

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

RP.No. 624 of 2013 (N) IN WP(C).15939/2012

AGAINST THE JUDGMENT IN WP(C) 15939/2012 DATED 04-12-2012

REVIEW PETITIONER(S)/RESPONDENTS 1, 2 & 4 IN THE W.P.(C):

1. THE ASSISTANT ENGINEER
LOCAL SELF GOVERNMENT DEPARTMENT
PANMANA GRAMA PANCHAYATH, PANMANA, KOLLAM.

2. THE EXECUTIVE ENGINEER
LOCAL SELF GOVERNMENT DIVISION, DISTRICT PANCHAYATH
KOLLAM-691009.

3. THE STATE OF KERALA
REPRESENTED BY THE SECRETARY
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM.

BY ADV. GOVERNMENT PLEADER SHRI.K.K.SAIDALAVI

RESPONDENT(S)/PETITIONER & 3RD RESPONDENT IN THE W.P.(C):

1. M.ABDUL MAJEED KUNJU
S/O.MUHAMMED KUNJU, PARAYANTAYYATHU VEEDU
PANMANA PUTHENCHANTHA P.O., CHAVARA-691583.

2. THE SECRETARY
PANMANA GRAMA PANCHAYATH, PANMANA P.O., KOLLAM-691583.

R1 BY ADV. SRI.V.JAYAPRADEEP
R2 BY SRI.V.G.ARUN

THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON
25-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. SURENDRA MOHAN,J.

R.P.No: 624 OF 2013 IN
W.P(C) NO. 15939 OF 2012

Dated this the 25th February, 2015.

O R D E R

Respondents 1,2 and 4 in WPC 15939/2012 are the review petitioners. The writ petitioner is the first respondent in the review petition and the second respondent in the writ petition is the second respondent herein. The petitioners have filed this review petition seeking review of the judgment dated 4.12.2012, finally disposing of the writ petition. As per the judgment sought to be reviewed, the following directions have been issued:-

“This writ petition is accordingly disposed of with the following directions:-

i) The second respondent is directed to complete the work of preparing a final bill on the basis of the quantification that has been done as

evident from Ext.P4. Final bill shall be prepared as expeditiously as possible and at any rate within a period of one month of the date of receipt of a copy of this judgment and payments shall be made immediately thereafter.

ii) The third respondent is directed to make payment of the admitted amounts that are due and payable to the petitioner within a period of two weeks of the date of receipt of a copy of this judgment.”

The review petitioners are aggrieved by the said directions.

2. According to the review petitioners, the contract work involved in the present case was that of filling up the play ground of the Sankaramangalam Higher Secondary School. The first respondent had undertaken the said work from the second respondent. The first respondent had approached this Court by filing the writ petition contending that he was not paid the bill for the work undertaken and completed by him. It was also contended that, the delay in payment of the bill was causing serious hardships and prejudice for the reason that, he had raised the amount for completing the work

by availing financial assistance from different banks including the District Co-operative Bank. The banks had initiated coercive proceedings for recovery of the loan. Therefore he sought for the issue of appropriate directions for disbursement of the amounts due to him. On receipt of notice, the second respondent entered appearance and filed counter affidavit in the writ petition. No counter affidavit was filed by any of the other respondents. The matter was heard and was finally disposed of on 4.12.2012, as per the judgment that is sought to be reviewed.

3. The writ petition was finally disposed of on 4.12.2012. As already noticed above, directions were issued to the petitioners as well as the second respondent to complete the formalities of preparing a final bill and to disburse the amount. Since the amount was not paid in spite of the direction issued as stated above, on 11.3.2014 the first respondent filed contempt of court case No:388/2014 alleging wilful violation of the direction of this Court against the second petitioner and the second respondent herein. This

review petition has been filed on 26.7.2013 after the contempt of court case had remained pending for a period of four months.

4. According to the respondents, they could not apprise this Court of the actual state of affairs before final disposal of the writ petition. What is stated in paragraph 3 of the review petition is that, in cases where the quantity of earth to be filled exceeds 300 M³, the initial level should be reported to the Chief Technical Examiner and on completion of the work final level should also be reported to the Chief Technical Examiner, in view of Annexures 1 and 2 Government Orders. In the present case, the initial level taken by the Assistant Engineer, Local Self Government Department, Panmana Grama Panchayat was reported to the Chief Technical Examiner on 25.9.2010. It was only thereafter that, the petitioner had commenced the work of filling earth for the purpose of raising the level of the School ground. According to the petitioners, the first respondent had thereafter taken up the stand that he had completed the work and had demanded payment for the

same. However, when the first respondent conducted an investigation it was found that only 738.5M³ of earth had been used. The first respondent was therefore informed of the said discrepancy, that the agreed quantity of earth had not been used. The initial level taken and the final levels recorded are alleged to be Annexures 4 and 5, Annexure 5 being the calculation. According to the petitioners, Annexures 4 and 5 show that instead of filling at certain points, cutting had been undertaken. It is alleged that though the petitioner was informed that the work had to be completed he took no action. In the above circumstances the Panchayat authorities had requested the second respondent to resolve the issue. Therefore, the second petitioner conducted an inspection and made a preliminary assessment of the quantity of earth that was used for filling. What is stated is that, it was found on inspection that there was a mistake in calculating the initial level and without reconstructing the initial level it was not possible to determine the exact quantity of earth that was used for filling the ground. However, the review petitioner

assessed the quantity of earth as 2982M³. According to the petitioners it was at a point of time when steps were being initiated for conducting a scientific measurement for reconstructing the initial levels and to determine the exact quantity of earth used for filling, by co-relating the initial level so reconstructed with the final level that the writ petition was filed. It is alleged that, what was done as per Ext.P4 in the writ petition was only a preliminary assessment and that it was not possible to prepare a final bill on the basis thereof. Therefore, on 2.3.2013 another inspection was conducted. On the basis of the said inspection, the initial level was reconstructed, the same was co-related to the final level that was taken and the quantity of earth that was used by the petitioner for filling up the ground was found to be 1593M³. It is therefore contended that the direction in the judgment sought to be reviewed, to prepare the final bill on the basis of Ext.P4 is liable to be reviewed and set aside. Annexures 1 to 13 are also relied upon to support the contention that it was necessary to review the judgment.

5. A counter affidavit has been filed by the first respondent. According to the first respondent, the work undertaken by the first respondent had to be done under the constant supervision of the first respondent. The work was commenced only after the initial level was taken. It is an admitted fact that the initial level was also reported to the Chief Technical Examiner. Since the work was being constantly supervised by the first petitioner, it is contended that the said authority had full knowledge of the manner in which the work was being conducted. However, the records have been manipulated according to the counsel, for reasons best known to the authorities. In Ext.R1 a document obtained by the first respondent under the Right to Information Act 2005, the Bench mark (TBM) has been fixed and marked at the step of the nearest Police Station. It is also stated that an "x" mark has been put on the step. The first respondent has produced a photograph of the said mark as Annexure R1(b). However, it is pointed out that at page 8 of Ext.R1(a) the TBM has been stated to be at the basement level of the Police

Station building. According to the counsel, difference in the levels has been subsequently created to prop up a case that the petitioner had not brought sufficient quantity of earth to the school ground. According to the learned counsel, the work was completed on 31.12.2011. Since the first respondent created some disputes the work was quantified by the second respondent who visited the spot and conducted excavation at various places. There is nothing in Ext.P4 to indicate that the same was only a preliminary assessment as contended. It is pointed out that, the present review petition is only the result of an afterthought, preferred after manipulating the records. For the above reasons it is contended that the review petition is only to be dismissed.

6. Heard. As already noticed above, the work was undertaken by the petitioner as per an agreement dated 2.9.2010, as evident from Ext.P2. The work was completed on 31.12.2011. Ext.P3 is the letter issued by the petitioner to the second respondent on 4.1.2012 claiming payment for the work undertaken by him. It was thereafter that, the second

respondent inspected the school ground on 13.3.2012. According to the second respondent there was some mistake in the initial levels that were taken. Therefore, he bore holes into the ground at 15 places using a JCB and determined the average depth. He made calculations on the basis of the said investigation undertaken by him and found that the quantity of earth used for filling up the ground was 2982M³. There is nothing in Ext.P4 to indicate that the exercise undertaken by the second respondent was of a preliminary nature or that the same was only a preliminary assessment. Therefore, I am not satisfied that the statements made to the said effect in the review petition can be accepted.

7. At the instance of the learned Govt. Pleader the second respondent was personally present in Court when the review petition was finally argued. He also came forward to explain the significance of the documents produced along with the review petition. To a pointed question of the Court as to what was wrong with the initial levels that were recorded and reported to the Chief Technical Examiner he could not give any

clear cut answer. His only explanation is that he found that instead of undertaking the filling work, at some places cutting work had also been undertaken which accounted for 140M³. The above according to the second respondent could be attributed only to some mistake in the initial levels that were recorded. It was for the said reason that he has stated that there was a defect in the initial levels taken. The above is evident from Annexure 5. However, the said contention cannot be accepted for the reason that the second respondent himself had no such case when he issued Ext.P4. Admittedly, after the writ petition was finally disposed of, on 2.3.2013 a further verification was conducted. There is no convincing reason put forward regarding the necessity for the above further verification or quantification that was undertaken. It is to be borne in mind that the work was completed as far back as on 31.12.2011. The second respondent himself had undertaken a quantification of the work conducted as per Ext.P4. Though it is contended that, what was attempted by Ext.P4 was only a preliminary investigation, as already found

above, there is no material or evidence produced before me to support the said contention. Since the writ petition had been disposed of directing the second respondent to complete the work of preparing a bill on the basis of the quantification undertaken there was no reason to conduct a further verification as done here. The bonafides of undertaking the said verification is questionable. The learned Govt. Pleader has made available to me the book containing the reconstructed levels taken by the second respondent as well as the field book maintained by the first respondent. I notice that on many pages there are corrections made using a whitener for which no explanation is forthcoming. Entries regarding levels entered have been scored off and corrected at various places without anybody initialling the corrections. I am not satisfied that the books could be accepted as having been properly maintained in the ordinary course of business or discharge of official duties.

8. As already noticed above as per the PWD manual the work was to be undertaken under the constant supervision of

the first respondent. Therefore it has to be presumed that the first respondent had undertaken the work under the constant supervision of the first respondent. The progress of the work was obviously being monitored constantly. In view of the above, it cannot be presumed that the second respondent was unaware of the details of the work that was undertaken and completed. Though the work was completed on 31.12.2011, the spot was inspected by the second respondent only on 13.3.2012 as evident from Ext.P4. I do not find that any scientific method was adopted for the verification conducted on 2.3.2013 by the very same person other than boring holes into the ground again at different places, taking the average depth and making calculations. The same exercise as in Ext.P4 has been repeated once more to arrive at a quantity that is lesser than what was found in Ext.P4. It is stated that what has been found in Annexure 10 is the actual quantity of earth used. I do not find any sanctity in the said calculation. On the contrary the allegation of the petitioner that the entire exercise was undertaken for the reason that contempt of court

proceedings had been initiated against the second respondent by the petitioner cannot be lightly brushed aside. For the above reasons, I do not find any infirmity in the judgment justifying a review or modification thereof, as sought for by the review petitioner. The review petition is therefore dismissed.

Sd/-
K. SURENDRA MOHAN
Judge

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/True copy/

