

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

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Miscellaneous Appeal No.2240/2020

M/s. Suman Infrastructure Pvt. Ltd.

Vs.

State of M. P. and Others

Miscellaneous Appeal No.2231/2020

M/s. Suman Infrastructure Pvt. Ltd.

Vs.

State of M. P. and Others

Indore, dated 09/10/2020

Mr. Shekhar Sharma, learned counsel for the appellant(s).

Ms. Kirti Patwardhan, learned Panel Lawyer for the respondent / State.

Regard being had to the similitude in the controversy involved in the present cases, the miscellaneous appeals were analogously heard and by a common order, they are being disposed of by this Court. Facts of Miscellaneous Appeal No.2240/2020 are narrated hereunder.

02- The present appeal has been filed by the appellant / plaintiff being aggrieved by order dated 06/03/2020 passed in RCS-A/410/2017 by IX Additional District Judge, Ujjain by which the application preferred under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 has been dismissed.

03- The facts of the case reveal that Public Works Department, a Department of State of Madhya Pradesh invited tender for

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construction of *Kiloli – Lakhesra* Road and the appellant was found to be eligible being “L1”. An agreement was executed between the State of Madhya Pradesh and the appellant followed by work order dated 10/05/2010. The appellant has stated that he has deployed resources including manpower and machinery for completion of work as it was required to be completed within 12 month including rainy season.

04- It has been further stated that the State Government has not made available funds as per the terms and conditions of the agreement and a Letter of Request was sent to respondent No.5 – Executive Engineer (B/R) on 28/02/2011. The appellant has stated that various obstacles and hindrance were in existence. Land was not made available, mining clearances were not granted and in those circumstances, various requests were made to the respondent No.5 for extension of time. A request was made on 06/05/2011 for extension of time up to 06/06/2012 and the time was extended only up to 31/03/2012.

05- Up to 31/12/2012, the appellant has completed the work of about Rs.160 Lakhs and he again applied for extension of time, however, no order was passed in respect of extension of time and no payment was made in respect of executed work. The appellant made a request to the Department for releasing the payment *vide* letter dated 30/05/2011, 23/08/2011 and 17/09/2011, however, nothing was done in the matter. Letters were written to remove encroachments and

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again nothing was done and finally a notice was issued on 06/12/2012 under Clause 3(c) for terminating the contract.

06- The appellant did submit a reply to the show cause notice, however, *vide* order dated 14/02/2013 the contract was terminated in exercise of power conferred under Clause 3(a) and 3(c) of the contract.

07- The appellant *vide* letter dated 03/04/2013 requested the Superintending Engineer, Ujjain Division, Ujjain for revival of the agreement, however, it was not revived. On 21/04/2014 a similar request was made. The appellant kept on writing to the respondents and without making funds available the contract was terminated. The appellant submitted an appeal on 21/07/2014 against termination, however, in spite of repeated requests, the appeal was not decided by respondent No.4 and the appellant was informed by letter dated 31/05/2016 that hearing of the appeal will take place on 05/06/2016 but nothing was informed to the appellant thereafter.

08- A letter was also issued by respondent No.3 – Chief Engineer, Public Works Department, Ujjain Zone on 10/03/2016 to adjust the earnest money and security deposits and to recover the remaining amount the other ongoing contracts. The respondent No.5 has issued a letter on 19/05/2016 for recovery of the money by issuing the RRC and the appellant finally came before this Court by filing a writ petition i.e. Writ Petition No.1032/2017 and an interim order was passed on

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20/02/2017. This Court by an order dated 22/02/2017 has directed the respondent No.4 to decide the appeal within a period of 60 days and the appeal was finally decided by an order dated 05/08/2017.

09- The present appellant thereafter preferred another writ petition i.e. Writ Petition No.6105/2017 before this Court, however, this Court by an order dated 13/10/2017 has directed the appellant to file a civil suit or to take recourse of arbitration proceeding.

10- A civil suit was preferred by the appellant along with an application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908. Reliance was placed upon a judgment delivered by this Court in the case of **B. B. Verma and Ors. Vs. State of Madhya Pradesh and Ors.** reported in **(2007) 4 MPLJ 610**, however, the Court below has dismissed the application preferred under Order XXXIX Rule 1 and 2 by an order dated 06/03/2020. The present appeal is arising out of order dated 06/03/2020.

11- Learned Government Advocate appearing in the matter has vehemently opposed the contentions and grounds raised by the present appellant. His contention is that the amount which is outstanding and due has to be recovered from the appellant without waiting for the final decision in the civil suit. It has been argued that the appellant has abandoned the work, he did not complete the work in time and therefore, the State Government is justified in rejecting the appeal preferred by the appellant and the trial Court was also justified

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in dismissed the application under Order XXXIX Rule 1 and 2 of the CPC.

12- In the present case, the issue involved is whether at this stage recovery can be done or not in the peculiar facts and circumstance of the case. This is the third visit of the petitioner before this Court. The petitioner did avail the remedy available as per the terms and conditions of the contract, however, as his appeal was not being decided, this Court by an order dated 16/08/2017 passed in Writ Petition No.1032/2017 has passed the following order:-

“Shri Yatish Laad, learned counsel for the petitioner.

Shri Pushyamitra Bhargav, learned Public Prosecutor for the respondents/State.

Heard.

This writ petition has been filed against the order dated 30/01/2017.

It is not in dispute that an appeal against the impugned order of termination of agreement is pending before the learned appellate authority, therefore, we grant one month time to the respondents to decide the appeal pending before respondent No.4 and submit its compliance report supported with the affidavit of respondent No.4.

In the meanwhile, the liberty granted vide the interim order passed on 20/02/2017 shall continue for a period of one month or till the disposal of the appeal, which ever is earlier.

With the aforesaid, this petition stands disposed of.”

The respondent No.4 therein the Superintending Engineer was directed to decide the appeal and an interim order was passed restraining the recovery.

13- After dismissal of the appeal a second writ petition was preferred i.e. Writ Petition No.6105/2017 and the Division Bench of

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this Court in the aforesaid case in paragraphs No.12, 13 and 14 has held as under:-

“12. In the present case, the petitioner is not seeking to enforce any statutory right of theirs nor he is seeking to enforce any statutory obligation cast upon the respondents. Indeed, the very resort to Article 226 of the Constitution of India is misconceived.

13. However, it is open to the petitioner, if it so chooses to either raise a dispute by filing an application under the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, if the same is in time, or to approach Civil Court, according to law, as the case may be. In the circumstances of the case, no order as to costs.

14. For the above mentioned reasons, Writ Petition No.6105/2017 filed by the petitioner is not maintainable and is accordingly dismissed. No costs.”

The petitioner has thereafter, preferred a civil suit along with an application under Order XXXIX Rule 1 and 2 of the CPC and the same has been dismissed.

14- The Full Bench of this Court in the case of **B. B. Verma** (Supra) has held as under:-

“**3.29.2.** Except where otherwise specified in the contract, for claim valued at Rs. 50,000/- or more the decisions of the S.E. of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specification, designs, drawings, and instructions hereto before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final provided that the S.E. shall before giving his decision in writing in the matter give an opportunity of being heard, to the parties to the contract.

If any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days after receiving notice of such decision may refer such dispute to the Arbitration Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1982 (No. 2 of

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1983).

3.38.1. Recovery of dues from the contractor.-

Whenever any claim against the contractor for the payment of a sum or money arises out of or under the contract, Government shall be entitled to recover such sum by appropriating, in part or whole, the security deposit of the contractor and to sell any Govt. promissory notes etc. forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Govt. Should this sum be not sufficient to cover the full amount recoverable from the contractor then it shall be recovered from him as arrears of land revenue.

A perusal of Clause 4.3.29.2 of the conditions of contract quoted above would show that the decision of the S.E. of the Circle for the time being in respect of questions and disputes mentioned therein 'or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract...or otherwise concerning the work of execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be final'. Hence, the decision of the Divisional Officer of the Executive Engineer under Clause 4.3.3.3 of the conditions of contract quoted above to have the unexecuted work completed by another contractor and claim the expenses which may have been incurred in excess of the sum which would have been paid to the original contractor is subject to the final decision of the S.E. if the contractor raises a dispute on such claim made by the Divisional Officer or the Executive Engineer. The second para of Clause 4.3.29.2 further stipulates that if any party to the contract is dissatisfied with the final decision of the S.E. in respect of any matter, he may within 28 days after receiving notice of such decision refer such dispute to the Arbitration Tribunal constituted under the Adhinyam. Hence, any decision taken and any amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not final but subject to the decision of the S.E. and any decision of the S.E. on these aspects is also subject to the decision of the Tribunal under the Adhinyam, if referred to the Tribunal by any party to the contract. The result is that the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not become a sum due from the contractor until the dispute is decided by the S.E. on an appeal made before him from the decision of the Executive Engineer or the Divisional Officer, or until the dispute is adjudicated by the Tribunal under the Adhinyam where the

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decision of the S.E. is challenged by way of reference.

Further, the Proviso to Section 7-B of the Adhiniyam states that if the Final Authority, namely S.E. fails to decide a dispute within the period stipulated therein, a petition to the Tribunal under Section 7 can be made by a party. Thus, when an appeal against the decision of the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 of the conditions of contract is not decided by the S.E. and a party files a reference under Section 7 of the Adhiniyam before the Tribunal, the amount claimed by the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 will not be due and therefore not recoverable from the contractor as arrears of land revenue under Clause 4.3.38.1 of the conditions of contract until the Tribunal adjudicates the dispute raised by the contractor.

In the two decisions in Ch. Chandra Shekhar v. State of M.P. and Ors. and Seth Mohanlal Hiralal v. State of M.P. and Anr. (supra), the Division Bench lost sight of the fact that the decision of the Executive Engineer or the Divisional Officer under Clause 4.3.3.3 and other Clauses of the conditions of contract is subject to the final decision of the S.E. and the decision of the S.E. is subject to the award of the Tribunal where a reference is made to the Tribunal against the decision of the S.E. or where the S.E. fails to decide the dispute. In fact, in the two decisions of the Division Bench, there is no reference whatsoever to the Clause providing for decision by the S.E. or by the Tribunal under the Adhiniyam.

In the two decisions of the Division Bench in Ch. Chandra Shekhar v. State of M.P. and Anr. and Seth Mohanlal Hiralal v. State of M.P. and Anr. (supra), there is also no reference to the decision of the Supreme Court in Union of India v. Raman Iron Foundry (supra). As we have seen, in Union of India v. Raman Iron Foundry (supra), Clause 18 of the general conditions of the contract which was titled 'Recovery of Sums Due' provided inter alia that whenever any claim for payment of a sum or money arises against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part the security if any deposited by the contractor and in the event of security being insufficient and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser. The Supreme Court, interpreting Clause 18 of the General Conditions of Contract, held that under Clause 18, the purchaser cannot recover the amount as claimed without resorting to arbitration by appropriating sums due to the contractor under the same contract or under other contracts and if the claim of the purchaser is not well founded and the appropriate made by him is therefore not justified, the contractor can always resort to civil suit or arbitration and it is only when the adjudication is made by the Civil Court or the

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arbitrator and the breach of the contract is established and the amount of damages decreed that the amount becomes due and recoverable from the contractor.

In the two decisions of the Division Bench in Ch. Chandra Shekhar v. State of M.P. and Ors. and Seth Mohanlal Hiralal v. State of M.P. and Anr. (supra), there is also no reference to the decision of the Supreme Court in State of Karnataka v. Rameshwar Rice Mills Thirthahalli (supra), in which Clause 12 of the agreement with the State of Mysore and a private person for purchase of paddy under the Paddy Procurement Scheme, 1959 inter alia provided that any amount that may become due or payable by the first party to the second party under any part of the agreement shall be deemed to be and will be recovered from the first party as if they are arrears of land revenue and the Supreme Court held that the terms of Clause 12 of the agreement do not have scope for liberal construction being made so as to confer power on the Deputy Commissioner to adjudicate upon disputed questions of breach as well as to assess the damages arising from the breach. The Supreme Court further held that the officers of the State Government which is a party to the agreement, cannot be an arbiter in his own cause and interest of justice and equity require that where a party to a contract disputes the committing of any breach of conditions, the adjudication should be by an independent person or body and not by the other party to the contract.

After considering the aforesaid decisions of the Supreme Court in Union of India v. Raman Iron Foundry and State of Karnataka v. Rameshwar Rice Mills Thirthahalli (supra), we have no doubt in our mind that Clause 4.3.38.1 does not confer any power on the State Government or its officers to recover any amount that is disputed by the contractor as payable under the contract to the State Government prior to the decision of the S.E. or of the Tribunal under the Adhiniyam.

In the decision of the Division Bench in Ch. Chandra Shekhar v. State of M.P. and Ors. (supra), a reference has been made to Sections 146 and 147 of the M.P. Land Revenue Code, 1959 (for short 'the Code') to show that the procedure has been prescribed for recovery of amount as arrears of land revenue. Section 146 of the Code provides that Tehsildar or Naib-Tehsildar may cause a notice of demand to be served on any defaulter before the issue of any process under Section 147 for the recovery of an arrear and Section 147 of the Code mentions the different processes by which arrear of land revenue payable to the Government may be recovered by the Tehsildar. These two provisions, provide the procedure for recovery of arrear of land revenue but does not provide whether any amount under any contract between the State Government and a private person can be recovered as arrear of land revenue. Section 155(b) of the Code provides that 'all moneys falling due to the State Government under any grant, lease or contract which provides

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that they shall be recoverable in the same manner as an arrear of land revenue' may be recovered in the same manner as an arrear of land revenue if the contract provides as such. Obviously, where the contractor disputes an amount claimed by the State Government or any officer on its behalf as payable by the contractor to the State Government, such an amount cannot be said to be due to the State under the contract and cannot be recovered as arrear of land revenue in accordance with the terms of the contract and Section 155(b) of the Code.

We may now deal with the contention of Mr. Shukla that under Clause 4.3.3.3 of the conditions of contract, the Executive Engineer or the Divisional Officer does not assess and recover any damages but expenses which may be incurred in excess of the sum which would have been paid to the original contractor in case the unexecuted part of the work is completed by another contractor. This contention of Mr. Shukla over-looks the fact that the additional expenses incurred by the State Government for getting the unexecuted part of the work completed by another contractor which are sought to be recovered under Clause 4.3.3.3 are really in the nature of damages. Section 73 of the Indian Contract Act, 1872 provides that when a contract is broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it but such compensation will not be given for any remote and indirect loss or damage sustained by reason of the breach. Where therefore a contractor does not complete the work entrusted to him under the contract and the unexecuted part of the work is entrusted to another contractor for completion and the Government incurs additional expenses for having the work completed by another contractor over and above the expenses which have been paid to the original contractor, the additional expenses sought to be recovered by the Government are nothing but damages within the meaning of Section 73 of the Indian Contract Act, 1872. The contention of Mr. Shukla that the additional expenses sought to be recovered under Clause 4.3.3.3 of the conditions of contract are not really damages is therefore misconceived.

We, therefore, hold that the view taken by the Division Bench in the two decisions in Ch. Chandra Shekhar v. State of M.P. and Ors. and Seth Mohanlal Hiralal (supra), that under Clause 4.3.38.1 or any other similar Clause in the conditions of contract, a claim against the contractor for payment of sum or money under the contract can be recovered by the Government from the contractor as arrears of land revenue in accordance with the M.P. Land Revenue Code, 1959 without a decision of the S.E. or the Tribunal under the Adhinyam where the contractor disputes the amount before the S.E. or the Tribunal under the Adhinyam is not correct in law and the two decisions of the

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Division Bench on this point are over-ruled.

The writ appeals will now be placed before the appropriate Division Bench for hearing on merits.”

Keeping in view the judgment delivered in the aforesaid case, as there is no adjudication so far in respect of the amount to be recovered and the civil suit is still pending, the prayer made by the appellant appears to be a genuine prayer.

15- In a similar case i.e. Writ Petition No.4205/2017 (M/s. Saneer Infrastructure Pvt. Ltd. Vs. The State of Madhya Pradesh) a writ petition was preferred challenging recovery and the recovery was being made from other contract of the Contractor therein / by issuing recovery certificate. The Division Bench of this Court on 21/06/2017 in Writ Petition No.4205/2017 has passed the following order:-

“Shri Brian D'Silva, Senior Advocate with Shri Abhijeet Awasthy, Advocate for the petitioner.

Shri Deepak Awasthy, Govt. Advocate for the respondents-State.

Learned counsel for the respondents-State seeks some time to file return. He may do so within three weeks. Learned counsel for the petitioner relies upon an order dated 20.4.2015 passed by this Court in W.P. No.5025/2015 whereby an interim order was passed that no coercive steps for recovery of the amount in pursuance to the Revenue Recovery Certificate be taken. The claim of the petitioner is that such interim order, pending hearing of the matter, in the matters raising similar question, should be granted in favour of the petitioner.

The question: as to whether the State is competent to recover the amount either by adjustment from the other contracts being executed by the contractor or by issuance of recovery certificate, requires consideration, which is pending before this Court in number of writ petitions.

Pending consideration of the said question, we find that the interest of the State is required to be equally protected, as in the event the writ petition is dismissed, the State will have to start the process of recovery afresh, the petitioners may dispose of

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their property or other contingency may render the recovery process redundant.

Consequently, we order that the adjustments from the other contracts and/or recovery proceedings shall remain stayed provided the petitioner submits the Bank Guarantee to the competent Authority and keeps the Bank Guarantee effective and valid during the pendency of the writ petition and for a period of three months after the decision of the writ petition.

List for final hearing immediately after three weeks.”

The Division Bench has directed the Contractor therein to furnish a bank guarantee.

16- The matter thereafter, has gone before the apex Court and the apex Court *vide* order dated 18/08/2017 in Special Leave to Appeal (C) No.18058/2017 has passed the following order:-

“Heard the learned counsel for the petitioner and perused the relevant material.

Application for exemption from filing official translation is allowed.

Issue notice.

Until further orders, there shall be stay of the interim order dated 21.06.2017 passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.4205 of 2017 and also of the proceedings initiated for recovery of amount *vide* Demand Notice dated 06.02.2017 by the Tehsildar, Najool Capital Project, T. T. Nagar, Bhopal).”

The apex Court has stayed the recovery as well as the order of the High Court by which the Contractor therein was directed to furnish bank guarantee.

17- In the considered opinion of this Court, the recovery ordered by the respondent, as there has been no adjudication so far in respect of quantum of the amount to be recovered from the appellant, deserves to be kept in abeyance till the civil suit is decided by the trial Court.

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Resultantly, it is directed that the recovery against the appellant shall remain in abeyance till the civil suit is decided by the trial Court. The trial Court is directed to decide the civil suit as expeditiously as possible preferably within a period of 03 months from the date of receipt of certified copy of this order.

18- In the another connected matter also i.e. Miscellaneous Appeal No.2221/2020 recovery shall remain in abeyance and the application preferred under Order XXXIX Rule 1 and 2 is allowed. The trial Court shall decide the civil suit within a period of 03 months from the date of receipt of certified copy of this order. With the aforesaid, both the appeals stand allowed.

Certified copy as per rules.

(S.C. SHARMA)
J U D G E

Tej

Digitally signed by
Tej Prakash Vyas
Date: 2020.10.13
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