IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.04.2024

PRONOUNCED ON : 03.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.13059 of 2021
and W.M.P.No.29455 of 2023

BNR Infrastructure Project (P) Ltd.,
Rep. by its Director
B. Charan Prasad,
No.923, 17th Main Road,
Anna Nagar West,
Chennai – 600 040. ... Petitioner

-Vs-

Tamil Nadu Slum Clearance Board,
Rep. by Superintending Engineer,
Chennai Circle I, TNSCB,
No.5, Kamarajar Salai,
Chennai – 600 005. ...Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus, directing the respondent to pay the sum of Rs.25,86,31,593/- (Rupees twenty five crores eighty six lakhs thirty one thousand five hundred and ninety three only) to the petitioner towards its Goods and Services Tax liability and amount held on account of Board resolution of TNSCB (BR7.04/493 dated 07.06.2019) in accordance with agreement dated 19.10.2017 along with interest from 30.10.2019 at the rate of 12 percent per annum till the date of payment.

For Petitioner : Mr.Anirudh Krishnan

For Respondent : Mr.R.Ramanlal
Additional Advocate General
Assisted by Mr.A.Edwin Prabakar
Government Pleader.

ORDER

This writ petition has been filed for direction directing the respondent to pay the sum of Rs.25,86,31,593/- to the petitioner towards its Goods and Services Tax (hereinafter referred to as "GST") liability, on account of Board resolution of TNSCB dated 07.06.2019 in accordance with agreement dated 19.10.2017.

2. The case of the petitioner is that in order to construct 2112 tenements under vertical-III (AHP) of Pradhan Mantri Awas Yojna (PMYA) housing for all urban scheme, floated a tender on 22.06.2017 inviting bid. The petitioner bid for the said project and the petitioner's bid was accepted

and approved by the respondent. After accepting the bid, the petitioner was called for negotiation of the tender in the meeting dated 18.08.2017. After negotiation on 27.09.2017, the respondent accepted the rates quoted by the petitioners at Rs.179,69,05,781/- and directed the petitioner to enter into the written agreement between the parties. Accordingly, the petitioner had entered into agreement between the parties for execution of work on 19.10.2017. The petitioner also had executed bank guarantee dated 29.02.2016 to the tune of Rs.2,74,78,200/- and made earnest money deposit of Rs.84,60,000/-. Various taxes and dues including income tax, sales tax, service tax etc., formed a part of the contract value i.e., consideration to be paid to the petitioner by the respondent for the execution of the works except GST which will have to be borne by the respondent. Therefore, GST stood expressly excluded by the parties from the total consideration payable and expressly agreed that the payment of GST will be borne by the respondent.

3. Thereafter, the petitioner vide E-mail dated 21.04.2018 had furnished the proof of payment for GST paid for Rs.10,79,12,794/- for

reimbursement of GST amount paid during the course of execution of the agreement. The respondent had paid GST at 12% extra for Rs.10,79,12,794/-. However, the respondent failed to pay additional GST for the subsequent bills. Therefore, the petitioner submitted representation to the respondent for the payment of GST amount. Since the same was not considered, the petitioner approached this Court by way of the present writ petition.

4. The learned counsel appearing for the petitioner submitted that the respondent by a letter dated 18.07.2018, stated that GST against the works of the said project may be given only after approval of a Revised Financial Statement (hereinafter called as "RFS"). By way of reply, the petitioner pointed out that they were acting in accordance with the terms of the agreement and requested to reimburse the GST amount. Even after RFS report, the petitioner was not settled with any amount. While being so, the respondent raised query as to why the government order passed in G.O.Ms.No.296 of 2017 Finance (Salaries) Department, dated 09.10.2017, cannot be applied to the project with respect to ascertain the value of

subsumed taxes, which will in turn lead to finding of value of supply on which amount GST was paid.

4.1. He further submitted that ever since GST was implemented, the contract had been finalized prior to GST coming into force, the government of Tamil Nadu issued two government orders to ensure that there is an equitable distribution of any losses that may have been caused due to introduction of GST. Therefore, the government orders are applicable to pre-GST contracts. The government orders would go to show that these are specifically being brought in force to resolve difficulties arising from contracts/agreements entered into the pre GST era i.e., before 01.07.2017. Admittedly the petitioner had entered into the agreement based on the representation that GST will be paid extra by the respondent. The agreement also expressly provided for the same. Hence, he prayed to allow the present writ petition.

5. The respondent filed counter and the learned Additional Advocate General appearing for the respondent submitted that the writ

petition itself is not maintainable since an alternative remedy is available under the Act. As per Section 95 of the Central Goods and Services Act, 2017, if the petitioner entertain any doubt regarding the applicability of GST to him, would have sought an advance ruling from the competent authority constituted under the Central Goods and Service Tax Act, 2017. As per Chapter 17 of GST Act, there is also an appellate remedy available for those who are seeking advance ruling.

5.1. Further, the petitioner has not stated whether he is eligible for input rate credit claim and whether he has a claim under a input rate credit as per Section 16 of the GST Act. The declaration under Section 16 of the GST Act, is mandatory to test the bonafide of the petitioner whether he had paid GST or not. Further, a declaration under Section 16 of the GST Act, is mandatory to test the bonafide of the petitioner whether he has paid GST or not. The agreement dated 19.10.2017 had contained an arbitration clause.

6. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

7. As per the tender document in condition No.31.0, bid quoted shall be for finished work in site and inclusive of all incidental and contingent charges. All taxes such as GST, seigniorage, cess, royalties, service tax etc., in respect of materials to be used on the work must be borne by the contractor. The quoted rate shall be inclusive of all taxes, duties and levies including income tax, sales tax, service tax, local taxes, toll charges octroy, all royalties, patent rights, other incidental charges and any other taxes which may arise/increase at a later date during currency of the agreement or for any other cause, shall be included in the rates wherever applicable and shall be paid by the contractor. No claim whatsoever in this regard shall be entertained by the employer at a later date.

8. Accordingly, the contractor himself admitted that all the taxes should be paid by him only because the agreement rates are inclusive of all taxes including GST. After agreements, the site was handed over to the petitioner. Further as per the financial bid clause No.6.4, the rates and price quoted by the bidder are not subject to adjustment during the performance

of the contractor for taxes, duties, cess and any other levies. Further as per clause 6.6, all duties, taxes, cess and other levies filed by the contractor as per the Rules shall be included in the contract value quoted by the contractor.

9. The petitioner has misquoted under the head of the agreement of scope of work, Clause 1.1 - general which says that the quoted rates shall be inclusive of taxes, duties and levies including income tax, sales tax, service tax, local tax, toll charges, octroy of royalties, patent rights, the other incidental charges and any other taxes which may arise or increase at a later date during the currency of the agreement or for any other cause shall be included in the rates wherever applicable and shall be paid by the contractor.

10. Now all the taxes are consolidated as GST and only one tax is available. Therefore, the scope of contract is inclusive of all taxes. After submitted bid value which includes GST, the contractor cannot claim additional GST tax which is tantamount to double payment of tax and more

over after finalizing and approving the tender all the taxes or GST cannot be excluded from the tender condition which is not permissible and tantamount to favouring one bidder over the other bidders and against the spirit of Tamil Nadu Tender in Transparency Act, 2000. Only to reduce the tax burden, the government has issued G.O.Ms.No.264 dated 05.09.2017, which stated that GST council in its meeting held on 20.08.2017 and 19.09.2017, deliberated to issue and GST on works contract for government work is being reduced to 12% in order to balance the taxes on works contract in the pre GST and post GST regime and therefore, the petitioner is no way affected.

11. Subsequently, the government of Tamil Nadu passed order in G.O.Ms.No.296, Finacne (Salaries) Department dated 09.10.2017, by way of amendment, which is binding on the contractor as signatory to the contract. Considering the necessity to provide for a transparent means of estimating subsumed tax, government had directed that the following methodology be adopted for estimating the value of subsumed taxes in the contracted value of work.

a) If the supplier has furnished break up of taxes within the quoted value (bid value) at the time of submission of tenders, it shall be taken as the basis for estimating the value of subsumed tax. If, after negotiation, the contracted value is less than the bid value, the tax quoted shall be proportionately reduced to arrive at estimate of the value of subsumed tax. For instance, if the bid value was Rs.50 Lakh and the breakup of tax is Central Excise Duty of Rs.1 Lakh and VAT or CGST of Rs.1 Lakh, the corresponding subsumed tax as per his breakup of taxes is Rs.2 lakh and after negotiation, contracted value was reduced to Rs.48 Lakh, The subsumed tax shall be taken as Rs.2 Lakh x 48/50 = 1.92 Lakh.

b) In case, the breakup of taxes was not obtained or furnished in the bid document, the supplier may be asked to furnish breakup of the taxes within the contracted amount, giving details and explanations and based on this estimate of total subsumed tax shall be arrived. For instance, if for the contracted amount of Rs.48 Lakh in the example above, the supplier states that the Central Excise Duty is Rs.1 Lakh and VAT or CGST is Rs.1 Lakh, after checking the reasonability of his claim, the subsumed tax may be arrived at Rs.2 Lakh.

c) The estimate of subsumed tax should also be worked out independently from the departmental estimates. Revised Schedule of Rate (SOR) showing basic price and tax components separately are being issued by the Public Works Department. Using the revised SOR, revised departmental estimates for the work without subsumed tax shall be arrived as per normal procedure. The difference between the departmental estimates arrived using earlier SOR with taxes would constitute value of subsumed tax in the value of work. For instance, if the estimate arrived at using the revised SOR without subsumed taxes is Rs.45 Lakh and that with earlier SOR with taxes is Rs.50 Lakh, the value of subsumed taxes in the value of work is Rs. 5 lakh. If the contracted value for the same work as Rs.50 Lakh is Rs.55 Lakh, i.e, with tender premium of Rs.5 Lakh then the value of subsumed tax may be proportionately enhanced (or reduced in case of tender discount or minus tender) as follows: Rs.5 Lakh X 55/50 = Rs.5.5 Lakh This method is considered as a good proxy for the actual value of subsumed tax for the purpose of determining the value of supply for payment to the supplier along with taxes under the GST laws.

The value of the subsumed tax may finally be arrived at values estimated in (a) or (b) or (c), whichever *is higher.*

The procuring entities shall negotiate existing agreements with works contractors and enter into supplemental agreements with revised agreement value fixed as the original contracted value minus the value of subsumed tax arrived in the above plus GST as applicable.

Hence, the contractor shall execute supplemental agreement with TNUHDB as arrived above as per the Agreement Special Condition No.1-6."

12. On receipt of the representation from the petitioner, appointed a consultant M/s.G.Sekar Associates to resolve the GST issue. As per the report, the petitioner has to execute a supplemental agreement to the tune of Rs.175.32 crores as against the original value of Rs.179.69 crores. Accordingly, as per the supplemental agreement which has been reduced to Rs.4.37 crores by the proceeding dated 07.06.2019. It was also communicated to the petitioner to execute the supplemental agreement by the communication dated 11.07.2019. However, the petitioner failed to execute any supplemental agreement.

13. Further the effective date of GST was 01.07.2017. The date publication of tender was on 22.06.2017. As per the agreements condition No.1.6, the G.O.Ms.No.264 dated 15.09.2017 and subsequent amendment in G.O.Ms.No.296 dated 09.10.2017 are biding on both the parties and applicable to this case. Further the petitioner has not chosen to produce any documents to show that he has paid GST. The petitioner also failed to produce document that he had claimed input tax credit.

14. In view of the above discussions, the issues involved in this writ petition are mixed question of facts and law and it cannot be decided in the writ petition that too under Article 226 of the Constitution of India. It has to be dealt with in accordance with law. Further there is an arbitration clause is available in the agreement and it is relevant to extract as follows :-

> *"ARBITRATION CLAUSE/SETTLEMENT OF DISPUTES: If any dispute of difference of any kind whatsoever arises between the TNSCB and the Contractor in connection with, or arising out of the Contract, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall in the first place, be referred to and settled by*

the Engineer-in-Charge who shall, within a period of thirty days after being requested by the Contractor to do so, give written notice of his decision to the Contractor. Upon receipt of the written notice of the decision of the Engineer-in-Charge the Contractor shall promptly proceed without delay to comply with such notice of decision."

In view of the above specific arbitration clause in the agreement executed between the petitioner and the respondent, the direction sought for in this writ petition cannot be issued. However, the petitioner is at liberty to invoke the arbitration clause, either before the Arbitrator or before the Court of law under jurisdiction of Chennai city, within a period of four weeks from the date of receipt of a copy of this Order.

15. With the above directions, the Writ Petition stands disposed of. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

03.06.2024

Index : Yes/No
Speaking/Non Speaking order
Neutral Citation : Yes/No
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To

The Superintending Engineer,
Tamil Nadu Slum Clearance Board,
Chennai Circle I, TNSCB,
No.5, Kamarajar Salai,
Chennai – 600 005.

G.K.ILANTHIRAIYAN. J,

rts

ORDER IN
W.P.No.13059 of 2021
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