

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

WP(C).No. 29128 of 2005 (P)

PETITIONER(S):

1. K.E.KUNJU MOHAMED,
KAROTHUKUZH HOUSE, EDATHALA P.O., ALUVA
ERNAKULAM DISTRICT. (DIED)

*** ADDITIONAL PETITIONERS 2 TO 4 IMPEADED**

2. AAYSHA MOHAMMED,D/O K.E.KUNJU MOHAMMED, AGED 20 YEARS
AGED 20 YEARS, KAROTHUKUZH HOUSE, EDATHALA P.O
ALUVA, ERNAKULAM DISTRICT.
3. IBRAHEEM MOHAMMED,S/O K.E.KUNJU MOHAMMED AGED 17 YEARS
AGED 17 YEARS, MINOR, REPRESENTED BY AAYSHA MOHAMMED
KAROTHUKUZH HOUSE, EDATHALA P.O, ALUVA
ERNAKULAM DISTRICT.
4. AARIFFA MOHAMMED,D/O K.E.KUNJU MOHAMMED,
AGED 15 YEARS, MINOR, REPRESENTED BY AAYSHA MOHAMMED
KAROTHUKUZY HOUSE, EDATHALA P.O, ALUVA
ERNAKULAM DISTRICT.

**[ADDITIONAL PETITIONERS 2 TO 4 ARE IMPEADED AS PER ORDER DATED
28.02.2006 IN IA NO.2923/06]**

BY ADV. SRI.K.BABU THOMAS

RESPONDENT(S):

1. KOTHAMANGALAM MUNICIPALITY,
P.B.NO.15, KOTHAMANGALAM, ERNAKULAM DISTRICT
REP. BY ITS SECRETARY.
2. THE MUNICIPAL ENGINEER,
KOTHAMANGALAM MUNICIPALITY, ERNAKULAM.
3. THE ASSISTANT ENGINEER,
KOTHAMANGALAM MUNICIPALITY, ERNAKULAM.

(CNTD)

4. STATE OF KERALA, REP. BY THE
SECRETARY TO GOVERNMENT, LOCAL ADMINISTRATION
DEPARTMENT, SECRETARIAT, TRIVANDRUM.

R1-R3 BY SRI.V.M.KURIAN, SC FOR KGLM MUNICIPALITY.
R4 BY SRI P.V.ELIAS, GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

- P1 : COPY OF REQUEST OF THE PETITIONER TO EFFECT PAYMENT
- P2 : COPY OF NOTICE OF THE FIRST RESPONDENT
- P3 : COPY OF MEMO ISSUED BY THE FIRST RESPONDENT TO THE 4TH RESPONDENT
- P4 : COPY OF MEMO ISSUED BY THE FIRST RESPONDENT TO THE 4TH RESPONDENT
- P5 : COPY OF LETTER ASSURING PAYMENT OF RS.12,11,228/-
- P6 : COPY OF JUDGMENT IN WPC NO.40308/2003
- P7 : COPY OF COVERING LETTER, BILL ABSTRACT AND ACKNOWLEDGEMENT OF THE FIRST RESPONDENT
- P8 : COPY OF THE COUNTER AFFIDAVIT IN CONT. CASE NO.1103/2004
- P9 : COPY OF AGREEMENT NO.53/1998-99 SHOWING QUOTED RATE OF 50% ABOVE ESTIMATE RATE

RESPONDENTS' EXHIBITS:

- R1(A) : COPY OF THE LETTER DATED 10.02.2004 SENT BY RESPONDENTS TO THE PETITIONER

//TRUE COPY//

P.A. TO JUDGE

JV

ANIL K. NARENDRAN, J.

W.P.(C) No.29128 of 2005

Dated this the 5th day of August, 2015

JUDGMENT

The petitioner, who had carried out the construction work of a three storied shopping complex of Kothamangalam Municipality has filed this writ petition seeking a writ of mandamus commanding the 1st respondent Municipality to effect payment of Ext.P7 final bill due to him, on checking the measurements recorded in it, within a time limit that may be fixed by this Court. The petitioner has sought for a declaration that, he is entitled to be paid interest on the unpaid amount retained and enjoyed by the 1st respondent Municipality, as is charged in his loan account, during the corresponding period from 01.03.2002 based on Ext.P1, till the date of payment. He has also sought for a writ of mandamus commanding the 4th respondent to pass orders authorising any Engineer to record final measurement of all items and quantities of work carried out by him, for effecting payment of the balance amount due to him, within a stipulated time, if such a course is required, notwithstanding Ext.P7.

2. Going by the averments in the writ petition, the petitioner had carried out the construction of a three storied

shopping complex for the 1st respondent Municipality at Post Office Junction, for a value of Rs.76,46,902.86, after executing agreement bearing No.53/98-99 dated 05.03.1999. According to the petitioner, the work was completed in all respects by 31.01.2002 including extra, additional and substituted items and the possession of the building in question was also handed over in the year 2002 itself. The 1st respondent Municipality effected payment of Rs.46,26,378/- towards value of the works carried out. Later, as directed by this Court in judgment dated 23.02.2004 in W.P.(C). No.40308/2003, the 1st respondent Municipality paid a further sum of Rs.12,14,301/-. But, according to the petitioner, the balance amount due comes to Rs.18,00,224/-.

3. The petitioner would contend that, going by sub-rule (7) of Rule 15 of Kerala Municipality (Execution of Public Works and Purchase of Materials) Rules, 1997 (hereinafter referred to as 'the Rules'), on receipt of report of completion of the work, the measurement and check measurement of items and quantities carried out should be completed by the 1st respondent Municipality and the Municipal Engineer within a week thereof. Immediately after completion of the work, the petitioner by

Ext.P1 representation dated 22.2.2002 requested the 1st respondent Municipality to effect payment for the value of works carried out. By Ext.P2 notice dated 03.05.2002, the 1st respondent Municipality directed the petitioner to handover the keys of the shop rooms to the Assistant Engineer concerned, the 3rd respondent herein, by 06.05.2002. Thereafter, the petitioner was issued with Exts.P3 and P4 memos dated 15.07.2003 intimating that, the Assistant Engineer, who was the Supervisor of the construction works, failed to record the final measurements and he was transferred and that, action is initiated against him. The said memo was followed by Ext.P5 communication of the 1st respondent dated 10.02.2004 intimating that approximately Rs..12,11,228/- is due to the petitioner in respect of the construction already carried out. In view of Ext.P5, this Court by Ext.P6 judgment, closed W.P.(C) No.40308/2003 filed by the petitioner claiming the balance amount payable by the 1st respondent Municipality after recording the submission made on behalf of the 1st respondent Municipality that, the amount mentioned in the aforesaid letter will be paid to the petitioner immediately and that, the balance amount shall be paid after finalisation of the amount.

4. According to the petitioners, due to the failure on the part of respondents 1 to 3 to take final measurement of the construction already carried out, the Engineers employed by the petitioner took final measurements and Ext.P7 final bill dated 20.11.2004 was submitted before the 1st respondent for a sum of Rs.33,32,728/- including interest. The petitioner would contend that, in accordance with Rule 18 of the Rules, the payment for value of works carried out should be made following the procedure in the Public Works Department. The time stipulated in MDSS for payment of bill for value of works carried out is ten days of presentation of the bill. It was due to the inaction on the part of respondents 1 to 3 in effecting payment of Ext.P7 final bill, the petitioner has approached this Court in this writ petition seeking various reliefs.

5. A counter affidavit has been filed on behalf of the 1st respondent Municipality contending, inter alia, that there exists serious factual disputes including breach of contract on the part of the petitioner and as such, the petitioner is not justified in invoking the writ jurisdiction of this Court under Article 226 of Constitution of India. According to them, the entire amount due to the petitioner had already been paid and no more payment is

pending. The Municipality would contend further that, on 10.02.2004, in response to the request of the petitioner dated 06.02.2004, he was informed vide Ext.R1(a) that excluding recovery, a total amount of Rs.47,13,739/- was paid to him and approximately Rs.12,11,228/- more would be payable. Accepting the statement contained in Ext.R1(a), W.P.(C).No. 40308/2003 filed by the petitioner was closed as per judgment dated 23.02.2004, directing the Municipality to make payment and also to pay balance, if any, on finalisation. Thereafter, final bill was prepared by the Municipality and the entire amount payable was paid and the matter was settled on 23.06.2004. The petitioner filed Contempt of Court Case No.1103/2004 before this Court, complaining that the Municipality failed to make the payment due to him in respect of the contract. The Municipality filed counter affidavit showing the details of the payment and also submitted that no further amount is payable and the Contempt of Court Case was closed as per judgment dated 30.09.2004, as infructuous. The Municipality would also contend that, the agreed PAC for the work was Rs.52,75,019/-. After the petitioner claimed that the entire work was completed, the Superintending Engineer, GCDA, who is the competent authority

to grant technical sanction for the work, inspected the work and sent his report dated 18.03.2003, pointing out the defects requiring rectification. Accordingly, the petitioner was directed to rectify those defects. The defects were not rectified satisfactorily and according to the Municipality, it was got rectified through other agencies. Therefore, the specific stand taken by the 1st respondent Municipality is that, no amount is payable to the petitioner; much less Rs.18,00,224/- as stated in Paragraph 3.

6. The petitioner has filed a reply affidavit reiterating contentions raised in the writ petition and stating that, the agreed PAC of the work under agreement dated 05.03.1999 was Rs.52,75,019/- plus 50% above the estimate rate quoted and accepted by the 1st respondent Municipality, i.e., Rs.79,12,528/-. In order to substantiate the said contention, the petitioner would rely on Ext.P9 quoted rate and also the tender schedule attached thereto. The petitioner would also contend that, no measurements were taken subsequent to 30.09.2004 when the Contempt Case (C).No. No.1103/2004 was closed. Measurements could be taken only with notice to the petitioner. It was due to the failure on the part of respondents 1 to 3 to record

measurements, the petitioner has prepared Ext.P7, which was acknowledged by the 1st respondent on 22.11.2004. Therefore, the petitioner would contend that there is absolutely no merit in the contention raised by the 1st respondent Municipality that no further amounts are payable in respect of the construction carried out by him.

7. I heard the arguments of the learned counsel for the petitioner, the learned Standing Counsel for respondents 1 to 3 and also the learned Government Pleader appearing for the 4th respondent.

8. The issue that arises for consideration in this writ petition is as to whether the 1st respondent Municipality can be directed to effect payment in terms of Ext.P7 final bill prepared by the petitioner.

9. The fact that the petitioner had undertaken the construction work of a three storied shopping complex of the 1st respondent Municipality is not in dispute. According to the petitioner, he has completed the entire construction in terms of the agreement executed with the 1st respondent Municipality and the keys of the shop rooms were also handed over to the Assistant Engineer concerned, pursuant Ext.P2 notice. Going by

Ext.P7 final bill prepared by the petitioner, the balance amount due to him comes to Rs.33,32,728/- with interest. On the other hand, the 1st respondent Municipality would contend that no further amount is payable to the petitioner and that, after the construction carried out by the petitioner certain defects were noticed, which required rectification from the side of the petitioner. Since the petitioner failed to rectify those defects to the satisfaction of the Municipality, those defects were got rectified through other agencies. The Municipality would also contend that since factual disputes are involved, this Court will not be justified in interfering with the matter under Article 226 of the Constitution of India.

10. From the facts borne out from the pleadings and documents on record, it is evident that, after completion of construction of the shopping complex no final measurement was taken by the 1st respondent Municipality, with notice to the petitioner. Exts.P3 and P4 memos dated 15.07.2003 would make it explicitly clear that the Assistant Engineer concerned, who was supervising the construction work, failed to record the final measurements and that, he was transferred and action was initiated against him. When admittedly there is no joint

measurement of the work already undertaken by the petitioner, this Court will not be justified in directing the 1st respondent Municipality to make payment on the basis of the measurements recorded in Ext.P7 final bill prepared by the petitioner.

In such circumstances, this writ petition is disposed of with the following directions:

Within one month from the date of receipt of a certified copy of the judgment, the 1st respondent Municipality shall take final measurement of the works undertaken by the petitioner, with due notice to him.

On the basis of the measurements so taken, the 1st respondent Municipality shall calculate the amount, if any, payable to the petitioner for the work he had undertaken.

Any such amount found payable to the petitioner shall be disbursed to him within a period of three months thereafter.

Any decision taken by the 1st respondent Municipality in this regard shall be communicated to the petitioner without further delay.

No order as to costs.

SD/-
ANIL K. NARENDRA,
JUDGE