Alancholai-Arukani Road and for reconstruction of small bridges. The petitioner firm had submitted their quotation on 03.11.2010. During the selection process, the petitioner was the successful lowest bidder. A work order was issued to the writ petitioner on



W.P(MD).No.15101 of 2013

01.12.2010 for a sum of Rs.1,17,83,667/- and an agreement was entered into between the parties on 05.01.2011.

3. According to the petitioner, the second respondent had failed to fulfil his obligation in handing over the site within 10 days from signing of the agreement. Due to heavy unprecedented rains and consequent floods for more than 15 days, the sub-grade of the road was heavily damaged. The contract awarded in favour of the writ petitioner was only for surface renewal and hence, an erosion of the sub-grade due to heavy floods had completely altered the nature of the work awarded to the writ petitioner.

4. The petitioner had further contended that on several occasions, he has informed about the serious damages caused to the sub-grade of the road during the period between 11.12.2010 to 25.12.2010 and that the surface renewal provision in the contract cannot be done in the road unless the damaged sub-grade is rebuild with suitable new provisions. According to the petitioner, the respondents have accepted to sanction the addition item of work in view of alteration in the physical feature of the site. Only based on the assurance granted by the respondent authorities, the petitioner had undertaken the work. On 03.05.2011, the petitioner has sent a representation explaining the damages in the road and seeking the respondents' attention to the petitioner's difficulties in commencing the work for which there was no response from the respondents. The respondent authorities have imposed a



W.P(MD).No.15101 of 2013

fine of Rs.2,00,000/- on the writ petitioner by an order dated 17.03.2011.

Therefore, the petitioner was constrained to send a communication on 16.08.2011 foreclosing the contract on the ground that, when laying of the sub-grade work has not been handed over to the writ petitioner, the petitioner firm cannot be found fault with. The respondent authorities have not responded to the foreclosure notice issued by the writ petitioner, but passed an order on 06.09.2011 terminating the contract and forfeiting the E.M.D, Security Deposit, Additional Security Deposit. However, by an order dated 23.12.2011, the petitioner firm was directed to continue the work in view of public pressure and urgency in completing the work. Thereafter, the petitioner has submitted a representation on 25.01.2013 again making a request for foreclosure. Thereafter, without considering the said request, an order was passed on 02.07.2013 by the authorities extending the time for completion of the work till 19.07.2013. Thereafter, the present impugned order was passed on 16.07.2013, finally terminating the contract and forfeiting the E.M.D, Security Deposit, Additional Security Deposit. This order is under challenge in the present writ petition.

5.The learned counsel for the petitioner had contended that at the time of issuance of work order, the sub-grade of the road was in existence and hence, the petitioner had accepted the said contract. But thereafter, due to heavy rain, the sub-grade of the road had got damaged and hence, the contract



W.P(MD).No.15101 of 2013

work allotted to the writ petitioner for surface renewal cannot be carried out without rebuilding of the sub-grade. Therefore, there is no fault on the part of the writ petitioner in delaying the work. The petitioner has been properly informing the authorities for issuance of a revised estimate for rebuilding the sub-grade. However, the said request was not responded. The authorities are only insisting upon the completion of the work in time.

6.The learned counsel for the petitioner had further contended that wherever the sub-grade was intact, the petitioner firm has completed the work. This amounted to 40% of the work and the bill amount related to the said amount has already been released by the respondent authorities. In respect of 60% of the balance work, the sub-grade had been fully damaged due to rain. Hence, the surface renewal work cannot be undertaken by the writ petitioner as per the contract. The petitioner cannot be compelled to perform the impossible thing and hence, termination order is illegal and the consequential order forfeiting the E.M.D, Security Deposit, Additional Security Deposit are also illegal.

7.The learned counsel for the petitioner had further contended that after terminating the writ petitioner's contract, it was awarded to a third party. The estimate for the said new contract would reveal that the amount has been allotted for rebuilding the sub-grade portion also. The inspection conducted by the engineer after termination of the petitioner contract will reveal that the



W.P(MD).No.15101 of 2013

sub-grade has been damaged due to heavy rain. Hence, the contention of the petitioner firm stand vindicated. Hence, he prayed for allowing the writ petition.

8.Per contra, the learned Special Government Pleader appearing for the respondent authorities had contended that the site was handed over to the writ petitioner on the date of agreement namely 05.01.2011 itself. Since the petitioner has not commenced the work, they were penalised by an order dated 17.03.2011 for a sum of Rs.2,00,000/-. Hence, it is evident that the site was handed over even prior to the said date. If really the site was not handed over to the petitioner firm, the said order dated 17.03.2011 would have been challenged by the writ petitioner firm. The learned Special Government Pleader had further contended that the petitioner has signed the agreement on 05.01.2011 and as per the said agreement, work has to be completed within a period of 4 months. In other words, the work has to be completed on or before 04.05.2011. During the said period of four months, the petitioner firm has not addressed any letter, complaining of any difficulty in carrying out the work. Only after completion of 4 months period, the petitioner firm has addressed a letter on 03.05.2011 seeking for revising the estimate. Hence, it is clear that the allegations made in the writ petition are only an after thought. He had further contended that no assurance was granted to the writ petitioner at any point of time for undertaking the revised estimate. If really the site has



W.P(MD).No.15101 of 2013

not been handed over to the petitioner, he would have made the said complaint in his letter dated 03.05.2011. When no such complaint has been made in the letter dated 03.05.2011, it has only to be presumed that the site was handed over on 05.01.2011 itself.

9.The learned Special Government Pleader had further contended that as per the agreement, they are empowered to terminate the contract when there is a delay on the part of the petitioner firm and they are entitled to forfeit the E.M.D, Security Deposit, Additional Security Deposit. Hence, the order impugned in the writ petition is clearly in consonance with the work order and the agreement. He had further contended that the petitioner firm had not completed the work and their contract has been terminated due to delay in completion of the work. Thereafter, a fresh tender was called for and hence, the Government had incurred huge expenditure due to escalation in the price. There is a provision in the agreement for recovering the escalated cost due to engagement of a fresh contractor. Hence, he contended that the impugned order may be sustained.

10.I have considered the submissions made on either side and perused the material available on record.

11.The petitioner firm has challenged the termination of the contract and forfeiture of E.M.D, Security Deposit, Additional Security Deposit. The respondent authorities have engaged a different contractor and they have



W.P(MD).No.15101 of 2013

already completed the work. The prayer relating to challenging of termination of a contract cannot be considered at this point of time.

12.A work order was issued to the petitioner on 01.12.2010 and he had entered into an agreement with the respondents on 05.01.2011. Though the petitioner had contended that the site was handed over to him belatedly, there is no such allegation in his letter dated 03.05.2011. Hence, as rightly contended by the learned Special Government Pleader, the site was handed over to the writ petitioner on 05.01.2011 itself.

13.The representation sent by the writ petitioner indicates that the petitioner had expressed his inability to perform the contract on the ground that the sub-grade has been damaged and hence, the surface renewal work cannot be carried out by him. If the said allegation is true, he should have withdrawn himself from the contract and he should not even entered into an agreement on 05.01.2011. As per the case of the writ petitioner, damage to sub-grade had happened due to heavy rain in the month of December 2010. Therefore, it is clear that if really the petitioner was aggrieved over the erosion of sub-grade, he should not have been entered into an agreement in January 2011. Though the petitioner was issued a forfeiture notice on 16.07.2013, the petitioner has continued with his work, even thereafter till he was terminated on 16.07.2013.



W.P(MD).No.15101 of 2013

14.As per the agreement dated 05.01.2011, the work has to be completed within a period of 4 months that is on or before 04.05.2011.

However, even on 16.07.2013 the petitioner firm has not completed the work and hence, the order of termination issued by the respondent authorities for delay in completing the work cannot be found fault with. Once the authorities have arrived at a finding that there is enormous delay on the part of the petitioner firm, in completing the work and they have terminated the work, it is nothing but consequential that E.M.D, Security Deposit and Additional Security Deposit are forfeited as per the terms of the contract. Hence, this Court does not find any illegality or infirmity in forfeiture of the above said amount.

15.The petitioner firm has expressed apprehension that the respondent authorities might recover the difference in cost in executing the contract through a new contractor. In fact, the order impugned in the writ petition also informs the petitioner that they would recover the additional expenditure incurred due to appointment of a new Contractor for completing the work.

16.The learned counsel for the petitioner had made elaborate submission relying upon the work order issued to the fresh contractor. The rebuilding of the sub-grade has been estimated in the new contract. He had further pointed out that the inspection conducted by the Engineer after termination of the contract on 26.08.2013 clearly indicates that the riding



W.P(MD).No.15101 of 2013

surface has got heavily damaged due to rain. Therefore, according to the learned counsel for the petitioner, unless the first work order and the second work order are compared, the escalation in the cost cannot be properly arrived at. When the additional work has been handed over to the second contractor, the said escalation cannot be imposed upon the writ petitioner. The main allegation was that without upgrading the sub-grade, the surface renewal cannot be carried out. His allegation has been found to be true, when the new work order is looked into. Therefore, according to the learned counsel for the petitioner, any additional expenditure incurred by the Government cannot be recovered from the writ petitioner.

17.It is true that unless the first and second work orders are compared to the nature of the work allotted to the respective contractor and an opportunity is given to the writ petitioner to explain, the respondent authorities would not be entitled to recover the additional expenditure from the writ petitioner. As far as that portion of the impugned order which seeks to recover the additional expenditure from the writ petitioner is concerned, the same is set aside with liberty to the respondents to conduct a proper enquiry after affording due opportunity and furnishing documents to the writ petitioner.

18.In view of the above said discussion, the writ petition is allowed only to the extent of recovery sought to be made from the writ petitioner firm



W.P(MD).No.15101 of 2013

towards additional expenditure incurred by the Government by engaging a new contract. However, the respondents are at liberty to conduct a fresh enquiry as stated supra for recovering the said amount. Till such enquiry attains finality, the recovery shall not be effected from the writ petitioner. In other aspects, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

18.11.2022

Internet : Yes/No
Index : Yes/No
msa

To

1.The Superintending Engineer
(Highways) Construction and Maintenance
Tirunelveli Circle
Palayamkottai
Tirunelveli 2

2.The Divisional Engineer
(Highways) Constructions and Maintenance
Nagercoil Division, P.W.D. Campus
Nagercoil 629 001
Kanyakumari District

3.The District Collector
Kanyakumari District at
Nagercoil 629 001



WEB COPY



W.P(MD).No.15101 of 2013

R.VIJAYAKUMAR, J.

msa

Pre-delivery order made in

W.P.(MD).No.15101 of 2013
and MP(MD).No.1 of 2013

18.11.2022