IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.10.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.2673 of 2023
and
W.M.P.No.2774 of 2023

M/s.Subaya Constructions Company Limited,
Represented by its Director S.Meenakshi,
No.21, Soundarapandian Street,
Ashok Nagar,
Chennai – 600 083. ... Petitioner

Vs.

1.The Chief Engineer (A/C),
TWAD Board,
No.30, Bharathi Park Road,
Siruvani Nagar,
Coimbatore – 641 043.

2.The Superintending Engineer,
TWAD Board,
Coimbatore.

3.The Executive Engineer,
TWAD Board,
Sewerage Division,
Pollachi. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus, directing the respondents to release the withheld amount of 25% on substituted items/additional items, the final bill, withheld amount and other pending bills as per contract with interest at the rate of 24% from the date of passing the respective running account bills, within a period stipulated by this Court.

For Petitioner : Mr.N.L.Rajah
Senior Counsel
for Mr.B.Natarajan

For Respondents : Mr.T.Mohan
Senior Counsel
for Mrs.Y.Kavitha

ORDER

The present Writ Petition is filed for issuance of a Writ of Mandamus, directing the respondents to release the withheld amount of 25% on substituted items/additional items, the final bill, withheld amount and other pending bills as per contract with interest at the rate of 24% from the date of passing the respective running account bills, within a period stipulated by this Court.

2.The brief facts, leading to the filing of this Writ Petition, are as follows:

2.1.According to the petitioner, the petitioner is a Public Limited Company incorporated under the Companies Act, 1956 and the petitioner Company is a highly reputed civil contractor in Tamil Nadu and has executed project work worth about 1,500 crores under Ground Sewage Scheme in Tiruchirappalli, Srirangam, Thanjavur, Tirunelveli, Sivagangai, Ramanathapuram, Villupuram, Udumalpet, Arokkonam, Avadi, Ambattur, Maduravoyal and Salem and Sewage Treatment Plant in Villupuram, Udumalpet, Arokkonam and Salem.

2.2.While so, the first respondent, who is the Chief Engineer of the Tamil Nadu Water Supply and Sewerage Board, invited tender for laying an underground sewerage system in Udumalpet Municipality in Tiruppur District. The petitioner was the successful bidder in the tender and the first respondent issued a work order vide letter No.Udumalaipet UGSS/T3/CE/CBE/2013, dated 27.03.2013. The scope of work given to the petitioner was 'supply, delivery, laying and joining of sewer line for Zone I and II, pumping main, house service connection, one lifting station and construction sewage treatment plant adopting activated sludge process technology for 7.81 MLD including the construction of office-cum-lab and compound wall including one year maintenance etc' and the value of the contract was

Rs.38,43,44,115/-. The period of completion of the entire work was 30 months from the date of the work order followed by 6 months trial run. The entire works were completed on 30.06.2016, the trial run was completed on 31.12.2016, the maintenance period was completed on 31.12.2017 and the defect liability was completed on 30.06.2018.

2.3.During execution of the works, mainly excavation of dense medium rock was required to be excavated at i) 0 to 2 m depth and ii) 2 to 3 m depth besides some more additional items. These items were essential and necessary for the completion of work and without these additional items, the project could not progress further and was later commissioned. However, the contract does not provide rates for these additional items. The respondents wanted the petitioner to do these works and the petitioner obliged and wanted the respondents to confirm the rates as proposed.

2.4.The Employer has to execute works as per agreement Clause 16, which specifies as follows:

> *'Clause 16 Additional items (Page No: 543 of Original Agreement) – If additional items that*

are not contemplated in the contract are to be executed, the Engineer in charge will execute the works either through the main contractor/firm or through any other agency. Payments for such works shall be made based on the rates derived by the Engineer in charge as per rules in force.'

2.5.Based on the above clause, the Engineer in charge derived rates for additional works from agreement rates. As per Clause 16, the department has to obtain consent from the main contractor for execution at derived rates and based on request by the Engineer in charge as per request, the petitioner had also given their consent for the rates derived by the Engineer in charge without disputing the derived rates. The consent letter forms part of the supplemental agreement.

2.6.Based on consent rates, additional works are to be executed as per Clause 17 of the agreement which specifies as follows:

'Clause 17: Order Book -

An Order Book will be kept by the officer in charge of the site (Junior Engineer/Assistant Engineer) *of the particular component of the works. Orders entered in this book by the Engineer in charge or any higher authority shall be held to have been formally communicated to the contract/firm. The officer in charge of the site will sign each other as it is entered and will hand over the duplicate to the contractor/firm or his agent, who shall sign the original in acknowledgment of having received the order.'*

2.7.Based on Clause 17, 53 site orders were issued for additional items of work by Department Engineers of various cadres up to the level of Chief Engineer and works were executed as directed. The additional items of work which were carried out as per site orders were properly recorded by the competent authorities in the measurement book. Regarding the rate of additional work, the rates derived as per the contract and the consent given were adopted by the execution wing for the bill. However, while making the payment, 75% of the value was paid and the balance 25% is yet to be released. The contract does not provide for retention of 25% of the value of work done. Hence withholding of 25% balance amount is against the contract.

2.8.The Engineer in charge is the final authority in technical matters and payment consideration as per GCC Clause 3 Authority of the Engineer in charge specifies as follows:

> *'It shall be accepted that the authority of the engineer in chief shall be an integral part of the contract in the matters regarding the quality of materials, workmanship, removal of improper work, interpretation of contract drawings and specifications, mode and procedure of carrying out the works where the decision of the engineer in chief shall be final and binding of the contractor. The engineer in chief shall have absolute authority on all technical matters and payment considerations.'*

2.9.The rates were available in the contract for SDR and DMR items, but in the case of DMR, there was no rate available for depths from 0-2 m and 2-3 m. As per the contract, rates can be derived from similar items of work in the accepted agreement, based on the agreement condition and the Engineer in charge (Executive Engineer) derived the rates accepted by the contractor and work was also executed and completed and the scheme was also put to public beneficial use. As per the contract, the rates were derived from the rates available in the contract by the engineer in charge ie., the

Executive Engineer and finalized for the depth of 0 m to 2 meters at the rate of Rs.1818/- per cu.m and for the depth of 2 m to 3 meters at the rate of Rs.1863- per cu.m. The derived rates by the Engineer in charge/the Executive Officer have also been accepted by the petitioner without any hesitation, vide letter dated 26.06.2014. The acceptance of rates by both parties constitutes a contract as there was an offer and acceptance and consensus ad idem between both parties and hence a concluded contract was arrived at. Therefore, entering into a supplemental agreement was a mere empty formality. Based on the site orders and on the acceptance of the rate for the additional works, the petitioner completed the works on the bonafide belief that payments for the said additional works would be made. It is stated that accordingly, the respondent also released 75% of the payments and did not release the balance 25% viz., Rs.47,26,050/-.

2.10.Hence, the petitioner approached the Engineer in charge/Chief Engineer (Employer) for the release of 25% balance pending payment. The Engineer in charge stated orally that the internal approval in the department is under process and the balance 25% payment will be released on internal approval by the Department. Based on the repeated requests, the Chief Engineer in their letter dated 02.09.2015, to the Managing Director, TWAD Board, clearly stated as follows:

> *'The DMR for the depths (i) 0-2 M& (ii) 2-3 M have been derived from the rates of similar items of works in the accepted agreement, the lifting charges have been derived from the rates of difference in cost of SDR in subsequent two depths and worked out in the supplemental proposal as per B.P.NO.27/COM WING/Dated 05.02.2002 (Note under item No.7a, 7b & 7c does not arise) since the rates for similar items of works in the accepted agreement are available. It was also requested in the said letter that the supplemental proposal please be approved by the competent authority and communicated to this office early for taking further action.'*

2.11.It is evident that the rates accepted were the settled one and derived by the competent authorities in the work order and as per the provisions of the concluded contract.

2.12.Clause 34 of the General terms and conditions reads as follows:

'If these rates do not apply to the additional works ordered to be carried out, then prior to execution of the additional work, a rate of such work shall ordinarily be agreed upon and entered in a supplemental schedule and signed by both the Engineer in charge and the contractor/firm.'

2.13.The rates were derived by the Engineer in chief/Executive Engineer and accepted by the petitioner. Hence, these correspondences constitute a valid contract which is binding. The stand of the respondent is that no supplemental agreement was entered into and hence, the rates agreed cannot be paid and cannot be accepted at all.

2.14.However, there has been much delay with the respondent Department for the release of pending payment even after the petitioner sent several letters, due to internal approval procedures of the respondent, even though the payment to the petitioner has been recommended by the Chief Engineer (Employer).

2.15.Hence, the petitioner was constrained to seek for convening the redressal committee vide letters, dated 04.08.2016 and 30.09.2016 pertaining to the release of the balance 25% payment. Subsequently, the petitioner preferred an appeal, dated 04.08.2016, before the dispute redressal committee. Since the said appeal was pending before the dispute redressal committee without disposal, the petitioner was constrained to file a Writ Petition in W.P.No.36007 of 2016 and this Court, by order, dated 17.10.2016, directed the respondents, especially, the fifth respondent therein to dispose of the appeal filed by the petitioner, dated 04.08.2016 within a period of six weeks. Pursuant to the order passed by this Court, dated 17.10.2016, the Redressal committee disputed the derived rates given by the Employer (Chief Engineer) and denied the derived rates given by the Employer vide its order, dated 06.04.2017.

2.16.According to the petitioner, after extracting works fully at rates finalized by the Employer (Chief Engineer) with the consent of the contractor and after completion of the project and putting it to beneficial use, the redressal committee denied the agreed rates by the Employer and contractor. The decision of the redressal committee was surprising, shocking, unsustainable and arbitrary. The redressal committee cannot after execution of additional works, deny the mutually consented rates as the same is against agreement conditions.

2.17.While so, the petitioner filed a Writ Petition in W.P.No.16018 of 2018 seeking for a Writ of Certiorarified Mandamus, to quash the minutes of the meeting dated 06.04.2017 on the file of the dispute redressal committee and to refer the claim of the petitioner for fresh consideration by the dispute redressal committee. However, this Court by order dated 07.07.2020 passed the following order:

> *'4.The petitioner has an effective alternative remedy to work out its grievance and this Court does not want to exercise its writ jurisdiction when there is an effective alternative remedy. That apart, this Court cannot undertake the exercise of appreciating the facts involved in this case. Therefore, this Court is not inclined to entertain this writ petition.*
>
> *5.This writ petition is disposed of by granting liberty to the petitioner to work out the remedy before the concerned District Court as per the terms of agreement, which has been extracted supra. The District Court shall entertain the petition filed by the petitioner and the concerned Court shall take note of the period during which this writ*

petition was pending before this Court and the petition need not be rejected on the ground of limitation if its otherwise in order. Except giving this liberty, no further orders can be passed by this Court. No costs. Connected miscellaneous petition is closed.'

2.18.At this juncture, the petitioner filed a Writ Petition in W.P.No.20805 of 2018 seeking for issuance of a Writ of Mandamus, directing the seventh respondent therein to pay the tender agreed final pending bill amount of Rs.3,92,01,666/-. When the said W.P.No.20805 of 2018 came up for hearing on 17.03.2023, it was represented that since the present Writ Petition W.P.No.2673 of 2013 is already pending, liberty was sought to withdraw W.P.No.20805 of 2018 and to canvas the same in W.P.No.2673 of 2023 and the said W.P.No.20805 of 2018 was closed with the above liberty vide order, dated 17.03.2023. The present Writ Petition is filed seeking for a narrow relief of release of the balance 25% payment.

3.The learned counsel appearing for the petitioner would submit that the first respondent/the Chief Engineer (Employer) derived rates for the substituted/additional items as per the contract letter No.4560/F. UDUMALPET UGSS/CE/CBE/ dated 02.09.2015. However, the third respondent/the Executive Engineer withheld 25% of the derived rates while making payment. The cause of action for W.P.No.16018 of 2018 is different from the present writ petition. The dispute redressal committee considered the board proceedings 7(i) & 7(c). The petitioner sent several letters dated 21.06.2021, 06.12.2021 and 31.01.2022 to settle the undisputed amounts early. The redressal committee sent a letter to convene a meeting on 24.02.2022 and the redressal meeting was held on 25.02.2022. Again, the petitioner has sent a letter dated 28.02.2022 before the redressal committee to resolve the issues. Based on the letter, dated 28.02.2022, the Executive Engineer vide letter dated 18.05.2022 requested the petitioner to furnish the details of their grievances and he had also furnished the same to the Executive Engineer vide letter dated 19.05.2022 and by further reminders on 20.06.2022, 08.08.2022 and 20.10.2022 etc. Even after such repeated requests, there was no response from the redressal committee about releasing the disputed payment of the balance 25%.

4.The learned counsel appearing for the petitioner would further submit that there was no dispute in the rates and quantities executed; the action of the respondents withholding payment of the amount of 25% on substituted items/additional items, the final bill and other pending bills are arbitrary; the actions of the respondents withholding payment is unfair since the scheme was completed on 30.06.2016 and the respondents have a duty to act fairly. The third respondent/the Executive Engineer (Engineer in charge), who is the competent authority, derived the rates as per clause 16 and site orders issued by competent authority up to the level of Chief Engineer as per clause 17 and is only seeking approval for supplemental proposal from the Managing Director/TWAD Board. The Chief Engineer (Employer) vide letter dated 02.09.2015 to Managing Director/TWAD Board clearly stated that 'the rates derived were as per accepted agreement and no dispute in rates. The supplemental proposal as per B.P.No.27/COM Wing/ dated 05.02.2002 (Note under item No.7 a), b) & c) does not arise since the rates for similar items works in the accepted agreement are available.' The Chief Engineer (Employer) requested that the supplemental proposal please be approved by the competent authority. The Engineer in charge has released payment of 75% of accepted rates pending acceptance of the supplemental proposal.

5.The learned counsel appearing for the petitioner would submit that the Writ Petition is maintainable even in case of contracts with the State. The Hon'ble Supreme Court in ***MP Power Vs. Sky Power*** reported in ***(2023) 2 SCC 703***, has specifically held that the relief of seeking payment of amounts due from the State is maintainable and State can be called upon to honour its obligations of making payment unless there is a serious and genuine dispute raised relating to the liability of State to make the payment. Only if there is a genuine dispute and that too if the dispute surrounds dissatisfying of documents, the Court relegate the party to a civil suit. In the present case, there cannot be a dispute with regard to payment towards works executed and the respondent is also not denying the same.

6.The learned counsel appearing for the petitioner would further submit that there was no dispute in rates and quantities; 25% of payment was withheld only for getting approval from the higher authorities which is the internal procedure of the Department and not binding on the parties and the parties are bound by the contract entered between the parties; as per clause 42 payment schedule, all the payment has to be released on completion of maintenance period on 31.12.2017, which amounts to Rs.2,22,86,363/-; as per clause 43.2, 2.5% out of the total 5% of the retention amount has to be released on 31.12.2017 but not yet released which amounts to Rs.86,48,798/-, which is an undisputed amount; as per clause 43.1, the retention money has to be released after the guarantee period of 2 years from the completion and commissioning that is after 30.06.2018 and the balance amount yet to be released for additional work amounts to Rs.47,26,049/- or regarding the recovery proposal of Rs.1,41,78,149/- by the respondent. Even assuming without admitting that the amount payable for the additional items is a disputed amount, the petitioner is entitled for the undisputed amount of Rs.3,95,83,959/-. The TWAD Board has got no authority to recover this amount from the undisputed amount without adjudicating and finishing the issue as per contract. The amount regarding additional items cannot be ordered to be released, the petitioner prays to order release of the undisputed amount of Rs.3,95,83,959/- (ie., final bill + retention with interest form the date of entitlement at the rate of 21% per annum till the realization of the payment).

7.The learned counsel appearing for the petitioner relied on the following Judgments:

'*(i)* ***Union of India and others Vs. N.Murugesan and others*** *reported in* **(2022) 2 SCC 25***.*

(ii) **Army Welfare Education Society, New Delhi Vs. Sunil Kumar Sharma and others** *reported in* **2024 SCC Online SC 1683***.*

(iii) **M.P.Power Management Company Limited, Jabalpur Vs. Sky Power SouthEast Solar India Private Limited and others** *reported in* ***(2023) 2 SCC 703.***'

8.The third respondent filed a counter affidavit, wherein, *inter alia* it is stated that the work of providing under Ground Sewerage Scheme to Udumalpet Municipality in Tiruppur District was administratively approved vide G.O.Ms.No.96, Municipal Administration and Water Supply Department, dated 27.05.2010 for Rs.3933.00 lakhs and technically sanctioned, vide order dated 23.12.2011 for Rs.3893.00 lakhs. Subsequently, revised administrative sanction was accorded vide G.O.Ms.No.38, Municipal Administration and Water Supply (MA3) Department, dated 30.03.2012 for Rs.5607.00 lakhs. The work was awarded to the petitioner by the Chief Engineer, vide agreement dated 15.04.2013 for a sum of Rs.38,43,44,115/-. During execution of works, mainly excavation of Dense Medium Rock (DMR), certain additional and substituted items were executed based on the site orders of the execution wing, as per the site condition. In the contract agreement entered between the petitioner and the Tamil Nadu Water Supply and Drainage Board, the rates for the above additional items have not been provided. Clause 16 of the agreement deals with substitute and additional items.

9.The rates for earthwork excavation in Dense Medium Rock for the initial depths ie., 0-2 m and 2-3 m were derived as Rs.1818/- and Rs.1863/- respectively based on the rate available at 3-4 m and 4-5 m in the original agreement for the soil classification of Dense Medium Rock. Subsequently, supplemental items (Earthwork of DMR at 0-2m and 2-3m) were executed accordingly and 75% payment viz., a sum of Rs.1,52,29,171/- was also paid to the petitioner. During scrutiny of supplemental proposal at Head Office, it was observed that, the supplemental work was executed in the year 2013-14 whereas, the rate for earthwork excavation in Dense Medium Rock (DMR) was available in the TWAD SoR 2013 to 2014 itself. Hence, the matter was referred to Chief Audit Office, TWAD Beard, Chennai. In the meanwhile, the Under Ground Sewerage Scheme to Udumalet Municipality in Tiruppur District was completed in all aspects on 30.06.2016. After the trial run for a period of 6 months, the paid maintenance period of one year was commenced on 01.01.2017 and the same was completed on 31.12.2017. On getting approval for supplemental proposal and after concluding supplemental agreement, balance 25% of payment will be made by the Tamil Nadu Water Supply and Drainage Board. The payment already paid to the petitioner is Rs.33,34,99,101/-. The balance payment has not been paid in view of the dispute pertaining to the rate adopted in the supplemental proposal. The Deputy Chief Engineer stated that when the schedule of rates have changed in the middle of work, the rates for extra item shall be taken from the current schedule of rates without any tender premium. Hence, the request of the petitioner was not accepted and the supplemental proposal was returned to the Chief Engineer on 06.09.2016. Hence, the petitioner filed a Writ Petition in W.P.No.36007 of 2016 seeking to release the pending 25% of the balance amount as per supplemental proposal based on the rate arrived from the agreement and this Court, by order dated 17.10.2016, directed the fifth respondent therein to dispose of the appeal by the petitioner within a period of six weeks. Accordingly, a Dispute Redressal Committee meeting was conducted on 06.04.2017 and in that meeting, the petitioner company expressed that the rates quoted by them for the supplemental item of work are reasonable one according to the field conditions.

10.The period of execution is during 2013-2014 and as the schedule of rates have changed from the schedule of rates on the date of receipt of the tender, the rates for the supplemental item shall be taken from schedule of rates 2013-2014 without tender premium. Hence, the Committee decided to make the payment as per the rates available in TWAD schedule of rates for the year 2013-2014 without tender premium. Aggrieved by the same, the petitioner filed a Writ Petition in W.P.No.16018 of 2018 and this Court, by order, dated 07.07.2020, granted liberty to the petitioner to approach the concerned District Court.

11.In these circumstances, a Dispute Redressal Committee meeting was held on 21.02.2023 and by letter dated 11.04.2023, it has been concluded that the supplemental proposal value is Rs.35,54,840/-. Upon confirmation from the petitioner company, the supplemental proposal will be approved by the competent authority and the supplemental agreement will be entered between the petitioner and the Chief Engineer (parties of the original agreement). Thereafter, the concerned Executive Engineer will prepare the Authorised Extra and Omission Statement (AEO Statement) and the same needs to be approved by the concerned authority. The final bill will be prepared and payment will be released to the Petitioner. Hence the above Writ Petition is premature.

12.The petitioner filed a rejoinder to the counter-affidavit filed by the third respondent stating that based on the acknowledgment contractor's consented the rates accepted by the contractor, the additional items were recorded in the measurement books and 75% of the payments at the accepted rates were released and balance 25% is to be released. The petitioner had approached DRC during later part of 2022 and on 04.02.2023 only for release of eligible/accepted/undisputed pending payments. But DRC miserably failed to understand the issue and deviated from our prayer.

13.The learned counsel appearing for the third respondent would submit that the Hon'ble Supreme Court has refused to intervene in a contractual dispute in the case of ***Noble Resources Limited Vs. State of Orissa and others*** reported in ***2006 (10) SCC 236***, since there was no violation of Article 14 of the Constitution of India. In the present case, there is no violation of Article 14 of the Constitution of India and there is no arbitrariness or favouritism that has been alleged as against TWAD Board to invoke Article 226 of the Constitution of India and hence, the Writ Petition is not maintainable.

14.In ***M/s Bio Tech Systems Vs. State of U.P and others*** reported in ***2020 SCC Online All 1361***, the Allahabad High Court has held that in a case where the contract entered into between the State and the person aggrieved is of a non-statutory character and the relationship is governed purely in terms of a contract between the parties, in such situations the contractual obligations are matters of private law and a Writ would not lie to enforce a civil liability arising purely out of a contract and the proper remedy in such cases would be to file a civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in a civil Court.

15.The respondent TWAD Board has already released a sum of Rs.33,34,99,301/- vide LS XCIII & Part Bill and has also released excess payment of Rs.1,52,29,171.00/- against the additional DMR work, out of the total value of work done being Rs.35,70,56,339/-, unless final bill is processed, the payment cannot be released as per agreement dated 15.04.2013.

16.The petitioner instead of filing a suit before the District Court, as directed by this Court in W.P.No.16018 of 2018, dated 07.07.2020, approached the Dispute Redressal Committee seeking for redressal. As per the agreement vide minutes dated 25.02.2022, the Dispute Redressal Committee confirmed that the rates as per current schedule of rates ie., rate as per TWAD SoR 2013-2014 without any tender premium shall be adopted. The revisit or reagitation cannot be used as a way to avoid complying with the earlier order of this Court. The claim made by the petitioner is not maintainable. The petitioner can seek remedy only in terms of the contract. As per the Circular, dated 02.01.2018, the final payment can be made by TWAD Board only after the preparation and approval of the supplementary proposals for the additional items. Even though the petitioner is not willing to enter into the supplementary agreement, he has not approached the District Court till date and prayed for dismissal of the Writ Petition.

17.The learned counsel appearing for the third respondent relied on the following Judgments:

'(i) ***Noble Resources Limited Vs. State of Orissa and another*** reported in **(2006) 10 SCC 236**.

(ii) ***Bio Tech System Vs. State of U.P and others*** reported in ***2020 SCC Online All 1361***.

(iii) ***Bharat Coking Coal Limited and others Vs. AMR Dev Prabha and others*** reported in ***(2020) 16 SCC 759***.

(iv) ***Jagdish Mandal Vs. State of Orissa and others*** reported in ***(2007) 14 SCC 517***.

(v) ***In Oil & Natural Gas Corporation Limited (ONGC Limited) Vs. Saw Pipes Limited*** reported in ***(2003) 5 SCC 705***.

(vi) In ***Tata Motors Limited Vs. Brihan***

Mumbai Electric Supply & Transport Undertaking (BEST) and others reported in ***2023 SCC Online SC 671***.'

18.The petitioner filed a response to the written arguments filed by TWAD and stated that as per Clause 3 of the contract, the respondent derived the rates and it was accepted by the petitioner. The respondent has released 75% of payment at the concluded rate itself is an evident that the rates were settled. The employer in his letter dated 02.09.2015 substantiated the rates derived and subsequently after extracting the work reducing accepted rates. According to the petitioner, the amount payable was Rs.47,26,049/-, whereas according to the respondent, the amount to be recovered from the payment already released towards additional items was Rs.1,41,78,149/-. These payments cannot be deducted towards alleged over payment towards additional works. The respondent relied on a circular, dated 02.01.2018 and this is an internal circular for adoption by the officials. Further, the circular is on 02.01.2018 ie., after the completion of execution of additional works. The petitioner submits that the total value of Final bill payment and retention amount viz., Rs.2,21,50,006.00 and Rs.1,75,52,595.00 and works out to Rs.3,97,02,601/- as per the working sheet of the respondent, whereas the petitioner makes out a claim of Rs.3,95,83,959/- leaving the amount payable for additional items. The respondent is not at liberty to recover the disputed amount without adjudication from the entitled undisputed payment.

19.Heard the learned senior counsels appearing on either side and perused the materials available on record.

20.On perusal of the materials available on record, it is seen that as per Clause 16 of the Contract, if additional items that are not contemplated in the contract are to be executed, the Engineer in charge will execute the works either through the main contractor/firm or through any other agency. Payments for such works shall be made based on the rates derived by the Engineer in charge as per rules in force. Accordingly, the Chief Engineer is the employer. Engineer means the Executive Engineer or any other engineer appointed from time to time by the employer to act as an engineer for the purpose of the works broad under the contract. Engineer in charge means the executive engineer or any other engineer authorized by him the Executive Engineer is the Engineer in charge in this case. The Engineer in charge is the final authority in technical matters and payment consideration as per GCC Clause 3, the Authority of Engineer in Charge specifies that it should be accepted that the authority of the Engineer in charge shall be an integral part of the contract in the matters regarding the quality of materials, workmanship, removal of improper work, interpretation of contract drawings and specifications, mode and procedure of carrying out the works where the decision of the Engineer in charge shall be final and binding of the contractor. The Engineer in charge shall have absolute authority on all technical matters and payment considerations. The rates were available in the contract for SDR and DMR items, but in the case of DMR, there was no rate available for depths from 0-2 m and 2-3 m. As per the contract, rates can be derived from similar items of work in the accepted agreement, based on the agreement condition and the Engineer in charge (Executive Engineer) derived the rates from the accepted agreement and the derived rates accepted by the contractor and work was also executed and completed and the scheme was also put to public beneficial use. The Engineer in charge ie., the Executive Engineer has finalized the rates as a depth of 0 m to 2 metres at the rate of Rs.1818/- per cu.m and for a depth of 2 m to 3 meters at the rate of Rs.1863/- per cu.m. The derived rates by the Executive Engineer have also been accepted by the petitioner without any hesitation in a letter dated 26.06.2014 addressed to the Executive Engineer, who is the Engineer in charge. As there was acceptance of rates by both the parties constituted a contract as there was an offer and acceptance and consensus ad idem between both the parties and hence a concluded contract was arrived at. Even though there was no supplemental agreement entered into, the letter arrived at the Engineer in charge and was accepted by the petitioner additional works were carried out and the respondents also released 75% of the payments and did not release the balance 25%. The contract does not provide for withholding of 25% of the value of work done which is against the agreement GCC clause 42-payment schedule, the respondent shall release the same. According to the petitioner, the balance of 25% payment was not paid by the respondents, who took a belated hypertechnical stand that a supplemental agreement was not entered into between the parties. Clause 34 reads that if these rates do not apply to the additional works ordered to be carried out, then prior to execution of the additional works ordered to be carried out, then prior to execution of the additional work, a rate for such work shall ordinarily be agreed upon and entered in a supplemental schedule and signed by both the Engineer in charge and the contractor/firm.

21.According to the petitioner, payment towards works executed (undisputed/admitted) was a sum of Rs.2,22,86,363/- and the balance refund of retention amount is Rs.1,72,97,596/- (undisputed/admitted) and payment towards additional works ie., 25% balance of Rs.47,26,050/- (admitted). According to the respondents, the Writ Petition is not maintainable. As per the agreement, the redressal forum is the civil forum and the petitioner has to approach the civil Court only. According to the respondent, they had overpaid by paying 75% as the rates agreed by them during the works were higher than their schedule of rates and hence, there is no supplemental agreement was entered into.

22.The Hon'ble Supreme Court in ***2023 (2) SCC 703 [MP Power Vs. Sky Power]*** has specifically held that the relief of seeking payment of amounts due from the State is maintainable. Only if there is a genuine dispute and that too if the dispute surrounds the demystifying of documents, the Court relegate the party to a civil suit. As there is no supplemental agreement has been entered into, but as per the letter of the engineer-in-chief, the petitioner agreed to execute the additional works at the rates derived by the executive engineer from similar items in the BOQ. The executive engineer had already issued site orders directing the petitioner to execute the works. The petitioner completed the works to the respondents and the respondents also released 75% of the agreed payment amount between the period 2015 and 2017 the balance 25% was not paid and the respondent took a hyper-technical stand that a supplemental agreement was not entered into between the parties.

23.It is to be seen that the respondents have made the petitioner to execute the additional works and then breach the promises without any basis by stating that the petitioner himself had approached the dispute redressal committee and the committee has rejected the claim made by the petitioner. The grievance raised before the redressal committee on 28.02.2022 was only to intervene and sort out the issues regarding the release of payment, whereas, the redressal committee vide order, dated 21.02.2023 confirmed the earlier order dated 06.04.2017. There should be a decision resolving the pending payment, but the redressal committee has passed an order stating that the rate which was given by the respondents and accepted by the petitioner is binding on both the petitioner and the respondents. The rates were derived by the respondents and agreed upon by the petitioner. If the respondent had arrived at the rates as that of now at the time of execution itself the petitioner would have avoided carrying out this work. The action of the respondents in revising the rates specifying as 'the rates are on the higher side' after concluding the rates and extracting the work is arbitrary.

24.According to the petitioner, as per clause 43.1, retention has to be released after the guarantee period of two years has gone by from the completion and commissioning on 30.06.2017 and till date, no amount has been paid by the authorities. When the rate was derived by the Engineer in charge and was accepted by the petitioner on 26.06.2014, the Chief Engineer also derived the rates from the rates available for similar items in the contract and the petitioner states that it is not mandatory to enter into a separate supplemental agreement. The rates were settled with mutual consent and there is no dispute in the rates between contractor and employer is not accepted by the respondents. The Chief Engineer, vide letter dated 02.09.2015 has stated that the supplemental proposal as per B.P.No.27/COM WING/dated 05.02.2002 (item Nos.7a, 7b & 7c does not arise) since the rates for similar items of works in the accepted agreement are available. The same Chief Engineer after becoming Engineering Director, after 20 months on 06.04.2017 stated that 'cannot be deemed to be similar item as the work' in the redressal committee meeting and the same was rejected and the redressal committee has no jurisdiction to fix or refix prices. Hence, the petitioner seeks the following reliefs:

a) 25% payment was withheld only for getting approval from the higher authorities which is the internal procedure of the Department and not binding on the parties.

b) As per clause 42 payment schedule, all the payment has to be released on completion of the maintenance period on 31.12.2017, which amounts to Rs.2,22,86,363/-. There is no dispute on this. This Rs.2,22,86,363/- is an undisputed amount.

c) As per clause 43.2, 2.5% out of the total 5% of the retention amount has to be released on 31.12.2017 but has not yet been released which amounts to Rs.86,48,798/-, which is an undisputed amount.

d) As per clause 43.1, the retention money has to be released after the guarantee period of 2 years from the completion and commissioning that is after 30.06.2018, which amounts to Rs.47,26,049/-.

e) The balance amount yet to be released for additional work amounts to Rs.47,26,049/-. Since the rates were settled this is an undisputed amount. But the respondent is not honouring the settled rate and imposing a recovery of Rs.1,41,78,149/- and attempting to recover. If at all any dispute ie., only regarding the payment of Rs.47,26,049/- or regarding the recovery proposal of Rs.1,41,78,149/- by the respondents.

25.The petitioner states that the respondent can release the undisputed amount of Rs.3,95,83,959/- ie., final bill + retention with interest from the date of entitlement at the rate of 21% per annum till the date of realization of the payment. Since the amount has been withheld, the same shall be released forthwith.

26.The learned counsel appearing for the respondents would submit that the supplemental proposal will be approved by the competent authority and the supplemental agreement will be entered between the petitioner and the Chief Engineer (parties of the original agreement). Thereafter, the concerned Executive Engineer will prepare the Authorised Extra and Omission Statement (AEO Statement) and the same needs to be approved by the concerned authority. The final bill will be prepared and payment will be released to the Petitioner. Hence the above Writ Petition is premature and submits that the averments in paragraphs 1 to 4 are formal in nature and the petitioner is put to strict proof of the same. The averments in paragraphs 5 and 6 have been suitably rebutted in the earlier paragraphs. Regarding the averments in paragraph 7, it is submitted that for additional items of work executed by the petitioner, the derived rates are adopted taking into account the dense medium rock rates available in the agreement in 3rd depth of 3 m to 4 m and 4th depth of 4 m to 5 m. The petitioner has given a consent letter to execute the additional items at derived rates. The payment at 75% of the derived rate value has already been released to the petitioner subject to the approval of the supplemental proposal by higher authorities. Payment made in the running bills LS VIII & part LS XVI & part on various dates in order to achieve the progress without any financial hindrance. With respect to averments in para 8 and 9, the petitioner is put to strict proof of the same.

27.According to the respondents, only upon finalising the supplemental agreement, the petitioner contractor is eligible for the balance 25% of the value. In this case, due to a dispute in the derived rate, the supplemental proposal has not been approved and the supplemental agreement has not been finalized. The dispute redressal committee, after having a detailed discussion, has decided not to accept the contractor's claim and allowed the claim to the extent permitted as per the schedule of rates for the year 2013-2014.

28.Further, according to the respondents, the petitioner filed a Writ Petition in W.P.No.16018 of 2018 and this Court, by order, dated 07.07.2020, directed the petitioner to work out its remedy before the competent District Court as per the terms of agreement and the Writ Petition is hit by principles of res judicata and this has become final and he has to approach the competent civil Court as directed by this Court. According to them, there is no such amount as an 'undisputed amount' and the sum due to the petitioner will be settled only after entering into a supplementary agreement. Even if the petitioner is unable to quantify the 'undisputed amount', the petitioner cannot maintain the same and he has to approach the competent civil Court. Further, according to the respondents, it is for the Tamil Nadu Water Supply and Drainage (TWAD) Board to resolve the issue, prepare the supplemental proposals and regulate the payment as decided by the dispute redressal committee.

29.This order was passed by the dispute redressal committee long ago and till date, they have not entered into a supplemental agreement for the extra work done, this Court is of the view that the TWAD Board cannot take the law into their own hands and state that the redressal committee having detailed discussions decided not to accept the contractor's claim and allowed the claim to the extent permitted as per the schedule of rates for 2013-2014. However, on perusal of the records it is seen that till date, the respondents have not come out with appropriate figures and it is not known how they are entitled to retain the said amount without releasing the retention amount. Further, if the TWAD Board takes a stand that they will resolve the issue regarding the supplemental proposals and regular payment as decided by the dispute redressal committee has also been put forth before this Court to show what the amount will be derived at and what is the amount to be paid to the petitioner is also not known. Then how the respondents can state that the disputed amount is not quantified and how do the authorities expect the petitioner to go and approach the civil Court.

30.Hence, this Court is of the view that the third respondent/the Executive Engineer, TWAD Board has to prepare the supplemental proposal and proceed further in the manner known to law in this regard. The writ petitioner is entitled for the amount which he should be allowed to receive, after the execution of work as per the original contract which has to be quantified by the authorities, within a period of three months from the date of receipt of a copy of this order. It is left open to the parties to proceed further thereafter in accordance with law.

31.With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

16.10.2024

Index : Yes/No
Internet : Yes/No
ps

To

1.The Chief Engineer (A/C),
TWAD Board,
No.30, Bharathi Park Road,
Siruvani Nagar,
Coimbatore – 641 043.

2.The Superintending Engineer,
TWAD Board,
Coimbatore.

3.The Executive Engineer,
TWAD Board,
Sewerage Division,
Pollachi.

V.BHAVANI SUBBAROYAN, J.

ps

W.P.No.2673 of 2023

16.10.2024