(2016) 03 KL CK 0031

In the High Court Of Kerala

Case No : W.P. (C) No. 6164 of 2010 (U)

Crescent Construction Company APPELLANT

Vs

The State of Kerala and Others RESPONDENT

Date of Decision : 04-03-2016

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 14, Article 226
Interest Act, 1978 — Section 3

Citation : (2016) 03 KL CK 0031

Hon'ble Judges : Alexander Thomas, J.

Bench : Single Bench

Advocate : K.L. Varghese, Sr. Adv., Santha Varghese and Nihad Mohamed Basheer, Advocates, for the Appellant; P.V. Elias, Government Pleader, for the Respondent

Final Decision : Disposed off

Judgement

Alexander Thomas, J.—1. The petitioner who is a registered contractor with the Public Works Department (PWD) of the Government of Kerala, was awarded the work of "Mental Health Centre-Construction of New Forensic Ward, Peroorkada, Thiruvananthapuram", as per Ext. P1 letter dated 16/04/2004 issued by the 2nd respondent Superintending Engineer, PWD Buildings, South Circle, Thiruvananthapuram. The contract was entered into between the petitioner and the competent authority of the Public Works Department for the execution of the above work for the benefit of the 4th respondent department. According to the petitioner, he had commenced the work in all seriousness and had carried out the construction of the work in question. That during execution, the respondent PWD authorities introduced some deviations in the work necessitating execution of lot of extra items of work by the petitioner and in compliance with the directions issued by the respondent PWD authorities, the petitioner completed all such works under the supervision of the competent Engineers concerned and to the best of the satisfaction as early as on 26/02/2007. After completion of work, respondents finalised the final bill for the work after due check measurement and as per the final bill, the total value of the work executed was Rs. 24,95,704/-. The respondent, PWD authorities had taken over the building and had subsequently handed over the same to the 4th respondent, Mental Health Centre and since then the building has been put to use. It is however that the payment now due to the petitioner under the final bill comes to about Rs. 5,12,000/- which has not been paid till now. The petitioner had sent Ext. P2 lawyer''s notice dated 15/05/2009, which has not evoked any response and it is thereafter that the petitioner has instituted the above W.P. (Civil) on 24/02/2010, seeking the following reliefs:

"(i) Issue a writ of mandamus or any other appropriate writ, order or direction, directing the Respondents to make payment of the final bill amount of Rs. 5,12,000/- or such other amount due as per Respondents'' reckoning in respect of the work of "Mental Health Centre - Construction of New Forensic Ward, Peroorkada, Thiruvananthapuram" immediately without any further delay.

(ii) Grant interest at 18% per annum on the payment due to petitioner from the date of preparation of the final bill till date of payment or realisation.

(iii) Grant costs to the petitioner and such other reliefs as are prayed for and deemed fit to be granted in the circumstances of the case."

2. It is specifically pleaded by the petitioner in Paragraph 6 of the writ petition that as per the seniority norms for payment of contracting bills as laid down by Division Rulings of this Court, the respondent authorities are bound to follow strict seniority of pending bills in making payments in respect of public works and that in the instant case, the respondent authorities had violated the seniority norms, thereby they had released payment for works completed much after the completion of the works in the instant case. Therefore, it is urged that the above said action of the respondents in not paying the bill amounts due to the petitioner amounts to hostile discrimination and is vitiated by impropriety and unfairness by the petitioner has been put to irreparable damages, injury and injustice.

3. The 3rd respondent, Executive Engineer, Buildings Division, Thiruvananthapuram, has filed a counter affidavit dated 12/02/2013. In paragraph 2 thereof, it is stated by the respondents that the work in question was awarded to the petitioner as per selection notice dated 16/05/2004 that is quoted rate of 10.6% above the estimate rate less cost of departmental materials and agreement was entered into between the petitioner and the 2nd respondent, Superintending Engineer, PWD on 22/04/2004. That though the construction was started, the work was stopped abruptly and without any reason or notice and then notice had been issued to the petitioner on different occasions asking to complete the work as per schedule. Bill for part payment was submitted. That since the deposit work, special sanction from Government was necessary for honouring payment and payment was made in pursuance to the

letter of credit issued by the Government in that behalf. That in the meanwhile, extra work stated to have been pointed out by the petitioner in pursuance to the request made by the Mental Health Authorities and since the deposit amount was not sufficient for clearing the final bill vide dated in 28/07/2008, request was made before the 4th respondent Mental Health Centre to remit the balance amount and the payment can be made to the petitioner only on receipt of the amount from the Mental Health Authorities. The allegation of the petitioner that the respondents are deliberately denying the payment, is denied etc. in Para 2 of the counter affidavit filed by the 3rd respondent which reads as follows:

"Work relating to the construction of Mental Health Centre-new forensic ward, Thiruvananthapuram was awarded to the petitioner herein vide Selection Notice dated 16.04.2004 at his quoted rate of 10.6% above estimate rate less cost of departmental materials. An agreement to that fact as entered into between the petitioner and the 2nd respondent on 22.04.2004. Though the construction was started the work was stopped abruptly without any reason/notice. Hence notice had to be issued to the petitioner on different occasions asking him to complete the work as per schedule. In the meantime bill for part payment was submitted. Since the work was a deposit work, special letter of credit from Government was necessary for making payment. Payment was made in pursuance to the letter of credit issued by the Government in that behalf. In the meantime, extra work was stated to be carried out by the petitioner in pursuance to the request made by the Mental Health Authorities. Since the deposit amount was not sufficient for clearing the final bill, vide letter dated, 28/07/2008, request was made before the 4th respondent to remit the balance amount. Payment can be made to the petitioner on the receipt of the amount from the Mental Health Authorities. The contention that the respondent is deliberately delaying the payment is not true and hence denied. Other contentions raised in the writ petitioner are also not maintainable. The petitioner is not entitled to get any reliefs as sought for."

4. Heard Sri. Rahul Varghese, learned counsel appearing for the petitioner and the learned Government Pleader appearing for the respondents.

5. The crucial fact of the matter is that the privity of contract is only between the petitioner on the one hand and the Public Works Department Authorities concerned on the other hand, as it is admitted in the counter affidavit that the agreement for the execution of the work in question was entered into between the petitioner and the 2nd respondent Superintending Engineer, Public Works Department. So the work in question has been carried out by the petitioner only in terms of the directions issued by Public Works Department. If as a matter of fact, Public Works Department has ensured the execution of the work, for the benefit of the 4th respondent Mental Health Department, those are all internal matters as between various departments under the State of Kerala. May be under the internal arrangements as between the various departmental authorities concerned, the money required for the work may have to be deposited by the 4th respondent Mental Health Centre before the 2nd

respondent, Superintending Engineer, PWD. The non-deposit of the money by the 4th respondent to the 2nd respondent is no ground for denying the payments due to the petitioner contractor. The averment of the petitioner that he has carried out the work to the full satisfaction of the departmental authorities and that the building was duly taken over by PWD department etc is fully admitted, is not in any way effectively rebutted or denied by the respondents in their pleadings.

6. The learned Government Pleader on instructions from the 3rd respondent Executive Engineer as per the Executive Engineer''s letter dated 03/03/2006 has submitted that as per the record of the PWD authorities, the gross amount payable to the petitioner contractor comes to Rs. 5,82,518/- and the net amount payable to the contractor comes to Rs. 5,26,503/- (deduction as per the prevailing rule of 2010-11) and that the balance amount was not deposited by the 3rd respondent Superintend of Mental Health Centre and that the amount can be paid to the petitioner contractor after receiving the deposit of the balance amount by the Mental Health Authority and letter produced from Government. So the fact of the matter that the gross amount payable to the petitioner comes to Rs. 5,82,518/- and that the net amount payable to the petitioner comes to Rs. 5,26,503/- is fully admitted by the respondents. Therefore, the balance bill amounts due to the petitioner as stated above is undisputed by the respondents. The aspects that the PWD authorities should receive the deposit of the balance amount from the Mental Health Authorities and that they have to get the letter of credit from the Government etc are all internal matters as between the various functionaries under the State Government and it is no ground whatsoever to deny or delay the payment to the petitioner contractor.

7. The scope and ambit of exercise of the power of judicial review in contractual matters in respect of the contractual obligations of the public authorities has been delineated with clarity by the ruling of the Full Bench of this Court reported in State of Kerala v. Anil [, 2002 (1) KLT 371] (FB); wherein it has been 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. It has been held in paragraph 18 thereof that all the activities of the State are in public interest and for public good, and that there is public law element in contracts where State is a party, and it naturally follows that there is public duty owned by such public authorities. And above all, any State action is liable to be tested on the touchstone of Art.14 of the Constitution of India. Essentially, the only limitation of the High Court is the self imposed restriction. A few relevant factors in exercising the self-imposed limitations under Art.226 of the Constitution of India in the matter of payment of Contractors'' bill are:

"(1) When there is no disputed question of fact requiring adjudication on detailed evidence.

(2) When no alternate form is provided in the resolution of any disputes

pertaining to a 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. It will be profitable to refer to observations of the Full Bench in Paragraph 18 of the said rulings which reads as follows:

"Guided by the salutary principles in the subject matter and as particularly laid down by the Supreme Court, and applying the same on the issue referred to us, it has to be 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. Though couched in different terms, all the decisions referred by us above lead to the said conclusion. All the activities of the State are in public interest and for public good. There is public law element in contracts where State is a party, and it naturally follows that there is public duty. And above all, any State action is liable to be tested on the touchstone of Art.14 of the Constitution of India. Essentially, the only limitation of the High Court is the self imposed restriction. A few relevant factors in exercising the self imposed limitations under Art.226 of the Constitution of India in the matter of payment of Contractors'' bills are:

(1) When there is no disputed question of fact requiring adjudication on detailed evidence.

(2) When no alternate form is provided in the resolution of any disputes pertaining to a 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."

8. The Division Bench of this Court in the judgment in Writ Appeal No. 1314/1993 has held that the State is bound to ensure timely payment of contractual dues owned in public work contracts on the basis of seniority of such claims based on the date of acceptance of the bills for the work. Later, a Division Bench of this Court in the ruling reported in Anirudhan v. Government of Kerala [, 1999 (3) KLT 1: 1999 (2) KLJ 252] has held in paragraph 19 thereof that irrespective of various heads of the principle of "first done first paid" should be ensured. In paragraph 9 on page 7 of the judgment (See KLT report of Anirudhan''s case supra) their Lordships of the Division Bench has referred to Article 10.2.4 of the PWD manual which deals with financial sanction and the said portion of the judgment reads as follows:

"Art. 10.2.4 of the P.W.D. Manual deals with financial sanction. 10.2.4.1 provides that an estimate can become operative for execution by P.W.D. only when funds are available. Generally even when technical sanction is issued the availability of funds will be examined and the source of funds noted in the sanctions. Art.10.2.4.2 deals with usual sources of funds for execution of works. They are:--

(a) By specific provision for the work in the budget for the year.

(b) By diversion or savings in the budget allotments for other works subject to the rules regarding such diversion (see paras 82-86 of the Budget Manual)

c) By obtaining a supplementary grant for the work.

d) By withdrawal of the required amount from the contingency fund with the sanction of Government to the latter regularised through supplementary grant.

e) By funds being placed at the disposal of the P.W.D. for specific work from out budget allotments of another departments.

f) By obtaining deposits from the parties or authorities on whose behalf the work is to be done by the P.W.D. (Applicable to deposit works)."

In that case, the Division Bench has also considered even works of civil nature as in the instant case relating to obtaining of the deposits from other parties or authorities on whose behalf the work is to be done by the PWD, which is applicable to deposit works.

9. The averment of the petitioner that the norm of seniority for payment of bill has been violated in as much as full amounts due to works which have been completed much later than the petitioner''s case has been paid by the PWD authorities etc has not been denied in the pleadings of the respondents. Moreover, in any view of the matter, the amount due to the petitioner is fully admitted by the respondents. There is no dispute regarding the entitlement of the petitioner to the balance amount due under the contract. Merely because the 4th respondent is not making deposit of the money due to the 2nd respondent Superintending Engineer, PWD, is no ground to justify the action of the respondent PWD Authorities in further delaying the payments due to the petitioner. Therefore, the respondents 1 to 3 are legally obliged to ensure that the balance amount due to be paid by the petitioner in relation to the execution of the above work has been paid without any further delay.

10. The next consequential issue to be considered is as to whether interest should is payable on such amounts as prayed in the writ petition. The petitioner has prayed that he may be granted interest on the above said amount at the rate of 18% per annum. The Apex Court reported in the case Alok Shanker Pandey v. Union of India [, 2007 (3) SCC 545] has held in paragraphs 6 and 7 thereof that there is no hard and fast rule about how much interest should be granted and it all depends on the facts and circumstances of the each case and that the lordship of the Supreme Court have the opinion that the grant of interest of 12% per annum is appropriate in the facts of that case and that since interest was not granted to the appellant therein along with the principal amount, the respondent therein should then in addition to the interest at the rate of 12% per annum also pay to appellant therein interest at the same rate on the aforestated interest from the date of payment of installments by the appellant therein to the respondent therein till the date of refund on this amount, and the entire amount

mentioned above must be paid to the appellant within two months from the date of this judgment. In paragraph 7 of that ruling, it has been held therein that there is a misconception about interest and that the interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example, if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B about 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and has earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B. Paragraph 6 and 7 of the said judgment reported in Alok Shanker Pandey v. Union of India [, 2007 (3) SCC 545] reads as follows:

"6. We are of the opinion that there is no hard and fast rule about how much interest should be granted and it all depends on the facts and circumstances of the each case. We are of the opinion that the grant of interest of 12% per annum is appropriate in the facts of this particular case. However, we are also of the opinion that since interest was not granted to the appellant along with the principal amount the respondent should then in addition to the interest at the rate of 12% per annum also pay to appellant interest at the same rate on the aforesaid interest from the date of payment of installments by the appellant to the respondent till the date of refund on this amount, and the entire amount mentioned above must be paid to the appellant within two months from the date of this judgment.

7. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."

11. In the judgment of the Division Bench of this Court in RFA No. 703/2014 in the case of Edward B John v State of Kerala reported in [2015 (3) KHC 867], it will be profitable to refer to paragraph 19 to 22 of the said judgment ruling in Edward B John''s case supra which reads as follows:

"19. In Alok Shanker Pandey v. Union of India and Others, , 2007 KHC 3126 : 2007 (3) SCC 545 : JT 2007 (4) SC 248 : AIR 2007 SC 1198 the Apex Court held that, award of interest on delayed payment of money is neither a penalty nor a punishment, but it is the normal accretion of capital. Hence equity demands not only the repayment of the principal amount, but also the interest thereon. Paragraph 9 of the judgment reads thus;

"9. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."

20. In Rakesh Kumar Jain and Another v. State of U.P. and Another, , 2007 KHC 3067 : 2007 (2) SCC 461 : JT 2007 (3) SC 244 : AIR 2007 SC 917 : 2007 (2) All LJ 241 the Apex Court held that persons who have been denied the beneficial use of money are entitled to interest from those who have wrongly deprived them the beneficial use of their money. Paragraph 5 of the judgment reads thus;

"5. .... Though the Agra Development Authority (respondent No. 2) had agreed to deposit the money within two months, they had not done so. Admittedly, they had issued a cheque after one year and five months and when the cheque was refused to be received by the land owners, they deposited the same in the Civil Court which does not carry any interest. Admittedly, the land owners have been denied the beneficial use of the money. In our opinion, the appellants have wrongly deprived of the beneficial use of their money. Therefore, they are entitled to interest. ....."

21. S.3 of the Interest Act, 1978 deals with the power of the Court to allow interest. As per sub-section (1) of S.3 of the said Act, in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the period enumerated in Clauses (a) and (b) to the said sub-section. Going by Clause (a), if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings and going by Clause (b), if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings. The proviso to sub-section (1) of S.3 provides that, where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this Section for the period after such repayment.

22. According to the respondent/plaintiff, consequent to non - payment of amounts due on completion of the work, he sustained severe financial loss and lack of funds for reinvestment made him handicapped to continue his business

properly. Hence, vide Ext. A3 letter dated 12/08/2005, the respondent/plaintiff informed the second appellant/second defendant that he has received the payment under protest and later caused Ext. A4 notice dated 12/04/2006 under S.80 of the Code of Civil Procedure, 1908 to be issued, demanding payment of interest at the rate of 12% per annum on delayed payment of the amount due on completion of the contract work. As we have already noticed, the appellants/ defendants have admitted that though they are bound by the terms of the contract, payment could not be effected in time due to paucity of Government funds. Though the final bill was drawn up and passed for payment as early as on 29/09/2003, payment was made only on 12/08/2005. Since the appellants/ defendants have wrongfully deprived the respondent/plaintiff the beneficial use of the money payable for the work undertaken by him till 12/08/2005, he is legitimately entitled for interest during the aforesaid period. The rate of interest awarded by the Court below is also just and reasonable. In such circumstances, we find absolutely no grounds to interfere with the judgment and decree passed by the Court below."

After considering Division Bench ruling of this Court in Anirudhan''s case supra as well as the Apex Court ruling in Alok Shanker Pandey''s case supra, the Division Bench awarded interest at the rate of 12% per annum on the delayed payment of the amounts owned by the State Authorities to a plaintiff therein who was a contractor in the Public Works Department of the Government of Kerala.

12. Having regard to the facts and circumstances of this case and on applying the legal principles laid down by various rulings cited above, this court is of the considered opinion that the ends of justice and equity could be adequately met, if this Court directs that interest on the above said delayed payment for the amount due to the petitioner is ordered to be given to him by the State authorities at the rate of 8% per annum for the period from 01/06/2010 (three months after the date of filing of this writ petition on 24/06/2010) up to the date of actual payment. This is so ordered having regard to the various legal principles referred to in the above said rulings and also having due regard to the fact that the work in question is one relating to a deposit work. Accordingly, the following directions are issued:--

"(i) Respondents 1 to 3 will ensure that the amount of Rs. 5,26,503/- (Rupees Five lakhs twenty six thousand five hundred and three only) or such other amounts as found to be due to the petitioner in relation to the above said work in question, is paid to the petitioner within a period of four months from the date of production of a certified copy of this judgment.

(ii) The above said amount will carry interest at the rate of 8% per annum for the period from 01/06/2010 to the date of actual payment.

(iii) In case, the above said amounts are not paid within the aforementioned stipulated time of four months, then the above said amounts due to the petitioner will carry interest at the rate of 10% per annum for the period from the expiry of the above said four months time limit."

With these observations and directions, the W.P(C) stands finally disposed of.

