

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2015

CORAM

THE HONOURABLE MR. JUSTICE V.DHANAPALAN
AND
THE HONOURABLE MR. JUSTICE G.CHOCKALINGAM

W.A.Nos.524 and 526 of 2011

M/s.Chandragiri Construction Company,
No.3/402 A, Karat Road,
West Nadakavu,
Kozhikode - 673 001, Kerala,
rep. by its Partner,
K.M.Moideen Kunhi ...Appellant in both Writ Appeals

vs.

1. State of Tamil Nadu,
rep. by its Secretary to Government,
Public Works Department,
Fort St. George,
Chennai 600 009.
2. The Chief Engineer,
Public Works Department,
Chennai Region,
Water Resources Organisation,
Chepauk,
Chennai 600 005.
3. The Superintending Engineer,
Public Works Department,
Water Resources Organisation,
Project Circle,
Vellore 632 006.
4. The Executive Engineer,
Water Resources Organisation,
Project Division, Sethuvandai,
Gudiyattam R.S.
Vellore District - 635 803.

5. The Branch Manager,
Federal Bank Ltd.,
M.G. Road, Kasargode,
Kerala State.

...Respondents in W.A.No.526 of 2011

1. State of Tamil Nadu,
rep. by its Secretary to Government,
Public Works Department,
Fort St. George,
Chennai 600 009.

2. The Chief Engineer,
Public Works Department,
Chennai Region,
Water Resources Organisation,
Chepauk, Chennai 600 005.

3. The Superintending Engineer,
Public Works Department,
Water Resources Organisation,
Project Circle,
Vellore 632 006.

4. A.P.Jayaprakash
Superintending Engineer,
Public Works Department,
Water Resources Organisation,
Project Circle,
Vellore 632 006.

5. The Executive Engineer,
Water Resources Organisation,
Project Division, Sethuvandai,
Gudiyattam R.S.
Vellore District - 635 803.

6. The Branch Manager,
Federal Bank Ltd.,
M.G. Road, Kasargode,
Kerala State.

...Respondents in W.A.No.524 of 2011

Writ Appeals filed under Clause 15 of the Letters Patent
against the common order dated 03.03.2011 passed by the learned
Single Judge in W.P.Nos.3379 and 3623 of 2009.

WP No. 3379 of 2009:-

Writ Petition filed under Article 226 of The Constitution of

India praying for a Writ of Certiorarified Mandamus calling for the records relating to the impugned order issued by the first respondent vide Government Letter No. 46434/T.1/2008 dated 12.12.2009 and quash the same and consequently direct the respondents 1 to 4 herein to revise the contract rates as per the Codal Rules framed by the Public Works Department for the year 2007-2008 in respect of the contract work named as "Formation of Reservoir Across Malattar River near Bathalapalli Village in Gudiyatham Taluk of Vellore District (vide Agreement No. 2CR/2005-2006).

WP No. 3623 of 2009:-

Writ Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records relating to the impugned order issued by the 5th respondent in No.10M/F.99/2003/D.O./dated 16.02.2009 and quash the same and consequently direct the respondents to extend the period of contract on a revised rates so as to enable the petitioner to complete the same in respect of the contract work named as "Formation of Reservoir Across Malattar River near Bathalapalli Village in Gudiyatham Taluk of Vellore District (vide Agreement No. 2CR/2005-2006).

For Appellant in both
Writ Appeals

: Mr.Vijay Narayan
Senior Counsel
for Mr.K.Premkumar

For Respondents 3 & 5
in W.A.No.524/2011
and Respondents 1 to 4
in W.A.No.526/2011

: Mr.P.H.Arvinth Pandian,
Addl. Advocate General
assisted by
Mr.R.Rajeswaran,
Special Govt. Pleader

Judgment Reserved on : 26.03.2015

Judgment Pronounced on : 29.04.2015

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COMMON JUDGMENT

V.DHANAPALAN, J.

As both Writ Appeals arise out of a common order dated 03.03.2011 made in W.P.Nos.3379 and 3623 of 2009, they are taken up for disposal by a common judgment.

2. Heard Mr.Vijay Narayan, learned Senior Counsel appearing for the appellant in both the cases and Mr.P.H.Arvinth Pandian, learned Additional Advocate General assisted by Mr.R.Rajeswaran, learned Special Government Pleader appearing for the respondents/State.

3. Aggrieved by the common order dated 03.03.2011 dismissing the Writ Petitions in W.P.Nos.3379 and 3623 of 2009, the Writ Petitioner therein, has come up before this Court by way of separate Writ Appeals.

4. Facts of the case, would run thus :

4.1. The appellant in both Writ Appeals is the writ petitioner. According to him, a contract was awarded to him by the respondent/Department to construct a reservoir across Malattar river in Gudiyatham Taluk and an agreement dated 26.10.2005 was entered into between the writ petitioner and the respondent Department. The contract value awarded in favour of the appellant was Rs.22,24,84,340/-. The period for completion of the contract was 18 months, the Earnest Money Deposit paid was Rs.10,75,000/- and a sum of Rs.45,00,000/- was offered by means of bank guarantee by the appellant. According to the appellant, originally, the site was handed over to them on 30.12.2005 and immediately thereafter, within a short period of four months time, dispute arose between the parties. Under those circumstances, the appellant filed three Writ Petitions namely, W.P.No.3977 of 2006 to quash the resolution of the Tender Award Committee and the consequential order of the Chief Engineer dated 13.01.2006 in respect of the construction of check dam across Palar river; W.P.No.45060 of 2007 to quash the termination of contract work dated 04.05.2006 and consequential re-tender notice dated 01.11.2006 regarding the very same work and W.P.No.45057 of 2007 to quash the order of the Superintending Engineer, Pollachi dated 10.10.2006 regarding cancellation of registration of the appellant's name as Class I contractor with the Public Works Department. All these Writ Petitions were jointly heard by this Court and a common order dated 26.04.2007 was passed in which the appellant was permitted to rectify the defects or sub-standard work in relation to the Malattar river work and liberty was given to the appellant to participate in the re-tender along with other tenders. Accordingly, the three Writ Petitions were closed by this Court.

4.2. Thereafter, on 18.05.2007, the appellant sought permission to commence the rectification work, as per the common order passed by this Court, followed by a reminder on 07.06.2007. Ultimately, on 25.10.2007, the appellant was permitted to resume the work as per the order passed by this Court. According to the

appellant, by 18.12.2007, he completed the sub-standard work and also rectified all the mistakes. Thereafter, the appellant was permitted to carry out the balance work, thereby, the appellant had completed atleast 35% of the work. In view of the resumed work performed by the appellant, the appellant sought to revise the rate of the current year PWD price index by means of letters dated 07.01.2008, 10.01.2008, 16.02.2008 and 16.12.2008. Further, the Superintending Engineer, by his proceedings dated 18.02.2008 extended the time for completion of work upto 18.02.2009, In that letter, it was stated that in so far as approval for the revision of rate is concerned, it will be done at a later point of time only after approval of the work. Since the appellant's request for consideration of higher price was not approved by the Department, the appellant filed another Writ Petition in W.P.No.27633 of 2008 for a mandamus directing the respondents to revise the agreement rate as per Public Works Department scheduled rates prevailing for the financial year, corresponding to the work executed by the appellant, including payment of idling charges as claimed by the appellant and handover the canal site after completing the land acquisition process so as to enable the appellant to complete his contractual obligations in respect of the contract work.

4.3. Pending writ petition, by letter dated 27.11.2008 of the third respondent, the appellant was called upon to expedite the work but rejected the request of the appellant for revision of the rate. In the meanwhile, W.P.No.27633 of 2008 was disposed of by this Court on 17.12.2008 directing the respondents to consider the appellant's letter dated 16.12.2008 and pass orders within a period of six weeks. Thereafter, by notice dated 22.01.2009, the Superintending Engineer alleged that there is no progress in the work and that the contract would be terminated due to the lethargic attitude of the appellant. Immediately, the appellant filed W.P.No.3378 of 2009 to quash that letter dated 22.01.2009 of the third respondent and obtained an order of interim stay on 17.03.2009. The appellant also made a further representation dated 31.01.2009 to the Secretary to the Government of Tamil Nadu. In the meanwhile, pursuant to the earlier directions issued by this Court, the Secretary to the Government, by an order dated 12.02.2009, rejected the request of the appellant. Subsequently, by an order dated 16.02.2009, the Executive Engineer terminated the contract, forfeited the Earnest Money Deposit and also invoked the Bank Guarantee on the ground that there was slow progress in the work and that the contractor had not adhered to the instructions given by the Department. Challenging the same, the above Writ Petitions are filed. In view of filing of W.P.No.3379 of 2009, the relief sought for by the appellant in the earlier writ petition in W.P.No.3378 of 2009 has become infructuous.

4.4. According to the appellant, the Chief Engineer himself inspected the site and made a note on 23.09.2008 that pillway and canal work could not be carried out due to certain bonafide reasons, whereas the Executive Engineer states that there is no bar for the petitioner to carry out the work. The Superintending Engineer further stated that 35% of the work was completed as early as on 18.02.2008 itself, whereas the Executive Engineer, in the impugned order had stated that only 14.35% work was completed. Further, the Executive Engineer never sent any proposal for revised rate even after the directions given by the Superintending Engineer and no reason was given to reject the valid explanation offered by the petitioner. Further, no pre-decision hearing was given to the appellant and that the fourth respondent had terminated the contract without any basis and that the contract was terminated only due to malafide.

4.5. The respondents filed a detailed counter before the Writ Court contending that the Writ Petitions are not maintainable as the disputes involved in both the Writ Petitions relate to contractual dispute inasmuch as the parties are governed by the terms and conditions of the contract. As per the terms and conditions of the contract between the parties, there is a clause for arbitration and if any party is aggrieved by any act of the other, they can invoke the arbitration clause and approach the Arbitrator. Without invoking the arbitration clause, the Writ Petitions filed by the appellant are not maintainable.

5. After hearing the learned counsel on either side, the learned Single Judge of this Court, by a common order dated 03.03.2011 in W.P.Nos.3379 and 3623 of 2009, dismissed the Writ Petitions with the following observation:

"26. When the petitioner has failed to perform the contract as per the agreement inspite of the fact it was informed that there is slow progress of work, the delay is only on the part of the petitioner in completing the work and such delay is inordinate, even though possession of the site was handed over to the petitioner on 30.12.2005. On the other hand, the reasons enumerated by the petitioner for the inordinate delay in completing the work does not deserve any consideration.

27. Even in the extension order, it was clearly stated that the work should be completed within the extended time now granted. It was further made clear that there should not be any loss to the Government by way of granting such extension of

time. In spite of the conditions stipulated, when the petitioner has not chosen to abide by the conditions, it is not open to the petitioner to seek the discretionary remedy from this Court, especially, seek to quash the order of termination. In fact, the termination order was passed by the fifth respondent after affording sufficient opportunity to the petitioner to complete the work in time and after exchange of various correspondences between the parties. Therefore it is clear that the petitioner had intentionally caused delay in completing the work on a day to day basis without taking note of the fact that time is the essence of the contract as per clause 57.1 to 57.3. Therefore, the respondents are fully justified in passing the impugned order of termination of the contract for violation of the terms and conditions of the contract by the petitioner.

28. In this background, we have to analyse the legal position in disputes of this nature. The learned Senior Counsel appearing for the petitioner relied on the decision of a Division Bench of the Orissa High Court reported in (Zerina Marines Pvt Ltd., vs. State of Orissa and others) AIR 2006 SC 66. In that case, there was a categorical recommendation by the Chief Engineer to extend the time to enable the petitioner to complete the execution of work and in spite of the same, the tender committee concluded that there is no progress on the part of the petitioner to complete the work and the work carried on by the petitioner was slow. Therefore, the committee closed the contract with the petitioner. Under those circumstances, the Division Bench of the Orissa High Court held that the administrative decision of the tender committee is arbitrary and illegal. This decision cannot be made applicable to the facts and circumstances of this case. In this case, from the various letters exchanged between the parties, it is clear that right from the beginning the petitioner delayed in carrying out the work and in fact, for such delay, the contract awarded in favour of the petitioner was validly cancelled by the respondents.

29. The learned Additional Advocate General appearing for the respondents relied on the decision of the Honourable Supreme Court reported in (State of U.P. And others vs. Bridge and Roof Company (India) Ltd) (1996) 6 SCC 22, it was held that in case of dispute relating to terms of contract, the appropriate course would be to refer the dispute to arbitration or institution of civil suit and not a writ petition. In Para No.21, it was held thus:-

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy in this case, provided in the contract itself is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 whether for issuance of mandamus or any other writ, order or direction was misconceived for the reasons mentioned supra."

30. The learned Additional Advocate General appearing for the respondents also relied on the

decision of the Honourable Supreme Court reported in (Kerala State Electricity Board and another vs. Kurien E.Kalathil and others) (2000) 6 SCC 293, wherein, it was held in para-11 as follows:

"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 by 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 relegated to other remedies."

31. The learned Additional Advocate General appearing for the respondents relied on the decision reported in (Pimpri Chinchwad Municipa Corporation and others vs. Gayatri Construction

Company and another) (2008) 8 SCC 172, in which, the Honourable Supreme Court held, by following the earlier decision in (Kerala State Electricity Board and another vs. Kurien E.Kalathil and others) (2000) 6 SCC 293 held that when the agreement provides for in-house remedy for resolution of the dispute, High Court should not interfere in those matters.

32. In the decision reported in (Kisan Sahkari Chini Mills Limited vs. Vardan Linkers) (2008) 2 SCC 500, relied on by the learned Additional Advocate General for the respondents, the Honourable Supreme Court wherein it was held that ordinarily, the remedy for breach of contract is a suit for damages or for specific performance and not a writ petition under Article 226 of the Constitution of India. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 of the Constitution of India may be invoked. In Civil suit, the emphasis is on the contractual right, whereas the emphasis in writ petition is on the validity of the exercise of power by the authority. In that case, there was a dispute in respect of very fact itself and therefore, the High Court should not normally interfere into the dispute or applicability of the question of fact. In Para No.24, it was held as follows:-

"24. In this case, the question arose for consideration in the writ petition was whether the order dated 24-04-2004 passed by the Secretary (Sugar) cancelling the allotment letter dated 26.03.2004 was arbitrary and irrational or violative of any administrative law principles. The question whether there was a concluded contract or not, was only incidental to the question as to whether cancellation order dated 24.04.2004 by the Secretary (Sugar) was justified. As the case involved several disputed questions in regard to the existence of the contract

itself, the High Court ought not to have referred the first respondent to a civil Court. But the High Court in exercise of its writ jurisdiction proceeded as if it was dealing with a pure and simple civil suit relating to breach of contract."

33. In our case on hand, the petitioner claimed to have completed 35% or 23% of the work and the respondents contended that only 14% of the work was completed by the petitioner. Such a disputed question cannot be adjudicated by this Court under Article 226 of The Constitution of India.

34. In any event, when there is an alternative remedy is available but without exhausting the same, the petitioner has come forward with this writ petition. Further, the findings rendered by the respondents for terminating the contract was cogent, clear and I do not find any reason to interfere with the same.

35. In the order dated 12.12.2009 of the first respondent, which is impugned in WP No. 3379 of 2009, the first respondent rejected the request of the petitioner seeking payment at an enhanced rate on the ground that in spite of handing over the site as early as on 30.12.2005, the petitioner has not completed the contract work in time. Even for completing the rectification work, the petitioner took much time and completed it only during December 2007. Therefore, according to the first respondent, the delay was only on the part of the petitioner in completing the work inspite of the fact that sufficient land was made available for the purpose of completing the work and this was one of the reasons for the first respondent to reject the claim of the petitioner for payment at enhanced rate. It was also pointed out in the impugned order that G.O. Ms. No.60, Public Works Department will be applicable only to those contracts which were allotted on and after 14.03.2008 and it will not apply to the contract awarded in favour of the petitioner on 26.10.2005. It was also mentioned therein that the amount is being paid only from the state fund norms and not from the financial assistance provided by World Bank fund norms and therefore also, the claim of the petitioner for

payment at enhanced rate cannot be accepted. Such a reasoning assigned by the first respondent cannot be said to be invalid. Moreover, apart from the reasonings given by the first respondent, in the agreement dated 26.10.2005 entered into between the petitioner and the respondents, there is an arbitration clause namely Clause 69 is available which provides that in respect of any dispute or claim to be made by one party against the other, the aggrieved person can move the arbitrator. Clause 69 reads as follows:-

"Clause 69. In case of any dispute or difference between the parties to the contract, either during the progress or within the three months of the completion of the works or after the determination, abandonment or breach of the contract, or as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under clauses 18, 20, 25.3, 27, 32, 34, 36 and 37 of "General conditions of contract" or TNBP Vol.II or as to the withholding by the Executive Engineer of payment of any bill to which the contractor may claim to be entitled, the either party shall forthwith give to the other notice of such dispute difference and such dispute or difference, shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in "Articles of Agreement" (hereinafter called the "Arbitrator") in cases where the value of claim is less than and upto Rs.50000/-, the parties will seek remedy through competent civil Court in cases when the value of claim is more than Rs.50,000/-."

36. Therefore, the agreement between the parties provide for resolution of disputes by an arbitrator and as far as the request of the petitioner for payment of the amount at enhanced rate is concerned, it can only be decided by the respondents or by an arbitrator in the event of the parties approaching the arbitrator and this Court

cannot decide the same in this writ petition. Therefore, I hold that the order of rejection, which is impugned in WP No. 3379 of 2009 is valid and interference of this Court is not warranted.

37. Though the petitioner alleged malafide against the Superintending Engineer, Vellore and impleaded him in his personal capacity in WP No. 3623 of 2009, no argument was separately advanced before this Court besides the plea of malafide was not proved or established by any documentary evidence.

38. In the result, the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed. It is open to the writ petitioner to seek such remedy as is available to him under law."

6. Learned Senior Counsel appearing for the appellant would strenuously contend that the contra findings recorded by the Writ Court based on the communications of the Superintending Engineer in contravention of the Chief Engineer's instructions are not based on sound reasoning. It is his further contention that the order under appeal is liable to be set aside for want of appreciation of indisputable materials available on record establishing the fact that the contractor was terminated from executing the work in view of the contradictory instructions issued by the authorities concerned and that no decision was taken on the lawful claim for revised rate applicable for the year 2007-2008. In addition, he would argue that the order challenged in this appeal is vitiated by self-contradicting findings such as the same contract was held to have been terminated more than once, i.e. on 04.05.2006 and also by virtue of order impugned in W.P.No.3623 of 2009 for want of considering the case in its proper perspective.

7. On the other hand, learned Additional Advocate General would mainly contend that the delay is totally on the part of the appellant. According to him, the original contract was cancelled on the ground of inordinate delay in completing the contract work inspite of the fact that the site was handed over to the appellant as early as on 30.12.2005. Inspite of the handing over of the site, the appellant did not complete the work as per the contract. He would contend that the contractor could have undertaken the work unhindered in many of the places and therefore, it is clear that the delay is on the part of the appellant.

8. We have given careful consideration to the submissions made by the learned counsel on either side.

9. The contract was awarded in respect of formation of a reservoir across Malattar river in Gudiyatham Taluk vide agreement No.2CR/2005-2006 entered into between the appellant and the respondent department on 26.10.2005 for a value of Rs.22,24,84,340/-. The period of completion of the contract was fixed as 18 months; the earnest money deposit paid was Rs.10,75,000/- and a sum of Rs.45,00,000/- was offered by the appellant towards bank guarantee.

10. According to the appellant, the site was handed over to them on 30.12.2005 and immediately within a short period of four months, some dispute arose between the parties to the contract. To overcome the said circumstances, the appellant moved this Court in three writ petitions, viz., W.P.Nos.3977 of 2006 to quash the resolution of the Tender Award Committee and the consequential order of the Chief Engineer dated 13.01.2006 in respect of the construction of check dam across Palar river; W.P.No.45060 of 2007 to quash the termination of contract work dated 04.05.2006 and consequential re-tender notice dated 01.11.2006 regarding the very same work and W.P.No.45057 of 2007 to quash the order of the Superintending Engineer, Pollachi, dated 10.10.2006, regarding cancellation of registration of the appellant's name as Class-I Contractor with the Public Works Department. All the three writ petitions were heard together and a common order was passed by a learned single Judge of this Court on 26.04.2007, allowing the appellant to rectify the defects or substandard work in relation to the Malattar river work and giving the appellant liberty to participate in the re-tender along with other tenderers. On 18.05.2007, the appellant sought permission to commence the rectification work as per the order passed by this Court followed by a reminder on 07.06.2007. Ultimately, on 25.10.2007, the appellant was permitted to resume the work as per the order passed by this Court. By 18.12.2007, he completed the sub-standard work and also rectified all the mistakes. Thereafter, the appellant was permitted to carry out the balance work, whereby, he had completed at least 35% of the work. However, in view of the resumed work performed by the appellant, he sought to revise the rate as per the PWD price index by addressing number of letters, one of which was lastly on 16.12.2008. Pursuant thereto, the Superintending Engineer, by his proceedings, dated 18.02.2008, extended the time for completion of work up to 18.02.2009. By the said proceedings, it was informed that in so far as approval for the revision of rate was concerned, it would be done at a later point of time only after approval of the work. Since the request of the petitioner for

consideration of higher price was not considered, the appellant filed another writ petition in W.P.No.27633 of 2008 for a mandamus, directing the respondents to revise the agreement rate as per Public Works Department scheduled rates prevailing for the financial year, corresponding to the work executed by the appellant, including payment of idling charges as claimed by him and hand over the canal site after completing the land acquisition process so as to enable him to complete the contractual obligations in respect of the contract work. Pending the Writ Petition, the Superintending Engineer, third respondent, in his letter dated 27.11.2008, called upon the appellant to expedite the work, but rejected the request of the appellant for revision of the rate. In the meanwhile, W.P.No.27633 of 2008 was disposed of by this Court on 17.12.2008, directing the respondents to consider the appellant's letter dated 16.12.2008 and pass orders within a time frame. However, by notice, dated 22.01.2009, the Superintending Engineer alleged that there was no progress in the work and that the contract would be terminated due to the lethargic attitude of the appellant. Immediately thereafter, the appellant filed W.P.No.3378 of 2009 to quash that letter dated 22.01.2009 of the third respondent and obtained an interim stay on 17.03.2009. The appellant made a further representation, dated 31.01.2009, to the Secretary to Government of Tamil Nadu. Pursuant to the direction issued by this Court, the Secretary to Government rejected the request of the appellant by an order, dated 12.02.2009. Subsequently, by an order dated 16.02.2009, the Executive Engineer terminated the contract; forfeited the earnest money deposit and also invoked the Bank Guarantee on the ground that there was slow progress in the work and that the contractor had not adhered to the instructions given by the department. In view of the filing of W.P.No.3379 of 2009, the relief sought for by the appellant in the earlier writ petition in W.P.No.3378 of 2009 to quash the letter dated 22.01.2009 of the third respondent had become infructuous.

11. Two writ petitions were filed before the learned single Judge; one being W.P.No.3623 of 2009, challenging the proceedings of the fifth respondent, namely, Executive Engineer, Water Resources Organisation Project Circle, Gudiyatham R.S., Vellore District, dated 16.02.2009, seeking to quash the same and for a consequential direction to extend the period of contract on revised rates; and the second being W.P.No.3379 of 2009, questioning the order of the Government in its letter No.46434/T.1/2008, dated 12.12.2009, and for a consequential direction to revise the contract rates as per the Codal Rules framed by the Public Works Department.

12. It was contended by the learned Senior Counsel for the appellant before the learned single Judge that the order of termination of contract, dated 16.02.2009, passed by the fifth respondent/Executive Engineer was arbitrary and without any basis. It was also contended that the Chief Engineer himself inspected the site and made a note on 23.09.2008 that spill way and canal work could not be carried out due to certain bonafide reasons, whereas the Executive Engineer stated that there was no bar for the appellant to carry out the work. The Superintending Engineer informed that 35% of the work was completed as early as on 18.02.2008 itself, whereas the Executive Engineer, in the impugned order, had stated that only 14.35% work was completed. Further, the Executive Engineer had never sent any proposal for revised rate even after the directions given by the Superintending Engineer and no reason was given to reject the valid explanation offered by the appellant and that no pre-decision hearing was given to the appellant and, therefore, both the impugned orders were liable to be set aside.

13. The respondents resisted the above contentions, stating that writ petitions were not maintainable as the disputes involved therein relate to contractual matters inasmuch as the parties are governed by the terms and conditions of the contract; there is a clause for arbitration and if any party is aggrieved by any act of the order, it can invoke the arbitration clause and approach the arbitrator and without invoking the arbitration clause, the writ petitions filed by the appellant were not to be entertained.

14. It was also contended that on 26.04.2007, in W.P.Nos.3977,45060 and 45057 of 2006, a consent order was passed by this Court, stating that the petitioner shall be permitted to participate in the re-tender. Therefore, it is clear that the tender itself was cancelled and when the cancellation was challenged before this Court, the appellant was permitted to participate in the re-tender and also the fact remains that the order of termination passed by the department was never set aside by the Court and, therefore, the appellant had no legal right to challenge the orders impugned in the writ petitions.

15. On the above submissions and on consideration of the facts and circumstances, the learned single Judge came to the conclusion that the earlier termination of contract dated 04.05.2006 has not been set aside in an earlier round of litigation in W.P.No.3397 of 2006 and, therefore, the same remains intact; that there was inordinate delay on the part of the appellant in performing his part of contract even though the work site was handed over to him on 30.12.2005 and hence the delay caused by the appellant does not deserve any consideration and lastly there was availability of

alternative remedy of civil suit for the claim of above Rs.50,000 and accordingly he dismissed the writ petitions on the ground of maintainability.

16. In the above background pleadings and the submissions made by the learned counsel for the parties, it would be very much relevant to consider three points.

(1) Whether the Writ Petitions were not maintainable, in view of the alternative remedy available to the appellant ?

(2) Whether the earlier termination of contract, dated 04.05.2006, has remained intact, even as the appellant was permitted to rectify the substandard works and to commence the contractual obligations ?

(3) Whether there was any delay on the part of the appellant in performing his part of contract after the work site was handed over to him ?

17. On first and second points, Mr.Vijay Narayan, learned Senior Counsel appearing for the appellant, would vehemently contend that when a public law element is involved, in appropriate cases, the writ court has jurisdiction to entertain the writ petition, involving disputed question of fact, and there is no absolute bar in regard thereto. In this regard, he relied on a decision of the Supreme Court in ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., reported in 2004 (3) SCC 553. He would also argue that the learned single Judge was not justified in dismissing the Writ Petitions on the ground that the writ court will not determine the disputed questions of fact. According to him, the High Court has jurisdiction to determine the questions of fact even if they are in dispute. In this regard, he relied upon an authority of the Apex Court in Smt.Gunwant Kaur and others v. Municipal Committee, Bhatinda, and others, reported in 1969 (3) SCC 769. Further, insistence has been made by the learned Senior Counsel on another ruling of the Supreme Court in Century Spinning and Manufacturing Company Limited v. The Ulhasnagar Municipal Council, reported in 1970 (1) SCC 582, thereby contending that the questions of fact raised by the petition in this case are elementary. Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice; the obligation arising against an individual out of his representation amounting to a promise may be enforced ex contract by a person who acts upon the promise and when the law requires that a contract enforceable at law against a public body shall be

in certain form or be executed in the manner prescribed by a statute, the obligation may be enforced against it in appropriate cases in equity.

18. The appellant explained to the respondent department of completion of 10% of work towards the obligation of 18 months contract. In the second part, he completed 20% of work; in third part, up to 25%; and in fourth and six parts, he claimed that he completed 20% and 6% respectively.

19. To examine the above position, it is to be seen that the appellant was handed over the possession of the work site on 30.12.2005. Based on the tender committee resolution, on 13.01.2006, the Chief Engineer passed an order to cancel the work, which was challenged in W.P.No.3977 of 2006 and on 04.05.2006, the Executive Engineer terminated the contract on the ground of slow progress and forfeited the security deposit, which was challenged in W.P.No.45060 of 2006. Thereafter, a show cause notice was issued to the appellant for cancellation of registration of appellant's name as Class I Contractor and the same was challenged in another W.P.No.45057 of 2006 and the said Writ Petitions were disposed of by this Court with a consent order, in which it was inter alia agreed by the parties that the respondent had agreed to withdraw the show cause notice for cancellation and permit the appellant to rectify the sub-standard work, whereby also giving liberty to the appellant to participate in the re-tender in relation to the same subject work. However, no re-tender was called for. The fact remains that the appellant was permitted to complete the entire contract work. The appellant was further allowed by the department to rectify the substandard work and also commence the work for the remaining contractual obligations.

20. It is noticed that whenever there was an action by the department, the appellant moved this Court and contested the matter. When the earlier termination of contract was ended with a consented common order, the appellant was allowed to participate in the re-tender, but, no re-tender was called for and, therefore, he was allowed to complete the remaining work, which shows that the earlier termination of contract was not in existence and the contractor has been allowed to continue with the work. Therefore, the finding rendered by the learned single Judge that the earlier termination of contract remained intact, in our considered opinion, is not correct.

21. Also, it is to be noted that not only a public duty but the statutory and contractual obligations are cast upon the respondent and, as and when they are necessitated, the same have to be done in the manner as expected. The department being the State

authority, and its obligation is considered to be a public duty, it is bound to obey the directions issued by this Court. In such circumstances, if the appellant is directed to go for the alternative remedy, that would cause a serious prejudice as per the ruling of the Supreme Court relied upon by the learned Senior Counsel in ABL International Ltd, cited supra, that, in appropriate cases, the writ court has jurisdiction to entertain the writ petition involving disputed questions of fact and that there is no absolute bar in regard thereto. These peculiar circumstances would give a clear impression to this Court that not only the terms and conditions of the contract but the legal obligation on the part of the parties would be binding. Therefore, the writ petitions are to be maintained to decide about the element involved in these cases and it could not be a factor that there is only a disputed question of fact.

22. On the third point as to delay, it is to be stated that the delay if any cannot be attributable to the appellant alone, because, out of 34 kilometres Branch/Main Canals, not even single kilometre was handed over to the petitioner till the date of termination of contract i.e., 21.01.2009 and hence the termination of contract is illegal, as also the obligation on the part of the department has not been concluded. That being so, the delay cannot be attributed to one party alone and it would be on both the parties.

23. In the impugned order of the learned single Judge in several paragraphs, it is observed that the correspondence between the parties to the contract shows that the earlier termination of contract was not acted upon and the contract was extended. The various dates and events would show that the contract was awarded to the appellant on 26.10.2005 and a portion of worksite was handed over to him on 30.12.2005 and the subsequent events which took place up to the termination of contract would indicate that there were inspections by the Chief Engineer and the Superintending Engineer and the reports drawn by them would reveal the Spill way : to make a detailed study about daily inflow and get approval for financial involvement; Formation of canal : directing not to proceed any further of evacuation of canal work until land acquisition is completed; and Costs of contract : directing to prepare the revised estimate in order to avoid further escalation.

24. On 31.10.2008, the appellant/contractor made a detailed representation stating the reasons for seeking revised rate as per Price Index of the Year and thereafter sought legal remedy before this Court by filing a writ petition. The stop work order was issued by the Chief Engineer on 31.01.2009. Though the Government took a stand that the delay was due to the filing of the writ

petition; incomplete land acquisition was not a bar; since the appellant carried out substandard work, he is not eligible for revised rate; the G.O.60, dated 14.03.2008, has no retrospective effect, they are all the factors, which could be matters between the parties to the contract. The points of slow progress, violation of agreement and not obeying the department's instructions are also raised by the department, but, what is material is, that, it is seen from the records that the delay has been occurred due to the action of both the parties. Therefore, on that ground, the relief claimed by the appellant cannot be denied.

25. For the foregoing reasons and considering the various factors involved in the matter, the attending circumstances and the obligations prevailed upon and the public duty involved in the construction of a reservoir across Malattar river, the orders passed by the respondents are liable to be interfered with. Therefore, the view taken by the learned single Judge as to the maintainability of the writ petitions, non-existence of contract and the delay aspects, in our standpoint, is not in accordance with law. As such, we feel, the matter has to be re-examined by the respondents concerned. Accordingly, we set aside the orders passed by the respondents, which are impugned in the Writ Petitions, thereby allowing these Writ Appeals and remanding the matter. The authorities concerned are directed to re-look into the matter, taking into account the circumstances and the factors, as explained above in this judgment, consider the claim of the parties and pass appropriate orders in the manner known to law. No costs.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

abe/dixit

To

1. Secretary to Government,
State of Tamil Nadu,
Public Works Department,
Fort St. George,
Chennai 600 009.

WEB COPY

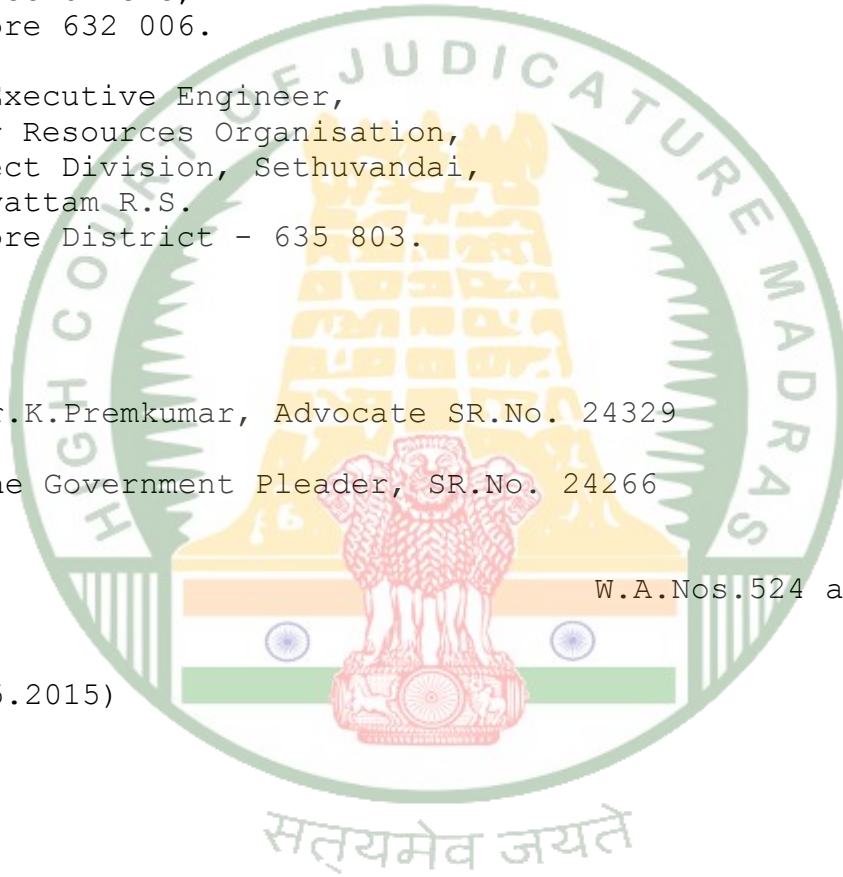
2. The Chief Engineer,
Public Works Department,
Chennai Region,
Water Resources Organisation,
Chepauk,
Chennai 600 005.
3. The Superintending Engineer,
Public Works Department,
Water Resources Organisation,
Project Circle,
Vellore 632 006.
4. The Executive Engineer,
Water Resources Organisation,
Project Division, Sethuvandai,
Gudiyattam R.S.
Vellore District - 635 803.

1 CC to Mr.K.Premkumar, Advocate SR.No. 24329

1 CC to the Government Pleader, SR.No. 24266

W.A.Nos.524 and 526 of 2011

RSK (CO)
PSI (05.05.2015)



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