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W.P.No.14840 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.09.2023

PRONOUNCED ON : 04.10.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

W.P.No.14840 of 2017
and
W.M.P.No.16085 of 2017
and
W.M.P.Nos.32110 and 32114 of 2019

M/s.Larsen & Toubro Limited [Construction]
Mount Poonamallee Road, Manapakkam,
P.B.No.979, Chennai – 600 089
Represented by its
Authorized Signatory Mr.NSR Venkatesan

... Petitioner

VS.

- 1.The Tamil Nadu Water Supply & Drainage Board
Represented by its Chief Engineer
TWAD Board
Vellore – 632006
- 2.The Executive Engineer
TWAD Board
Major Project Division II
Tirupattur



W.P.No.14840 of 2017

3.The Joint Managing Director
TWAD Board
Head Office – Chepauk
Chennai 600 005

4.The Chief Audit Officer
TWAD Board
Head Office – Chepauk
Chennai – 600 005

... Respondents

PRAYER: Writ Petition is filed Under Article 226 of the Constitution of India to issue a Writ of Mandamus, restraining the Respondents and any person claiming through or under them or acting on their behalf, from in any manner taking any action to seek recovery of the sum of Rs.35.56 Crores.

For Petitioner : Mr.P.S.Raman
Senior Advocate
for M/s.Preeti Mohan

For Respondents : Mr.S.Silambanan
Additional Advocate General-II
Assisted by M/s.S.Shahila Bhanu

ORDER

The writ petitioner seeks issuance of Writ of Mandamus forbearing the respondents from recovering a sum of Rs.35.56 crores from the petitioner based on the audit objection raised by the 4th respondent.



W.P.No.14840 of 2017

2. The 1st respondent had floated a tender inviting bids for executing works for providing Combined Water Supply Scheme (CWSS) to Vellore Corporations and other connected areas. The petitioner herein participated in the tender and the bid of the petitioner was accepted by the 1st respondent. The 1st respondent issued a Letter of Acceptance on 30.12.2011 accepting the bid and setting out some terms and conditions. Thereafter, an agreement was entered into between the petitioner and the 1st respondent on 03.02.2012. The petitioner executed the work as per the terms of the agreement and it was also paid the amount as calculated based on the formula mentioned in Clause 51 of the Agreement. Suddenly, the petitioner had received a communication from 2nd respondent stating that a sum of Rs.35.56 crores was paid to the petitioner in excess. The said communication was based on the audit objection raised by the 4th respondent with regard to adoption of incorrect base date in the calculation of price adjustment. The 4th respondent relying on Government Order in G.O.(Ms).No.227, Municipal Administration and Water Supply (MA3) Department dated 23.11.2009 opined that the base date for calculating price variation shall be the quarter in which the agreement was entered into and on the other hand, the respondents 1 to 3 had taken the bid closing date as a



W.P.No.14840 of 2017

base date for calculating price escalation and the same is not in accordance with Government Order referred above. In view of the audit objection raised by 4th respondent regarding wrong adoption of base date for calculating price escalation, a sum of Rs.35.56 crores said to have been paid in excess to the petitioner and respondents 1 to 3 made an attempt to recover the same from the petitioner by invoking bank guarantee, in these circumstances, the writ petition is filed seeking above said relief.

3. Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner submitted that as per Clause 51.2 of Agreement, the price escalation shall be calculated based on the formula mentioned therein. As per the formula mentioned in Clause 51.2 of Agreement, the base date for calculating price escalation shall be the quarter preceding the date of opening of bids. The respondents 1 to 3 based on the condition mentioned under Clause 51.2 of Agreement correctly adopted date of opening of the bids for the purpose of fixing base date and accordingly, calculated the price escalation and paid the amount due to the petitioner. However, the 4th respondent raised objection based on G.O.(Ms).No.227, Municipal Administration and Water Supply (MA3) Department dated 23.11.2009 and without affording any



W.P.No.14840 of 2017

opportunity to the petitioner, the respondents 1 to 3 arrived at a conclusion the base date for calculating price escalation is date of execution of Agreement. The learned Senior Counsel further submitted that as per the above said Government Order, the base date for price escalation shall be date of agreement, only in case of delayed execution of agreement.

4. In the case on hand, even though, there is a delay of five days in execution of agreement, the same is not attributable to the petitioner and delay is only due to the doubt entertained by the 1st respondents with regard to the necessity for registration of Power of Attorney in favour of the person, who was authorised to sign the agreement on behalf of the petitioner. Precisely, it is the case of the petitioner that since the delay is not due to its fault the respondents 1 to 3 are not entitled to adopt date of agreement as the base date for calculation of escalation.

5. Mr.S.Silambanan, learned Additional Advocate General-II appearing for respondents by taking this Court to the Government Order referred above submitted that as per the said Government Order, in case of delayed execution of agreement, base date for calculation of price escalation



W.P.No.14840 of 2017

shall be the quarter in which the agreement was entered into. The Additional Advocate General-II further submitted that in the case on hand, the Letter of Acceptance was issued to the petitioner on 30.12.2011 and the agreement was not executed within 28 days as per conditions mentioned therein. The agreement was entered into only on 03.02.2012. Therefore, as per the above mentioned Government Order, the 4th respondent raised audit objection. The Additional Advocate General-II further submitted that as per Clause 67 of General Conditions of Contract, there is a Dispute Redressal Committee headed by Managing Director/Joint Managing Director and consisting of Engineering Director of 1st respondent-Board and the petitioner is expected to approach the Disputed Redressal Committee for redressal of its dispute concerning the contract. In view of availability of alternative remedy, the writ petition filed by the petitioner is not maintainable.

6. The petitioner seeks issuance of Writ of Mandamus forbearing the respondents from recovering alleged excess payment paid to the petitioner based on audit objection made by the 4th respondent. As seen from the prayer itself, so far, the respondents 1 to 3 have not passed any order against the petitioner seeking recovery of the amount. The audit objection made by



W.P.No.14840 of 2017

the 4th respondent is an internal communication, which was made without hearing the petitioner. If the 1st respondent-Board wants to recover alleged excess payment made to the petitioner, it has to give an opportunity to the petitioner to put forth their case and pass a speaking order.

7. A perusal of Clause 2 of Letter of Acceptance issued by 1st respondent read with Clause 51 of amended bid document would suggest that the base date for calculation of price escalation would be the quarter preceding the date of opening of bids.

8. Likewise, the formula mentioned in Clause 51.2 of Agreement signed between the petitioner and the 1st respondent would suggest that the base date for calculation of price escalation is the quarter preceding the date of opening of bids. However, as per G.O.(Ms).No.227, Municipal Administration and Water Supply (MA3) Department dated 23.11.2009, the base date for calculation of price escalation shall be the quarter of the calendar year in which the last date for submission of bid is fixed. However, in case of delayed agreement, the base date shall be the quarter in which the agreement is signed.



W.P.No.14840 of 2017

WEB COPY 9. Though Government Order referred above prescribed a later date for the purpose of price escalation in case of delayed agreement, the same is not reflected in the formula mentioned in Clause 51.2 of Agreement. It is not clear how the 1st respondent entered into an agreement with the petitioner without incorporating the condition mentioned in the above said Government Order prescribing a later date for delayed agreement.

10. The learned Senior Counsel appearing for the petitioner also raised a point that the execution of agreement got delayed only due to certain clarification sought for by the 1st respondent with regard to the necessity for registration of Power Deed. This Court is not inclined to venture into decide the question who is responsible for the delay, in the absence of any order passed by the respondents 1 to 3 seeking recovery of the amount. If the respondents 1 to 3 want to recover alleged excess amount from the petitioner based on the audit objection made by the 4th respondent, it shall be done only after giving opportunity to the petitioner and passing a reasoned order to that effect.



W.P.No.14840 of 2017

11. It is seen from the letter of petitioner dated 27.01.2017 included in Page No.12 of the typed set filed by the learned counsel for the respondents 1 to 4 dated 11th April 2022, the petitioner has already moved the Dispute Redressal Committee and the grievance of the petitioner is under consideration. In these circumstances, this Court is inclined to direct the petitioner to approach the Dispute Redressal Grievance Committee as per Clause 67 of Agreement Conditions and the petitioner's grievance regarding fixation of base date for price escalation shall be considered by the said Committee by giving due opportunity to the petitioner. It is also open to the petitioner to raise all the points raised in this writ petition before the said Committee.

12. Till the grievance of the petitioner with regard to fixation of base date is considered by the 1st respondent-Board/Grievance Committee and a considered order is passed, after giving opportunity to the petitioner, the respondents 1 to 3, shall not recover alleged excess payment made to the petitioner. The objection raised by the petitioner regarding fixation of base date shall be considered by the Grievance Committee on merits and in accordance with law within a period of eight weeks from the date of receipt



W.P.No.14840 of 2017

of copy of this order.

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13. With these directions, the writ petition stands disposed of. No costs. Consequently, the connected miscellaneous petitions are closed.

04.10.2023

Index : Yes / No
Speaking order : Yes / No
Neutral Citation : Yes / No
dm



W.P.No.14840 of 2017

To

WEB COPY

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Tamil Nadu Water Supply & Drainage Board
TWAD Board
Vellore – 632006
- 2.The Executive Engineer
TWAD Board
Major Project Division II
Tirupattur
- 3.The Joint Managing Director
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- 4.The Chief Audit Officer
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W.P.No.14840 of 2017

S.SOUNTHAR, J.

dm

**Pre-delivery order made
in W.P.No.14840 of 2017**

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