

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

THURSDAY, THE 21ST DAY OF MAY 2015/31ST VAISAKHA, 1937

WP(C).No. 20228 of 2012 (C)

PETITIONER :

**M.M.VARGHESE,
S/O.M.V.MATHAI, AGED 63 YEARS,MUTTAVANCHERY HOUSE,
THAMARACHAL,KIZHAKKAMBALAM, ALUVA-683 562.**

BY ADV. SRI.PHARIDAS

RESPONDENT(S):

- 1. THE STATE OF KERALA, REPRESENTED BY ITS SECRETARY,
WATER RESOURCES DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHPAURAM-695 001.**
- 2. THE KERALA WATER AUTHORITY,
REPRESENTED BY ITS MANAGING DIRECTOR,
THIRUVANANTHPAURAM-695 001.**
- 3. THE FINANCE MANAGER AND CHIEF ACCOUNTS OFFICER,
KERALA WATER AUTHORITY, THIRUVANANTHPAURAM-695 001.**
- 4. THE SUPERINTENDING ENGINEER,
KERALA WATER AUTHORITY, P.H. CIRLCE, MALAPARAMBA,
KOZHIKODE-673 009.**
- 5. THE EXECUTIVE ENGINEER,
KERALA WATER AUTHORITY, PROJECT DIVISION,
MALAPPUARAM-676 505.**

**R1 BY GOVERNMENT PLEADER SRI.RAFEEK.V.K.
R2 TO R5 BY ADV. SRI.GEORGE MATHEW, SC, KERALA WATER AUTHORITY**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 18-02-2015, THE COURT ON 21-05-2015 DELIVERED THE
FOLLOWING:**

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APPENDIX

PETITIONER(S) EXHIBITS

- EXHBIT P1. TRUE COPY OF THE RELEVANT PORTION OF THE NOTICE INVITING TENDER.
- EXHBIT P2. TRUE COPY OF THE LETTER DATED 23/7/2010 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT.
- EXHBIT P3. TRUE COPY OF THE GOVERNMENT ORDER DATED 18/1/2011.
- EXHBIT P4. TRUE COPY OF THE WORK ORDER DATED 10/11/2011 ISSUED BY THE 3RD RESPONDENT.
- EXHBIT P5. TRUE COPY OF THE SCHEDULE OF RATES.
- EXHBIT P6. TRUE COPY OF THE SPECIAL CIRCULAR DATED 26/2/2009 ISSUED BY THE 2ND RESPONDENT .
- EXHBIT P7. TRUE COPY OF THE CALCUATION OF PRICE VARIATION MADE BY THE 5TH RESIDENT.
- EXHBIT P8. TRUE COPY OF THE LETTER DATED 17/3/2012 SENT BY THE PETITIONER TO THE 3RD RESPONDENT .
- EXHBIT P9. TRUE COPY OF THE LETTER DATED 17/3/2012 OF THE 5TH RESPONDENT TO THE 3RD RESPONDENT
- EXHBIT P10. TRUE COPY OF THE LETTER DATED 20/3/2012 SENT BY THE PETITIONER TO THE 3RD RESPONDENT
- EXHBIT P11. TRUE COPY OF THE PROCEEDINGS DATED 21/3/2012 ISSUED BY THE 4TH RESPONDENT
- EXHBIT P12. TRUE COPY OF THE LETTER DATED 23/3/2012 ISSUED BY THE 3RD RESPONDENT TO THE 4TH RESPONDENT
- EXHBIT P13. TRUE COPY OF THE PRINTOUT OF THE PRICE INDEX.
- EXHBIT P14. TRUE COPY OF THE LETTER DATED 1/4/2012 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT.
- EXHBIT P15. TRUE COPY OF THE LETTER DATED 20/6/2012 ISSUED BY THE 4TH RESPONDENT TO THE 5TH RESPONDENT.

RESPONDENTS' EXHIBITS:

- EXHIBIT R2(A). TRUE COPY OF THE ORDER NO.KWA/HO/WN-I/KKD/TD-51/70/09 DATED 22/10/2011
- EXHIBIT R2(B). TRUE COPY OF THE LETTER DATED 14/06/2009.

/TRUE COPY/

P.A.TO JUDGE

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A.V. RAMAKRISHNA PILLAI, J.

W.P.(C) No. 20228 of 2012

Dated this the 21st day of May, 2015

J U D G M E N T

Aggrieved by the refusal of respondents 2 to 5 in disbursing the amount claimed by the petitioner in terms of price variation, the petitioner has come up before this Court.

2. The petitioner is an A-Class Contractor. Respondents 2 to 5 tendered a work on 29.01.2009 to the petitioner and the work was awarded to the petitioner. According to the petitioner, as per the notice inviting tender, the Government Orders in vogue and the work order, price variation is applicable to the contract. The petitioner points out that in spite of several reminders, work orders were received only on 10.11.2011; and except some minor works, he completed the work in time. Though the Superintending Engineer issued proceedings upholding price variation, respondents 2 to 5 declined to

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disburse the amount claimed in terms of price variation and almost ₹4 crores were deducted from the petitioner's bills in respect of three other works in terms of price variation clause. It is with this background, the petitioner has come up before this Court.

3. In the counter affidavit filed by respondents 2 to 5, it was contended that the total liability of the respondent authority was limited to ₹6,11,12,500/- as per Ext.R2(a) proceedings, which was informed to the petitioner as per Ext.P4. The petitioner was well aware of the fact while executing the agreement. It was further alleged that being an A-Class registered contractor, the petitioner should have clarified the issue of price variation clause before executing the agreement. It was further contended that by Ext.R2(b) letter dated 14.06.2009, the 1st respondent has informed that proposal for incorporating price variation clause in the NIT for SPAN projects cannot be agreed to since it involves a general policy decision; and it cannot be considered only

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for the Kerala Water Authority (KWA). It is further contended that the said work was not aided by NABARD, but is aided by the Government of India under the Accelerated Rural Water Supply Programme (ARWSP) by the Ministry of Rural Development; and the petitioner was well aware of the current practices followed in the KWA including the non application of price variation clauses coming under the ARWSP. Therefore, they prayed for a dismissal of the writ petition.

4. A reply affidavit has been filed by the petitioner in answer to the counter affidavit.

5. Arguments have been heard.

6. Though the due date of tender was 29.09.2009, the 3rd respondent issued Ext.P4 work order only on 10.11.2011. The petitioner has completed the work to the satisfaction of the respondent authority and submitted the bill. His case is that since the original estimate was on the basis of schedule of rates of the year 2008, there was substantial increase in the price index and in the

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price of materials. According to the petitioner, the delay was on account of the delay in issuing work order. The petitioner relies on Ext.P6 circular of the 2nd respondent dated 26.02.2009 governing the field. The petitioner requested respondents 2 to 5 to sanction and disburse the amount due to him; and finally, the 5th respondent calculated the price variation in terms of Ext.P6 and the bill has been submitted. Ext.P7 is the copy of the calculation of price variation by the 5th respondent. However, the 3rd respondent maintained the stand that the work order should be amended; and under such circumstances, the petitioner addressed the 3rd respondent as per Ext.P8 letter dated 17.03.2012. Though the 5th respondent, by Ext.P9 letter dated 17.03.2012, requested the 3rd respondent to issue necessary orders and the 4th respondent had issued Ext.P10 letter dated 20.03.2012 to the 5th respondent clarifying that price variation clause is applicable; and though the 4th respondent issued Ext.P11 proceedings

dated 21.03.2012, the 3rd respondent insisted for a proceeding by the 4th respondent. The 3rd respondent also issued Ext.P12 letter dated 23.03.2012 requiring some other documents including the printout of price index. Ext.P13 is the print out of price index submitted by the petitioner. The grievance of the petitioner is that though he had complied with all formalities, the respondents have not approved the price variation and disbursed the amount. The petitioner further points out that on early occasions, the respondents have applied price variation clause for their benefits for works, which was aided by the NABARD.

7. The definite stand taken by the respondents is that in Ext.R2(a) proceedings, they have clearly mentioned ₹6,11,12,500/- as the total amount of work and the petitioner had to complete the work in all respect as per NIT conditions within the accepted PAC of ₹6,11,12,500/-. Their further stand is that the previous two works, in respect of which price variation clause was

permitted to be applied, were funded by the NABARD and the present project was funded by the Ministry of Rural Development under the ARWSP.

8. The contentions raised by the respondents cannot be countenanced for the following reasons;

The estimate is only about the Probable Amount of Contract (PAC). The same would always be subject to Price Estimation Clause. It was based on the Schedule of Rates (SoR) of 2008. Nobody is expected to complete work in 2012 at Schedule of Rates (SoR) of 2008. The delay in issuing the work order was not on account of any fault on the part of the petitioner. The petitioner always has clarified about the price variation clause contained in NIT. This was understood by the respondents and price variation clause and NIT was taken into account and accepted by the Managing Director, who in turn observed in Ext.R2(a) that the price variation would not affect contractors. The NIT was issued on 02.12.2008 taking into account all the conditions in the NIT including price

variation clause, offer and acceptance were made and agreement was executed. The agreement stipulates that the conditions in the NIT would form part of the agreement. Ext.R2(b) relied on by the respondents is with respect to the SPAN work, which is not applicable to the works involved in this case. In spite of Ext.R2(b), the respondents deducted more than ₹9 crores with respect to SPAN works for their benefits. In Ext.P5 work order itself, the price of materials was quoted taking into account the PSA given by the petitioner. Undoubtedly, it was for the purpose of invoking price variation clause. Negotiation arrived at PAC is only a probable amount, which would form part of the agreement.

Therefore, this Court is of the definite view that the petitioner is entitled to the reliefs as prayed for.

In the result, the writ petition is allowed.

- Ext.P15 is quashed.
- The respondents are directed to approve and disburse the amount in lieu of price variation for the work of

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supplying, laying, testing and commissioning of 400mm pipe for D1 K9 pipe for clear water pumping main - CARWSS to Moorkanad to the petitioner in terms of Ext.P7 within a period of two months from the date of receipt of a copy of this judgment.

- In case, the respondents fail in disbursing the amount to the petitioner within the aforesaid time, the respondents shall pay interest @ 12% per annum on the aforesaid amount from the date of submission of bills till the date of realisation.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-