

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

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

WP(C).No. 22920 of 2010 (L)

PETITIONER(S):

**M/S.PLANET HOME AND VILLAS (P)LTD.
THAVAKARA COMPLEX, THAVAKKARA, KANNUR
KERALA -670 002, REP.BY ITS MANAGING DIRECTOR
SRI.GEOGY GEORGE, AGED 48, S/O.K.J.GEORGE
KUTHUKAPPALLY HOUSE, KALPATHY PO, PALAKKAD DISTRICT.**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SMT.PREETHY KARUNAKARAN
SRI.K.RAVI (PARIYARATH)**

RESPONDENT(S):

**1. THE STATE OF KERALA AND OTHERS
REP.BY THE SECRETARY TO THE GOVT., LOCAL SELF
GOVERNMENT DEPARTMENT, GOVT.SECRETARIAT,
THIRUVANANTHAPURAM.**

**2. THE PARAVUR MUNICIPALITY, REP.BY ITS
SECRETARY, NORTH PARAVUR PO, 683 515.**

**3. THE CHAIRMAN, THE PARAVUR MUNICIPALITY,
NORTH PARAVUR PO-683 513.**

*** ADDL.R4 & R5 IMPEADED**

**4. VENUGOPAL
S/O.BHASKARAN NAIR, ELAMANPARAMBIL, PARKVIEW ROAD
N.PARAVUR, ERNAKULAM DISTRICT.
ADDL. R4 IS IMPEADED AS PER ORDER DATED 10/09/2012 IN IA 11958/2012.**

**5. KITCO LIMITED REPRESENTED BY ITS MANAGING DIRECTOR
FEMITHUS, POST BOX NO.4407, PUTHIYA ROAD
N.H. BYE PASS, VENNALA, COCHIN - 682 028.
ADDL. R5 IS IMPEADED AS PER ORDER DATED 29/05/2014 IN IA
NO.3085/2014.**

**R1 BY GOVERNMENT PLEADER SRI.JUSTIN JACOB
R2 & 3 BY ADV. SRI.C.S.AJITH PRAKASH,SC
R4 BY ADV. SRI.MANSOOR.B.H.**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11-02-2015,
ALONG WITH WPC. 16278/2012, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

APPENDIX

PETITIONERS' EXHIBITS

- P1: COPY OF THE APPROVED PLANS PETITIONER FOR THE BUILDING IN QUESTION DATED NIL.
- P2: COPY OF THE AGREEMENT ENTERED INTO BY THE PETITIONER WITH THE R2 DATED 15/10/09
- P3: COPY OF THE FOUNDATION STONE CEREMONY PAPER REPORT DATED 5/4/10
- P4: COPY OF THE COMMUNICATION BY THE R3 DATED 20/3/10
- P5: COPY OF THE JUDGMENT IN WA.495/10 DATED 17/3/10 OF THIS HONOURABLE COURT.
- P6: COPY OF THE NOTICE ISSUED BY THE MUNICIPALITY DATED 2/6/12
- EXHIBITS P7 & 8 NIL.
- P9: COPY OF THE NEWS ITEM PUBLISHED MALAYALA MANORAMA DAILY DATED 22/2/14
- P10: COPY OF THE NEWS ITEM WHICH CAME IN MALAYALA MANORAMA DAILY DATED 16/2/14
- P11: COPY OF THE NOTICE PUBLISHED DATED NIL.

RESPONDENTS' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 22920 of 2010

&

W.P. (c) No. 16278 of 2012

Dated this the 11th day of February, 2015

COMMON JUDGMENT

The petitioner, a construction Company, has approached this Court complaining that the respondent Municipality has committed unilateral breach of contract. Since both the writ petitions were filed by the same petitioner against the same set of respondents, raising issues involving a series of acts arising out of one single transaction; namely a contract, this Court proposes to dispose of both the writ petitions under a common Judgment.

2. The facts in brief are that the second respondent, among other things, owned 57 cents of land on which it proposed to have a building to accommodate its administration. Owing to what is said to be lack of funds, the second respondent thought of constructing a building

through private participation i.e. on the principle of 'Build, Operate, and Transfer' (BOT). In furtherance of the said objective, the respondent Municipality called for tenders and eventually declared the petitioner to be the successful bidder.

3. Having held negotiations, eventually the petitioner and the second respondent Municipality entered into Exhibit P2 contract proposing to have a three storied building constructed under BOT Scheme. The terms of the contract in Exhibit P2 need not be referred to for the reasons indicated herein below.

4. Though initially there seems to have been certain follow-up steps on the part of either of the parties, i.e. the petitioner and the second respondent, the project, however, has not taken off, materializing into any concrete structure.

5. Initially, the petitioner filed W.P. (C) No. 22920/2010 seeking a direction to the first respondent to permit it to commence and complete the construction of the building in terms of Exhibits P1 and P2 proceedings and agreement. In the light of the subsequent amendment of the Building Rules, it appears that the respondent

Municipality has, however, decided not to go ahead with the project; instead, it has proposed to have certain other construction raised under Muziris Heritage Project to house Library and Visitors' Centre. It is not in dispute that in terms of the changed policy of the respondent Municipality, it went ahead and constructed a building which is slated to be, according to the learned counsel for the respondent, inaugurated on 15.02.2015.

6. In fact, questioning the said alleged unilateral decision by the respondent Municipality to shelve the project, the petitioner has filed W.P. (C) No. 16278/2012, the second writ petition. It is the contention of the learned counsel for the petitioner that the petitioner has already spent more than thirty lakh rupees on the project and at no point of time has the respondent Municipality put the petitioner on notice concerning either the petitioner's deficiencies in carrying out the project or the change of policy by the respondent Municipality.

7. Equally, on his part, the learned counsel for the respondent Municipality has submitted that the petitioner has abandoned the project and has never approached the

respondent Municipality in furtherance of Exhibit P2 agreement. Be that as it may, as is to be delineated below, I do not propose to enter into the controversy agitated by either of the parties.

8. There is any amount of factual controversy whether the building plan was approved, whether the plan was required to be referred to the Chief Town Planner Officer and whether the consent of the Government is required. Equally disputed are the mutual allegations by the petitioner and the second respondent as to the breach of contract on the part of either of the parties.

9. Indeed, there are allegations and counter allegations and they require sufficient amount of evidence to determine or to fasten the liability on either of the parties. In my considered view, the whole issue is mired in controversy, factual and legal, and it requires proper adjudication by a competent civil court. In other words, it is hardly possible for this Court under Article 226 of the Constitution of India while exercising summary jurisdiction, as a matter of public law remedy, to adjudicate the disputed questions of fact.

10. Indisputable is the fact that the first project, as envisaged and sought to be executed through Exhibit P2 agreement, never took shape, for fault of whichever party. On the other hand, the respondent Municipality constructed on the same piece of land another building under a different project and it is all set to be operational soon.

11. What is required to be decided is at whose fault the project, as has been envisaged under Exhibit P2 agreement, could not fructify. Indeed, it is the singular contention of the learned counsel for the petitioner that the petitioner has been put to great prejudice in view of what he termed as the arbitrary and unilateral action of the respondent Municipality in shelving the project without following due process, i.e. without adhering to the principles of natural justice.

12. Once this Court declines to exercise its jurisdiction on the ground that the matter involving disputed questions of fact requires to be adjudicated upon other than by way of summary proceedings, or that the parties have an efficacious alternative remedy, it is inadvisable to express any opinion on the merits on the matter, for it is otherwise bound to prejudice the cause of either party before the forum they

choose to approach.

13. Variably expressed, if the writ petition under Article 226 is to be dismissed on the ground of alternative remedy, or any other analogous ground, the High Court is not required to express any opinion on the merits of the case, which is to be pursued before an alternative forum. (vide *Tin Plate Co. of India Ltd. v. State of Bihar*, (1998) 8 SCC 272).

14. There are no two opinions about the aphoristic judicial observation that Article 226 of the Constitution confers extra-ordinary jurisdiction on this Court and that it is wide as well as expansive; no fetter can be placed on the exercise of the said extra-ordinary jurisdiction. The adjudicatory ambit of an issue, indeed, is left to the discretion of this Court.

15. Having said that, if we visit the precedential precincts of the issue, in ***State of Kerala v. Anil***, [2002 (1) KLT 371], a learned Full Bench of this Court has emphatically held that it cannot be said in absolute terms that a writ petition is not maintainable in contractual matters including where the contractors seek enforcement of the obligation on the part of the state to pay the bill amounts admitted by the

state. This Court has observed that all the activities of the state are in public interest and for public good. The Court has eventually set out the circumstances under which the writ petition is maintainable, thus:

- “(1). When there is no disputed question of fact requiring adjudication on detailed evidence.
- (2). When no alternative form is provided in the resolution of any disputes pertaining to the contract.
- (3). When claim by one party is not contested by the other and the contest does not require adjudication requiring detailed enquiry into facts.”

16. In ***Kerala State Electricity Board v. Kurien E. Kalathil***, (AIR 2000 SC 2573), the Apex Court has held thus:

“11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body

need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.”

17. Referring to the above ratio with approval, recently another learned Bench of the Hon’ble Supreme Court in ***Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.,*** (2013) 5 SCC 470, has held as follows:

“21. It is evident from the above that generally the Court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus is to protect and

establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justitiae*). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal."

18. Guided by the above ratio if we observe, it is not the case of the petitioner that the contract is statutory in nature involving any deprivation of fundamental rights or negation of Article 14 in terms of arbitrary approach of the authorities. At best, it is to be observed, without prejudice to the cause of either of the parties, it is pure and simple a contractual dispute, the negation of which is to be determined. Under those circumstances, this Court has felt it desirable to

dismiss the writ petition, preserving the petitioner's liberty to approach an appropriate forum such as a competent Civil Court seeking a proper remedy on the ground of contractual dispute, on the same cause of action.

19. In the facts and circumstances, this Court, without advertent to the merits of the matter, dismisses the writ petition leaving it open for the petitioner to take appropriate measures, if it is aggrieved by the action of the respondent Municipality *vis-a-vis* Exhibit P2 agreement.

As a matter of abundant caution, it is made clear that no observation made inadvertently or incidentally while disposing of the present writ petition shall be taken as an expression of opinion on the merits of the matter by this Court.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-