

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

WP(C).No. 8542 of 2014 (P)

PETITIONER : -

K.J.BIJU, AGED 43 YEARS,
S/O.K.K.JOHN, KARAKALIL HOUSE,
PERINGANAD P.O. ADOOR,
PATHANAMTHITTA DISTRICT.

BY ADVS.SRI.J.JULIAN XAVIER
SRI.FIROZ K.ROBIN

RESPONDENTS : -

1. STATE OF KERALA,
REPRESENTED BY ITS SECRETARY,
LOCAL SELF GOVERNMENT DEPARTMENT,
THIRUVANANTHAPURAM – 695 001.

2. THE SECRETARY,
BLOCK PANCHAYATH,
ELANTHOOR,
PATHANAMTHITTA DISTRICT – 689 643.

R2 BY ADV.SRI.JACOB P.ALEX
R2 BY ADV.SRI.JOSEPH P.ALEX
R1 BY GOVERNMENT PLEADER SMT. C.K. SHERIN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
06-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 8542 of 2014 (P)

APPENDIX

PETITIONER'S EXHIBITS : -

EXT.P-1 : A TRUE COPY OF THE AGREEMENT DATED 6.2.2007.

EXT.P-2 : A TRUE COPY OF THE PLAINT IN OS NO.117/2008, OF THE MUNSIF COURT, PATHANAMTHITTA.

EXT.P-3 : A TRUE COPY OF THE APPROVAL OF THE FINAL BILL DATED 26.3.2013 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' EXHIBITS : -

EXHIBIT R2(a) : TRUE COPY OF THE NOTICE BEARING No. A2/805/06 DATED 28.05.2013 ISSUED TO THE PETITIONER BY 2nd RESPONDENT.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 8542 of 2014

Dated this the 06th day of March, 2015

JUDGMENT

Heard the learned counsel for the petitioner and the learned Government Pleader for the first respondent, as well as the learned counsel for the second respondent, apart from perusing the record. Since the issue lies in a narrow compass, this Court proposes to dispose of the writ petition at the admission stage itself.

2. Briefly stated, the petitioner, an 'A' Class Contractor, was assigned certain civil work by the second respondent, the Block Panchayat. After the execution of the said work, the second respondent prepared a final bill showing net amount payable to the petitioner as Rs.15,07,007/-. Ventilating his grievance that despite the preparation of Exhibit P3 final bill, the second respondent has not actually disbursed the amounts, the petitioner has filed the present

writ petition.

3. The second respondent joined the issue by filing a counter affidavit. In consonance with the averments made therein, the learned counsel for the second respondent has contended that subsequent to the preparation of Exhibit P3 final bill, an audit inspection was conducted, resulting in Exhibit R2(a) notice dated 28.05.2013 issued by the second respondent. In expatiation of his submissions, the learned counsel would contend that there was inordinate delay of four years on the petitioner's in executing the work. Under those circumstances, based on the observations of the audit team, the second respondent deducted an amount of Rs.5,28,870/- as penalty and paid the rest of the amounts, as has been indicated in paragraph 6 of the counter affidavit.

4. The learned counsel for the petitioner has strenuously contended that after preparation of the final bill, there is no justification for the second respondent to deduct amounts merely based on what is said to be a directive of the Local Fund Audit and A.G. Audit in the Block Panchayat. He has also made submissions with regard to under what circumstances the delay, if at all, has occurred.

5. The learned counsel for the petitioner has drawn my attention to Ext.P2 plaint in O.S. No.117 of 2008 on the file of the learned Munsiff Court, Pathanamthitta. He has contended that a third party filed the said suit against the respondent as well as the petitioner himself seeking liquidated damages for the loss allegedly caused to the plaintiff as a result of the execution of the civil work. According to the learned counsel, the delay, if any, in execution of the work was due to the pending litigation.

6. I do not, however, propose to enter into that controversy on what grounds the delay has occurred or whether there is any justification on the part of the second respondent in deducting the amount as penalty, albeit based on the directions or observations of the Audit Department. Suffice it to observe that this Court, in summary proceedings under Article 226 of the Constitution of India, as a matter of public law remedy, cannot go into the issue of disputed question of fact.

7. In ***Godavari Sugar Mills Ltd. v. State of Maharashtra***, (2011) 2 SCC 439, the Hon'ble Supreme Court has surveyed the precedential position on the point of

public law remedy vis-à-vis contractual disputes and has this to say:

"8. The observations in *Suganmal* [*Suganmal v. State of M.P.*, AIR 1965 SC 1740] related to a claim for refund of tax and have to be understood with reference to the nature of claim made therein. The decision in *Suganmal* has been explained and distinguished in several subsequent cases, including in *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, 2001 (2) SCC 549, and *ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd.*, 2004 (3) SCC 553. The legal position becomes clear when the decision in *Suganmal* read with the other decisions of this Court on the issue, referred to below:

(i) Normally a petition under Article [226](#) of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers, [vide *Burmah Construction Co. v. State of Orissa*, (1962) Supp 1 SCR 242.

(ii) If a right has been infringed - whether a fundamental right or a statutory right and - the aggrieved party comes to the court for

enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the government without the authority of law (vide *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006).

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the Petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money, (vide *Suganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740).

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of a writ of mandamus to the state to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the

taxes collected was without authority of law and therefore the Respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition [vide *Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nangaon*, (1988) 1 SCC 401].

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, 2001 (2) SCC 549).

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution

will not be denied. [Vide *Sanjana M. Wig v. Hindustan Petroleum Corporation Ltd.*, (2005) 8 SCC 242.]

8. Going by the above distillate of many decisions, we may see that the dispute is contractual; no challenge is laid against the deduction effected by the respondents on the ground of ultra vires or want of authority of law. The delay in execution and consequential deduction of amounts as a matter of penalty are all disputed questions of fact, requiring a thorough adjudication, which is impermissible under a summary procedure. In fact, the writ petition was filed for the simple relief of recovery of money.

9. There is no — and there cannot be any — sweeping proposition that no writ lies involving a contractual dispute. Indeed, if there is an express admission on the part of the respondent, who is amenable under Art.12 or Art.226, that the amounts are due, even out of a non-statutory contract, the respondent is bound by common law principles of estoppel, etc. On the other hand, where the facts are not in dispute, where the collection of money or withholding thereof is without the authority of law, where the action of

the respondent authority is unconstitutional or ultra vires, or where the withholding of amounts or recovery thereof is collateral to a dispute having the public law character, a writ petition does lie.

10. In the facts and circumstances, this Court dismisses the writ petition, leaving it open for the petitioner to lay a proper challenge before an appropriate forum, if he is aggrieved by Exhibit R2(a) notice and the consequences ensued therefrom resulting in a deduction of Rs.5,28,870/- as penalty against the petitioner.

No order as to costs.

DAMA SESHADRI NAIDU
JUDGE

DMR/-