

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&**

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 23RD DAY OF JULY 2015/1ST SRAVANA, 1937

RFA.No. 621 of 2014

O.S.NO.118/2006 OF SUB COURT, NEDUMANGAD

APPELLANT(S)/DEFENDANTS IN O.S :

- 1. STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**
- 2. THE SUPERINTENDING ENGINEER,
ROADS AND BRIDGES (SOUTH CIRCLE), KERALA PWD,
THIRUVANANTHAPURAM.**

BY GOVERNMENT PLEADER SRI.P.P.PADMALAYAM

RESPONDENT(S)/PLAINTIFFS IN O.S. :

- 1. SREE BHADRA CONSTRUCTION COMPANY,
A PARTNERSHIP FIRM HAVING ITS REGISTERED OFFICE AT ASHA
BHAVAN, NEDUVATHOOR, NEELESWARAM P.O., KOTTARAKKARA,
KOLLAM DISTRICT, CONSISTING OF THE PLAINTIFF'S 2 TO 4 HEREIN
AND REPRESENTED BY ITS MANAGING PARTNER D.GIRIJA,
W/O.PARAMESWARAN PILLAI, AGED 53 YEARS, CONTRACTOR
RESIDING AT ASHA BHAVAN, NEDUVATHOOR, NELESWARAM P.O.,
KOTTARAKKARA, PIN- 695 106.**
- 2. GIRIJA, AGED 53 YEARS,
W/O.PARAMESWARAN PILLAI, CONTRACTOR
ASHA BHAVAN, NEDUVATHOOR, NELESWARAM P.O.,
KOTTARAKKARA, PIN- 691 506,
MANAGING PARTNER SREE BHADRA CONSTRUCTION CO.**
- 3. P.PARAMESWARAN PILLAI, AGED 63 YEARS,
S/O.MADHAVAN PILLAI, CONTRACTOR, ASHA BHAVAN,
NEDUVATHOOR, NEELESWARAM, KOTTARAKKARA, PIN- 691 506,
PARTNER, SREE BHADRA CONSTRUCTION CO.**

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**4. P.DEEPAK, AGED 30 YEARS,
S/O.PARAMESWARAN PILLAI, BUSINESS, ASHA BHAVAN
NEDUVATHOOR, NEELESWARAM P.O., KOTTARAKKARA, PIN- 691 506,
PARTNER, SREE BHADRA CONSTRUCTION COMPANY.**

**BY SRI.K.L.VARGHESE (SENIOR ADVOCATE)
ADVS. SMT.SANTHA VARGHESE
SRI.RAHUL VARGHESE
SRI.RANJITH VARGHESE**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 23-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

Msd.

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

R.F.A. No. 621 of 2014

Dated this the 23rd day of July, 2015

JUDGMENT

Sunil Thomas, J.

The defendants in a suit for recovery of money and declaration, aggrieved by the judgment dated 30th October, 2013 in O.S.No.118 of 2006, of Sub Court, Nedumangad, have preferred this appeal.

2. The first plaintiff is a partnership firm, with second to fourth plaintiffs as its partners. They are engaged in undertaking contract work with various governmental and other institutions. In response to a tender notification of the second defendant, quotation was submitted by them for the improvement of a restricted stretch of Aryanad-Palode road. After negotiations, the work was entrusted with the plaintiffs at the rate of 9.90% over and above the tendered rate. A selection notice dated 13.11.2002 was issued, with period of completion of six months, expiring on 13.05.2003. A formal agreement dated 12.12.2002 was entered into for an agreed probable contract amount of Rs.56,52,021/-. The plaintiffs

started the work pursuant to the contract. However, due to several breaches committed by the defendants, plaintiffs could not complete the work within the scheduled period. There was a considerable unilateral modification in the tender schedule. They also revised the tendered estimate to Rs.66,99,229/-. The modification resulted in major increase in the item of work and the revised estimate was inadequate for completion of the work. The site that was handed over was a part of hilly tract which was considerably damaged. On completion of work of a distance of two kilo meters, the departmental authority directed the plaintiffs to stop the work, awaiting further sanction from the higher authorities. In the meanwhile, the local MLA also intervened and suggested various modifications for completion of the work. The second defendant prepared revised estimate for 86 lakhs of rupees and forwarded it to the Chief Engineer for sanction. However, Governmental order was awaited for a long time. Since the excess work was 77.68% over and above the estimated work, the execution of the work was stopped awaiting sanction from the Government. The decision to execute huge additional work to cope up with site requirement was taken by the department towards the lag

end of the contractual period. There was a fundamental breach committed by the defendants and a sum of Rs.14,29,950/- was due from the defendants towards the value of the work done, even at the time of termination of the contract. The contract was terminated on 15.12.2003 by the 2nd defendant. Hence, the suit was filed seeking recovery of the above amount. The Executive Engineer was the only authority competent to terminate the work and hence termination of the contract was liable to be declared as void ab initio. The sum of Rs.1,23,875/- was liable to be refunded as the security amount including interest.

3. The defendants 1 and 2 filed a joint written statement denying the various allegations. Administrative sanction was granted for Rs.50,00,000/-, though the agreement was for Rs.56,52,021/-. The work was started as per the estimate. Since the rate was left unattended for several years, there was strong public demand to construct a pucca road. Hence, local MLA who was then a Minister also intervened and after the inspection by the concerned authorities, it was agreed to do the work in accordance with the site requirement. A protective retention wall at a distance of 2km alone could be

done. The revised proposal was not sanctioned by the Government though the plaintiffs were bound to execute the work up to a variation of 25% of the quoted rate. Instead of attending other items of work, the plaintiffs suddenly stopped the work, alleging liability on the department. The sudden stoppage of work created a lot of inconvenience to the public and hence, revised proposal was sent to the Government. Since the work was not completed as per the directions, the contract was terminated. The claim of Rs.14,29,950/- was incorrect, since the work was terminated. The risk and cost of the plaintiff. He was not entitled to get the cost of the work done. The claim of the plaintiff for the value of construction materials was also not materialized.

4. On the basis of the above pleadings, appropriate issues were framed by the court below and the parties proceeded for trial. On the side of the plaintiffs, PWs1 to 3 were examined and Exts.A1 to A13 were marked. On the side of the defendants, DW1 was examined and Exts.B1 to B6(a) were marked. The commission report and estimate were marked as Exts.C1 and C1(a).

5. On an appreciation of the available materials, court

below held that plaintiffs were entitled to recover a sum of Rs.14,29,950/- towards the value of the work done by him with 6% interest. He was also entitled for realisation of the security amount of Rs.1,00,000/- with 6% interest from the date of agreement. The court declared that Ext.A8 order of termination was arbitrary and not binding on the plaintiffs.

6. This is assailed in this appeal. Heard both sides and examined the records.

7.It is admitted that by Ext.A2 selection notice dated 13/11/2002, the quotation submitted by the plaintiffs was accepted, at an estimated probable contract amount of Rs.56,52,021/-. The period of completion of the work was six months from the date of agreement i.e. 12/12/2002, to be completed on 13/5/2003. It is further admitted that the contract was cancelled by Ext.A8 dated 15/2/2003, which was also marked as Ext.B4, on the side of the defendants.

8. The essence of the contention of the defendants was that after the acceptance of the tender, there was an unilateral change of the tender schedule and tender estimate was revised escalating to Rs.66,99,229/-. It was further contended that more works, than the originally agreed upon, was liable to be

done, the work site was totally dilapidated and had been remaining unattended for long. It was further stated that there was interference from the public and at the instance of the local MLA. Plaintiffs were called upon to carry out all the revised proposals. Quantity sanctioned got exhausted after completion of two k.ms. Even though the revised estimate was sought to be approved by the State, it was also not done. In the meanwhile, the contract was unilaterally canceled by the defendants causing injury to the plaintiffs.

9. The defendants contended that there was no unilateral modification or alteration of the tender schedule and consequent revision of tender estimate. The plaintiffs called upon the defendants to produce the original tender agreement by filing I.A.No.1658/2012. The second defendant did not produce the original tender agreement on an excuse that it was misplaced. Consequently, Ext.A13, a photocopy of the agreement, was admitted in evidence and relied on by the court below. Ext.A13 showed that the agreement was executed for the very same amount mentioned in Ext.A2 selection notice. Evidently, had there been a revision of any tender schedule and a revision of estimate, it could have only

at the risk of defendants, and with the appropriate approval and sanction of the appropriate authority.

10. According to the plaintiffs, even though earnest efforts were taken by them, they could not complete the work due to various reasons as mentioned above. It was admitted even by the defendants that the work site was totally dilapidated and there was public outcry for carrying out more works. It is also brought on record that due to the intervention of the local MLA, the work inspection was done again and revised proposal for the balance work was sent to the Government. There is no serious dispute to the fact that the quantity sanctioned got exhausted, when the work was completed to a length of two k.ms. Evidently, in the case of such a revised proposal, the sanction of the Government was mandatory. It appears that the Government was moved for revision of the rates and also for sanction of the revised estimate. The defendants have no case that it was sanctioned by the Government, in the meanwhile.

11. Ext.B6 is the M. Book produced by the defendants. It describes the quantity of work done by the plaintiffs. Evidently, they could not have done the work in piece meal

manner, since the work to be done involved the earth work, construction of the retaining wall, construction of culvert metaling and tarring. Hence, the works seems to be inter-dependent and composite. It is also on record that there was interference from the public and hence there was further revision regarding the additional works to be done. These were the hindrances, which delayed the completion of the work. Evidently, the plaintiffs were constrained to stop the work, as the quantity sanctioned got exhausted and he was waiting for sanction of the revised estimate from the Government.

12. The definite contention of the plaintiffs was that the defendants had directed them to stop the work and to wait for sanction from the Government. Though the defendants denied this, Ext.A3 and A4 letters issued by the plaintiff dated 16/2/2003 and 25/3/2003 probabalises the case set up by the plaintiffs. Though an attempt was made by the defendants to contend that by Exts.B3 to B5, the defendants had directed the plaintiffs to resume the works, they are letters subsequent to Exts.A2 and A5. Evidently, the further execution of work under the contract had become stalled by that time.

13. The nature of the work done by the plaintiff is evident from the M Book produced by the defendants as well as the commission report. Even though the defendants had admitted that the plaintiff had done the work to an estimate of Rs.14,29,950/-, they had a case that the plaintiffs were not entitled for recovery of the above amount since they unilaterally stopped the work. The available materials indicate that the further progress of the work was rendered impossible due to the hindrances and non co-operation from the part of the defendants.

14. Even though the evidence of DW1 would allege that the plaintiffs unilaterally stopped the work, available materials indicate that the additional work sought to be done was more than 77% of the tender schedule which was a substantial work to be carried on. In the meanwhile, the plaintiffs have been demanding to carry out the measurement of the work already done, to make regular payments. It is also pertinent to note that though the contract stipulated payment of the amount at regular intervals, it was also not complied with.

15. The plaintiffs have claimed for value of the construction materials collected at the work site. The amounts

quantified for the above materials was Rs.2,91,599/-. The fact, that the materials were scattered at the site and that they were lying there for long, is also not seriously disputed. The evidence on record also indicates that the plaintiffs have been repeatedly requesting for measuring the above, which was also not acceded too. The commissioner, who inspected the site and submitted the report as Exts.C1 and C1(a), has proved that the materials were collected and were lying scattered and damaged, due to long lapse of time.

16. On an evaluation of the entire materials as above, the court below correctly and justifiably concluded that the plaintiff was constrained to stop the work due to reasons not attributable to any of his laches. There were substantial materials on record to show that due to the various hindrances from the side of the defendants the work, as agreed upon, could not be completed. Further, the materials that was supplied was sufficient only to satisfy only a portion of the work tendered. It was an admitted fact that the work done by the plaintiff was to the extent of Rs.14,29,950/-. Consequently, he was entitled for recovery of the above amount with interest at the rate of 6%. The court below was justified in granting the

above with reasonable interest as well as to return the security amount in the light of the finding that in spite of the request, the defendants did not co-operate. In the above background, the court below was also justified in arriving at a conclusion that the cancellation of the contract by the defendants was incorrect.

An evaluation of the entire materials leads to a conclusion that the court below was justified in granting the decree under challenge. No sustainable ground is made out in the appeal memorandum for interference with the factual findings. The appeal is without any merit and is, accordingly dismissed. No costs.

Sd/-
THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge

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