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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.04.2023

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P No.11627 of 2023
and W.M.P Nos.11532 & 11534 of 2023

Mrs.N.A.Tamilselvi

Petitioner

vs.

- 1.The Director,
Directorate of Town Panchayats,
No.27-CF, 7th and 8th Floors,
Urban Administrative Office Campus,
MRC Nagar, RA Puram,
Chennai – 600 028.
- 2.The District Collector,
Dharmapuri District,
Dharmapuri 636 705.
- 3.The Assistant Director of Town Panchayats,
behind the District Collector's Office,
Dharmapuri Zone,
Dharmapuri 636 705.
- 4.The Executive Officer,
Pennagaram Town Panchayat,
Pennagaram Taluk,
Dharmapuri District,
Pin Code: 636 810.
- 5.The President,
Pennagaram Town Panchayat,
Pennagaram Taluk,
Dharmapuri District,
Pin Code: 636 810.

Respondents



Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the 4th Respondent in Na.Ka.No. 547/2014/A1, dated 30.03.2023 served on the petitioner on 06.04.2023 viz., the termination of work order for the construction of Septage Management Treatment Plant (Sewage Wastewater Treatment Plant) in the 5th Respondent's Town Panchayat in Roc.No.1246/2019/A1, dated 21.06.2019 and consequently, direct the 4th Respondent to pay the withheld payment of Rs.31 Lakhs for the work completed between September, 2022 and December, 2022 and permit the petitioner to complete the remaining Septage Management Treatment plant work thereafter, or any further order or direction that may deem fit and proper in the facts and circumstances of the case.

For Petitioner : Mr.S.Sathiaseelan

For Respondent : Mrs.S.Mythreye Chandru
Special Government Pleader for R1 to R3
Mr.U.Baranidharan
Additional Government Pleader for R4 & R5

ORDER

This writ petition has been filed challenging the impugned proceedings of the 4th respondent in Na.Ka.No.547/2014/A1, dated 30.03.2023 terminating the work order given to the petitioner and for a consequential direction to the 4th respondent to permit the petitioner to complete the remaining work and to pay the amount that has been withheld by the 4th respondent for the work that has already been completed.



2. Heard Mr.S.Sathiaseelan, learned counsel appearing on behalf of the petitioner, Mrs.S.Mythreye Chandru, learned Special Government Pleader appearing on behalf of the respondents 1 to 3 and Mr.U.Baranidharan, learned Additional Government Pleader appearing on behalf of the respondents 4 and 5.

3. The petitioner participated in the tender notification that was called for by the 4th respondent for the construction of a Septage Management Treatment Plant (Sewage Wastewater Treatment Plant) in Pennagaram Town Panchayat. The petitioner was the successful bidder and the work order was given in favour of the petitioner through proceedings of the 4th respondent dated 21.06.2019. For proper appreciation, the terms of the work order is extracted hereunder:

*1. **Contract Period:** The Contract period is for 12 months from the date of issue of Work Order to the successful contractor.*

*2 **Payment Schedule:** Part or complete Payment will be made every month by the Executive Officer based on the outturn of satisfactory completion of work in the previous month and value of work executed shall be determined, based on the measurements and check measurements by the Engineer in the M.Book.*

*3. **Milestones and Liquidation Damages:** The work will have two milestones*



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In case of Septage Management, the following milestones have to be met

- a. Minimum one third of the value of work should be completed by the end of the 6th month, and*
- b. Work should be completed in all respects by the end of the 12th month.*

If there is default in meeting either or both these deadlines, Liquidated damages @ 0.1% of the unfinished value of work (in relation to the two milestones) will be levied per day till their completion

4. No joint ventured or consortium shall be allowed or Sub contracting is permitted

***Machineries:** The bidder should own or lease Tanker Lorry, Concerete Mixing mixer, Heavy goods lorry at work site.*

*5. **Retention Money:** The Town Panchayat shall retain a sum equivalent to 5% of the value of the such bill as retention money from each payment due to the Contractor. Out of the 5% of the retention amount, on issue of completion certificate for the work 2.5% will be released to the Contractor, while the balance 2.5% will be retained during defect liability period (ie, 1 year for the this Work). The retained 2.5% will be released by the Executive Officer, after ensuring no liability in connection with work*



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6. State Quality Monitors: *In order to ensure quality of the work, Third party checks and inspections by the State Quality Monitors will be taken up. Any defects pointed out by the State Quality monitors shall be attended by the Contractor at his own cost and rectified.*

7. Fraudulent Practices : *If it is found any time during the tender process, award of contract, or during the contract period, that the Contractor has furnished false certificate or if the Contractor, in the judgment of the Employer has engaged in corrupt or fraudulent practices in competing for, getting the contract or in the executing the Contract, the Contract will be summarily terminated and Criminal Proceedings will be initiated.*

8. Price Adjustment Clause: *Price Adjustment Clause as per G.O. 227, MAWS Dept dt 23.11.2009 is applicable for the tenders of Rs.1.00 crore and above, even if the contract period is less than 1 year.*

9. Termination of the Contract: *If the work is not completed even 45days after the contract period (12 months period), the contract is liable for summary cancellation*

10. Defect Liability Period: *The defect liability period is 1 year for this work*



4.As per the above terms, the petitioner was expected to complete the work within twelve months from the date of issue of the work order. That apart, the payment schedule was also fixed by the respondent. The work order also contemplates the termination of contract if the work is not completed even 45 days after the contract period.

5.According to the petitioner, he commenced the Septage Management Treatment Plant construction work during November 2019. Unfortunately, the pandemic period intervened and as a result of the same, the petitioner was not able to carry on with the work from February 2020. In view of the same, there was complete restriction and the restriction was lifted in a phased manner and it extended upto March 2022. Thereafter, the petitioner proceeded further with the work and managed to complete 84% of the construction of the Septage Management Treatment Plant in the 5th respondent town panchayat till December 2022.

6.The further case of the petitioner is that the 4th respondent had released the payment for the work only till August 2022 and thereafter, no payment was released even for the completed work and thereby, for the completed work amounting to a sum of Rs.1.70 Crores, only a sum of Rs.1.42 Crores was released by the 4th respondent. The petitioner was insisting for the payment of the amount in order to carryout the

work



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7. The grievance of the petitioner is that the 4th respondent proceeded further to issue the impugned communication terminating work order in an arbitrary manner and hence, the present writ petition has been filed before this Court.

8. The learned counsel for the petitioner brought to the notice of this Court the judgment of the Hon'ble Apex Court in ***M.P. Power Management Company Limited, Jabalpur vs. Sky Power Southeast Solar India Private Limited and Others*** reported in **2023 2 SCC 703**, wherein it was categorically held that where the termination of the contract had arisen due to arbitrariness, the Court can always exercise its jurisdiction under Article 226 of the Constitution of India and interfere with the decision taken. According to the learned counsel for the petitioner, the impugned communication issued by the 4th respondent terminating the work order is clearly an arbitrary act, since the 4th respondent did not take into consideration the intervening pandemic period and also did not make the payment as per the contract and in spite of the same, the work order was proceeded to be canceled without calling for the explanation from the petitioner.

9. In the considered view of this Court, the petitioner is governed by a work order. The work order clearly contemplates the completion of the work within a period of twelve months from the date of the issue of the work order. Even according to the petitioner, he commenced the work during November 2019. The intervening pandemic



period started effectively from the March 2020. In view of the same, the petitioner was not able to complete the work. Even according to the petitioner, the lock down was lifted only in a phased manner and it went on till March 2022. For the sake of argument, if it is taken that the petitioner was not able to carry on with any work between March 2020 to March 2022, the petitioner was expected to complete the work atleast after March 2022. The petitioner had already commenced the work in November 2019 and had done the work for nearly four months. If the petitioner had again commenced the work in March 2022, the petitioner should have completed the work by September or October 2022. Admittedly, only 80% - 84% of the work was completed. The letter dated 10.02.2023 issued by the 4th respondent shows that the petitioner was repeatedly asked to complete the work and there was absolutely no progress in the work from September 2022 onwards. Hence, the petitioner was directed to commence the work, failing which, the work order will be cancelled. The petitioner was repeatedly informing the 4th respondent that his payment has not been given as per the work order and was insisting for the same. Ultimately, the work order came to be cancelled by the 4th respondent through the impugned proceedings dated 30.03.2023. On carefully going through the impugned order, it can be seen that the petitioner has been informed repeatedly to complete the work and it is not as if the petitioner was never put on notice before the impugned proceedings came to be issued by the 4th respondent.



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10. The only issue to be considered in the present writ petition is as to whether the petitioner has approached the correct forum in order to ventilate his grievance.

The grievance of the petitioner is that he was not able to complete the work during the pandemic period which is an act of God and that apart, the petitioner was not given the full payment for even the completed work. On the other hand, the 4th respondent has taken a stand to the effect that the work order contemplated the completion of the work within the stipulated period and the petitioner did not complete the work and in spite of several notices, there was no progress in the work after September 2022. In view of the same, the work order came to be cancelled. The grievance expressed by both sides requires determination on facts. As a matter of prudence, writ petitions are not entertained to resolve contractual disputes between the parties. Just because one of the party to the contract happens to be the State or the instrumentality of the State, that does not mean that a writ petition can be filed where the contract is cancelled.

11. A careful reading of the judgment that was cited by the learned counsel for the petitioner, culls out the principles involved in entertaining a writ petition in a contractual matter and for proper appreciation, the same is extracted hereunder:

82. We may cull out our conclusions in regard to the points, which we have framed:

82.1. It is, undoubtedly, true that the writ jurisdiction is a

public law remedy. A matter, which lies entirely within a private



realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.

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82.2. The principle laid down in Bareilly Development Authority that in the case of a non-statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including Radhakrishna Agarwal, may not continue to hold good, in the light of what has been laid down in ABL and as followed in the recent judgment in Sudhir Kumar Singh.

82.3. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent State in a case by itself to ward off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/inaction is, per se, arbitrary.

82.4. An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into (see RamanaDayaram Shetty). This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular v. Union of India⁴⁷

82.5. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a writ



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82.6. *Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.*

82.7. *The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a writ petition in a contractual matter. Again, the question as to whether the writ petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the writ court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.*

82.8. *The existence of a provision for arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a writ petition [see*



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in this regard, the view of this Court even in ABL explaining how it distinguished the decision of this Court in State of U.P. v. Bridge & Roof Co. (India) Ltd, by its observations in SCC para 14 in ABL.]

82.9. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a writ petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.

82.10. The reach of Article 14 enables a writ court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the writ remedy provides an effective and fair means of preventing miscarriage of

82.11. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation.

The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public



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interest, apart from ensuring the fundamental right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible rule in favour of the Court turning away the petitioner to alternate fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the writ court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL, if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL. It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.



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breach of a contract is alleged against the State, a civil action in the appropriate forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (see in this regard Shrilekha Vidyarthi v. State of U.P.). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case, must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely mala fide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.

82.13. A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate forum.



82.14. Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the writ petition itself.

82.15. Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. (See Sudhir Kumar Singh).

12. On carefully going through the conclusions extracted *supra*, it can be seen that a matter which completely falls within a private realm, cannot be dealt within a writ jurisdiction. That apart, even for interfering in a contractual dispute, as a Rule, a writ petition should not be entertained unless, there are no disputed questions of facts or where the action on the side of the State or the instrumentality of the State suffers from arbitrariness or where the action has been taken without affording an opportunity and public interest will suffer if such interference is not made by the Court.

13. In the instant case, the parties are governed by a contract. The contract has fixed a period for the completion of the work. The contract has also stipulated the payment schedule. According to the 4th respondent, the contract was not completed within the stipulated period and even during the extended period and the entire work



had come to a standstill from September 2022. On the other hand, according to the petitioner, the payments were stopped and even for the completed work, the payment was not made as per the payment schedule. That apart, the 4th respondent did not take into consideration the intervening pandemic period.

14. In the considered view of this Court, the grievance that has been expressed by both sides cannot be resolved in this writ petition, since it involves factual determination based on evidence. It is not as if the work order was canceled without putting the petitioner on notice. It is seen from the materials placed before this Court that the petitioner was repeatedly put on notice and asked to complete the work. The petitioner may have his own grievance with regard to the non-payment of the amount for the completed work and that may be the reason for the petitioner for not completing the balance work. However, the reason as to why the balance amount was not paid by the 4th respondent is a matter which cannot be gone into a writ petition and there may be various factors which prevented the 4th respondent from making the balance payment and more particularly when the work has not been completed. This cannot be decided in the writ petition and certainly, action taken by the 4th respondent cannot be categorized as an arbitrary act. In view of the same, this Court is not inclined to entertain this writ petition.



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15. It is made clear that the petitioner may be having a genuine grievance against the respondents insofar as the non-settlement of the payment that is due and payable to the petitioner. In that case, the petitioner must only go before the appropriate forum and the matter cannot be agitated in a writ jurisdiction. Hence, liberty is given to the petitioner to workout his remedy before the appropriate forum including his challenge to the impugned communication dated 30.03.2023 issued by the 4th respondent canceling the work order. The order passed in this writ petition will not come in the way of the petitioner to agitate his grievance before the appropriate forum. Any findings that are rendered in this writ petition will not have any bearing and if the petitioner approaches the appropriate forum, the matter will be decided on its own merits and in accordance with law without being influenced by the order passed in this writ petition. Except giving this liberty, no further orders can be passed in this writ petition.

16. It is also left open to the petitioner to make a representation before the 4th respondent to give him sometime for the completion of the balance 14% - 20% work without insisting for the payment of money as a pre-condition for completing the work. If any such representation is made, it is left open to the 4th respondent to take a decision independently without being influenced by the order passed in this writ petition. Considering the fact that only a small portion of the work is yet to be completed, the 4th respondent instead of wasting the time by calling for another tender



can rather utilize the services of the petitioner. If the 4th respondent decides to permit the petitioner to complete the balance work within a stipulated period and the petitioner completes the work, it goes without saying that the 4th respondent will make the payment as per the work order.

17. In the result, this writ petition stands dismissed in the above terms. No Costs. Consequently, connected miscellaneous petitions are closed.

18. The Registry is directed to return back the original impugned order of the 4th respondent to the learned counsel for the petitioner after retaining a copy of the same.

17.04.2023

Index : Yes
Internet : Yes
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes
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To

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