



W.P(MD)No.718 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

DATE : 18.04.2024

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.718 of 2023

and

W.M.P.(MD)No.722 of 2023

M/s.Consolidated Construction
Consortium Limited.,
rep.by its Authorised Signatory,
Mr.J.Varusai Mohamed

... Petitioner

Vs.

- 1.The Managing Director,
TWAD Board,
Chepauk, Chennai.
- 2.The Dispute Redressal Commission,
TWAD Board, Chepauk, Chennai.
- 3.The Chief Engineer,
TWAD Board, Southern Region,
Ganesh Nagar, Madurai.
- 4.The Superintending Engineer,
TWAD Kovilpatti Circle,
Kovilpatti.



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5.The Executive Engineer,
TWAD Board, Project Division,
Dr.No.82/4, Old Trunk Road,
Sattur – 626 202,
Virudhunagar District.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus to call for the records pursuant to the impugned order passed by the third respondent in his proceedings bearing Lr.No.F.Aruppukkottai CWSS-pkg III/DO II/2022 dated 20.12.2022 and quash the same and consequently direct the respondents 1, 3 and 5 herein to calculate the price variation from the date of tender submission as per Clause 49.1 of the tender and pass the price variation bills from January 2022 to till date along with 18% interest p.a towards the delayed payment and pass any such further or other orders as this Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.M.Ajmalkhan, Senior Counsel
for Mrs.Porkodi Karnan

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General
assisted by Mr.B.Vijayakarhikeyan



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ORDER

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Heard both sides.

2.The writ petitioner is a company registered under the Indian Companies Act. It had undertaken various contractual works for many government departments. The work “Combined Water Supply Scheme to Aruppukottai, Sattur and Virudhunagar Municipalities in Virudhunagar District - Package -III” was awarded by TWAD Board to the petitioner vide agreement dated 31.12.2020. The petitioner wrote to the respondent Board for reckoning the quarter when the bid was submitted for the purpose of calculating price adjustment. The third respondent informed the petitioner vide communication dated 20.12.2022 that the quarter in which the agreement was signed will be the reckoning basis. Challenging the same, the present writ petition came to be filed.

3.The TWAD Board filed counter affidavit controverting the averments set out in the affidavit filed in support of the writ petition. In the alternative, it was contended that the petitioner has to be non-suited for not exhausting the remedy before the Dispute Redressal Committee.



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4.On 14.03.2024, I directed TWAD Board to convene the Dispute Redressal Committee and take a call in the matter. Pursuant to the said direction, the Committee met on 25.03.2024 and heard the petitioner. It was concluded that the petitioner's request to allow the price adjustment clause to operate from the quarter when the bid was submitted cannot be accepted. The Committee stood by the order impugned in the writ petition.

5.The learned Senior Counsel appearing for the petitioner took me through the averments set out in the affidavit filed in support of this writ petition and also the materials enclosed in the typed set of papers. He read out the relevant clauses in the agreement as well as the tender document and contended that the petitioner's case deserves to be accepted. He relied on the decisions of the Hon'ble Supreme Court reported in (2021) 16 SCC 35 and (2023) 8 SCC 240 in support of his contentions that this writ petition is maintainable.

6.The learned Additional Advocate General appearing for TWAD Board submitted that the petitioner is obliged to go to the civil court and



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that this writ petition is not maintainable. He relied on the decisions of the Hon'ble Supreme Court reported (2002) 1 SCC 216 and (2015) 7 SCC 728 in support of his contention that monetary claims arising out of breach of contract are required to be determined on the basis of evidence led in a civil suit. He pointed out that from the sequence of events, it can be seen that it was the petitioner who was responsible for the agreement not being entered into in the third quarter. By making an unreasonable request that a special purpose vehicle (SPV) will be the party to the agreement, the petitioner needlessly delayed the finalisation of the contract. Having signed with open eyes on the dotted lines, the petitioner cannot wriggle out of the consequences flowing therefrom. He pressed for dismissal of this writ petition.

7.I carefully considered the rival contentions and went through the materials on record. The TWAD Board issued notification inviting tenders from eligible persons for carrying out the petition mentioned work. The petitioner submitted their tender on 20.02.2020. The tenders were opened on the same day. After completing technical evaluation, the price bids were opened on 18.06.2020. The petitioner was declared as



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the successful bidder on 25.09.2020. The work order was issued on 28.09.2020. On 29.09.2020, the petitioner wrote to the third respondent that they proposed to execute the project through a Special Purpose Vehicle (SPV) for better accounting purpose and called upon the Board to mention the SPV name in the work order. This was rejected on 19.12.2020 and the petitioner was called upon to conclude the agreement. Immediately thereafter, the petitioner submitted their performance guarantee and complied with the other formalities. On 23.12.2020, the petitioner sent communication to that effect to the third respondent. On 31.12.2020, agreement was entered into between the parties.

8.The case of the petitioner is that the petition mentioned contract is not a “fixed-rate contract”. It contains price adjustment clause. The respondents have to honour the price escalation bills also. What should be the basis for reckoning price escalation is the question calling for consideration. The petitioner would claim that the quarter in which the bid was submitted should be the basis. The Board would claim that the quarter in which the agreement was signed should be the basis. It is not in dispute that the bid was submitted in February 2020 (first quarter)



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whereas the agreement was signed on 31.12.2020 (last quarter). The answer to this issue turns on the interpretation of the relevant clause.

9. Before I undertake the said exercise, the issue of maintainability of the writ petition must be settled. No doubt, the case-laws relied on by the learned Additional Advocate General throw considerable doubt on the maintainability of the writ petition. There has been a march of law. The precedents cited by the learned Senior Counsel appearing for the writ petitioner embolden me to entertain the writ petition and adjudicate the issue on merits. In ***Unitech Limited and other vs. Telengana State Industrial Infrastructure Corporation (TSIIC) (2021) 16 SCC 35***, it was held as follows :

“39.5. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of State power or a misuse of authority.

39.6. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well settled that the



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jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does (*sic* not) oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.”

A three Judges bench of the Hon'ble Supreme Court in ***Madras Aluminium Company Limited v. Tamil Nadu Electricity Board and anr (2023) 8 SCC 240***, held that the fact that a dispute falls into the contractual realm does not relieve the State of its obligation to comply with the requirements of Article 14. The leading case on the subject i.e., ***Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212*** was followed. It is relevant to note here that the precedents relied on by the learned Senior Counsel for the petitioner involve monetary claims. I, therefore, hold that this writ petition is maintainable.

10.Let me now come to the relevant clause in the contract. Clause 49.1 (ix) is as follows :

“Price adjustments will be calculated once in a quarter as per the specified formula from the last date of submission of bid up to the end of agreement period



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provided, if the agreement is signed within the minimum specified time, failing which, the price variation will be applicable from the date of agreement only, based on the whole sale price indexes of RBI. The quarter would be reckoned with reference to the quarter of the calendar year in which the last date on bid submission is fixed. In case of delayed agreement, the quarter in which the Agreement is signed will be reckoned for the purpose of calculation of Price Adjustments.”

Any contractual clause will have to be interpreted and applied so as to effectuate the intention of the parties. Clause 49 contains price adjustment clause. There are as many as nine sub-clauses. Sub-clause (ix) provides that the base quarter for reckoning will be that in which the last date of submission of bid falls. This will be the position provided the agreement signed within the minimum specified time. Otherwise, the price variation will be applicable from the date of agreement only.

11. Though the tender was submitted in the first quarter, the price bid was opened only in the second quarter. This delay was because of the onset of Covid pandemic. The work order was issued in the third quarter ie., 28.09.2020. The agreement was entered towards the close of fourth



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quarter. The stand of the respondents is that the agreement would have been signed in the third quarter itself and that the petitioner's conduct contributed to the delay. My attention is drawn to the letter dated 28.08.2020 written by the petitioner proposing creation of a special purpose vehicle. This was duly acknowledged by the office of the Managing Director of TWAD Board. After the work order was issued, once again, the request was reiterated on 29.09.2020. The respondents took close to 80 days to reject this request. If the petitioner's request was so preposterous, it could have been turned down then and there and the petitioner could have been called upon to execute the agreement. The delay on the part of the respondents in negating a genuine request is what that took the reckoning base from the third quarter to the fourth quarter. As already pointed out, it is not as if the petitioner made such a proposal for the first time on 29.09.2020. Even during the price negotiation stage, such a request was made in writing. The respondents cannot take the stand that they were taken by surprise.

12.Rule 30(4) of the Tamil Nadu Transparency in Tenders Rules, 2000 is as follows :



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“Within such reasonable time as may be indicated in the tender documents, the tenderer whose tender has been accepted will be required to execute the contract agreement in the prescribed format.”

Clause 34 and Clause 35 of the bid document stipulate that within 28 days from the date of the letter of acceptance, the successful bidder shall deliver to the employer a performance security and sign the agreement. In this case, the petitioner had complied with the requirements. Even the letter dated 29.09.2020 merely requests TWAD Board to mention the SPV name in the work order. It was not stipulated as a counter condition.

13.Clause 49.1(ix) states that price variation will be based on the wholesale indexes of RBI. I repeatedly queried the officials assisting the learned Additional Advocate General if the index will be an undulating curve. To my surprise, the answer was in the negative. It was stated that it will be an upward graph. If the last date of submission of bid is reckoned as the base, it would favour the tenderer. If the agreement date is the base, it would favour the department. The clause stipulates that the choice of reckoning will be determined by the delay factor. If the tender had contributed to the delay, the quarter in which the agreement is



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signed will be reckoned for the purpose of calculation of price adjustments. The aforesaid clause will have to be understood only in this manner. Otherwise, the department by delaying the signing of the agreement can conveniently pass on the resulting burden to the contractor. The department cannot be permitted to take advantage of their own wrong. That is why, the learned Additional Advocate General was at great pains to emphasise that the delay took place on account of the petitioner. If the clause is to be understood literally and mechanically, there was no need for putting forth such an argument.

14.TWAD Board is a State instrumentality falling within the scope of Article 12 of the Constitution of India. The petitioner had offered his tender in February 2020 itself. He would have tailored his bid by taking into account the price position that prevailed in January and February 2020. He was not responsible for the delay in finalising the price bid. Even according to the respondents, the price bid was opened on 08.06.2020. On account of price negotiations, the matter was further delayed and the petitioner was declared as successful bidder only 25.09.2020. The work order was issued on 28.09.2020. Thus, full seven



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months had elapsed. If the tender process had been expeditiously finalised, the reckoning quarter for price adjustment would have been in the first quarter of 2020. On account of the reasons mentioned above, work order could be issued in the third quarter of 2020. At least, this should have been the reckoning basis. By delaying the response when the petitioner proposed creation of Special Purpose Vehicle (SPV), the respondents had dragged the matter to the fourth quarter. But the petitioner had begun to carry out the contractual works even October 2020. To a specific question from the court, the officials assisting the learned Additional Advocate General replied that even before the agreement was entered into, based on the work order dated 28.09.2020, the petitioner was called upon to begin implementation of the project. Thus, on the own showing of the respondents, the work order was accorded importance compared to the agreement.

15.It is true that the petitioner had signed the agreement. But the question of applying the principle of estoppel will not arise at all. The case of the petitioner is that since the delay is not attributable to the petitioner, Clause 49.1(ix) must be applied in support of the petitioner's



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contention. Since I have found that both the parties had treated the work order as the basis, I hold that the third quarter of 2020 shall be the reckoning basis for calculating the price variation.

16.In this view of the matter, the impugned order is set aside. The writ petition is allowed and the respondents are directed to apply Clause 49.1 of the tender in the manner mentioned above and pass the price variation bills accordingly. If the bills are settled within twelve weeks from the date of receipt of copy of this order, it will not carry interest. Otherwise, it will carry interest @ 6% p.a from the date when they became due. No costs. Connected miscellaneous petition is closed.

18.04.2024

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
Skm

Issue order copy on 14.08.2024



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To:-

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G.R.SWAMINATHAN, J.

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