

(2021) 04 KL CK 0180

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23006 Of 2019, 15489 Of 2020

M/S. Ajit Associates Architectural Consultants Pvt. Ltd And Ors	APPELLANT
Vs	
State Of Kerala And Ors	RESPONDENT

Date of Decision : 26-04-2021

Acts Referred:

Kerala Maritime Board Act, 2017 — Section 10, 11

Citation : (2021) 04 KL CK 0180

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : Babu Karukapadath, M.A. Vaheeda Babu, P.U. Vinod Kumar, Avinash P Raveendran, Arya Raghunath, Anjaly N.S, Johnson Gomez, C. Unnikrishnan, A.V. Indira, S. Biju, Jane Maria Tomy, Uthara A.S, Karishma Jojo, Gajendra Singh Rajpurohit, Gayathri V Nair, Liya Elza Ale, D. Jayakrishnan, K.P. Sudheer, K.B. Pradeep, Harisankar R, Sreeraj M.D, K.V Manoj Kumar, Vaisakhi V, T.M. Muhammed Musthaq

Final Decision : Dismissed

Judgement

1. The petitioner in WP(C) No.23006 of 2019 is a Company engaged in the activities of Architects, Designers and as Project Managers and Supervisors of such activities. The petitioner seeks to direct respondents 1 to 3 not to release any more amounts to the 4th respondent without considering the points of objections raised by the petitioner in Exts.P6 to P9. The 4th respondent in WP(C) No.23006/2019, is the petitioner in WP(C) No.15489 of 2020. In W.P.(C) No.15489 of 2020, the 4th respondent-petitioner seeks to command respondents 1 to 3 to release Rs.2,72,98,311/-illegally withheld from him along with interest at the rate of 18% per annum from various bills of effecting deductions, with future interest.

2. As both these writ petitions relate to one contract work and to payments pursuant to the contract, they are heard together and being disposed of by a common judgment. The parties in these writ petitions are referred to in this

judgment, as they are arrayed in WP(C) No.23006/2019.

3. The Government of Kerala approved the appointment of petitioner as an Architect for construction of the campuses of the 3rd respondent-Kerala Maritime Institute at Neendakara. The petitioner entered into an agreement dated 03.07.2010 with the 3rd respondent. The petitioner would contend that for construction of a library with ground plus one floor and an academic block with a ground +2 floors, only shallow foundation/footing design was necessary. However, the 4th respondent insisted for a pile foundation. According to the petitioner, actually the piling drawings were meant only for the hostel block which was of 8 floors.

4. The petitioner would state that when the bills submitted by the 4th respondent was scrutinised and examined, it was noticed that the amounts already paid were in excess by Rs.2.9 Crore. Noticing this excess payment by respondents 2 and 3 to the 4th respondent-contractor and also noticing certain anomalies, the petitioner sent a letter dated 09.02.2019 to the 2nd and 3rd respondents requesting to withhold further payments to the 4th respondent. According to the petitioner, a sum of Rs.9.906 Crores was to be recovered from the 4th respondent under various heads.

5. In spite of the objections of the petitioner the officials attached to the office of the 2nd and 3rd respondents continued to insist for payment of undeserving amount to the 4th respondent-contractor. A meeting in the presence of the Minister for Sports was held on 02.08.2019. The Managing Director of the petitioner was laid up and could not attend the meeting. In the meeting, certain unfounded allegations were raised against the petitioner. The petitioner sent a letter dated 03.08.2019 to the Minister for Sports, pointing out corruption in the matter of payment of amounts to the 4th respondent-contractor. However, respondents 1 to 3 are trying to close the contract with the 4th respondent, discharging the 4th respondent from further contractual liability and to pay him further amount without effecting recovery of excess amount already paid. In the circumstances, the petitioner seeks to direct respondents 1 to 3 to realise the excess amount paid to the 4th respondent in violation of the advice and instructions given by the petitioner in Exts.P6 to P9.

6. In the writ petition filed by the 4th respondent, the 4th respondent stated that the 4th respondent participated in the tender for construction floated by the Director of Ports, the 2nd respondent, and as the bid of the 4th respondent being lowest, the tender was awarded to the 4th respondent. The petitioner was appointed as the Project Management Consultant of the Project. The petitioner being the Consultant, had prepared the bid document and specifications for construction of Institute buildings. The petitioner issued drawings and the 4th respondent commenced construction accordingly.

7. The petitioner-Consultant had issued pile foundation drawings for all the structures initially, but it was changed to shallow foundation for two main

structures during May, 2013. When the petitioner supplied pile foundation drawings, the petitioner prescribed that piling need to be done only up to a depth of 22 m. The petitioner made such prescription after conducting a soil test through M/s.LAN-Dec Engineers, Cochin, its soil testing agency. When the 4th respondent proceeded with piling work, they could not find any hard strata even after 22 m. They were instructed to further deepen the pile and they could not find hard strata even at a depth of 50 m. This was confirmed by another soil testing agency "CGL-GEO INFOMATICS".

8. Thereafter, the petitioner changed their pile foundation drawings in respect of two main structures within two months and prescribed isolated footing foundation. The 4th respondent had completed works amounting to Rs.33.3 Crores. An amount of Rs.3.3 Crores was withheld as retention money. Another Rs.2.73 Crores was withheld without any reason. The 4th respondent submitted a letter dated 24.11.2016 seeking to release the said amount. The 2nd respondent Port Director also requested the Government to release the payment to the 4th respondent as per Ext.P3 dated 30.11.2016. The 4th respondent made a series of communications / representations to respondents 1 and 2.

9. The Director of Ports wrote Ext.P5 letter to the Secretary to Government pointing out that the bill due to the 4th respondent is pending with the petitioner-consultant and the petitioner has not recommended payment because the Department has not paid consultancy fee to the petitioner. The petitioner recommended payment of 22nd RA Bill of the petitioner for Rs.1,45,25,983/- with statutory recovery of Rs.21,78,998/-, but at the same time petitioner also recommended recovery of Rs.9.688 Crore from 4th respondent. The Director of Ports stated that on examination of recommendation of the petitioner, it was noted that the recoveries from the 4th respondent were proposed in a revenging manner.

10. The 4th respondent stated that more than 90% of works have been completed by them before October, 2018 and work could not be further proceeded with due to non- co-operation of the petitioner. Therefore, it would be only just and proper to release the retention amount to the 4th respondent as the work has reached a halt for the last two years for no fault of the 4th respondent.

11. During the pendency of the writ petition, the Kerala Maritime Board was impleaded as additional 5th respondent, since due to Sections 10 and 11 of the Kerala Maritime Board Act, 2017, the assets and functions of the 3rd respondent-Kerala Maritime Society was vested with the Kerala Maritime Board. As per the direction of this Court, the petitioner sought to implead the Training Coordinator of the Kerala Maritime

12. The Chief Executive Officer of the 5th respondent-Kerala Maritime Board filed a counter affidavit in WP(C) No.15489/2020. The 5th respondent stated that the petitioner is expected to carry out joint measurement along with the contractor's

engineer and to verify and certify measurements before recommending bills submitted by the 4th respondent- contractor. Now the Director of Ports is disabled to take measurement of the work carried out with respect to RAB-22 due to non-co-operation of the petitioner. The Director of Ports is unable to terminate the agreement between the petitioner and the Kerala Maritime Society due to the pendency of WP(C) No.23006/2019. The 5th respondent stated that there are sufficient reasons to terminate the agreement with the petitioner, due to inadequacy of service by the petitioner with regard to timely completion of designs/drawing/other documents enabling smooth and timely completion of the project and quality supervision over the work.

13. The 5th respondent stated that as per the total value of work approved by the petitioner in respect of running account bills RAB-6 to RAB-13, the amount payable to the 4th respondent after statutory deductions comes to Rs.2,72,98,311/-. This amount is not paid due to lack of authorisation from the Government. The Director of Ports has retained 10% of the amount towards retention money as per the agreement conditions. The retention money thus withheld amounts to Rs.3,29,65,792/- and it can be paid only along with the final bill. The petitioner has breached the condition as to providing architectural services and they stopped their service from 22.12.2018 onwards by withdrawing their site engineer.

14. The 5th respondent stated that the 4th respondent contractor has executed work in excess of the scheduled quantity. Such excess work was necessitated as a result of violation of conditions of agreement by the petitioner whereby the petitioner has made deviation, alteration, addition to the approved drawings without the knowledge and prior written consent of the Society. The structural changes made by the petitioner were not brought to the notice of the 3rd respondent for approval. The petitioner did not submit revised estimates with deviation statements for approval.

15. The 5th respondent stated that the construction work was stalled during the implementation of the project due to inconsistency of issued working drawings and the drawings submitted by the petitioner after the new soil testing report. The non-cooperation of the petitioner after receiving 70% of consultancy fee forced the 3rd respondent to deduct the extra amount of expenditure incurred for soil testing. The petitioner also raised a new claim for consultation fee, contended the 5th respondent.

16. The additional 6th respondent in WP(C) No.23006/2019 filed a detailed counter affidavit. The additional 6th respondent stated that the following clauses described in paragraphs (a) to (e) of the said agreement were breached by petitioner:

"(a) As per clause 1.01 of the Agreement, Architect shall provide services pertaining to the plan, design, estimate preparation and supervision of the said project. Clause 1.06 and 1.07 says that after the written approval of the sketch

of the architect shall prepare the detailed drawings along with schedules of specifications and schedule of quantities. The Architect shall also furnish detailed estimate on the specification and schedule of rate adopted by the State PWD in the region.

(b) Clause 1.11 stipulates that the Architect shall prepare and submit complete working drawings and details sufficient to commence the work at the site for the proper execution during the construction.

(c) Clause 1.12 states that the Consultant shall visit the site of work as and when necessary to clarify any decision or interpretation of the drawings and specifications. They shall attend conferences and meetings as and when required till the completion of the project.

(d) Clause 1.13 insists that the Architect shall not make any deviation, alteration, addition to or omission to the approved drawings without the knowledge and prior written consent of the Society, the Society reserves the right to omit or postpone any works or part thereof at its discretion.

(e) As per clause 2.01, the Architect shall submit to the Society all the necessary sketch plans/designs, draft tender documents within the period stipulated by the society. They shall carry out the works in all respects as required by the society and within the stipulated time. Time shall be construed as the essence of the agreement."

The above clauses described in paragraphs (a) to (e) are 1.01, 1.02, 1.11, 1.12 & 2.01 of the agreement dated 03.07.2010 which are violated by the petitioner. These breaches were duly reported to the Government under letter No.C2-289/2011/DP(1) dt.28/05/2019 by Director of Ports and Special Officer of Kerala Maritime Society (2nd & 3rd respondent), contended the additional 6th respondent.

17. I have heard the learned counsel for the petitioner, the learned Government Pleader appearing for respondents 1 and 2, the counsel appearing for the 4th respondent, the Standing Counsel appearing for the additional 5th respondent and the counsel appearing for the additional 6th respondent.

18. From the pleadings, it is evident that the Government of Kerala accepted the tender for the construction of Kerala Maritime Institute at Neendakara as per G.O. dated 07.01.2013. As per the Scheme, 11 components were included for construction, which are as follows:

"1. Library Block

2. Hostel Block

3. Canteen Block

4. Academic Block

5. Electrical Room and Substation

6. Auditorium
7. Security Cabin
8. Swimming Pool
9. Road and Drain
10. Compound wall and Parade Ground
11. UG sump, Pump House STP"

The petitioner was the Project Management Consultant (PMC) and the 4th respondent was the Contractor with whom the 3rd respondent-Kerala Maritime Society entered into agreements.

19. According to the petitioner, a Library with Ground +1 Floor and an Academic Block with Ground +2 Floors were proposed to be constructed in non-mining areas, but in fact mining activities were going on at the sites. After careful study, the petitioner found that only shallow foundation/ footing design is required, which would also reduce cost and hence petitioner proposed shallow foundations. According to the petitioner, the 4th respondent and the additional 6th respondent did not accept the proposal. The mining activity was at the instance of the additional 6th respondent and was intended to give piling work to the 4th respondent as it was more gainful for the latter. The petitioner submitted Ext.P6 letter dated 05.04.2016 to the 3rd respondent pointing out the facts. When Running Bills RAB 1 to RAB 22 of the 4th respondent were examined it was found that the 4th respondent already received excess amounts. Hence Ext.P7 letter dated 09.02.2019 was sent to respondents 2 and 3 pointing out that Rs.9.906 Crores was to be recovered from the 4th respondent. The petitioner has further alleged that the 4th respondent did not start the construction part of auditorium but started work at a non-excavation area, which resulted in additional cost. Therefore the intention of the 4th respondent is malafide and the bills cannot be settled without deducting undue excess amount paid to the 4th respondent.

20. But, the pleadings would reveal that when initially tenders were issued shallow foundation alone was mentioned, but after the Government handed over the area for mining work, an addendum notification was issued including in it piling work. Exts.R4(d) and Ext. R4(e) pile foundation drawings were issued by the petitioner itself, to the 4th respondent. The drawings were prepared based on a soil investigation report prepared by M/s.LAN-Dec Engineers, Cochin, an agency arranged by the petitioner. On the basis of the said report, piling work was suggested and that too only up to 24m depth. The 4th respondent could not find hard strata at 24m depth. The petitioner was required to continue with piling and hard strata could be touched only at a depth of 58-60 m. The petitioner again engaged another soil testing agency M/s.CGL-GEO Infomatics who confirmed the hard strata only at that depth. The piling at a depth of 58-60m caused additional expenditure not originally provided for. This extra cost was as a result of the petitioner engaging a sub standard agency for soil testing.

Thereafter, the pile foundation drawings in respect of two main structures were changed to that of the isolated footing foundation.

21. It has been revealed that the first soil test result by M/s.LAN-Dec, Cochin was received on 08.08.2012. The petitioner issued pile foundation drawing of 18-21 m for Library block on 06.03.2013. The piling work was stopped on 20.03.2013 as the 4th respondent could not find hard strata even at a depth of 50m. A notice was issued to the petitioner in this regard on 21.03.2013. The Structural Engineer of the petitioner who visited the site on 21.03.2013 admitted that the soil test report is incorrect. On 01.04.2013, the petitioner issued Ext.R6(Q) letter requiring detailed soil investigation. These facts would show that the initial soil investigation conducted at the instance of the petitioner was faulty and the fault has resulted in substantial delay in work and extra costs.

22. Another allegation of the petitioner is that the 4th respondent did not start construction work of the auditorium. The 4th respondent has stated that the petitioner has so far not handed over drawing of auditorium to the petitioner. Furthermore, in the special meeting on the construction, convened on 25.06.2014 by the Director of Ports, it was decided to keep in abeyance the construction of the auditorium and compound wall. This is evident from Ext.R4(b) minutes. Therefore, the petitioner cannot blame the delay on the 4th respondent.

23. The prayer of the petitioner is not to make any more payments to the 4th respondent without considering the objections of the petitioner. As discussed and found herein above, the delay in construction and escalation of cost of construction is not attributable to the 4th respondent. As regards alleged excess payment made to the 4th respondent, the Director of Ports has considered the issue in detail in Ext.P5 and observed that the petitioner has suggested to recover amounts from the 4th respondent in a revengeful manner, for not getting paid their consultancy fee. In the facts of the case, this Court finds no reason to disregard or disbelieve the conclusions of the Director of Ports contained in Ext.P5. WP(C) No.23006/2019 filed by the petitioner is therefore liable to be dismissed.

24. As regards the prayers of the petitioner in WP(C) No.15489/2020 to release the amounts due to him under the contract, the 3rd respondent in their counter affidavit in WP(C) No.15489/2020, has stated that the Director of Ports is totally unable to make the measurements of the work carried out by the 4th respondent without the service of the petitioner since the petitioner is expected to carry out joint measurement along with the Engineer of the 4th respondent to verify and certify such measurements before recommending the bills submitted by the 4th respondent for payment. Due to the pendency of WP(C) No.23006/2019, the Director of Ports is unable to terminate the agreement with the petitioner. It is not in dispute that the petitioner has denied their service from 22.12.2018, by withdrawing their Site Engineer. In the circumstances, necessary orders need to be passed directing respondents 1 to 3 in WP(C) No.15489/2020 to take effect steps to release amounts due to the petitioner.

25. For the reasons stated above, WP(C) No.23006/2019 is dismissed and W.P. (C) No.15489/2020 is disposed of with the following directions:-

There will be a direction to respondents 1 to 3 in WP(C) No.15489/2020 to release the amounts withheld from and any other amounts due to the petitioner in WP(C) No.15489/2020, within a period of two months. The claim and question of interest made in WP(C) No.15489/2020, are left open.