

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN**

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

RFA.No. 703 of 2014

**AGAINST THE JUDGMENT DATED 30-09-2010 IN OS. NO.312/2006 OF PRINCIPAL
SUB COURT, THIRUVANANTHAPURAM.**
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APPELLANTS/DEFENDANTS:-

- 1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
SECRETARIAT, THIRUVANANTHAPURAM.**
- 2. THE SUPERINTENDING ENGINEER,
ROADS & BRIDGES, SOUTH CIRCLE,
THIRUVANANTHAPURAM.**

BY GOVT. PLEADER SRI.A. MOHAMMED SAVAD.

RESPONDENT/PLAINTIFF:-

**P. EDWARD JOHN, AGED 51 YEARS,
S/O.PONNUMUTHAN NADAR,
GOVERNMENT CONTRACTOR,
VENEESH BHAVAN, MARIYAPURAM P.O.,
THIRUVANANTHAPURAM.**

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

**THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION
ON 12/03/2015, THE COURT ON 20/05/2015 DELIVERED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S ANNEXURES:- **NIL.**

RESPONDENT'S ANNEXURES:-

- | | |
|--------------------|---|
| ANNEXURE I | COPY OF THE CASE STATUS BEFORE THE EXECUTION COURT
IN TRIVANDRUM AS RETRIEVED FROM THE OFFICIAL
E-COURT WEBSITE. |
| ANNEXURE II | COPY OF THE MEDICAL CERTIFICATE SHOWING THAT THE
RESPONDENT IS A CANCER PATIENT AND IS UNDERGOING
TREATMENT. |

//TRUE COPY//

P.S. TO JUDGE

rs.

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

R.F.A.No.703 of 2014

DATED THIS THE 20th DAY OF MAY, 2015

JUDGMENT

ANIL K.NARENDRA, J.

The appellants are the defendants in O.S.No.313 of 2006 on the file of the Court of the Principal Subordinate Judge of Thiruvananthapuram. The said suit was filed by the respondent herein for realisation of the sum of ₹4,27,276/- due to him as per the statement of accounts furnished, from the appellants and their assets and for allowing him to realise future interest at the rate of 18% per annum on the aforesaid sum from the date of suit till realisation together with costs of the suit. The court below by judgment delivered on 30.9.2010 decreed the suit and allowed the respondent to realise the sum of ₹4,27,276/- together with interest at the rate of 12% per annum from the date of suit till realisation and costs of the suit from the appellants and their assets. Aggrieved by the said judgment and decree, the appellants are before this Court in this appeal.

2. We heard the arguments of the learned Government Pleader appearing for the appellants/defendants and also the learned counsel appearing for the respondent/plaintiff.

3. Going by the plaint averments, the plaintiff is a registered PWD contractor, who had undertaken the contract work of

"Improvements to Thirupurathoor-Pulluvila Road between Ch.2/600 to Ch.5/600" in pursuance of Ext.B1 agreement dated 14.12.2002 executed between the plaintiff and the second defendant (second appellant herein) acting for and on behalf of the Government of Kerala. The plaintiff had completed the entire work to the satisfaction of the defendants in September, 2003. During the execution of work, in terms of the provisions in the contract, a part bill for work amounting to ₹5,73,007/- was drawn up during March, 2003. While the part bill was pending payment, the plaintiff proceeded with the work and completed the same on the belief that the defendants would honour their contractual obligations. But, the defendants did not release the payment due under the part bill even after completion of the work. After completion of the work, final measurement of the work carried out by the plaintiff was recorded in the measurement books and a final bill in terms of such measurements was drawn up for a sum of ₹14,67,988/-, excluding a sum of ₹5,73,007/- covered by the part bill and passed for payment on 29.9.2003. The plaintiff contended that, as per the terms of contract, the defendants were liable to pay the final bill immediately on completion of the work. However, they released ₹5,73,007/- covered by the part bill only on 23.2.2005 and

₹14,67,988/- covered by the final bill only on 12.8.2005, nearly two years after the completion of work. Therefore, the plaintiff filed the suit to realise the sum of ₹4,27,276/- due as per the statement of accounts furnished together with interest at the rate of 12% per annum from the date of suit till realisation, with costs from the defendants and their assets.

4. The defendants (appellants herein) filed a written statement admitting the award of the contract work of "Improvements to Thirupurathoor-Pulluvila Road between Ch.2/600 to Ch.5/600" to the plaintiff vide Agreement No.78/SESC/2002-03 dated 14.12.2002 and also the fact that, the first and part bill (CC 1st) amounting to a gross amount of ₹5,92,194/- was received in the office of the Executive Engineer on 5.3.2003 and CC 2nd and final bill for a gross amount of ₹19,09,733/- was received in that office on 27.9.2003. Though the Department is liable to make payment as per agreement conditions as and when work bills are received, payment of the work bills can be effected only based on strict seniority and availability of funds and letter of credit and that the plaintiff was fully aware of this fact when he entered into the agreement for the execution of work. According to the defendants, there was no wilful delay in entertaining

the request made by the plaintiff as payment can be released only by observing strict seniority, in accordance with the orders of this Court. According to the defendants, there is no oral provision or agreement condition to give interest on belated payments and that payment was made to the plaintiff observing strict seniority and also as per allotment of funds and letter of credit.

5. Exts.A1 to A6 were marked on the side of the respondent/plaintiff and Exts.B1 to B5 were marked on the side of the appellants/defendants. Both sides have not chosen to adduce any oral evidence. On an appreciation of the facts of the case and the evidence on record, the court below came to the conclusion that there was delay on the part of the appellants/defendants in making payment to the respondent/plaintiff and that he is entitled to interest on the amount covered by the part bill and final bill from 29.9.2003 at the rate of 12% per annum till realisation together with costs.

6. The only question raised by the learned Government Pleader is, whether the court below is right in holding that the respondent/plaintiff is entitled to interest on delayed payment of the amount covered by the part bill and final bill for the period from 27.9.2003, when disbursement of payment to a registered contractor

of the Public Works Department (PWD) can be made only on the basis of a State-wise priority list for each Department prepared on the basis of registration of the bills.

7. As we have already noticed, the award of the contract work in question to the respondent/plaintiff on the strength of Ext.B1 agreement is not in dispute. Further, the appellants/defendants have admitted the fact that, the part bill and final bill in question were received in the office of the Executive Engineer on 5.3.2003 and 27.9.2003 respectively and that payment in respect of those bills were released to the respondent/plaintiff only on 23.2.2005 and 12.8.2005, nearly two years after the completion of the work. It is not in dispute that the provisions in the contract mandate payment as and when work bills are received. But, according to the appellants/defendants, they could not make payment for the work in question due to paucity of funds and the same was released to the respondent/plaintiff in terms of priority in the department concerned and as per availability of funds and letter of credit.

8. According to the respondent/plaintiff, in terms of the contract provisions, the appellants/defendants are liable to pay the final bill immediately on completion of the work. The

respondent/plaintiff had availed over draft facility from his bankers M/s. Federal Bank Ltd., Kunnathukal Branch, for executing the work in question and the defendants were well aware of the said fact since he has executed a power of attorney in favour of his bankers with the prior approval of the second appellant/second defendant. Consequent on the non-payment of amounts due on completion of the work, the respondent/plaintiff sustained severe financial loss and lack of funds for reinvestment made him handicapped to continue his business properly. Hence the respondent/plaintiff informed the second appellant/second defendant vide Ext.A3 letter dated 12.8.2005 that he has received the payment under protest and later caused to issue Ext.A4 notice dated 12.4.2006 under Section 80 of the Code of Civil Procedure, 1908, demanding payment of interest at the rate of 12% per annum for delayed payment of the amount due on completion of the contract work and thereafter instituted the suit.

9. On the other hand, the appellants/defendants contended that, the respondent/plaintiff is not entitled to claim interest on the part bill as well as final bill, since there is no delay or laches on their part as this Court in its judgment in C.C.C.No.803 of 2000 has directed the Government to make payment to the contractors in respect of the

bills registered before and after 31.3.1999 strictly in accordance with priority and that this Court in its order dated 18.10.2002 in C.M.P.No.50557 of 2002 in C.C.C.No.803 of 2000 has permitted the Government to prepare state wise priority list of each department based on the date of registration of the bill and to effect payment from the funds allocated to the department concerned on the basis of priority in each list. According to the appellants/defendants, the respondent/plaintiff was aware of the aforesaid order of this Court at the time of execution of Ext.B1 agreement, which was executed on 4.12.2002, and that the payment in respect of the work bills were made to the respondent/plaintiff in terms of the priority in the department concerned and hence the respondent/plaintiff is not entitled to interest for delayed payment.

10. The Kerala Financial Code (hereinafter referred to as 'the Financial Code') contains rules relating to all financial transactions of Government which fall into two broad classes, viz., receipts and disbursements; which should be followed by every Government servant in the matter of receipt, custody and disbursement of Government money. These rules are supplementary to the rules contained in the Kerala Treasury Code and should be applied in

conjunction with them. Chapter VII of the Financial Code deals with 'works'. Article 163 of the Financial Code provides that, the rules in Chapter VII are applicable to departments in General and are supplemented for particular departments by the detailed rules and orders contained in the respective department manuals and codes and any other special orders applicable to them. Article 165 provides further that, the Public Works Department (PWD) is responsible for the execution of all works which the Government have not specifically allotted to other departments. Article 178 deals with 'method of executing works' and Article 180 deals with 'provision of funds'. As per Article 180, except in accordance with the provisions of Articles 184 and 185 of that Code, no Government servant may enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures.

11. Article 184 of the Financial Code deals with 'starting of work without a sanctioned estimate or without adequate funds having been provided'. As per Article 184, if a higher authority orders a Government servant, on any ground whatever, to start a work for

which an estimate is required under the rules but no estimate has been sanctioned or for which adequate funds have not been provided and no competent authority has undertaken to provide the necessary funds, before the liability matures (whether an estimate has been sanctioned or not), it should convey the order to start the work to him in writing. A Government servant who starts any such work without a written order from a higher authority and a Government servant who issues a written order to start a work otherwise than in accordance with the rules will be liable to be held personally responsible for paying for the work done if it is found that his action was not fully justified by very exceptional circumstances. Similarly, Article 185 of the Code, which deals with 'starting a work in an emergency' provides that, it is occasionally necessary for a Government servant to start a work immediately on the occurrence of some sudden, unforeseen emergency, e.g., the breaching of the bund of an irrigation work, without waiting for an estimate to be sanctioned and funds provided. A Government servant who does this should report the facts at once to his immediate superior and to the Accountant General.

12. In the case on hand, the work in question is "Improvements to Thirupurathoor-Pulluvila Road between Ch.2/600 to

Ch.5/600" executed in terms of Ext.B1 agreement dated 14.12.2002 entered into between the respondent/plaintiff and the second appellant/second defendant acting for and on behalf of the Government of Kerala. The appellants/defendants have no case that the work in question falls within the sweep of Article 184 or 185 of the Financial Code. In such circumstances, the irresistible conclusion which can be drawn is that, the work in question falls within the sweep of Article 180 of the Financial Code, which mandates the second appellant/second defendant not to enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures.

13. Chapter X of the Kerala Public Works Department Manual (pre-revised) deals with preparation of 'estimates' for works to be executed. As per Para.10.2.4.1 of the PWD Manual, an estimate can become operative for execution by PWD only when funds are available. Generally, even when technical sanction is issued the availability of funds will be examined and the source of funds noted in the sanctions. The usual sources of funds for execution of works are enumerated in clauses (a) to (f) in Para.10.2.4.2 of the PWD Manual. Similar

provisions are there in Section 1801.1.4 of the Kerala Public Works Department Manual Revised Edition-2012.

14. Chapter XV of the Kerala PWD Manual (Pre-revised) deals with 'tenders and arrangement of contracts'. As per clause (c) in Para.15.2.2 of the PWD Manual, before tenders are invited for a work, there should be ample provision of funds for the work in the budget. If there is only a token provision in the budget, the work shall be put to tender only if additional funds can be found by diversion or otherwise. Similarly, Section 2003 of the Kerala PWD Manual Revised Edition-2012 provides for arrangement of works having administrative and technical sanctions with proportionate provisions of funds in the budget for the year through bids (tenders).

15. In **Anirudhan v. State of Kerala (1999 (3) KLT 1)** a Division Bench of this Court held that, "having regard to the explicit terms of Article 180 of Kerala Financial Code and Para.15 of the Kerala PWD Manual it is clear that Government are duty bound to make payments to the work completed. The aforesaid provision, which would unambiguously command that no work shall be tendered except with the availability of complete funds, has given rise to a promise or representation and it is on that basis alone the contractors come

forward to undertake the work, plan their work programme and arrange for the employment of staff and engagement of machinery and incur large investments.” Repelling the argument advanced on behalf of the State that, principles of seniority has to be maintained in the matter of payments for the works completed, the Division Bench held further that, “principles of seniority is totally irrational and opposed to the mandate under the Financial Code, PWD Manual and provisions of the agreement. The Financial Code and the PWD Manual provide for complete funding and tendering and only thereafter the work is to be called. The arrears, as pointed out by the contractors and also by the State, are accumulating only because of violation of the rules by not providing full funds as provided in the rules. The Government has to make payments strictly in time.” The Division Bench held that disbursement of arrears to the contractors should be on the principle of 'first done first paid'. In view of the undertaking given by the State that, all the contractors who have filed writ petitions and appeals on or before 23.6.99 will be paid within four months, the Division Bench did not award any interest for delayed payment; but it was made clear that, the State shall pay the amounts to the contractors within the aforesaid period, failing which the State shall

pay interest at the rate of 18% per annum to all such contractors and that, interest is payable on the matured liability after the completion of one month's time from the date of completion of the work with reference to each contractor. The judgment in **Anirudhan's case (supra)** was referred to by a Full Bench of this Court in **State of Kerala v. Anil (2002 (1) KLT 371)**.

16. The provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work. The fact that, after the completion of work final measurements were recorded and a final bill in terms of such measurements was drawn up and passed for payment on 29.9.2003 is not in dispute. But, according to the appellants/defendants, they could not make payment due to paucity of funds and the same was released to the respondent/plaintiff in terms of priority in the department concerned and as per availability of funds and letter of credit. They would also contend that, the respondent/plaintiff is not entitled for any interest for delayed payment, since going by Exts.B4 and B5 judgment/order of this Court any payment to the contractors can be made only in accordance with priority based on the date of

registration of the bill and subject to availability of funds.

17. When the provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work, the contractors are legally entitled for such payments without any delay, as they are undertaking the contract work on the legitimate expectation and promise that payment will be made at any rate immediately after the completion of work. Going by the terms of the agreement a contractor has to deposit a sum amounting to 5% of the cost of the work undertaken by him as security for the due performance of the contract and all damages payable by the contractor under the terms of the contract shall be deducted by the Executive Engineer concerned by adjustment of a sufficient part of the security deposit or from any other sum due, or which may become due to the contractor by the Government. In addition to this, a deduction of 10% from all the payments made to the contractor shall be made by the Executive Engineer concerned as guarantee fund, which shall be released to the contractor only after the work is completed to the satisfaction of the department and it is finally taken over by the department. When payment of part bills is

delayed indefinitely, the contractors are constrained to complete the entire work within the time stipulated in the contract by investing the entire funds raised by them, which in most of the cases would be borrowed funds from banks or financial institutions at higher rate of interest.

18. In the case on hand, the respondent/plaintiff had availed over draft facility from his bankers M/s. Federal Bank Ltd., Kunnathukal Branch, for undertaking the work in question, and had executed a power of attorney in this regard in favour of his banker with the prior approval of the second appellant/second defendant. Though the final bill was drawn up and passed for payment as early as on 29.9.2003, part payment was made only on 23.2.2005. The fact that payment for the work undertaken by the respondent/plaintiff was delayed due to paucity of Government funds is not in dispute. Admittedly, the respondent/plaintiff was denied the beneficial use of money for more than one year. The provisions in the Kerala Financial Code and the Kerala PWD Manual, which we have already referred to and the conditions of the contract for execution of the work lead to the irresistible conclusion that, the appellants/defendants have wrongfully deprived the respondent/plaintiff the beneficial use of the money

payable for the work undertaken by him. Exts.B4 and B5 judgment/order of this Court permitting the appellants/defendants to make payment to the contractors on priority based on the date of registration of the bill would not in any manner absolve the appellants/defendants from their statutory/contractual obligations under the Kerala Financial Code, the Kerala PWD Manual and the contract for execution of the work.

19. In **Alok Shanker Pandey v. Union of India and others (2007 (3) SCC 545)** the Apex Court held that, award of interest on delayed payment of money is neither a penalty nor a punishment, but it is the normal accretion of capital. Hence equity demands not only the repayment of the principal amount, but also the interest thereon. Paragraph 9 of the judgment reads thus;

“9. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.”

20. In **Rakesh Kumar Jain and another v. State of U.P. and another (2007 (2) SCC 461)** the Apex Court held that persons who have been denied the beneficial use of money are entitled to interest from those who have wrongly deprived them the beneficial use of their money. Paragraph 5 of the judgment reads thus;

"5. Though the Agra Development Authority (respondent No.2) had agreed to deposit the money within two months, they had not done so. Admittedly, they had issued a cheque after one year and five months and when the cheque was refused to be received by the land owners, they deposited the same in the Civil Court which does not carry any interest. Admittedly, the land owners have been denied the beneficial use of the money. In our opinion, the appellants have wrongly deprived of the beneficial use of their money. Therefore, they are entitled to interest."

21. Section 3 of the Interest Act, 1978 deals with the power of the court to allow interest. As per sub-section (1) of section 3 of the said Act, in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the period enumerated in clauses (a) and (b) to the said sub-section. Going by

clause (a), if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings and going by clause (b), if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings. The proviso to sub-section (1) of section 3 provides that, where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

22. According to the respondent/plaintiff, consequent to non-payment of amounts due on completion of the work, he sustained severe financial loss and lack of funds for reinvestment made him handicapped to continue his business properly. Hence, vide Ext.A3 letter dated 12.8.2005, the respondent/plaintiff informed the second appellant/second defendant that he has received the payment under protest and later caused Ext.A4 notice dated 12.4.2006 under Section 80 of the Code of Civil Procedure, 1908 to be issued, demanding payment of interest at the rate of 12% per annum on delayed payment

of the amount due on completion of the contract work. As we have already noticed, the appellants/defendants have admitted that though they are bound by the terms of the contract, payment could not be effected in time due to paucity of Government funds. Though the final bill was drawn up and passed for payment as early as on 29.9.2003, payment was made only on 12.8.2005. Since the appellants/defendants have wrongfully deprived the respondent/plaintiff the beneficial use of the money payable for the work undertaken by him till 12.8.2005, he is legitimately entitled for interest during the aforesaid period. The rate of interest awarded by the court below is also just and reasonable. In such circumstances, we find absolutely no grounds to interfere with the judgment and decree passed by the court below.

In the result, the appeal fails and the same is dismissed with costs of the respondent/plaintiff.

Sd/-

P.N.RAVINDRAN, JUDGE

Sd/-

ANIL K.NARENDRA, JUDGE

dsn

"O.S.No.313 of 2006" occurring in the first line of paragraph 1 at page 1 of the judgment dated 20/05/2015 in R.F.A.No.703/2014 is corrected and substituted as "O.S.No.312 of 2006", vide order dated 24/06/2015 in R.F.A.703/14.

Sd/- Registrar (Judicial)