

**S. Shanmugasundaram Vs. The Project Director, Tsunami Project Implementation Unit, Rural Development and Panchayat Raj Department, Chennai and Another**

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**Court :** Chennai Madurai

**Decided On :** Nov-28-2016

**Judge :** V. Bharathidasan

**Appeal No. :** Writ Petition (MD) No. 18556 of 2014 & M.P(MD)No. 2 of 2014

**Appellant :** S. Shanmugasundaram

**Respondent :** The Project Director, Tsunami Project Implementation Unit, Rural Development and Panchayat Raj Department, Chennai and Another

**Judgement :**

(Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to the impugned proceedings issued by the 2nd respondent District Collector in Na.Ka.NO.779/2011 A 11 dated 22.8.2014 quash the same and further direct the 2nd respondent District Collector to sanction and disburse the amount towards the increased amount of a sum of Rs.12 03 065/- and Rs.11 67 704/-(Totalling Rs.23 70 769/-) towards the 1st quarter and 4th quarter respectively in the light of clause 47 of the Agreement dated 08.09.2010.)

Challenging the order passed by the second respondent, dated 22.08.2014, rejecting the petitioner's request for disbursement of price escalation costs for the work done by the petitioner, the present writ petition has been filed.

2. Heard Mr.Isaac Mohanlal, learned counsel appearing for the petitioner, Mr.R.Anandaraj, learned Government Advocate appearing for the respondents.

3. The case of the petitioner, in brief, is as follows:-

The petitioner is a class-1 Contractor and he was awarded with a contract for the reconstruction of 76 houses in vulnerable areas of coastal habitation in S.R.Pattinam Panchayat in Thanjavur District by the second respondent by an order dated 12.08.2010. According to the petitioner, he has deposited a sum of Rs.14.61 lakhs towards performance security plus additional security. Subsequently, he has also entered into an agreement for the said work and as per the agreement, the petitioner should complete the work within 15 months ie., before 08.12.2011 and stated that after the agreement, immediately, he commenced the work. It is further stated that due to non availability of labourers and construction materials viz., sand and bricks and due to heavy rain, continued power shut down, the petitioner could not complete the work within the stipulated time. In the above circumstances, the petitioner has approached the second respondent seeking extension of time to complete the construction work. The second respondent has also accepted the petitioner's request and extended the time for completing the work on various periods which are tabulated as under:-

| Sl.No. | Application for extension | Reasons for extension of time                                                                                     | Period of extension           |
|--------|---------------------------|-------------------------------------------------------------------------------------------------------------------|-------------------------------|
| 1      | 12.12.2011                | Delay in getting the materials viz., sand and bricks in view of the KVVt (kalaingar Veetu vasadhi thittam) scheme | From 09.12.2011 to 29.02.2012 |
| 2      | 17.04.2012                | The labourers who are belonging to Cuddalore District were affected by the Dhane storm                            | From 01.03.2012 to 31.05.2012 |

|   |            |                                                                    |                               |
|---|------------|--------------------------------------------------------------------|-------------------------------|
| 3 | 21.06.2012 | Non availability of skilled labourers and the continuous power cut | From 01.06.2012 to 31.07.2012 |
| 4 | 14.08.2012 | Continuous power cut and non availability of quarry materials      | From 01.08.2012 to 30.09.2012 |
| 5 | 04.10.2012 | Continuous power cut and shortage of sand                          | From 01.10.2012 to 31.11.2012 |

4. According to the petitioner, during the fourth extension period, the second respondent issued a show cause notice dated 15.09.2012 calling upon the petitioner to give explanation for the non completion of the work. It is further stated in the said notice that if the work is not completed within one week, as per clause 59 of the agreement, dated 08.06.2010, the contract would be cancelled and the performance bank guarantee would be credited into the Government Account. Thereafter, the petitioner has submitted a detailed explanation on 25.09.2012. Based on the said explanation, the second respondent granted the fifth extension till 30.11.2012. According to the petitioner, he has completed the entire work within the extended time i.e., on 30.11.2012. It is further stated that the actual estimation of the reconstruction process was increased for the 4<sup>th</sup> quarter (from October to December 2012) and 1<sup>st</sup> quarter (from January to March 2013) for a sum of Rs.11,67,704/- and Rs.12,03,065/- respectively and as per clause 47 of the agreement, dated 08.09.2010, the second respondent is bound to disburse the said amount towards the increased rate of price of labour, materials, fuels and lubricants, as the work was carried out within the stipulated time and delay was not attributable on the part of the petitioner.

5. It is further stated that in the above circumstances, the petitioner submitted several representations to disburse the amount as per the increased rate in accordance with clause 47 of the agreement. Since no order has been passed, the petitioner has filed writ petition in W.P(MD).No10096 of 2014 before this Court seeking for a direction to the second respondent to consider his representation dated 03.04.2014 for disbursement of the said price escalation cost and this Court by an order dated 02.07.2014, disposed of the writ petition and directed the second respondent to consider the claim of the petitioner and pass appropriate

orders within a period of four weeks from the date of receipt of a copy of the order. Thereafter, based on the said direction, the second respondent has passed the impugned order rejecting the claim of the petitioner stating that there is no provision for sanctioning price escalation cost and the petitioner has also not completed the work within the stipulated/extended time and there is a delay in filing the application.

6. According to the petitioner, as per clause 47(1) of the agreement, price adjustment shall apply from the date of commencement of the work, till the completion of work, including the extension period and the second respondent is not justified in stating that there was no provision for the sanction of the price escalation cost for the extended periods. It is further stated that the second respondent has admitted the increased amount from the estimated value and hence, there is no dispute with regard to the increased amount. According to the petitioner, only after accepting the petitioner's request, the second respondent granted extension for the completion of entire work till 30.11.2012. It is further stated that though the petitioner completed the entire work on 30.11.2012, the bills were settled by way of seven instalments and the bill was finally settled only on 07.03.2013, and thereafter, the petitioner submitted representation for the price escalation cost under clause 47 of the agreement, dated 08.09.2010. Therefore, there was no delay on the part of the petitioner in approaching the second respondent for the above said relief. In the above circumstances, the order passed by the second respondent, dated 22.08.2014 rejecting the claim of the petitioner for the price escalation cost, is liable to be quashed.

7. The second respondent has filed a counter affidavit inter alia contending that due to administrative reasons necessary extensions of time were given to the petitioner-contractor at his own risk for five times for the completion of the work till 30.11.2012. The second respondent has also admitted in the counter that the petitioner has completed all the works on 30.11.2012 before the expiry of the extension granted by him. It is further admitted that the second respondent did not take any action to terminate the contract of the petitioner and no fine amount has been imposed. It is stated that the price escalation cost of Rs.3,80,652/- for the fourth quarter has been settled as per the agreement and the petitioner is not

entitled to grant increased rate of labour costs as he did not complete the work within the contract period. Therefore, the petitioner's claim for escalation cost for the delay caused by him is not legally sustainable. It is further stated that if the price escalation is allowed for the extension periods, then the Government would be put to loss of revenue.

8. The learned Senior Counsel appearing for the petitioner would contend that the second respondent accepting the reasons for the delay in executing the work has granted extension till 30.11.2012 and as per clause 47 of the agreement, the petitioner is entitled to price escalation cost and since the delay is not attributable to the petitioner and it is not open to the respondents to reject the claim on the ground that the petitioner has not completed the work within the stipulated period and that there is a delay in approaching them seeking for price escalation cost.

9. The learned Senior Counsel would further contend that the impugned order has been passed only based on the direction given by this Court in W.P(MD)No.10096 of 2014 which was filed by the petitioner seeking for a direction to the second respondent to consider his representation dated 03.04.2014 for disbursement of the price escalation cost and therefore, no delay in approaching the respondent for getting the said relief.

10. Learned Senior Counsel would further contend that even though there is a provision in the agreement for referring the dispute to Adjudicator, since the issue involved in this case only relates applicability of clause 47 of agreement, the petitioner can approach this Court under Article 226 of the Constitution of India and the alternative remedy is not a bar to entertain the writ petition. In support of his submissions, learned Senior Counsel appearing for the petitioner relied upon the following decisions:-

(i) In Hindustan Petroleum Corporation Ltd., Vs. Dolly Das reported in (1999) 4 SCC 450

(ii) In Style (Dress Land) Vs. Union Territory, Chandigarh reported in (1999) 7 SCC 89

(iii) Sushila Chemicals Private Limited Vs. Bharat Coking Coal Limited reported in (2010) 10 SCC 388

(iv) Union of India Vs. Tania Construction Private Limited reported in (2011) 5 SCC 697

11. Per contra, learned Government Advocate appearing for the respondents submitted that there was a delay in completing the work for which the Government cannot be penalised by paying price escalation costs. He would further contend that there is a provision in the agreement that if the petitioner has got any grievance, he has to approach the Adjudicator and therefore, the petitioner cannot maintain this writ petition.

12. I have considered the submission made by the learned counsel appearing for the parties and perused the entire materials available on record.

13. The entire dispute revolves around the applicability of clause 47 of the agreement, dated 08.09.2010 which reads as follows:-

#### 47. Price Adjustment

47.1. Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the contract data:

(a) The price adjustment shall apply for the work done from the start date given in the contract data upto end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the contractor .

14. As per the clause 47 (1), the contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the agreement and the price adjustment shall apply for the work done from the start date given in the contract data up to the end of the initial intended completion date or extensions granted by the competent authority and shall not apply to the work carried out beyond the stipulated time for reasons attributable to

the contractor and the price adjustment is applicable to the extended period of contract also provided, the delay is not attributable to the contractor.

15. Now, this Court has to consider the question as to whether the delay is attributable to the petitioner in completing the work. Admittedly, there was a scarcity for bricks and sand during the year 2011 and therefore, the second respondent issued a circular in Na.Ka.No.681 of 2009/T.S.2, dated 03.01.2011 which reads as follows:-

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16. In the above circumstances, the petitioner approached the second respondent seeking extension of time on the ground of non availability of construction materials. The second respondent, accepting the request of the petitioner, has granted first extension from 09.12.2011 to 29.02.2012 by order dated 12.12.2011. The second respondent again granted second extension on 17.04.2012 on the ground of non availability of labours for the period from 01.03.2012 to 31.05.2012, again, the second respondent has granted extension on the ground non availability of skilled labours and the continuous power cut on 21.06.2012 for the period from 01.06.2012 to 31.07.2012. The second respondent has granted fourth extension by an order dated 14.08.2012 for the period from 01.08.2012 to 30.09.2012 and finally, the second respondent by an order 04.10.2012 has granted extension for the period from 01.10.2012 to 31.11.2012 on the ground of continuous power cut and shortage of sand and the petitioner has also completed the construction before 31.11.2012.

17. The second respondent, after accepting the reasons stated by the petitioner that the delay is only due to non availability of labours, construction materials and continuous power cut has granted the above extensions and now cannot turn around to state that the delay is attributable to the petitioner. In the above circumstances, as per clause 47(1)(a) of the agreement, the second respondent is bound to pay the price escalation cost.

18. So far as the contention of the respondents that the petitioner has applied belatedly is concerned, admittedly, the petitioner has completed the entire work on

30.11.2012 and the bills were settled by way of seven installments and the final bill was settled only on 07.03.2013 and thereafter, the petitioner has sent representation to the respondents seeking price escalation cost under clause 47 of the agreement. Since no order has been passed on the said representation, the petitioner has filed W.P(MD)No.10096 of 2014 and this Court by an order dated 02.07.2014 disposed of the said writ petition, directing the second respondent to consider the said representation and pass appropriate orders on merits and in accordance with law, within a period of four weeks from the date of receipt of a copy of the order and based on the said order, the second respondent passed the present impugned order. In the above circumstances, there is no delay on the part of the petitioner and the second respondent cannot reject the application on the ground of laches stating that the petitioner has applied belatedly.

19. So far as the objection, namely, availability of alternative remedy is concerned, even though, an arbitration clause is provided in the agreement, it is settled law that if the facts pleaded before the Court, are of such a nature as do not involve any complicated questions of fact which require elaborate investigation, the High Court may exercise jurisdiction under Article 226 of the Constitution of India.

20. The Hon'ble Supreme Court in Hindustan Petroleum Corporation Ltd's case (supra) has held as follows:

9. We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such contract or relief thereof or any other fall out thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the court are of such nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under Article 226 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong.

21. In Sushila Chemicals Private Limited's case (supra), the Supreme Court has held as follows:

20. It is settled by a series of decisions of this Court starting from Kumari Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 537] that even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.

22. In similar circumstances, the Supreme Court in Tantia Construction Private Limited's case (supra), has held as follows:

33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company.

34. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits.

23. In the above circumstances, since the question involved in the present writ petition is as to whether the delay in executing the work is attributable to the petitioner or not, from the reading of the orders of extension granted by the second respondent shows that only after accepting the reasons for the delay given by the

petitioner which is beyond his control, the second respondent granted extension and hence, it does not require any interpretation of contract and for that purpose, the petitioner need not approach the Adjudicator.

24. In the above circumstances, the impugned order passed by the second respondent rejecting the claim of the petitioner for the price escalation cost is set aside and the second respondent is directed to consider the petitioner's application for grant of price escalation cost and grant the same after ascertaining the actual cost payable to the petitioner. Accordingly, the writ petition is allowed. No costs. Consequently, M.P(MD)No.2 of 2014 is closed.

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