



**W.A(MD) No.1072 of 2022**

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

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**Dated : 21.03.2025**

**CORAM**

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN  
AND  
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN**

**W.A(MD) No.1072 of 2022**

**and**

**C.M.P.(MD)No.8584 of 2022**

M/s.The Indian Hume Pipe Co. Ltd.,  
No.8, First Street,  
Gopalapuram,  
Chennai-600006.

**... Appellant / Petitioner**

**Vs**

1.TWAD Board, Urban Division,  
No.7/33, Rajappa Nagar, 4<sup>th</sup> Street,  
M.C.Road, Thanjavur.

2.The Executive Engineer,  
TWAD Board, Urban Division,  
No.7/33, Rajappa Nagar, 4<sup>th</sup> Street,  
M.C.Road, Thanjavur.

**... Respondents / Respondents**

**PRAYER:** Writ Appeal filed under Clause 15 of Letters Patent, praying this Court to set aside the order passed by this Court in W.P.(MD)No. 10263 of 2010, dated 23.06.2022 and allow the same.



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**W.A(MD) No.1072 of 2022**

For Appellant : Mr.B.Saravanan  
Senior Counsel  
for Mr.D.Kirubakaran

For Respondents : Mr.Ajmal Khan  
Additional Advocate General  
assisted by  
Mr.B.Vijay Karthikeyan

**ORDER**

(Order of the Court was made by **G.R.SWAMINATHAN, J.**)

The writ petitioner was awarded the work namely CWSS to Nagapattinam Municipality Kilvelure & Velankanni RTP's with Bulk provision for 890 Rural habitations in Nagapattinam, Keezhaiyur, Thirumarugal, Thalainayar and Kilvelur Panchayat Unions in Nagapattinam District by TWAD Board. The work order was issued on 26.12.2003. The project consisted of various components and one of the components was the construction of collection wells and foot-bridges in Coleroon river near Ammaiyappan & Vandayarirupu. The work was commenced on 09.01.2004. When the work was nearing completion, there was an unprecedented rain on 24.10.2005. From mettur dam, a huge quantity of water was also released. As a result, the collection wells I & II were heavily damaged. Deck slab was also washed away.

2/14



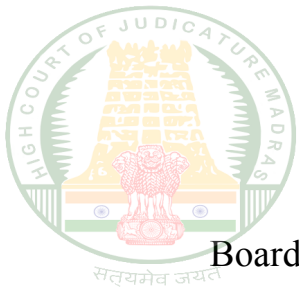
W.A(MD) No.1072 of 2022

For almost a month, the contractor could not resume their work. At this stage, the Executive Engineer, TWAD Board, Urban Division, Thanjavur called upon the contractor to commence the construction work of foot-bridges for collection well I at Vandayar Irupu for the flood damaged work with well foundation and complete the balance work as per the agreement conditions immediately. The balance details including the depth of well foundation were also furnished to the contractor. In response to the said letter dated 21.12.2005, the contractor replied as follows:-

“1. Major Changes have been done in the design of Foot Bridge. The structure of foundation has been changed from friction pile foundation to well foundation which require long period for construction. We require minimum 6 months for doing all works as per your revised drawing.

2. The tender for this project was called during 2003 and cost of the major materials have increased unprecedently during last two years. Hence, we are not in a position to execute the above supplemental works as per the agreement rates.”

Parallely, the extension of time to complete the work by 30.06.2006 without price escalation was also granted. While the contractor completed the other works, they refused to carry out the flood damaged work as per the revised terms and conditions. Therefore, the TWAD



**W.A(MD) No.1072 of 2022**

Board was left with no other option but to get the said work done through a third party. In fact, for the work done by the contractor, the TWAD Board paid the entire payment. Subsequently, there was an audit objection. In view of the same, the TWAD Board vide letter dated 23.07.2010 ordered recovery of a sum of Rs.32,24,219/- from the contractor's bill of payment. Challenging the same, the contractor filed W.P.(MD)No.10263 of 2010. The learned single Judge vide order dated 23.06.2002 dismissed the writ petition in the following terms:-

“11.It is settled position, if there are factual disputes especially in contractual matter, this Court cannot exercise its jurisdiction under Article 226 of Constitution of India. The present impugned order has been passed to recover certain amount from the writ petitioner on the ground that he has committed breach of contract by refusing to execute the work as per agreement. But the petitioner had strenuously contended that since redesign and additional work were directed to be completed by the Board under the old rates, they were not willing to execute the said work.

12.There is no dispute that a component of the work done by the writ petitioner company was washed away due to unprecedented flood. In fact, immediately, the petitioner company has informed about the said damages caused to the completed structure to the respondent Board. On 27.11.2005, the petitioner company has addressed a letter to the second respondent quantifying the damages incurred by the petitioner company due to unprecedented food. In the said letter, the petitioner company has requested to consider



WEB COPY



**W.A(MD) No.1072 of 2022**

redesigning the foot bridge foundation considering location of collector well, sand bed depth, depth of scouring, velocity of flow, maximum flood level, soil bearing capacity etc., in order to have stable foundation at all conditions. The said request of the petitioner after due deliberations within the Board, has been accepted by the Board. The Board has issued a communication to the petitioner company on 21.12.2005 along with necessary plan details and depth of the earth foundation to be provided with necessary reinforcement details. Hence, it is evident that the Board has requested the petitioner company to commence the construction work based upon the redesign. For the said communication, the petitioner company has responded on 30.12.2005 refusing to execute the work contending that the major changes have been done for the design of the foot bridge and they sought six months time for doing all the works as per Rules of Contract.

13.A perusal of Clauses 34 and 35 of the Contract clearly indicates that the respondent Board has got power to vary works and contractors shall not have any claim for any variation or alteration or increase other than for the work actually calculated according to the prices tendered and accepted in the contract. As per Clause-35, if any unforeseen additional work becomes necessary and the same is carried out under the contract on proper written orders, the rates will be paid to the contractor as per the rates specified in the contract. In case, if the rates do not apply to the additional works ordered to be carried out, then a rate could be agreed between the parties by way of supplemental schedule should be signed by the parties. Hence, it is evident that due to unforeseen situations, variation was made in the design in public interest by the respondent Board which was sought to be executed through the petitioner company. In fact, in view of



WEB COPY



W.A(MD) No.1072 of 2022

Clauses 34 and 35 of the Contract, the petitioner company was duty bound to carry out the additional work and in case, if there is escalation of cost, they were always at liberty to enter into a supplemental agreement with the TWAD Board. However, they have refused to carry out the work.

16. In view of the contention of both the parties, it is clear that there is a serious dispute whether the redesign provided by the respondent Board would fall within Clause 34 of the contract or not. In case, if it falls within Clause 34, the petitioner company was duty bound to execute the said work. On the other hand, if the redesign provided by the TWAD Board is a completely different one, then the petitioner would be at liberty to withdraw himself from executing the said work. Whether redesign was a mere variation or it was a completely different design is a matter which could not be decided in the present writ petition. This factual dispute warrants oral evidence and expert opinion to find out the veracity of contention of the either parties. Hence, in view of the Supreme Court judgment cited supra, this Court feels that it would not be appropriate to invoke Article 226 of Constitution of India to arrive at a finding whether the refusal of the petitioner to carry out the work is breach of contract or not.”

The learned single Judge relied on the decision of the Hon'ble Supreme Court reported in *2015 (7) SCC 728 (Joshi Technologies International Inc. Vs. Union of India (UOI) and others)* in support of his reasoning. Challenging the same, this writ appeal has been filed.



W.A(MD) No.1072 of 2022

WEB COPY

3. The learned senior counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds of writ appeal. He filed written statement and took us through the same. Relying on the decisions reported in *(2004) 3 SCC 553 (ABL International Limited Vs. Export Credit Guarantee Corporation of India Limited and another)*, the learned senior counsel argued that relief can very well be granted in writ proceedings, even though the dispute arises out of a commercial contract.

4. Per contra, the learned senior counsel appearing for the TWAD Board assisted by the learned standing counsel submitted that the impugned order passed by the learned single Judge is well reasoned. The learned senior counsel pointed out that Clause 67 of the Contract specifically states that in the event of any dispute arising between the parties in respect of any matter comprised in the contract, the same shall be settled by the competent court having jurisdiction over the place where the contract is awarded and the agreement is concluded and by no other court.



W.A(MD) No.1072 of 2022

WEB COPY

5. Our attention was drawn to the decision of the Hon'ble Division Bench reported in **2010 (6) CTC 27 (Semalaippan, Contractor represented by its Sole Proprietor Vs. Tamil Nadu Water Supply and Drainage Board rep. by its Chief Engineer)**. The Hon'ble Division Bench had held that the expression “Court” found in Clause 67 of the agreement should be understood as referring to the jurisdictional civil Court. The learned senior counsel drew us to quite a few decisions including the latest one reported in **2024 SCC Online SC 840 (Municipal Committee Katra Vs. Ashwani Kumar)** in support of his contention that dispute arising out of purely contractual obligations cannot be entertained by the High Court in exercise of its extraordinary jurisdiction. He called upon this Court to dismiss the writ appeal.

6. We carefully considered the rival contentions and went through the materials on record. At the out set, we must endorse the stand of the learned senior counsel appearing for the TWAD Board that if there are disputed questions of fact arising out of the contract, then the issue has to be necessarily resolved only by the jurisdictional civil Court and that the



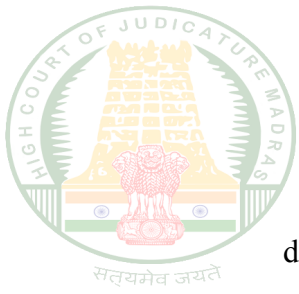
W.A(MD) No.1072 of 2022

writ Court ought not to embark on adjudicating the issue. As far as this legal proposition is concerned, there can be no doubt whatsoever. But the moot question that calls for consideration in this case is whether there are any disputed questions of fact.

7. The learned single Judge had proceeded on the premise that the contractor had refused to carry out the revised instruction given by the TWAD Board. The entire reasoning of the learned single Judge rests on this premise. After carefully considering the entire materials on record, we come to the conclusion that the contractor had not really refused to carry out the revised instructions issued by the employer. Clauses 34 & 35 are as follows:-

“34. Power to vary work

The description of the works required to be executed by the contractor / firm are set out in the specifications, schedules and drawings, but the engineer in charge reserves the power to vary, extend or diminish the quantities of work, to alter the line, level or position of any work, to increase, change or decrease the size, quality description, character or kind of any work, to order the contractor / firm to execute the works, or any part thereof, by day or night work, or to add or take from the work included in the contract as he may deem fit and proper without violating the contract and the contractor / firm shall not have any claim upon the employer for any such variation, extension,



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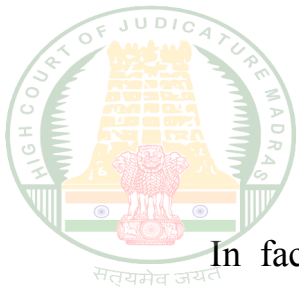
W.A(MD) No.1072 of 2022

diminution, alteration, increase, change or decrease other than for the work actually done, calculated according to the prices tendered and accepted in this contract.

35. Extra for varied works

Any unforeseen additional work that may become necessary and is accordingly carried out under this Contract based on proper written orders shall be measured and valued by the engineer in charge at the rates contained in the contractor's firm's original bill of quantities. 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 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.”

8. A mere reading of the aforesaid clauses would show that the Engineer in-charge has the power to vary work and issue the revised instructions to the contractor and the contractor shall be obliged to carry out the same. In fact, vide letter dated 30.12.2005, all that the contractors said was that they would require six more months to complete the work as per the revised instructions and that they cannot carry out the work as per the agreement rates. In other words, all that the contractor sought was that the supplemental schedule should be entered into containing the rate for the other varied works to be carried out.



**W.A(MD) No.1072 of 2022**

In fact, Clause 35 specifically provides for this. In response to the contractor's letter dated 30.12.2005, the TWAD Board failed to respond.

In fact, a reading of the letter dated 21.12.2005 sent by the executive engineer of the TWAD Board and the reply dated 30.12.20205 sent by the Contractor would indicate that the work originally envisaged was “pile foundation”. But the revised instructions was to install the “well foundation”. Thus, the agreement originally entered into between the parties would not about “well foundation”. Therefore, in the very nature of things, as per Clause 36, a revised schedule should have been entered into. If according to the TWAD Board, the revised works should also be carried out as per the agreement rates, they ought to have shown as to which would fall within the scope of Clauses 34 & 35. No such effort was ever made. In fact, the TWAD Board was clear that the case on hand would fall within the second part of Clause 35. It was only because of audit objection, the impugned order came to be passed. The decision to recover the amount of Rs.32,00,000/- from the bill of payment was made only pursuant to the audit objection.



W.A(MD) No.1072 of 2022

WEB COPY

9. The learned senior counsel appearing for the appellant drew our attention to the three-Judges Bench decision reported in **(2020) 19 SCC 241(Popatrao Vyankatrao Patil Vs. State of Maharashtra)** approving the principles of law laid down in **ABL International Limited Vs. Export Credit Guarantee Corporation of India Limited (2004) 3 SCC 553** . It was held therein that the writ petition involving a consequential relief of monetary claim is also maintainable.

10. In the case on hand, a mere look at the letters sent by the TWARD board to the District Collector, Thanjavur as well as the letters exchanged between the parties would indicate that the contractor was not at fault. Only on account of the unprecedented flood, whatever work that was carried out by him got washed away. Admittedly, the contractor cannot be blamed for the said event. Taking into account all these aspects, the TWAD Board came out with the revised instructions. All that the contractors said was if he was called upon to execute extra works, he should be paid extra and that he cannot be called upon to work



**W.A(MD) No.1072 of 2022**

WEB COPY

at the agreement rates. To this stand of the contractor, there was no response. We are satisfied that the decision to order recovery of this amount from the contractor's bill of payment is not justified. The learned Judge had proceeded on the premise as if the contractor had refused to perform the contract. The order impugned in the writ petition is set aside. The writ appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

**(G.R.S., J.) (M.J.R., J.)**  
**21.03.2025**

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Internet : Yes / No  
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W.A(MD) No.1072 of 2022

**G.R.SWAMINATHAN, J.**  
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W.A(MD) No.1072 of 2022

21.03.2025