

**(2020) 10 BOM CK 0056**

**In the Bombay High Court**

**Case No :** Writ Petition No. 2209 Of 2020, Writ Petition (St) No. 7625, 7626 Of 2020

Musale Constructions

APPELLANT

Vs

Vidarbha Irrigation Development Corporation And Ors

RESPONDENT

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**Date of Decision :** 29-10-2020

**Acts Referred:**

**Citation :** (2020) 10 BOM CK 0056

**Hon'ble Judges :** A. S. Chandurkar, J;N. B. Suryawanshi, J

**Bench :** Division Bench

**Advocate :** J. T. Gilda, R. Deshpande, S. G. Jagtap, A. J. Gilda

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**Judgement**

N. B. Suryawanshi, J

1. Rule. Rule made returnable forthwith. Heard finally by consent of learned counsel appearing for the parties.

2. Since in all these three petitions, the challenges raised, so also the grounds of challenge are same, they are heard together and are decided by this common judgment. The petitioner in these three petitions seeks quashing of Circular No. 9 dated 17.02.2020, issued by the respondent no. 1-V.I.D.C.

3. The petitioner is a partnership firm doing construction business and has been taking contracts from Government, first respondent and other authorities. The first respondent is a Corporation constituted for removing backlog of irrigation and for carrying out various irrigation projects in Vidarbha region. The first respondent from time to time issued tender notices in respect of construction of various projects. The petitioner filled in tenders and three tenders of the petitioner were accepted as follows :-

i) Construction of earthwork and structure along Minor-1 RD 2350M and its sub minor, Minor-2 L RD-3090M and its sub minor, tail minor RD-4330 and its sub minor of distributory D-5 at RD-5850 on Gosikhurd Righ Bank Canal.

ii) Construction of earthwork and structure TAS Minor No. 2 offtaking from main canal of Mokhaburdi Lift Irrigation Scheme.

iii) Work of construction of dam and head regulator of Shirud M.I. tank, Hinganghat, Dist. Wardha.

Accordingly, tender agreements/contracts were executed between the petitioner and respondent no. 1 and work orders were issued in favour of the petitioner on 27.05.2014, 19.12.2011 and 17.06.2014 respectively.

4) In accordance with the terms of the contract, the royalty charges were being deducted from the running bills of the petitioner. So far as escalation in the royalty charges are concerned, the same were calculated in accordance with the terms of the contract. The governing council of the first respondent in its 55th meeting dated 24.02.2014, passed resolution no. 55/6. On that basis, a circular dated 28.03.2016 was issued wherein, it was provided that from the bills of the contractor, the difference of price escalation in the royalty be recovered and proposal for refund of difference amount of increase in the royalty rates be submitted along with the demand for funds for payment of the bills.

On 16.11.2016, the Executive Engineer of first respondent addressed a communication to the Chief Engineer, Water Resources Department, Amravati by giving reference to a letter of Regional Office dated 30.09.2016. It was stated that the price escalation on the royalty shall be applicable to the royalty rates, which are included in the tender rates and the price escalation shall not be applicable to the difference in price increase in the royalty rates. Thereafter, by giving reference to the 55th meeting of the governing council and the resolution no. 55/6, circular no. 23 was issued by the second respondent on 30.12.2017, which states that while making the payments to the contractor, on account of increase in royalty levied on minor minerals, price escalation on royalty (as stipulated in the agreement/contract) shall not be deducted.

The royalty payment was being deducted from the running bills of the petitioner and the price escalation in the royalty charges was being calculated in terms of the tender agreement/contract.

5. The second respondent on 17.02.2020 issued circular no.9, reiterating the circular dated 28.03.2016 and communication dated 06.11.2016 and canceling circular no.23 dated 30.12.2017 thereby issuing revised instructions, by placing reliance on paragraph no.17 of the judgment of the Hon'ble Supreme Court in National Highway Authority of India ..Vrs.. Progressive MVR (JV) 2018 (14) SCC 688. As per the revised instructions while calculating the price escalation as per the circular dated 28.03.2016 and letter dated 16.11.2016, the amount of royalty was to be deducted and the price escalation was to be calculated on the remaining amount. The Superintendent Engineers and Executive Engineers of the first respondent were called upon to take action as per the impugned circular no.9. According to the petitioner, certain amounts which were payable to the petitioner by the second respondent were now sought to be recovered, by

placing reliance on the impugned circular no.9. The petitioner seeks quashing of this circular on various grounds.

The respondents, by filing the reply, have opposed the petitions. It is contended that the petitioner has not made representation to the appropriate authority in respect of the impugned circular. The impugned circular is in accordance with the terms and conditions of the tender documents. The tender agreements specifically provides for inclusion of Royalty payable by the contractor on the minor minerals under Clause 36. For calculation and reimbursement of Royalty, Clause 36(A), is applicable. The tender price is inclusive of Royalty, in terms of Clause 36(A). The amount accrued on royalty was deducted and kept aside while making a payment of running bills including Price Variation/Escalation under Clause 33 of the Special Conditions of the tender agreement to secure the liability towards payment of royalty and it was reimbursed to the contractor upon production of payment receipt/proof thereof including the rise or fall in the Royalty, or paid to the concerned Collector/Authority if not paid by the contractor. Hence, the challenge raised by the petitioner to the circular is misplaced and is liable to be rejected.

6. Shri. J. T. Gilda, learned Senior Advocate appearing for the petitioner argues that the case of the petitioner is governed by the terms and conditions of contract between the petitioner and the respondent - Corporation. The payment of the price escalation of royalty is to be made as per the conditions of contract. The respondent had all the while acted upon and implemented the terms of the tender agreement and the royalty charges were deducted from the running bills of the petitioner, as per Clause 36 and 36(A) of the tender agreement. Even the price variation/escalation of royalty was calculated as per the formula provided in Clause 33.

It is further submitted that the reliance placed by the first respondent on the decision of Hon'ble Apex Court in NHAH (supra) is misplaced and misconceived, as the facts and conditions of the contract referred to in the said judgment are totally different, from the conditions of contracts entered into between the petitioner and the first respondent. It is submitted that the impugned circular is hit by the doctrine of promissory estoppel as the promise made by the Corporation in terms of the contract, and acted upon by it while making payments to the petitioner, cannot be resiled after a period of more than two years by issuing the impugned circular. It is submitted that the case of the petitioner will be governed by the terms of the tender agreements/contracts and particularly, the price variation Clause provided in Clause 33 and the impugned circular issued in the year 2020 cannot be made retrospectively applicable to the case of the petitioner.

7. Learned Senior Advocate further submits that by issuing the impugned circular, the first respondent has unilaterally altered the conditions of contract and the first respondent cannot by executive instructions or circulars amend the conditions of contract entered into between the petitioner and the first

respondent. Though the petitioner forwarded the representation dated 03.06.2020, pointing out to the respondent that the contract of work was entered into between the petitioner and the first respondent on 27.05.2014, and at the work site, there was delay in removing the electricity lines and as land acquisition process was not completed hence, the work could not be completed within stipulated time. There did not appear any provision to deduct price escalation and the payments were required be made as per the terms and conditions of the contract, without deducting the price escalation charges on royalty. However, there was no response from the respondents to this representation. Learned Senior Advocate therefore, contends that the impugned circular cannot be sustained on the ground of misinterpretation of the judgment of the Hon'ble Supreme Court in NHAI (supra) which was rendered in different facts and the first respondent cannot alter the terms of the tender agreement unilaterally which was detrimental to the interest of the petitioner. He, therefore, prays that the petitions deserve to be allowed and impugned circular is liable to be quashed and set aside. In support of his submission, he placed reliance on the following judgments :-

i) National Highway Authority of India ...Versus... Progressive - MVR (JV) (2018) 14 SCC 688

ii) Bharat Sanchar Nigam Limited and Another ...Versus... BPL Mobile Cellular Limited and Others (2008) 13 SCC 597

iii) C-5 Facility and Security Services, Nagpur ...Versus... Bharat Sanchar Nigam Ltd., Nagpur 2015(6) Mh.L.J. 647.

iv) Manjeri Vijaysinh Patil ...Versus... State of Maharashtra and another 2009(1) Mh.L.J. 371.

8. The learned advocate for the respondents submits that by the impugned circular revised instructions are issued by the second respondent and the same is by way of a policy decision. The second respondent was entitled to change the policy and taking into consideration the escalation of price of minor minerals at the behest of Revenue and Forest Department, the second respondent was required to issue the impugned circular. The second respondent was entitled to issue the circular which was applicable to the petitioner's contracts. The learned advocate for the respondents further submitted that it was the responsibility of the petitioner to pay the royalty of minor minerals and hence, in view of the impugned circular, the petitioner was liable to pay the difference of increase in Royalty because of price escalation. He submits that the impugned circular was issued in view of the decision of the Hon'ble Supreme Court in NHAI (supra) and the petitioner has not made out any case to quash and set aside the impugned circular, the petitions are devoid of substance and the same may be dismissed. He relied upon the judgment of NHAI (supra). He also submitted that the petitioner without making any representation to the Superior Authorities had directly approached this Court.

9. Heard learned counsel for the respective parties and perused the writ petitions, the annexures thereto and reply filed by the respondents.

10. The question for consideration is :

Whether, the impugned circular dated 17.02.2020 can be retrospectively made applicable to the case of the petitioner or whether, the petitioner's cases would be governed by the terms and conditions of the tender agreements/contracts entered into between the petitioner and the first respondent ?

11. For considering the dispute, we deem it appropriate to reproduce the price variation Clause no.33 of the special terms and conditions of the tender agreement so also Clause 36 and 36(A).

"33. Price Variation Clause : (G. R. dated 16.05.2005)

If during the operative period of the contract as defined in conditions (i) below there shall be any variation, in the Consumer Price Index (New Series) for Industrial Workes for Nagpur centre as per the Labour Gazette Published by the Commissioner of Labour, Government of Maharashtra and/or in the whole-sale Price Index for all commodities prepared by the Office of Economic Adviser, Ministry of Industry, Government of India or in the price of petrol/ oil and lubricants and major construction materials like bitumen, cement, steel various types of metal pipes etc. then subject to the other conditions mentioned below, price adjustment on account of.

- (1) Labour Component.
- (2) Material Component.
- (3) Petrol, Oil and Lubricants Component.
- (4) Bitumen Component.
- (5) HYSD & Mild Steel Component.
- (6) Cement Component.
- (7) C.I. & D.I. Pipes Component.

Calculated as per the formula hereinafter appearing, shall be made. Apart from these, no other adjustments shall be made to the contract price for any reasons whatsoever. Component percentage as given below are as of the total cost of work put to tender. Total of Labour, Material & POL components shall be 100 and other components shall be as per actual.

1. Labour Component-K1 19%
2. Materials Component-K2 72%
3. POL Component-K39%
4. Bitumen ComponentActual

5. TMT Steel Component Actual

6. Cement Component Actual

7. C.I. & D.I. Pipe Component Actual

Note : If Cement, Steel, Bitumen, C.I. & D.I. Pipes are supplied on Schedule 'A' then respective component shall not be considered. Also if particular component is not relevant same shall be deleted."

Rest of the Clause is not reproduced as it is not found relevant for deciding the question for consideration.

CLAUSE 36 :

Payment of quarry fees, and Royalties :-

All quarry fees, royalties, Octroi dues and ground rent for stacking materials, if any should be paid by the contractor. The tendered rates shall be inclusive of all liability under Maharashtra minor mineral extraction rules and the contractor shall take all steps necessary as are essential in terms of Maharashtra minor mineral extraction rules.

CLAUSE 36 (A) :

The bill wise royalty charges for constructing material payable to the contractor shall be calculated separately from payment made to the contractor the amount of royalty charges so calculated shall be withheld in the form of deposit, the withheld amount shall be return to the contractor on production of proof of payment for royalty charges to the Revenue Department. The contractor shall be solely responsible for payment of quarry fees royalty charges etc.

12. The tender agreements were entered into by the petitioner and the first respondent in the year 2011 and 2014. In terms of Clause 36, the royalty is to be paid by the contractor. The rates shall be inclusive of all liability under the Maharashtra Minor Mineral Extraction Rules and the contractor has to take all the steps necessary as are essential in terms of the Maharashtra Minor Mineral Extraction Rules. As per Clause 36(A), bill wise royalty charges for construction material payable to the contractor was to be calculated separately from the payment made to the contractor. The amount of royalty charges so calculated were to be withheld in the form of deposit. The withheld amount had to be returned to the contractor on production of proof of payments of royalty charges to the Revenue Department.

13. The petitioner from time to time has submitted the running bills, from which the amount of royalty was deducted. The petitioner has placed on record the chart of six running bills at Annexure P7, the total amount of running bills is Rs.3,51,69,757/-, from which the royalty amount of Rs.38,22,307/- was deducted. At Annexure P8, the petitioner has placed on record price escalation bills, which were calculated as per the formula given in Clause 33 the Price

Variation Clause. This position is not disputed by the respondents. In the tender agreement, there does not appear any provision to deduct the price escalation charges on royalty and the learned counsel for the respondents was not in a position to point out any such provision in the tender agreements/contracts.

14. The tender agreements were entered into between the petitioner and the first respondent in the year 2011 and 2014, the terms and conditions of the tender agreements have been acted upon since the year 2011 and 2014. The impugned circular is issued in the year 2020, under the signature of the Executive Engineer. There is no reference of resolution no.55/6 passed in 55th meeting of the governing council of respondent no.1. The circular issues revised instructions in respect of refund of difference of price escalation of royalty to the contractors. The language used in the circular does not indicate that it is applicable retrospectively. It is the settled legal position that a statute or direction issued thereunder is presumed to be prospective only unless retrospectivity is indicated expressly or by necessary implication, as held in *Kusum Hotels (P) Limited ..Vs.. Kerla SEB 2008(13) SCC 213*. In this view of the matter, the impugned circular issued in the year 2020 cannot be made applicable in the case of the petitioner retrospectively. According to us, the circular would be applicable prospectively to the contracts entered into after 17.02.2020.

15. The impugned circular by which the revised instructions are issued cannot be made applicable to the case of the petitioner, as it would amount to alteration of the terms of the contract entered into between the petitioner and the first respondent unilaterally, which is not permissible in view of the settled legal position. The Hon'ble Supreme Court in *BSNL (supra)* found that where the Department of Telecommunication (DoT) claimed charges from the mobile companies on the basis of the internal circular issued, contrary to the contracts entered into between the parties, held : "the circulars having no statutory force would not govern the terms of the contract, such circulars cannot ipso facto be given effect to unless they become part of the contract. Once a concluded contract was arrived at between the parties concerned, they were bound thereby. If the parties were to alter/modify the terms of contract, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of 'acceptance sub silentio'. Any novation in contract was to be done on the same terms as are required and entered into a valid and concluded contract and no change into the contract could have been made unilaterally. When a contract entered into between the parties, what is determinative is enforcement of the terms and conditions to be governed by the contract, subject, of course, to the application of the statute and statutory provisions. Promise on the part of the government was acted upon by the respondents, therefore, the Government now should not ordinarily be permitted to take a different stand."

This Court in *C-5 Facility and Security Services, Nagpur ...Vs... B.S.N.L.*, held that "the parties are bound by the agreement and the respondents ought not to

have modified part of the terms of the agreement unilaterally, the reasons assigned by the respondent for issuance of corrigendum would not be enough to unilaterally modify the terms and conditions of the agreement, particularly when petitioner deployed Security Guards exclusively within the framework of the contract."

The Hon'ble Apex Court in *Suresh Kumar Wadhwa ...Versus... State of Madhya Pradesh and others* AIR 2017 SC 5435, held :-

26. Equally well-settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally "alter" the terms and conditions of the contract and nor they have a right to "add" any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, who adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply such additional terms/conditions.

16. In the case in hand, the issue as to price adjustment of the difference in increase in the royalty charges is covered by the terms of the contract tender agreements/contract, particularly Clause 33 of the said terms and conditions of the tender agreement, which have been acted upon and implemented since the date of tender agreements. In this view of the matter, according to us, the petitioner has rightly invoked the doctrine of promissory estoppel. The second respondent is estopped from unilaterally altering the terms and conditions of the tender agreement by applying the impugned circular to the case of the petitioner. In the light of the above referred decisions, according to us, the respondents are not justified in applying the impugned circular to the case of the petitioner.

17. In view of the forgoing reasons, we are of the considered opinion that the impugned circular issued in the year 2020 cannot be made applicable retrospectively to the contracts entered into between the petitioner and the first respondent in 2011 and 2014. The terms of the tender agreements/contracts entered into between the petitioner and the first respondent will govern the case of the petitioner in respect of payment of royalty in terms of Clauses 36 and 36(A). The Price Variation Clause under Clause 33 will govern the case of the petitioner in respect of the escalation in royalty charges and not impugned circular. In view of the aforesaid conclusion, we are not required to go into the merits of the challenge raised by the petitioner as to whether the respondents were justified in issuing the impugned circular on the basis of the decision of the Hon'ble Supreme Court in *NHAI (supra)*. Challenge to the circular is thus kept



open for being considered in an appropriate matter. Since we have not gone into the merits of the challenge to the impugned circular, we do not deem it appropriate to quash it. Hence, we pass the following order by moulding the relief claimed in the petition :

ORDER

i) It is hereby declared that the impugned circular dated 17.02.2020, shall not apply to the case of the petitioner and the petitioner's case would be governed by the tender agreements/contracts entered into between the petitioner and the first respondent in the year 2011 and 2014.

ii) The respondents are hereby restrained from deducting price escalation charges on Royalty from the bills of the petitioner in terms of the impugned circular dated 17.02.2020.

18. Rule is made absolute in above terms with no order as to costs.