

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

WP(C).No. 12582 of 2009 (P)

PETITIONER :

K.K.SIVAN, P.W.D. CONTRACTOR,
'SARANYA NIVAS', VADAKKAL P.O., ALAPPUZHA-3.

BY ADVS.SRI.BABU JOSEPH KURUVATHAZHA
SRI.T.K.BIJU

RESPONDENTS :

1. STATE OF KERALA, REP. BY ITS
SECRETARY TO GOVERNMENT, DEPT. OF WATER RESOURCES,
GOVT. SECRETARIAT, THIRUVANANTHAPURAM.
2. THE SUPERINTENDING ENGINEER,
IRRIGATION SOUTH CIRCLE, THIRUVANANTHAPURAM.
3. THE SECRETARY TO GOVERNMENT,
DEPT. OF COASTAL, SHIPPING AND INLAND NAVIGATION,
GOVT. SECRETARIAT, THIRUVANANTHAPURAM.

R1 – R3 BY GOVERNMENT PLEADER SRI.P.V.ELIAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :-

- EXT.P1 : COPY OF THE SELECTION NOTICE BEARING NO.D124-1185/08/ISC DTD.6.8.2008 ISSUED BY THE 2ND RESPONDENT.
- EXT.P2 : COPY OF THE ACCEPTED SCHEDULE OF THE WORK INVOLVED IN EXT.P1 SELECTION NOTICE.
- EXT.P3 : COPY OF G.O.(Rt.)NO.20/2008/CSIND DTD.19.5.2008 ISSUED BY THE 3RD RESPONDENT.
- EXT.P4 : COPY OF THE ESTIMATE PREPARED BY THE ASSISTANT ENGINEER, IRRIGATION SECTION, THOTTAPPALLY PERTAINING TO EXPENDITURE REQUIRED FOR THE EXECUTION OF THE 1ST ITEM OF WORK MENTIONED IN EXT.P2 SCHEDULE.
- EXT.P5 : COPY OF TEHE REPRESENTATION DTD.10.9.2008 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- EXT.P6: COPY OF THE LETTER BEARING NO.D12A.1185/08/ISC DTD.17.9.2008 ISSUED BY THE 2ND RESPONDENT.
- EXT.P7: COPY OF THE LETTER NO.D12A.1185/08/ISC DTD.5.12.2008 ISSUED BY THE 2ND RESPONDENT.
- EXT.P8 : COPY OF THE REPRESENTATION DTD.26.12.2008 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- EXT.P9: COPY OF THE REPRESENTATION DTD.15.1.2009 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- EXT.P10: COPY OF THE PROCEEDING NO.D12A.1185/08/ISC DTD.19.1.2009 OF THE 2ND RESPONDENT.
- EXT.P11: COPY OF THE REPRESENTATION DTD.24.1.2009 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.
- EXT.P12: COPY OF THE ORDER NO.D12A.1185/08/ISC DTD.4.2.2009 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' EXHIBITS:- NIL.

True copy

P.A to Judge

ANIL K.NARENDRA, J.

W.P.(C)No.12582 of 2009

Dated this the 2nd day of July, 2015

JUDGMENT

The petitioner, who is a Government Contractor has submitted tender pursuant to a tender notification issued by the second respondent for the work of TRP Desilting the leading channel at the downstream of Thottappally Spillway in Purakkad Village in Alappuzha District. Being the lowest bidder, the work was ordered to be awarded in his favour at 35% above the estimate PAC and Ext.P1 selection notification dated 6.8.2008 was issued to him, with a direction to execute the agreement by depositing an amount of ₹.1,00,000/- towards security.

2. Ext.P2 is the accepted schedule of the work involved in Ext.P1 selection notice. Going by Ext.P2 the work includes earth work excavation in all classes of soil including in under water by mechanical excavator 90 CK fitted on pontoon upto profile and depositing the soil away from the site as directed by the departmental officers at site. The rate of work was fixed at ₹104 per M³ and the total estimated quantity of work was for the value of ₹.34,33,248/-. The grievance of the petitioner is that, subsequent to submission of tender pursuant to the tender notification issued by the second respondent, the 3rd respondent issued Ext.P3 Government Order dated 19.5.2008 stating that, the rate of removal of sand/earth permitted

as per Ext.P2 accepted schedule, would not be allowed to continue and the earth/soil removed by the contractor as a result of excavating the site where the work has to be executed, must be separately kept and sold in public auction.

3. According to the petitioner, Ext.P4 estimate prepared by the Assistant Engineer, Irrigation Section, Thottappally is pertaining to expenditure required for the execution of the 1st item of work mentioned in Ext.P2 schedule. In Ext.P4 estimate, the cost of excavating 1 M³ of soil was mentioned as ₹.152.30/-, but the cost of 1 M³ of earth was ₹48/-. It was based upon the above calculation, i.e., when ₹48/- is deducted from ₹.152.30/-, the rate of ₹.104.30/- was arrived at, which was rounded to ₹.104/- per M³ towards the cost of excavating the soil, as provided in the 1st item of work mentioned in Ext.P2.

4. The petitioner submitted Ext.P5 representation dated 10.9.2008 before the second respondent praying that, he may be exonerated from the liability of executing the agreement, for re-tendering the work by releasing the EMD, or in the alternative he may be permitted to carry out the work as per the terms and conditions insisted in Ext.P2 schedule, which alone was applicable to him. On receipt of Ext.P5, the second respondent issued Ext.P6 letter wherein it was stated that the provisions of Ext.P3 would be made applicable to the work mentioned in

Exts.P1 and P2 and hence the Executive Engineer should find out suitable site for the purpose of yard, for dumping the soil.

5. The petitioner, thereafter, approached the second respondent as well as the Executive Engineer more than one occasion and requested an order to carry out the work as per the terms and conditions in Ext.P2 accepted schedule or in the alternative, the work should be rearranged by inviting new tenders, for submitting new tenders with open eyes, based upon the amended terms and conditions of the schedule, which should be prepared on the basis of Ext.P3. However, without considering the request made by the petitioner in Ext.P5, the second respondent has issued Ext.P7 intimating the petitioner to submit reason for not executing the agreement, failing which the work will be rearranged at the risk and cost of the petitioner. Immediately on receipt of Ext.P7 the petitioner submitted Ext.P8 representation before the second respondent, which was followed by Ext.P9. However, the second respondent issued Ext.P10 proceedings intimating the petitioner that, the work would be rearranged at his risks and cost unless the petitioner executes the agreement within three days.

6. Immediately on receipt of Ext.P10 the petitioner submitted Ext.P11 representation before the second respondent stating that, he was very much ready and willing to execute the agreement for the completion

of the work as per the terms and conditions of Ext.P2 accepted schedule, whereas he was not bound to execute the work, if alterations were caused to Ext.P2 accepted schedule, based upon Ext.P3 order of the Government, which was subsequently issued, after the submission of tender by the petitioner. But the said contention was rejected by Ext.P12 order passed by the second respondent terminating the work at the risk and cost of the petitioner and forfeiting the EMD, even without notice to the petitioner. It is aggrieved by Exts.P10 and P12 the petitioner has approached this Court in this Writ Petition seeking a writ of certiorari to quash Exts.P10 and P12 and seeking a writ of mandamus commanding the 2nd respondent to permit the petitioner to execute the agreement for executing the work involved in Ext.P2 schedule, without incorporating the provisions of Ext.P3 G.O., or in the alternative release the EMD provided by the petitioner, for participating in the work involved in Ext.P2 schedule of work.

7. A counter affidavit has been filed by the second respondent contending, inter alia, that the tender submitted by the petitioner was accepted by the Government as per the Government Order dated 11.7.2008. Then the Superintending Engineer, Irrigation South Circle issued Selection Notice to the petitioner on 8.8.2008 with a time of completion of 4 months. But the petitioner was not willing to execute the agreement, inspite of repeated reminders. According to the second

respondent, the accepted rate is same as the rate quoted by the contractor and no alterations were made in the schedule. Relying on Ext.P2 acceptable schedule, the second respondent would contend that, the schedule specifically provided that excavated soil should be deposited as directed by the departmental officers. Regarding paragraph 4 of the Government Order dated 19.5.2008, the second respondent would contend that the Government have issued directions, that where agreements have not been executed, necessary changes will be made in the contract stipulating stocking of soil in the pre-determined yard which will be guarded by the Irrigation Department and later auctioned as per rules. But in the case of the petitioner as per Ext.P2 acceptable schedule, the petitioner is bound to deposit the soil away from the site as directed by the departmental officers. Relying on Ext.P2 acceptable schedule, the second respondent would also contend that, the excavated soil is Government's property and there was absolutely no justification on the part of the petitioner in not executing the agreement in terms of Ext.P1 selection notice, and undertaking the work in question in spite of the repeated reminders sent by the departmental officers. The petitioner failed to execute the work in terms of Ext.P1 selection notice, which resulted in Exts.P10 and P12 orders passed by the second respondent, which are under challenge in this writ petition.

8. I heard the arguments of the learned counsel for the petitioner and also the learned Government Pleader appearing for the respondent.

9. The petitioner is challenging Exts.P10 and P12 orders mainly on the ground that after submission of the tender pursuant to the notification issued by the second respondent, the first respondent issued Ext.P3 Government Order by which the departmental officers will have to make necessary arrangements to stock the excavated soil, which has to be later auctioned treating it as Government Property. The main argument advanced by the learned counsel for the petitioner is that, it was taking note of the quantity of sand that can be excavated from the site while undertaking the work in question, the petitioner has quoted the rate in its tender form and when he is denied the opportunity to sell the excavated sand, relying on Ext.P3 Government Order, he will not be in a position to execute the work as agreed upon.

10. As I have already noticed Ext.P2 is the accepted schedule attached to Ext.P1 Selection Notice. Item No.1 in Ext.P2 accepted schedule is the work in question namely, earth work excavation in all classes of soil including in an under water by mechanical excavator 90 CK fitted on pontoon upto profile and depositing the soil away from the site as directed by the departmental officers. A mere reading of Ext.P2 make it abundantly clear that the petitioner is not permitted to take the soil

excavated in connection with the work in question. Therefore, in view of the specific stipulation made in Ext.P2 there was no necessity for the petitioner in executing any further arrangement with regard to the soil excavated from the site. Therefore, the reasons stated by the petitioner for not executing the agreement in terms of Ext.P1 selection notice cannot be sustained at all. If that be so, the second respondent cannot be found fault in issuing Exts.P10 and P12 orders thereby terminating the work in question at the risk and cost of the petitioner and forfeiting the EMD towards the loss sustained by the Government.

11. I find absolutely no illegality or irregularity in Exts.P10 and P12 orders issued by the second respondent.

12. In the result, the writ petition fails and the same is dismissed.

No order as to costs.

ANIL K.NARENDRAN, JUDGE

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