

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

WEDNESDAY, THE 11TH DAY OF FEBRUARY 2015/22ND MAGHA, 1936

WA.No. 1892 of 2012

AGAINST THE JUDGMENT IN W.P.(C).NO.6982/2011, DATED 03.08.2012

APPELLANT(S)RESPONDENTS IN W.P.(C) :

- 1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
DEPARTMENT OF WATER RESOURCES,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.**
- 2. DIRECTOR OF INLAND NAVIGATION,
INLAND NAVIGATION DIRECTORATE, KALLADA HOUSE,
ASRAMAM P.O., KOLLAM-692 002.**
- 3. THE EXECUTIVE ENGINEER,
IRRIGATION DIVISION, MALAPPURAM-676 505.**

BY SPL.GOVERNMENT PLEADER SMT.GIRIJA GOPAL

RESPONDENT(S)/PETITIONER IN W.P.(C) :

**K.A. YOOSAF,
S/O.ALIKUNJU, P.W.D. CONTRACTOR, KARUKAPADATH HOUSE
ERIYAD P.O., KODUNGALLOOR, THRISSUR DISTRICT-680 666.**

**BY ADVS. SRI.BABU KARUKAPADATH
SMT.M.A.VAHEEDA BABU
SRI.JAGAN GEORGE
SRI.K.A.NOUSHAD
SRI.P.GPRAMOD
SRI.KANDAMPULLY RAHUL**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30-01-2015,
THE COURT ON 11-02-2015 DELIVERED THE FOLLOWING:**

Msd.

WA.No. 1892 of 2012

APPENDIX

PETITIONER(S)' ANNEXURES :

NIL

RESPONDENT(S)' ANNEXURES :

**ANNEXURE R1(A): A TRUE COPY OF THE ORDER DATED 08.05.2013 ISSUED BY
THE 2ND APPELLANT TO THE PETITIONER/1ST RESPONDENT
ALONG WITH ITS TRUE ENGLISH TRANSLATION.**

//TRUE COPY//

P.S.TO JUDGE.

Msd.

Ashok Bhushan, Ag. C.J & A.M. Shaffique, J.

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W.A. No. 1892 of 2012

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Dated this, the 11th day of February, 2015.

J U D G M E N T

Shaffique, J.

This writ appeal is filed by the respondents in the writ petition challenging the judgment dated 3.8.2012 in W.P (C) No. 6982/2011. The writ petition is filed by the respondent herein, who is hereinafter referred to as the petitioner.

2. The writ petition is filed seeking to quash Ext. P28 and for a direction to the 1st respondent to terminate the work awarded to the petitioner without his risk and cost and further to disburse the security amount and retention amount to the petitioner. Relief is also sought for to declare that respondents have no authority or jurisdiction to decide as to whether the petitioner has committed breach of contract.

3. The short facts involved in the above writ petition would disclose that the petitioner was awarded a contract in relation to execution of work "TFC-Development of Water ways and Canals - Improvement to PC Canal from Andathodu to Ponnani Ch. N. 310 KM to 321.556 KM. Reach VI from Ch 320.184 to 320.78 KM." Ext. P1 is the agreement dated 27.10.2007. According to the petitioner, he had completed 50% of the casting work as contemplated in the terms of agreement. However, in the absence of

proper survey work of the property and demarcation of the points where piles were to be erected, the work could not be commenced. Petitioner had sent various representations, which did not yield any result. It is therefore contended that there was delay on the part of the respondents in providing work front as per the terms and conditions of the contract. Later, a supplementary agreement dated 28.10.2008 was executed extending the period of agreement up to 31.1.2009.

4. It is contended that even after the execution of the supplementary agreement no action was taken by the respondents to complete the survey. The boundaries of the canal and the points wherein the piles were to be erected were not demarcated for facilitating erection of the piles and slabs. After survey was completed, it was noticed that there were old rubble retaining walls on both sides of the canal, almost at the length of 450 meters in the 6th Reach and without removing the same, it was not possible to identify the points for erection of piles or to proceed with the work. Such work of removal was not within the scope of work tendered to the petitioner and it was the obligation of the respondents to ensure removal of

the same. There were other hindrances in carrying out the work which were pointed out to the respondents. Certain houses were also there, which required to be demolished. However, no steps were taken by the respondents to enable the petitioner to proceed with the work. Accordingly, the petitioner sent letter dated 27.1.2009 to the 2nd respondent stating the reason as to why the work could not be proceeded. The Assistant Executive Engineer has suggested extension of period of contract by nine months from 30.1.2009. But, no orders had been passed in that regard. However, later, time was extended up to 30.6.2009. Still, no action had been taken by the respondents to remove the obstructions and in the meantime, time for completion of work had expired. No action was taken by the respondent to extend the time and there was no possibility for the petitioner to continue with the work or to complete the same. The petitioner submits that with reference to identical contracts, the respondents have waived liability on the contractors as it was found that contractors were not in a position to complete the work on account of the fact that it was not within their control. Seeking identical treatment, the petitioner submitted a representation to the

respondents. But, by Ext. P28 dated 5.1.2011, the Coastal Shipping and Inland Navigation Department has rejected the request of the petitioner and a decision was taken to terminate the work at the risk and cost of the petitioner. It is inter alia stated that the petitioner cannot be treated along with other contractors whose works were terminated without their risk as the petitioner had abandoned the work in spite of extension of time given to him two times up to 30.6.2009.

5. The 3rd respondent had conducted an inspection as per the directions issued by the learned Single Judge dated 11.7.2011 and submitted a report. No counter affidavit has been filed in the matter. The petitioner had submitted objection to the report as well.

6. The learned Single Judge, after considering the rival contentions, allowed the writ petition, setting aside Ext. P28 and directed the Government to issue orders terminating the contract awarded to the petitioner otherwise than at his risk and cost. Consequently, a direction was issued to refund the security amount and retention amount.

7. It is impugning the aforesaid judgment, this appeal has been filed.

8. The learned Special Government Pleader

Smt. Girija Gopal appearing for the appellants, inter alia contended that the learned Single Judge ought not to have directed the work to be terminated without the risk and cost of the contractor. Being a contractual matter, writ court was not expected to consider whether there was breach of contract on the part of the contractor or not. It involves consideration of substantial disputed questions of fact. Even otherwise, unless the entire materials on record are evaluated, it may not be possible for the Court to arrive at a finding regarding breach of contract. When the appellants had formed an opinion that the petitioner has committed breach of contract, it is for the petitioner to challenge the same in a civil court. These are matters to be adjudicated by a civil court and cannot form the basis of evaluation by a constitutional court. That apart, there are sufficient materials to indicate that the petitioner has committed breach of contract and has abandoned the work, which is evident on an evaluation of the evidence.

9. On the other hand, Smt. Vaheeda Babu, learned counsel for the petitioner, supported the judgment of the learned Single Judge and submitted that the learned Single Judge has rightly allowed the

writ petition based on admitted facts and no evaluation of evidence was required. The learned Single Judge having exercised jurisdiction to consider the issue, there was no reason to set aside the judgment on the ground of maintainability of the writ petition. Further, it is evident from the admitted facts that the time for performance of the contract expired on 30.6.2009, which was not extended by the appellants and therefore the finding in Ext. P28 that the petitioner has abandoned the work is absolutely baseless., Even as on 30.6.2009, the estimate for the extra work to be done to enable the petitioner to proceed with the contracted work has not been prepared. Under such circumstances, it was not a case of abandonment of work, whereas it was a case where the petitioner was unable to carry out the work within the stipulated time on account of absence of work front. That apart, it is argued that in respect of several contractors who had undertaken similar works in different reaches, the Government has taken a decision to terminate the contract without their risk and cost and the petitioner has sought for a similar treatment by filing the above writ petition.

10. The learned Single Judge mainly considered

the question relating to Exts. P21 and P21(a) Government Orders and found that when similarly placed contractors' work had been terminated without risk and cost, there is no reason for discriminating the petitioner. Further, it was found that the contention that the petitioner has abandoned the work cannot be sustained. The learned Single Judge considered this aspect in paragraph 14 of the judgment, which reads as under:

"14. In my opinion, the stand taken by the Government in Ext. P 28 cannot be sustained. The Government could not have in view of the admitted fact that the northern and southern boundaries of the PC Canal were demarcated only on 12.12.2008 and also in view of the admitted fact that revised estimate was approved only on 8.7.2009, after the period fixed for performance of the contract had expired, taken the stand that the petitioner is guilty of having abandoned the work. The materials produced by the petitioner especially Ext. P 29 letter establishes the fact that the VIth reach of the canal does not have a uniform width through out. The petitioner is bound to maintain a width of 14 meters and without removing the existing rubble masonry walls the petitioner could not have executed the work before 30.6.2009 maintaining the width of 14 meters. In such circumstances, I am of the considered opinion that the petitioner is entitled to have the benefits flowing from paragraph 2.3 of Ext. P22 circular in view of the fact that he could not have executed the work within the time stipulated even though the revised estimate was approved by the Chief Engineer on 8.7.2009. I accordingly hold that the petitioner is entitled to succeed."

11. Though it is contended by the learned Government Pleader that the learned Single Judge has committed a serious error in adjudicating the disputed questions of fact based on affidavits in a contractual matter, the facts involved in the above writ petition requires to be gone into, to ascertain whether the contention urged is sustainable or not.

12. It is settled position of law that a writ court, under Article 226 of the Constitution of India, shall not normally consider disputed questions of fact especially in contractual matters. A contract involves corresponding obligations between the awarder and awardee of the work. Substantial documents relating to the work as well as the ground realities are to be considered to ascertain whether a contract had been performed by either of the parties. Termination of contract arises when there is a breach of contract or it becomes impossible for performance of the contract. It can also be terminated on mutual consent. Therefore, as rightly contended by the learned Government Pleader, under normal circumstances, Courts will not interfere with the rights of the parties under a contract and disputed facts have to be decided either by the

forum agreed upon by the parties in the form of Arbitration or by approaching a civil court, as the case may be.

13. But, in the present case, , the learned Single Judge had already ventured to look into the factual situation on the basis of certain admitted facts and on the materials available on record. Therefore, it may not be proper for this Court to dismiss the writ petition and relegate the parties to civil court at this point of time.

14. The facts involved in the above writ petition clearly discloses that the work front was not given to the contractor within time, as a result of which contract period has to be extended twice, first up to 30.1.2009 and thereafter up to 30.6.2009. Subsequent to 30.6.2009, there is no material on record to indicate that time has been extended. The learned Government Pleader also placed before us the file relating to the above contract from which we do not find any material to suggest that time has been extended after 30.6.2009.

15. Admitted facts indicate that contractor was unable to carry on with the work further for the reason that (1) additional work had to be done for which

estimate was not prepared, (2) the entire work front was not available and (3) time has not been extended. If these are the admitted facts and when the period of performance of contract has not been extended, under what circumstances can the contractor be mulcted with the liability to pay damages suffered by the Government is not known. Compensation can be claimed under the agreement at the risk and cost of the contractor, if the contractor had not performed the contract within the time stipulated or that he has committed breach of contract. Breach occurs when all the facilities have been given to the contractor to perform the work and he had failed to do so. In this case, materials on record clearly suggest that work front was not available to enable the contractor to proceed with the work. Under such circumstances, this is not a case where the contractor has abandoned the work, whereas it is a case where the Government have failed to provide the work front to enable the contractor to proceed with the work. That apart, there is no material to indicate that after 30.6.2009, the period of contract had been extended. It is relevant to note the contents of the following to ascertain the above position.

16. Exts. P5, P9 and P10 are the documents by which time has been extended up to 30.1.2009 without levying liquidated damages. Exts. P14, P17 and P18 would further indicate that time was extended up to 30.6.2009 without levying liquidated damages. Ext. P 26 dated 7.6.2009 issued by the Director, Inland Navigation Directorate to the Chief Engineer, Irrigation and Administration, Thiruvananthapuram in respect of the aforesaid work clearly indicates that request has been made for sanctioning of revised estimate with reference to the very same work ch. 310 km. to 321.556 km. The contents of the letter reads as under:

“Sub: TFC Development of waterways and canals. Main canal - improvement to PC Canal from Andathodu to Ponnani ch. 310 km. to 321.556 km - sanction for revised estimate requested reg.

Ref: That office TS no. 101/CE I&A/06-07 dated 26.3.2007

2. The office agreement no. 28/DIR/INDT/07-08 26th day of October 2007

3. Letter no. D4-317/07 dated 11.06.2009 of the Executive Engineer, Irrigation Division, Malappuram.

Above work was awarded to K.A. Yoosaf, Karkappadath House, Eriyad P.O., Kodngaloor, vide the office agreement cited 2nd and is in good progress. During the course of the work, some difficulties were experienced for the smooth progress of the work. The Executive Engineer, vide letter 3rd cited, has submitted a revised estimate incorporating the

inevitable items to be included in the estimate for the satisfactory completion of the same.

Main variations are

1. Length of driving of pile. As per the estimate, 3.85 m was proposed to be driven into the soil, which is from heed level. But during the course of work, it is seen that the pile and slab were to be driven down below the excavation is started, as the area is heavily built up and a number of houses are existing very close to the canal, if not, the entire bund will be collapsed. Hence the excess length is involved.
2. In the case of dead man and slab, there was no provision for excavation in the estimate and hence is given as extra item. In the case of depth of cutting, the canal is in step cutting and the sides are sloping and so, the depth of cutting is 1.85 m.
3. In the case of slabs, it was suggested to place the slab after driving down of pile and completing excavation. But in actual practice, pile and slab have to be driven down as pointed out in item 1 above. Hence, driving down the bottom three slabs were included as extra item, as it involves extra labour and expense than placing slab.
4. As the bottom slabs are to be driven down instead of placing as explained above, driving bottom three slabs were taken under extra item.
5. Sides of the canal were dumped with rubble during the past, which was being submerged and was not visible during the preparation to the estimate. The remains of dumped rubble stumps of trees etc., have to be removed before driving the piles and slabs. Hence provision for engaging man mazdoor is included as extra item.
6. Dismantling and clearing away partly damaged masonry works on the right side of canal is included as extra item.
7. A retaining wall for a length of 8 m on both side of approaching thodu to canal using departmental stone

obtained from dismantling is proposed. The balance rubble obtained in excess over the masonry will be auctioned and disposed off.

8. CC 1.3:6 using 20 mm broken stone is proposed as top belt over masonry relating wall for a thickness of 10cm.

Most of these were convinced by me during my site visits. The Chief Engineer, Irrigation and Administration, during site visit on 20.2.2009 have also noticed these facts. Total amount of the revised estimate comes to Rs 91,27,482/- against the TS amount of Rs. 83,00,000/-, resulting in a total excess of 9.97%. As the variation is within the power of acceptance of that office, I request that the revised estimate may kindly be sanctioned and communicated. I hereby submit the detailed comparison statement and data for the extra item for getting approval. I request that the revised estimate may be sanctioned at the earliest so as to complete the work at the earliest, as about 70% of the work is completed by now."

17. It is virtually evident from Ext. P26 that there was substantial variations in the work to be done by the petitioner for which revised estimate was required. Revised estimate has not been sanctioned at least as on 17.6.2009. It is further clear that 70% of the work was completed and unless revised estimate is sanctioned, the work cannot proceed further. Perusal of the file produced before this Court by the learned Government Pleader indicates that the Deputy Chief Engineer, Irrigation and Administration, as per order dated 8.7.2009, sanctioned the revised estimate for an amount of Rs. 91,19,112/-. The said communication

was forwarded to the A.E.E. (Irrigation), Ponnani for information and further action as per endorsement dated 27.7.2009. But, there is no material to indicate that any communication has been given to the contractor extending time for performance with or without levy of liquidated damages and calling upon him to proceed with the work. It is, therefore, clear that after 30.6.2009, there is no extension of time to enable the contractor to proceed with the work. For that reason itself, the finding in Ext. P28 that the contractor has abandoned the work cannot be sustained.

18. It is under this background that the concessions extended by the Government for two other contractors has to be viewed. Exts. P21 and P21(a) are the orders issued by the Government relieving the contractors from any responsibility on the ground that there had been an increase in rates and the contractor was unable to perform the contract. The petitioner however did not seek any enhancement of rates, but has only requested for removing the obstacles and hindrances in carrying out the work. Ext. P23 dated 1.7.2009 is the letter issued by the petitioner to the respondent requesting the respondent to exonerate him

from the obligation in executing the balance work, to record the measurement of the work executed by him and to release the admitted bill amounts along other payments. This was followed by another letter dated 10.7.2009 as Ext. P24, wherein similar request has been made. In these letters, the petitioner had pointed out his practical difficulties in proceeding with the work as site was not made ready for execution and he was prevented from executing the work. Reference is also made to termination of contract with reference to one P.M. Muhammed Ali subsequently, as mentioned in Ext. P21. Apparently, no reply was sent to the aforesaid letters. Subsequently, requests were also made by the petitioner for releasing him from any further liability in this regard.

19. Having gone through the aforesaid documents, it is rather clear that this is not a case in which any dispute exists regarding the reason, on account of which the petitioner was unable to perform the contract. From Ext. P26 referred above, it is clear that the contractor was prevented from carrying out the work and it is not a case that he did not carry out the work as per the terms of the contract. Under such circumstances, cancelling contract at his risk and cost

is arbitrary and illegal. Hence, the learned Single Judge was justified in allowing the writ petition and issuing directions as sought for.

We do not think that any grounds are made out to interfere with the judgment of the learned Single Judge. Accordingly, the writ appeal is dismissed.

Sd/-

Ashok Bhushan, Ag. Chief Justice

Sd/-

A.M. Shaffique, Judge.

Tds/