(2020) 11 KL CK 0154

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 13419 Of 2013 (B)

H. Dileep Kumar APPELLANT

Vs

Secretary Industries Department And Ors RESPONDENT

Date of Decision : 26-11-2020

Acts Referred:

Citation : (2020) 11 KL CK 0154

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : K. Ramakumar, K.R. Sunil, K. Subash Chandra Bose, M.K. Chandra Mohan Das, Thoufeek Ahamed, Reshmi K.M

Final Decision : Disposed Of

Judgement

1. This writ petition of the year 2013, has been filed by the Proprietor of High-Elect Enterprises, Thiruvananthapuram seeking to compel respondents

1, 2 and 3 to release the balance amount shown in Ext.P4 to the petitioner forthwith.

2. The case of the petitioner in short, is as follows:- The petitioner is an electrical contractor. The 3rd respondent is a company under the Kerala

Government. On 01.10.2009, the 3rd respondent issued a work order to the petitioner for supply and execution of street lights under the project

implementation scheme of the 3rd respondent, for road upgradation and junction improvement for Kollam, Kappalandimukku-Muneeswaram Temple

Road. The project was implemented by the 2nd respondent-Project Manager, Kerala Sustainable Urban Development Project, Corporation of Kollam,

through the 3rd respondent.

3. The 3rd respondent entrusted the said work to the petitioner as per Ext.P1

sub-contract dated 01.10.2009 and the Articles of Agreement was executed by the 3rd respondent as per Ext.P2 on 07.10.2009. The drawings submitted by the petitioner were approved by the 2nd and 3rd respondents on 26.06.2012. The petitioner completed the work and the 3rd respondent issued Ext.P3 completion certificate certifying that actual date of completion of work is 31.12.2011. The 3rd respondent further certified that no material deviations from the sanctioned plans and specification other than those sanctioned by the competent authority, are effected by the petitioner.

4. The petitioner on receipt of Ext.P3, submitted Ext.P4 final bill dated 02.07.2012 forR s. 52,32,312.63. Though the 2nd respondent acknowledged the receipt of Ext.P4, the amount was not disbursed. The petitioner thereafter submitted Exts.P5 to 7 representations and reminders, which were not heeded to. Hence, the petitioner is before this Court.

5. The 3rd respondent contested the writ petition and filed counter affidavits. The 3rd respondent stated that the writ petition is not maintainable. All disputes have to be redressed in Kollam. The 3rd respondent pointed out that as per Clause 14 of Ext.P2 agreement, the 3rd respondent has been passing on the amount that is received from the 2nd respondent to the petitioner. The payment of the contract amount to the writ petitioner is contingent upon the amount received from the 2nd respondent.

6. According to the 3rd respondent, the entire problem in delayed payment is invited by the petitioner due to the variation in substituting the stipulated MS painted polls as per specifications, with Galvanised Octagonal Poles, though Octagonal Poles are more durable and safe.

The 3rd respondent further submitted that the petitioner quoted higher rates for certain items in excess of the rates quoted by the 3rd respondent.

7. The writ petitioner decided to use Galvanised Octagonal Poles made out of galvanised iron instead of MS tubular type. This variation has not been approved by the 2nd respondent. The 3rd respondent has issued the completion certificate in consequence to the completion certificate issued by the 2nd respondent. However, the 2nd respondent has not yet approved the bill for variations and additions and extras.

8. On 24.03.2014, this Court passed an interim order directing the 2nd respondent to forthwith pay to the 3rd respondent the amount claimed in the final bill submitted by the 3rd respondent expeditiously.

9. The 3rd respondent filed an additional counter affidavit dated 20.07.2016 wherein it has been stated that the writ petitioner has no right to claim

amount of Rs. 52,32,312.63. The petitioner is eligible for only an amount of Rs. 7,19,628/-. The company issued a request to the 2nd respondent to

settle the final bill of the company for enabling the company to settle the amount to the sub contractor in order to comply with the interim direction of

this Court. The 2nd respondent issued Ext.R3(e) letter wherein it was stated that the 3rd respondent is entitled for only an amount of Rs. 7,19,628/-.

10. The 2nd respondent filed a one page statement in the writ petition. The 2nd respondent took a technical approach and stated that neither the 2nd

respondent nor Kollam Corporation are parties to Ext.P2 agreement and therefore the petitioner has no locus standi to raise any claim against the 2nd

respondent.

11. Heard learned counsel for the petitioner, learned Government Pleader appearing for the 1st respondent, learned Standing Counsel appearing for

the 2nd respondent and the learned counsel appearing for the 3rd respondent.

12. The basic facts in the writ petition are not in dispute, though the exact amount payable by the 2nd respondent is disputed. The 3rd respondent-

Company is a Government of Kerala undertaking. The 3rd respondent undertook the work of 2nd respondent- Kerala Sustainable Urban Development

Project of Kollam Corporation, the work being Street Lighting-Kollam. It was a project implemented with the assistance of Asian Development Bank.

As the 3rd respondent had no expertise in doing the work, the 3rd respondent entered into Ext.R3(a) agreement with the petitioner.

13. The petitioner carried out the work. But, while carrying out the work, the petitioner used Galvanised Octagonal Poles instead of the original

specification of MS painted poles. It is not in dispute that the Galvanised Octagonal Poles used and installed by the petitioner is costlier and more

durable. However, variation permit was necessary as there was change in specifications.

14. Ext.P1 is the purchase order issued by the 3rd respondent to the petitioner for Rs. 1,11,52,500/-. Ext.P2 is the Articles of Agreement between the

3rd respondent and the petitioner. Payment Terms for the Supply and Installation as per Ext.P2, are as follows:-

â??On progress of supply: 75% of the payment from KSUDP on the basis of supply value assessed by Engineer-in-charge shall be passed on to the

Hi- Elect Enterprises.

On Progress of erection: 75% of the amount for the completed work, less initial payment till date shall be paid on final completion of the entire

suppliers and installation work under contract, for which payments are claimed.

On taking over: 100% of the contract amount, less amount already paid and security deposits due, and retention money if any, shall be paid on

completion of testing, trail run and satisfactory commissioning of the installation and issued of the final completion certificate and on acceptance of the

same by UNITED ELECTRICAL INDUSTRIES LTD, after obtaining the clearance from the Electrical Inspectorate.

Refund of Security: 10% of the payment from first payment to each payment upto a maximum 10% of the contract amount is kept as retention

money. The retention money can be refunded on the basis of Bank Guarantee issued by a Nationalized Bank infavour of United Electrical Industries

Ltd., which is valid for period of one year form the date of execution of Bank Guarantee.â??

15. One Objection now raised by the 3rd respondent in these proceedings is that the petitioner has substituted MS Painted Poles with Galvanized

Octagonal Poles without approval for variation.

16. The 3rd respondent, as per Ext.P3, has certified that the work mentioned was completed on 31.12.2011 and handed over on 30.06.2012. The 3rd

respondent has further certified that there have been no material deviations from the sanctioned plans and specifications other than those sanctioned

by the competent authority.

17. In view of Ext.P3 Completion Certificate issued by the 3rd respondent and Ext.R3(b) Completion Certificate issued by the 2nd respondent, it is

evident that respondents 2 and 3 were satisfied that the work has been completed satisfactorily, the site with completed work was handed over by the

petitioner and there was no material deviation.

18. The 2nd respondent-KSUDP has issued Ext.R3(b) certifying that the work mentioned was completed on 31.12.2011 and handed over on

30.06.2012 and further that there have been no material deviations from the sanctioned plans and specifications other than those sanctioned by the competent authority. The 3rd respondent has stated in its counter affidavit dated 23.09.2013 that Galvanized Octagonal Poles are claimed as more

durable and safe. The 2nd respondent has not disputed this fact. The petitioner is not claiming any higher amount for the better and costlier Poles

used. Therefore, going through Exts.P3 and R3(b), the only conclusion possible is that substitution of poles by using better material is with the sanction

of respondents 2 and 3. If variation order in this regard is to be passed, it has to be passed by the 2nd respondent, taking into account the fact that

better material has been used and if the deviation, if any, is made, it is with the sanction of the competent authority, as certified in Exts.P3 and R3(b).

The petitioner is therefore entitled to receive the balance amount as per the contract.

19. Ext.P4 would show that the petitioner has received only Rs. 60,42,998/- towards the contractual amount. Therefore, the contract amount being

Rs. 1,11,52,500/- as is evident from Ext.P1, the petitioner has yet to be paid the balance amount which will be more than Rs. 51 lakhs.

20. As regards the amount payable to the petitioner, Ext.P1 of the 3rd respondent would show that the total purchase value is Rs.1,11,52,500/-. The

petitioner has admitted receipt of Rs.60,42,998/- in Ext.P4. Going by Exts.P1 and P4, the balance payable would be Rs.51,09,502/-, subject to statutory

deductions, if any. However, by Ext.R3(e), the 3rd respondent has taken a stand that the balance due is Rs.4,14,430/- only.

21. Ext.P8 of the 3rd respondent would indicate that the amount payable to the petitioner is Rs.67,80,387/-. This amount outstanding must necessarily

be as on 27.05.2014, the date of Ext.P8. In Ext.P8, the 3rd respondent again deducted Rs.59,65,252/- from the outstanding of Rs.67,80,387/-, stating

that Rs.59,65,252/- is already paid to the petitioner. The outstanding of Rs.63,79,682/- being after adjusting the amounts already paid to the petitioner,

the further deduction of Rs.59,65,252/- therefrom can only be an arithmetical mistake. The balance payable to the petitioner, indeed is much higher

than Rs.4,14,430/-.

22. Another reason for not settling the Bill of the petitioner, advanced by the 3rd respondent, is that in the invoice submitted by KSUDP, the total value

of work executed by the Company is shown as Rs. 94,07,794/-. This is for the reason that the KSUDP has not approved the Bill for extra items. In fact, the Team leader of KSUDP as per Ext.P11 has required the 2nd respondent for approval for the substituted street poles and extra items. The

2nd respondent is bound to consider whether the extra items were necessary for the work and whether actually used by the contractor and take an

informed decision. The 2nd respondent may accept or refuse payment for extra items, but it should be for reasons recorded. Without considering these

aspects, the 2nd respondent just cannot sit on the bills and say that those are not approved.

23. In the afore circumstances, respondents 2 and 3 are directed to process the Final Bill of the petitioner in the light of the observations made

hereinabove, within a period of four weeks and pay the balance amount to the petitioner within a further period of four weeks.

The writ petition is disposed of with the above directions.