

THE HON'BLE SRI JUSTICE A.ABHISHEK REDDY

WRIT PETITION No.15900 of 2020

ORDER:

This writ petition is filed seeking the following relief:-

“...direction or writ, particularly in the nature of Mandamus duly declaring the letter of the 3rd respondent vide Ref.No. CRP/CVL/MNG/TN-76/2016-17/1536, dated 01.09.2020, advising to withhold the amount of Rs.86,27,120/- from the bills to be paid in respect of a contract vide CRP/CVL/KGM/TN-63/2018-19, dated 19.11.2018, to recover the said amount on an alleged defect of contract vide CRP/CVL/MNG/TN-76/2016-17, dated 03.03.2017, as illegal, arbitrary, against the principles of natural justice, and consequently set aside the said letter, and direct the respondent SCCL to treat the existing four contracts vide MNG/CVL/TN-75/2018-19, CRP/MNG/CVL/TN-74/2018-19/98/365/7, CRP/ MNG/CVL/TN-712018-19/19/418 & KGM/CVL/DB-1759/656 of the petitioner in joint venture with SRICO as independent and release the amounts as accrued on the said contracts...”

The petitioner, M/s. M. Damodaar Reddy, a partnership firm, being Class-I Contractor, engaged in the civil works for the last 25 years. For the purpose of bidding for a contract against a tender, dated 03.03.2017, floated by the Singareni Collieries Company Limited, respondent Nos. 1 to 3 in the year 2017 for the work of “*Construction of Cement Concrete pavement at MNG OCP, Manuguru area, Bhadradi Kothagudem District*”, the petitioner formed a Joint Venture (JV) in the name of SVC-MDR with M/s. Sri Venkateswara Constructions. The SVC-MDR (JV) emerged as successful bidder; entered into agreement with the respondents-Company; completed the work in time i.e., by 31.10.2018, to the satisfaction of the respondents and a certificate of Quality Control Inspection Report, dated 25.04.2019 was also issued in favour of SVC-MDR. Subsequently, the final bill was also settled.

Later, in response to the e-procurement tender notice No. CRP/CVL/KGM/TN-63/2018-19, dated 19.11.2018 issued by the respondents-Company for “*Construction of 3 Nos. 100 tonnes steel bunkers, connected gantries, Retaining wall and RCC foundations for 3 nos. 500 TPH feeder breakers at JVR OC-II, Sathupalli, Khammam*

District, Telangana State”, the petitioner formed a JV in the name of SRICO-MDR. The JV, SRICO-MDR emerged as successful bidder; contract was awarded in its favour; and after entering into an agreement on 19.11.2018 with the respondents-Company, the SRICO-MDR commenced the work. While so, the respondent No. 3 issued a letter, dated 01.09.2020 to the earlier JV i.e., SVC-MDR in relation to the tender works, dated 03.03.2017 stating that the Vigilance Enforcement Department had conducted an enquiry on the subject work and found that that *“the average core strength of 9 Nos. of cores is not satisfying the next 2 lower grades i.e., M-35 and M-30, hence the CC Pavement of size 140 x 70 m was rejected”*. Consequently, in its report, the Vigilance Department had recommended to *“recover an amount of Rs.86,27,120/- from M/s. SVC-MDR (JV), Paloncha, Bhadradi Kothagudem District”*. By the said letter, the respondent No. 3 advised the SVC-MDR to pay an amount of Rs.86,27,120/- to the respondents-Company within 15 days. Moreover, on the same day, the respondent No. 3 requested the AGM (Civil)/MNG and DGM(Civil) KGM Area to withhold an amount of Rs.86,27,120/- from the bills payable to the petitioner in the JV with SRICO (SRICO-MDR). Hence, the present writ petition.

The respondent Nos. 1 to 3 filed a counter affidavit stating that M/s. SVC-MDR (JV) has concluded the agreement with the respondents-Company for *“Construction of CC Pavement at MNG OCP, Manuguru Area, Bhadradi Kothagudem District”* vide agreement, dated 07.12.2017; commenced the work and completed the same on 31.10.2018 with a delay of 3 months 21 days; and that the final bills were paid to M/s. SVC-MDR (JV) without imposing any penalty for the said delay. Subsequently, the respondent No. 4 had conducted an enquiry on the works done by M/s. SVC-

MDR (JV) during 11.01.2018 to 31.10.2018 and through his report, dated 22.05.2020 the Director General (Vigilance & Enforcement) & E.O., Principal Secretary to Government requested the Special Chief Secretary to Government, Energy Department to issue necessary instructions to the respondent No. 1 to recover an amount of Rs.86,27,120/- from M/s. SVC-MDR (JV) for the deficiencies mentioned in the report. As a result and as on that date, since no other works are being executed by M/s. SVC-MDR (JV), the respondent No. 3 advised AGM (Civil)/Manuguru and DGM (Civil)/Kothagudem Area, within whose jurisdiction the petitioner firm is executing the present works with SRICO by forming Joint Venture i.e. M/s. SRICO-MDR, to withhold an amount of Rs.86,27,120/- from the bills payable to M/s. SRICO-MDR. That till date, no deduction of the amount is done since M/s. SVC-MDR (JV) has so far not raised any bills. It is stated that at present, the petitioner firm, by forming JV with M/s. SRICO i.e., M/s. SRICO-MDR is executing three works under the respondents-Company in the ratio of 70:30 (M/s. SRICO – 70% & MDR – 30%) apart from another work by petitioner firm independently. That the amount proposed to be withheld from the bills payable to the works being done by M/s. SRICO-MDR is only from the share of the petitioner firm, inasmuch as Clause No 4, at page No. 45 of the agreement, entered by M/s. SVC-MDR (JV) with the respondents-Company, clearly stipulates that *“the parties to be jointly and severally responsible for all obligations and liabilities relating to the project”*. It is their case that the defect liability period, in respect of the works executed by M/s. SVC-MDR (JV) completes only on 30.10.2020, and therefore, the subject work is still under defect liability period and is prone for any kind of checking/testing and

the respondents-Company can effect recoveries as it deem fit. The inspection carried on by respondent No. 4 was duly intimated to the petitioner firm and Sri Ravinder Reddy, who is none other than brother-in-law of the petitioner, being the representative of JV had witnessed the collection of concrete cores by the officials of respondent No. 4 on 21.01.2020, but however, no one from the petitioner firm had attended for testing on 28.01.2020. Although the respondents-Company furnished all the documents, including the Vigilance report of the respondent No. 4, dated 22.05.2020, the petitioner did not choose to challenge the said vigilance report. Moreover, the petitioner firm, without resorting to invoke the dispute resolution, provided under Clause No. 20 of the agreement, has directly approached this Court and therefore, the writ petition is liable to be dismissed even on the ground of maintainability.

The respondent No. 4 filed a separate counter stating *inter alia* that a memo, dated 12.09.2019, was received from the then Director General, Vigilance & Enforcement to conduct inspection/verification on the two executed works i.e. (i) Construction of CC Pavement at MNG Open Cast Project, Manugur Area, and (ii) Strengthening of executing approach road from PV colony to Railway Gate to Railway Station, Manugur area, and to subject the report. As a result, the Regional Vigilance & Enforcement Officer, Warangal Unit had conducted the enquiry and found deficiency/irregularities in the work No. (i) and accordingly, proposed to recover an amount of Rs.86,27,120/- from the contractor and the enquiry report was submitted to the Director General, Vigilance & Enforcement, who in turn forwarded the Report to the Special Chief Secretary to the Government, Energy Department.

Heard the learned counsel for the petitioner the learned Standing Counsel for the respondent Nos. 1 to 3 and the learned Government Pleader for GAD, F&P, I.T. Department. Perused the material available on record.

The learned counsel for the petitioner has submitted the following contentions:-

Firstly, M/s. SVC-MDR had completed the project in all respects by 31.10.2018 to the satisfaction of the respondents-Company and the final bills were also settled. At every stage of the work, there was inspection from the various officials of respondents-Company and only on their satisfaction of the quality, the bills have been cleared to M/s. SVC-MDR (JV). Although the agreement does not contemplate that the work or the quality is subject to clearance from the Government Vigilance department, nearly after two years, the Vigilance Department has come into picture; without there being any intimation/notice to the petitioner firm, the inspection was conducted; samples were obtained in its absence; and therefore, the said recommendations of respondent No. 4 cannot bind on the petitioner firm.

Secondly, the previous concluded contract and the present contract are totally independent and with the different partners and at different profit ratio. The petitioner firm is holding only 30% share in the present work with SRICO, and if the proposed amount is withhold, there is no way for the petitioner to complete the ongoing work.

Lastly, there is an arbitration clause in the agreement of contract with the respondents-Company. In the event of any defect in the quality or difference of contract, the respondents-Company ought to have opted for the said clause and would have given an

opportunity of being heard and explained of the allegations. But, the letter issued by the respondent No. 3 to withhold the payment from the ongoing different project is beyond the scope and the said arbitration clause, as such the petitioner firm is left with no other remedy except to approach this Court under Article 226 of the Constitution of India.

Per contra, the learned Standing Counsel for the respondents-Company has argued that M/s. SVC-MDR (JV) entered into agreement with the respondents-Company on 07.12.2017; commenced the work on 11.01.2018 and completed the work on 31.10.2018 with a delay of 3 months 21 days. As per the conditions of the agreement, the two years defect liability period completes only on 30.10.2020 and therefore, the subject work is well within the defect liability period. As the deficiencies are identified within the defect liability period of two years, it is binding on the petitioner firm to pay the amount advised by the respondent No. 4. Further, since the Telangana Government is having major share in the respondents-Company, the respondent No. 4 has every authority to inspect/check the works in the respondents-Company in public interest. The petitioner firm was informed over phone about the inspection by the respondent No. 4 as well as testing of samples at M/s. Standardtec Engineers India Pvt. Limited at Hyderabad; Sri Ravinder Reddy, brother-in-law of the petitioner, being representative of M/s. SVC-MDR, had witnessed the collection of concrete cores by officials of respondent No. 4 on 21.01.2020, but none had attended for testing on 28.01.2020. Therefore, the contention of the petitioner that they were not called for when the samples were taken nor informed about the nature of tests they have conducted, is incorrect. It is fairly admittedly by

the learned Standing Counsel that the previous concluded contract and the present contract are independent and with different partners through different JVs. However, he submits that at present, M/s. SVC (the other partner in earlier JV with petitioner) is not doing any works with respondents-Company and inasmuch as the petitioner is holding 30% share in the ongoing project with M/s. SRICO, the respondent No. 3, having left with no other option, sought to withhold the proposed amount towards the share of the petitioner firm from the bills of works being executed by M/s.SRICO-MDR by virtue of Clause No. 4 at page No. 45 of the agreement, which specifies that *“the parties to be jointly and severally responsible for all obligations and liabilities relating to the project”*. Therefore, the action of respondents in proposing to withhold the estimated amount from the share of the petitioner firm is neither illegal nor unwarranted. Further, from the letter, dated 01.09.2020 it is clear that the amount was sought to be withheld from the share of the petitioner firm only from the bills of other works, but not from the share of lead partner of JV pertaining to their works. The learned Standing Counsel contends that the dispute resolution methodology is covered under Clause No. 20 of the agreement and generally, all the disputes should be settled by negotiations between the Company and the contractors. That in case any dispute/different is not settled through negotiations, the respective parties can seek remedy by arbitration by invoking the clause within 120 days of dispute and it is for the petitioner firm to invoke the said arbitration clause, if it is aggrieved, but, instead, it has straightaway approached this Court by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, which is not maintainable.

In rejoinder, the learned counsel for the petitioner firm laid emphasis on the letter of the respondent No. 3, dated 01.09.2020 written to the AGM (Civil)/Manuguru and DGM (Civil)/Kothagudem. The relevant portion of the said letter reads thus:-

“5. Hence, it is advised to withhold an amount of Rs.86,27,120/- in the bills payable on the above works under intimation to this office and confirm the action taken.”

Adverting to the above letter, the learned counsel contends that the words “on the above works” would indicate the entire works and therefore, the contention of the respondents that the said amount is proposed to be withheld from the bills payable from the above works from the share of the petitioner firm only, is incorrect. The learned counsel further contends that the testing of samples done at M/s. Standardtec Engineers India Pvt. Limited, Hyderabad is not known to the petitioner and that the testing laboratory is a private limited company and therefore, the authenticity of the said company and its report cannot be final and conclusive proof. In the Report, the calculation done towards the rate of cement is meaningless, as the rate of Rs.3323.44 per Cum is inclusive of the cement also. The cement supplied by the respondents-Company is not free of cost, but is part and parcel of the cost that is incurred by the petitioner firm in completing the work. It is further contended that the relief sought for in the writ petition is to set aside the impugned notice for recovery of proposed amount, which is the culmination of the report of the respondent No. 4, dated 22.05.2020 and therefore, the writ petition covers the report of the respondent No. 4 as well. Adverting to the Clause No. 20 of the agreement, which deals with settlement of disputes, the learned counsel contends that the respondents-Company ought to have initiated the proceedings under the Arbitration clause and without

any show-cause notice or enquiry, involving the petitioner, straightaway calling for recovery of the amounts is absolutely not justified and the petitioner is left with no other option except to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and therefore, the writ petition is absolutely maintainable.

Heard the learned counsel for the parties and perused the material available on record.

After going through the respective pleadings of the parties and after going a considerable thought to the submissions made by the learned counsel appearing on behalf of the petitioner as well as the respondents, this Court is of the firm opinion that the writ petition, as has been filed questioning the letter of the respondent No. 3, dated 01.09.2020 advising the AGM (Civil)/MNG and DGM(Civil) KGM Area to withhold an amount of Rs.86,27,120/- from the bills payable to the petitioner in the JV with SRICO (SRICO-MDR), is not maintainable for the reasons recorded below.

Admittedly, the petitioner firm formed a Joint Venture in the name of SVC-MDR with M/s. Sri Venkateswara Constructions and completed the contract work in time by 31.10.2018 to the satisfaction of the respondents and a certificate of Quality Control Inspection Report, dated 25.04.2019 was also issued in favour of SVC-MDR. Subsequently, the final bill was also settled. However, the defect liability period in respect of the said work will only expire by the end of 30.10.2020. Merely because the Quality Control Inspection Report has been issued on the earlier occasion, it does not necessarily mean that the official respondents are precluded or barred from conducting any further Quality Control Test within the defect liability period. The authorities are well within their rights to

conduct the Quality Control Inspection and take action if the same is not upto the standards prescribed. Thus, the issuance of impugned letter, dated 01.09.2020, by the respondent No. 3 is well within the defect liability period, as prescribed in the agreement entered between the parties. In its affidavit, the petitioner firm has stated that no show-cause notice was issued to the petitioner calling for explanation with regard to the amount that is sought to be withheld and also the defects pointed out by the respondent No. 4 in its report, dated 22.05.2020 and that the inspection by the respondent No. 4 was done behind the back of the petitioner firm. However, a perusal of the counters, filed by the respondents, clearly show that the inspection carried on by respondent No. 4 was duly intimated to the petitioner firm; that Sri Ravinder Reddy, the brother-in-law of the petitioner, being the representative of JV had witnessed the collection of concrete cores by the officials of respondent No. 4 on 21.01.2020; that no one from the petitioner firm had attended for testing of samples on 28.01.2020. It is also stated that the respondents-Company furnished all the documents, including the Vigilance report of the respondent No. 4, dated 22.05.2020, but the petitioner firm did not choose to challenge the said vigilance report. Moreover, the amounts proposed to be withheld from the bills payable to the works being done by M/s. SRICO-MDR is only from the share of the petitioner firm. In this regard, the learned Standing Counsel for the respondents-Company has relied on Clause No 4, at page No. 45 of the agreement, entered by M/s. SVC-MDR (JV) with the respondents-Company, which states that "*the parties to be jointly and severally responsible for all obligations and liabilities relating to the project*". The impugned letter of the respondent No. 3, which is sought to be challenged in

this writ petition, is only an internal communication to the AGM (Civil), Manuguru and DGM(Civil), Kothagudem Area, within whose jurisdiction M/s. SRICO-MDR (JV) is executing the ongoing works, wherein the petitioner firm's share is 30%. Further, Clause No. 20 of the agreement provides for dispute resolution methodology. It stipulates that in case any dispute/difference is not settled through negotiations, the respective parties can seek remedy by arbitration by invoking the same within 120 days of dispute. However, the petitioner firm, without availing the efficacious alternate remedy, has straightaway approached this Court.

Moreover, for the reasons best known to the petitioner firm, it has neither challenged the Vigilance Report, dated 22.05.2020, nor the report of the lab, M/s. Standardtec Engineers India Pvt. Limited, Hyderabad in relation to the samples that were collected by the respondent No. 4. It is not the case of the petitioner firm that the sample report by the said lab is biased or manipulated. This Court is of the opinion that since the impugned action of the respondents for withholding of the amount of Rs. 86,27,120/- from the bills of M/s. SRICO-MDR (JV) towards the share of the petitioner firm is within the defect liability period, they are entitled to recover the same from the share of the petitioner firm even from the ongoing works being executed by M/s. SRICO-MDR (JV) in light of Clause No. 4 at page No. 45 of the agreement entered by M/s. SVC-MDR (JV) with the respondents-Company. Merely because the earlier JV i.e., M/s. SVC-MDR has come to an end, it cannot be said that any amount towards its defects/liabilities cannot be recovered from the ongoing works being executed by M/s. SRICO-MDR (JV) in which the petitioner firm is having 30% share. Moreover, in the counter filed by respondent Nos. 1 to 3, it is

specifically stated that the amount proposed to be withheld is only from the share of the petitioner firm. Therefore, there is no illegality or infirmity in the impugned letter, dated 01.09.2020 of the respondent No. 3. However, before recovering the proposed amount from the share of the petitioner firm, the respondents are directed to put the petitioner firm on notice and afford an opportunity to file its explanation. Any amounts recovered or sought to be recovered, shall be without prejudice to the rights of the petitioner to dispute the said recovery by the authorities and raise all permissible legal objections before the Authority, Arbitrator or any Court of Law.

With the above observations, the writ petition is dismissed.

Miscellaneous petitions pending in this writ petition, if any, shall stand closed. There shall be no order as to costs.

A.ABHISHEK REDDY, J

Date : 07-06-2021
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