

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 5TH DAY OF MARCH 2015/14TH PHALGUNA, 1936

AS.No. 160 of 1997 (E)

AGAINST THE JUDGMENT IN OS 119/1991 of PRINCIPAL SUB COURT,
ALAPPUZHA, DATED 30-11-1995.

APPELLANT/DEFENDANT:-

STATE OF KERALA, REPRESENTED BY THE
DISTRICT COLLECTOR, COLLECTORATE,
ALAPPUZHA.

BY GOVERNMENT PLEADER SHRI.T.J.MICHEAL.

RESPONDENTS/PLAINTIFF:-

1. K.MANOCHARAN, P.W.D. CONTRACTOR,
DEVASWOMVELI, POLETHAI P.O.,
S.L.PURAM, ALAPPUZHA. (DIED)

(**)ADDL.2. PONNAMMA, W/O.LATE MANOHARAN,
POLLETHAI P.O., S.L.PURAM.

3. LEKSHMI, D/O.LATE MANOHARAN,
POLLETHAI P.O., S.L.PURAM.

4. PARVATHY, D/O.LATE MANOHARAN,
POLLETHAI P.O., S.L.PURAM.

(ADDITIONAL RESPONDENTS 2 TO 4 ARE IMPEADED AS PER
ORDER IN IA.NO.2300 OF 2009 DATED 16.1.2014)

BY ADV. SRI.JOMY GEORGE
ADV. SRI.JOHN JOSEPH
ADV. SRI.K.RAMANATHAN, FOR ADDL.R2, TO R4.

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 05-03-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Kvs/-

P.B.SURESH KUMAR, J.

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A.S.No.160 of 1997.
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Dated this the 5th day of March, 2015.

J U D G M E N T

The State of Kerala, the defeated defendant in O.S.No.119 of 1991 on the file of the Court of the Principal Subordinate Judge, Alappuzha is the appellant in this appeal.

2. O.S.No.119 of 1991 is a suit for the realisation of money. The facts relevant for the decision of the appeal are the following:

3. The Public Works Department ('the Department', for short) of the State invited tenders for execution of a few works in connection with the construction of Pulinkunnu Police Station. The probable amount of contract for the works was Rs.3,88,688/-. The plaintiff submitted a bid for the works. The bid of the plaintiff was to execute the works at 45% above the probable amount of contract. The bid submitted by the plaintiff was accepted by the State.

Thereupon, Ext.B1 agreement was entered into between the plaintiff and the State by which tendered work was assigned to the plaintiff. The main item of the works assigned to the plaintiff was the construction of a concrete roof for the building. According to the plaintiff, after he has made all the arrangements for the works, he was instructed by the officials of the Department to stop the work on the ground that the walls of the building do not have sufficient strength to hold the concrete roof. It is also his case that later, the officials of the Department directed him to construct an asbostos cement roof for the building in the place of the concrete roof provided for in the contract. According to the plaintiff, he was not obliged to execute the said work and when he expressed his inability to execute the same, the contract was terminated at his risk and costs, after forfeiting the earnest money deposit made by him. The case of the plaintiff is that the termination of the contract is illegal and he is entitled to compensation for the breach of the contract committed by the State. The suit claim was for

Rs.1,38,515/-.

4. The defendant filed a written statement contenting mainly that the plaintiff was bound to execute the asbastos cement roof work for the building and since he did not execute the same, the termination of the contract is in accordance with law.

5. The plaintiff gave evidence as PW1. Two witnesses were examined on his side as PW2 and PW3. Exts.A1 to A10 are the documents produced by the plaintiff. One witness was examined on the side of the defendant as DW1. Exts.B1 to B3 are the documents produced by the defendant.

6. The trial court, on an evaluation of the materials on record, found that the defendant had committed breach of the terms of contract and that therefore, the termination of the contract was illegal. The trial court also found that since the termination was illegal, the plaintiff is entitled to the earnest money deposit made by him and the loss of profit, by way of damages. Rs.19,450/- was the earnest

money deposit made by the plaintiff. Since the probable amount of contract was Rs.3,88,688/-, the trial court computed the loss of profit at Rs.38,863/-. A decree was accordingly passed for a sum of Rs.58,313/-. The defendant is aggrieved by the said decision of the court below and hence this appeal.

7. Heard the learned Government Pleader appearing for the appellant and the learned counsel for the respondent.

8. It is beyond dispute that as per the terms of the contract, the plaintiff had to construct a concrete roof for the building, and to carry out a few ancillary works. It is admitted by DW1 that when cracks were noticed in the walls of the building, the Department had directed the plaintiff to stop the work. Ext.A1 is the letter sent by the plaintiff to the Executive Engineer of the Department on 23.5.1988. In Ext.A1, it is stated by the plaintiff that while the work was being carried out by him, the Assistant Executive Engineer of the Department had instructed him to stop the work on 3.5.1988. As per Ext.A1, the plaintiff sought the permission

of the Department to resume the work. The defendant has no case that what is stated by the plaintiff in Ext.A1 is incorrect. They have also no case that any reply has been sent to Ext.A1 letter. Ext.A2 is another letter sent by the plaintiff to the Executive Engineer of the Department on 6.6.1988, wherein also the contents of Ext.A1 letter is reiterated. In Ext.A2, it is stated that the Superintending Engineer of the Department had also inspected the site of the work and instructed him not to carry out the work. The defendant has no case that what is stated by the plaintiff in Ext.A2 is incorrect. They have also no case that any reply has been sent to Ext.A2 letter. Ext.A3 is another letter sent by the plaintiff to the Superintending Engineer of the Department on 4.7.1988. As per Ext.A3, the plaintiff had requested the Department to take back the Departmental materials supplied to him for the execution of the work. There was no reply to Ext.A3 letter as well. Ext.A4 is another letter sent by the plaintiff to the Superintending Engineer of the Department on 20.9.1988, wherein the

plaintiff has categorically stated that in so far as he could not complete the work on account of the intervention of the Department, he may be paid the cost of the work already executed. There was no reply to Ext.A4 letter. Ext.A5 is a letter issued by the Assistant Executive Engineer of the Department to the plaintiff. It is seen that Ext.A5 is the reply to Ext.A4 letter addressed by the plaintiff to the Superintending Engineer of the Department. As per Ext.A5, the Department had directed the plaintiff to construct an asbestos cement sheet roof for the building in the place of the concrete roofing. Ext.A6 is the notice of termination of the contract. In Ext.A6, it is stated that the plaintiff has not carried out the work in accordance with the terms of the agreement and therefore the Department proposes to terminate the contract at the risk and costs of the plaintiff. In Ext.A6 there is no mention about the direction issued by the Department to stop the work and the subsequent direction issued by the Department to change the nature of the work. Instead, Ext.A6 proceeds as if the plaintiff had

agreed to construct the asbestos cement sheet roof for the building and he has failed to execute the work as agreed. It is beyond dispute that the contract was not to carry out the asbestos cement sheet roofing work for the building and therefore, the finding of the court below that the plaintiff has not committed breach of the terms of the contract is perfectly in order. It is beyond dispute that the termination of the contract was on the basis that the plaintiff has committed breach of the contract. The finding of the court below that the termination of the contract is illegal is also therefore in order.

9. Coming to the quantum of compensation, it is seen that the plaintiff has been given a decree only for the earnest money deposit made by him amounting to Rs.19,450/- and Rs.38,863/- towards loss of profit. The learned Government Pleader, relying on Sections 56 and 65 of the Contract Act, contended that the contract in question being one incapable of performance is a void contract and therefore the plaintiff is not entitled to compensation for loss

of profit. According to him, the plaintiff is entitled only to compensation for the expenses incurred by him in connection with the work. In other words, according to the learned Government Pleader, the impugned decree directing the defendant to pay to the plaintiff a sum of Rs.38,863/- towards loss of profit is unsustainable. There is no substance in the said argument. The plaintiff has no case in the plaint that the walls of the building were not strong enough to hold a concrete roof. Instead, the case set up by him was that when he was about to commence the work of the roof, the officials of the Department instructed him to stop the work. The materials referred to earlier would also indicate that it is at the instance of the officials of the Department that the work was stopped. DW1 has admitted in cross examination that he has instructed the plaintiff to stop the work of the concrete roof work on behalf of the Department. As noticed above, the plaintiff has though sent letters requesting the Department to permit him to resume the work, no reply was sent to those letters. As such, it

cannot be said that the plaintiff had maintained at any point of time the stand that the work assigned to him was incapable of performance, so as to make the contract void. It is the case of the Department that the walls of the building were not strong enough to hold a concrete roofing on the same. The court below has not considered the question as to whether the walls of the building were strong enough to hold the concrete roof or not. There is also no finding by the trial court that the contract is void. In the circumstances, the contention raised by the learned Government Pleader that the contract in question was a void contract and therefore, the plaintiff is not entitled to compensation for loss of profits, is unsustainable. The appeal is devoid of merits and the same is accordingly dismissed.

**Sd/-
P.B.SURESH KUMAR,
(Judge)**

Kvs/-

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PA TO JUDGE.