IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.06.2023

DELIVERED ON : 09.06.2023

CORAM

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

REV.APLC(W)Nos.157 to 159 of 2021
and
W.M.P.Nos.25063, 25066 and 25067 of 2021

1.TWAD Board,
(Tamilnadu Water Supply and Drainage Board),
represented by its Executive Engineer,
Urban Division, Villupuram.

2.TWAD Board,
(Tamilnadu Water Supply and Drainage Board),
represented by its Chief Engineer,
Northern Region, Vellore.

3.The Managing Director,
TWAD Board,
(Tamilnadu Water Supply and Drainage Board),
No.31, Kamarajar Salai, Cheapauk,
Chennai-5. ... Petitioners in all cases

vs.

1.M/s.Subbaya Constructions Co.Ltd.,
represented by its Director,
Mrs.S.Chandra Ganthimathi,

Chennai- 600 083.
2.The Senior Audit Officer,
O/o The Principal Accountant General (G & SSA),
Lekha Parksha Bhavan,
No.361, Anna Salai, Teynampeti,
Chennai- 600 018. ... Respondents in all cases

COMMON PRAYER: Review Applications filed under Article 226 of the Constitution of India r/w order 47(1) and Section 114 of Code of Civil Procedure to review the order passed in W.P.Nos.18258, 18255 and 18260 of 2019, dated 14.02.2020.

For Petitioners :Mr.Silambanan
Additional Advocate General-II
Assisted by Ms.S.Shahila Bhanu
For R1 :Mr.N.L.Rajah,
Senior Counsel
for Mr.B.Natarajan
(in all cases)

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C O M M O N O R D E R

All these three Review Applications have been filed by the second, third and fourth respondents in the Writ Petitions, TWAD Board, represented by Executive Engineer, Urban Division, Villupuram, Chief Engineer, Northern Region, Vellore, and the Managing Director, TWAD

Board, seeking review of a common order dated 14.02.2020 passed in W.P.Nos.18255, 18258 and 18260 of 2019.

2.The said Writ Petitions had been filed by the first respondent herein, M/s.Subbaya Construction Company Limited, represented by its Director. The first respondent in the said Writ Petition was the Senior Audit Officer, Office of Principal Accountant General (G&SSA), Chennai.

3.Since arguments were advanced in all the three Review Applications and same grounds have been urged, a common order is passed.

4.All the three Writ Petitions had been filed in the nature of a Mandamus seeking a direction against the 2-4 Respondents/the review petitioners to pay the pending dues claimed by the Writ Petitioner in their letter, dated 22.04.2019 together with 21% interest per annum from 25.06.2015, the date of completion of defect liability period, within a stipulated time as determined by this Court.

5.The Writ Petitioner had participated in three tenders called by the third respondent in the Writ Petitions, Chief Engineer, TWAD Board, Northern Region, Vellore, for

(i) construction, commissioning, trial run for six months and subsequent maintenance of Sewage Treatment Plant (STP) of 3.5 MLD capacity at Erumanthangal Eri in Villupuram Municipality, for 5 years on Designs Built Operate and Transfer basis on 21.01.2009, with respect to W.P.Nos. 18255, 18258 & 18260 of 2019.

(ii) providing underground sewerage scheme to Villupuram Municipality; and

(iii) construction, commissioning, trial run for six months and subsequent maintenance of Sewage Treatment Plant (STP) of 9 MLD capacity at Kakuppam Eri in Villupuram Municipality, for 5 years."

6.The petitioner was allotted the works and agreements had been entered into between them. With respect to the first tender, the petitioner had quoted a sum of Rs.4,21,15,887/-. With respect to the second tender, the petitioner had quoted a sum of Rs.21,04,88,362/-. With respect to the third tender, the petitioner had quoted a sum of Rs.8,99,79,816/-. In the Writ Petitions, it had been averred that the Writ Petitioner had completed the works and had raised bills for payment.

7.The petitioner had also earlier filed W.P.Nos.31655, 31660 and 31665 of 2018 seeking practically the same relief, for a direction to pay the outstanding amount towards the bills raised by the Writ Petitioner and a learned Single Judge of this Court had directed that the Writ Petitioner should submit an explanation to the respondents therein relating to a communication sent by the Principal Accountant General, dated 14.03.2019. The Principal Accountant General, who had been impleaded as the first respondent in the Writ Petitions, had raised objections relating to the settlement of the bills by the TWAD Board. Those objections were finally adjudicated as follow by the Principal Accountant General:

> *"(1)Para is not pursued further; and (2).inspection report is treated as closed.*
> *This is for information and necessary action at your end."*

8.In the counter affidavit to the Writ Petitions, the respondents/TWAD Board had stated that the aforementioned remarks of the Principal Accountant General were very vague and unless they are clarified, the dues to the petitioner could not be paid. It was also stated that the Principal Accountant General had not stated that there was no legal bar in settling the amount to the petitioner. This Court had passed the following order in the three Writ Petitions:

> *"11. On perusing the material records, I hold that this stand of the fourth respondent cannot stand the scrutiny of the Court. The petitioner had executed the works. The second, third and fourth respondents have to pay and settle the dues of the petitioner. By the delay they would only incur interest. This loss by way of interest is a direct result of their own delay. The fourth respondent appears to shift the blame on the first respondent, Accountant General. The Accountant General would only give a reply in the manner they deem fit to the queries raised. They have given a reply that "the para is not pursued and that the inspection report is treated as closed." Once the Accountant General had closed the entire issue and had specifically stated that they are not pursuing with any issue further, a duty is cast on the fourth respondent to settle the dues. The petitioner had to unfortunately approach this Court again and again and every time a Mandamus has been issued directing the respondents to act in accordance with law. Acting in accordance with law indicate that the amounts that are due and payable will have to be paid.*
>
> *12. I find no justification on the part of the fourth respondent in holding over the payments. Consequently, a direction is issued to the fourth respondent to immediately settle the three payments due to the petitioner in the three Writ Petitions for the works already completed and executed. The only concession that this Court can grant relief is from payment of interest. However, if the respondents still do not pay*

the amount on or before 30.05.2020, then the petitioner will be entitled to claim the same with interest at 21% as claimed by them.

13. With the above said observation, these Writ Petitions are allowed. No costs."

9.Questioning this common order, the review applicants had filed Writ Appeals in W.A.Nos.433, 444 and 442 of 2021. The Writ Appeals came up for consideration before the Division Bench and by a common judgment, dated 03.03.2021, it was held as follows:-

"It is submitted on behalf of the appellants that a relevant fact pertaining to an order of rejection pursuant to an audit objection had not been brought to the notice of the Writ Court.

2. Since it does not appear that such aspect of the matter was canvassed before the Writ Court, the order impugned cannot be faulted. However, it will be open to the appellants to apply for review by bringing the fresh material on record. This order does not imply that the review petition has to be entertained; only that a petition for review may be carried before the Writ Court for the Writ Court to consider the same.

3. The present appeals can no longer be pursued since the appellants are desirous of carrying review petitions before the Writ Court. However, it will be open to the appellants to assail the order impugned herein by way of appeal in the event the review petition is not entertained. W.A.Nos.433, 440 and 442 of 2021 are disposed of since they arise out of a common order. There will be no order as to costs. Consequently, C.M.P.Nos.1729, 1735, 1744 of 2021 are closed."

10.Taking advantage of the observation of Division Bench that the review applicants can file petitions by bringing fresh materials on record, the present Review Applications have been filed.

11.The previsions of law however must be kept in mind. They are Section 114 of CPC and Order XLVII Rule 1 CPC.

12.Section 114 of CPC reads as follows:

> "114.***Review***. *Subject as aforesaid, any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been referred.*
> *(b) by a decree or order from which no appeal is allowed by this Code, or*
> (c) by a decision on a reference from a Court of Small Causes may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

13..Order XLVII Rule I CPC reads as follows:

> *"**Application for review of judgment***
>
> *(1) Any person considering himself aggrieved-*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."*

14.It must also be noted that in the grounds to review the judgment, it had not been stated that there is an error apparent on the face of the judgment, of which review is sought.

15.The primary ground in which review is sought is on the liberty granted by the appellate Court and on the further ground that in the agreement, Clause-24 relating to 'dispute' and Clause-25 relating to the 'procedure for disputes' should have been adhered to by the Writ Petitioners and that a Writ Petition under Article 226 of Constitution was not the appropriate petition to have been filed. It had been stated that if there is a dispute relating to any decision taken by the Review Applicants, then it should have been sought to refer the same to an adjudicator and later to arbitration.

16.The learned Additional Advocate General who urged consideration of the review applications took the Court through the agreement between the parties and stated that when a method is provided to resolve the disputes, then it was incumbent on the Writ Petitioner to take recourse to that particular method and also stated that the direction in the Writ Petitions should therefore be reviewed and re-visited by this Court.

17.On the other hand, Mr.N.L.Rajah, learned Senior Counsel for the first respondent/Writ Petitioner after pointing out that it had not been stated that there is an error apparent on the face of the order and also the observation of the Division Bench that the order could not be faulted, pointed out that that the documents now produced would themselves reflect that review applicants/TWAD Board had justified payment of the amounts due to the first respondent herein before the Principal Accountant General Office.

18.It is also contended by the learned Senior Counsel that it would therefore not lie in the mouth of the review applicants to state that there is a dispute and that such dispute must be resolved through proper procedure as agreed by the parties. He stated that there was no dispute at all as between the review applicants/TWAD Board and the Writ Petitioner/contractor. An objection was raised by the Principal Accountant General and that objection was replied by the TWAD Board justifying the amounts paid or sanctioned and thereafter, the Accountant General on the basis of the reply had closed the file and had further stated that “this is for information and necessary action at your end”. This, according to the learned Counsel, will naturally mean that the only further action taken by the TWAD Board would be to honour the bills outstanding and payable to the Writ Petitioner. He further pointed out that the TWAD Board had not raised any dispute. The Writ Petitioner had not raised any dispute. There was no dispute between the parties. It was therefore contended by the learned Senior Counsel that the review applications should be rejected by this Court.

19.I have given my careful consideration to the arguments advanced.

20.The following facts stand out:

(1)There were agreements between the Writ Petitioner and the review applicants/TWAD Board for execution of works offered by way of tender.

(2)There is no dispute that the Writ Petitioner had completed the works:

(3)There is no dispute that the date of completion of defect liability period had expired on 25.06.2015.

(4)No dispute had been raised either regarding the nature of work executed or the bills presented by the Writ Petitioner.

(5)An audit objection was raised by the first respondent in the Writ Petition.

21.That audit objection and the reply given by the TWAD Board had been placed as additional materials before this Court. It will be worthwhile to examine those additional documents.

(1)The first document is a copy of G.O.Ms.No.101, dated 10.06.2009, Public Woks (G2) Department, relating to price adjustment mechanism for civil works ordered in G.O(Ms)No.60, Public Works (G2) Department, dated 14.03.2008. Amendment had been issued by the Government vide G.O.Ms.No.101, dated 10.06.2009.

(2)The second document is the copy of a letter from the office of the Principal Accountant General (G&SSA), dated 27.01.2016, in which they had enclosed a note "unwarranted expenditure owing to incorrect operation of price adjustment clause while implementing UGSS to Villupuram Municipality-Rs.172 lakhs".

(3)The third document is a letter received again from the office of Principal Accountant General (G&SSA), dated 14.03.2019, in which they had stated that inspection report is treated as closed which portion had been extracted in the order in the Writ Petitions.

(4)The fourth document is the extract of the dispute resolution clause in the agreement between the parties.

(5)The final document was a statement about the excess amount paid and recovered from the contractor (price adjustment).

22.The Review applicants also relied on the judgment of the Honourable Supreme Court in ***Civil appeal No.4981 of 2021 [Union of India and others vs M/s.Puna Hinda]*** wherein, by a judgment, dated 06.09.2021, the Honourable Supreme Court had held that the jurisdiction of the High Courts in respect of pure contractual matters is extremely negligible and they should be better adjudicated by the forum agreed to by the parties. In effect, reliance is placed on the said judgment to state that the Writ Petitions themselves are not maintainable.

23.However, it must be stated that there is no dispute between the Writ Petitioner and the TWAD Board relating to any of the bills raised. It was an audit objection raised by Principal Accountant General and the TWAD Board had replied to the Principal Accountant General justifying the amounts paid to the Writ Petitioner. That justification had been filed as a document in the review applications and it had been stated that the objection of the TWAD Board was on the basis of G.O(Ms)No.60, Public

Works (G2) Department, dated 14.03.2008 and that such Government Order would not be applicable because, the tender in the instant case had been called for on 16.10.2007 prior to the issuance of the above Government Order and the tender was opened on 19.11.2007, which was also prior to the issuance of the above Government Order. The actual words in the reply issued by the Managing Director, TWAD Board are as follows:

> *"The Audit para has stated that, the G.O.(Ms)No.60 (PWD)(G1) Dept. dt.14.3.2008 which was referred in B.P.(Ms)No.81, dt.22.8.2008 has not been followed for price adjudication.*
>
> *As per G.O/B.P, price adjustment has to be calculated on departmental estimate of the work. In this case the price adjustment is calculated 'R' – as per value of work done.*
>
> *It is seen that the date of GO and BP, referred in the Audit para is not applicable in this case because the tender has been called for on 16.10.2007 which is prior to the issue of above GO/BP. The tender was also opened on 9.11.2007. This is also prior to the issue of GO/BP.*
>
> *Any order (or) conditions stipulated in G.O.(or) BP will be applicable only to the prospective operations only and not retrospective, unless or otherwise it is specifically stated. This is statutory condition prevailing/existing in force.*
>
> *As per sub para (1) of para 3 of the said GO, revised price adjustment shall come into effect prospectively and shall be available only for those tenders which have been called for on or after the date of the Government order."*

24.It is thus seen that the review applicants themselves had stated that there was no dispute raised and that they are justified in making the payment to the Writ Petitioner.

25.They will therefore have to pay the outstanding amounts to the Writ Petitioner.

26.It must also be pointed out that the scope of review is very limited.

25.In ***(1997) 8 SCC 715 [Parsion Devi and Others Vs. Sumitri Devi and Others],*** the Hon'ble Supreme Court has held as follows:-

> *"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise.*
>
> *10. Considered in the light of this settled position we fine that Sharma, J. clearly over-stepped the jurisdiction vested in the court under Order 47 Rule 1 CPC. The observation of Sharma, J. that "accordingly", the order in question is reviewed and it is held that the decree in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunction were provided" and as such the case was covered by Article the scope of Order 47 Rule 1 CPC. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the later only can be corrected by exercise of the review jurisdiction. While passing the impugned order, Sharma, J. found the order in Civil Revision dated 25.4.1989 as an erroneous decision, though without saying so in so many words. Indeed, while passing the impugned order Sharma, J. did record that there was a mistake or an error apparent on the face of the record which not of such a nature, "Which had to be detected by a long drawn process of reasons" and proceeded to set at naught the order of Gupta, J. However, mechanical use of statutorily sanctified phrases*

cannot detract from the real import of the order passed in exercise of the review jurisdiction. Recourse to review petition in the facts and circumstances of the case was not permissible. The aggrieved judgment debtors could have approached the higher forum through appropriate proceedings, to assail the order of Gupta, J. and get it set aside but it was not open to them to seek a "review of the order of petition. In this view of the matter, we are of the opinion that the impugned order of Sharma, J. cannot be sustained and accordingly accept this appeal and set aside the impugned order dated 6.3.1997."

26.In ***(2008) 11 SCC 107 [T.Thimmaiah (dead) by Lrs. Vs. Venkatachala Raju (dead) Lrs.],*** the Hon'ble Supreme Court has held as follows:-

"2. During the course of hearing, the learned counsel for the appellant has pointed out that a bare perusal of the order in review would reveal that it is based on a complete reappreciation of the matter on facts and the provisions of Order 47 Rule 1 of the Code of Civil Procedure w hich would govern an application for review, have been completely ignored. It has been submitted by the counsel that the Single Judge had, in the first Judgment, examined the facts and dismissed the appeal and on a reconsideration of the same facts, had allowed the same, which was not justified. We find merit in this plea. From a bare perusal of the Judgment in review, it is clear that the principles laid down under Order 47 Rule 1 CPC have been completely ignored. We accordingly allow the appeal, set aside the order in review dated 26.2.2001 and dismiss the appeal in the suit. We, however, give liberty to the respondent herein to challenge the Judgment dated 16.2.1999, if so advised."

27.In ***(2018) 4 SCC 587 [Sivakami and Others Vs. State of Tamil Nadu and Others],*** the Hon'ble Supreme Court has held as follows:-

"18. The scope of the appellate powers and the review powers are well defined. The power of review under Order 47 Rule 1 of the Code of Civil Procedure, 1908 is very limited and it may be exercised only if there is a mistake or an error apparent on the face of the record. The power of review is not to be confused with the appellate power. The review petition/application cannot be decided like a regular intra court appeal. On the other hand, the scope of appeal is much wider

wherein all the issues raised by the parties are open for examination by the Appellate Court.

19. A fortiori, what was not decided in appeal by the Division Bench could not be decided by the Division Bench while deciding the review application. It is for this reason, we are also constrained to set aside the review order."

28. The ratio laid are binding. To repeat, no error on the face of the record has been pointed out in the grounds of review. The Review Applicants had relied on documents, which speak adverse to their own cause and even if permission was granted by the Division Bench, have also not stated why the documents were not produced at the time of hearing of the Writ Petitions. The Review Applicants rather stated that an alternate finding could have been given. To hold that such alternate finding should have been given is the prerogative of the Appellate Court. Review Applications will have to necessarily fail.

29.I do not find any grounds to review the common order in the Writ Petitions. The Review Applications stand rejected. No costs. Consequently, connected miscellaneous petition is closed.

Index :Yes / No
Internet :Yes
NCC : Yes/No
cmr

09.06.2023

C.V.KARTHIKEYAN, J.

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Pre-Delivery Common Order made in
REV.APLC(W)Nos.157 to 159 of 2021

09.06.2023