

(2023) 04 KL CK 0165

In the High Court Of Kerala

Case No : Writ Petition (C) No. 12643 Of 2023

M/s Deens Constructions

APPELLANT

Vs

State Of Kerala Represented By The Secretary To The
Government

RESPONDENT

Date of Decision : 25-04-2023

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 56, 56

Citation : (2023) 04 KL CK 0165

Hon'ble Judges : Shaji P. Chaly, J

Bench : Single Bench

Advocate : Santhosh Mathew, Karthika Maria, Anil Sebastian Pulickel, Abi Benny Areeckal, Mathew Nevin Thomas, Kurian Antony Mathew, K.V. Manoj Kumar

Final Decision : Dismissed

Judgement

Shaji P. Chaly, J

1. The petitioner, a contractor engaged by the State Public Works Department for the work "Special Package Non Plan works 2020-21-Improvements (BM & BC) to Vypin-Pallipuram Parallel road Ch. 11/000 to 17/000", has filed this writ petition challenging Exhibit P26 order dated 15.03.2023 passed by the Superintending Engineer, PWD Roads Division, Central Circle, Aluva Ernakulam District--respondent No.3; whereby the contract was terminated at the risk and cost of the petitioner.

2. The basic facts for the disposal of the writ petition are as follows:

On the basis of Exhibit P1 Notice Inviting Tender dated 15.02.2021, the petitioner participated in the tender and was awarded the work as per Exhibit P2 letter of acceptance; consequent to which Exhibit P3 agreement dated 08.09.2021 was executed by and between the parties.

3. As per the terms and conditions of the tender, the petitioner has provided a

bank guarantee of Rs.8,83,750/-, which is valid upto 14.01.2027. The petitioner had submitted initial levels to the Assistant Engineer, PWD Roads Section, Njarakkal, respondent No.6, evident from Exhibit P4 communication dated 18.08.2021.

4. According to the petitioner, the said levels were not approved for an inordinate amount of time. It is further submitted that the work involves scarifying the existing surface of the site. According to the petitioner, it was part of the petitioner's scope of work and necessary for the execution of the work as a whole. It is also submitted that the Chief Technical Examiner of the State Government, respondent No.1, vide Exhibit P5 Observation memo dated 11.11.2021, had directed the Executive Engineer, PWD Roads Division, Ernakulam, respondent No.4, to report the intermediate levels after scarifying the existing carriageway and rolling the scarified materials before laying the GSB layer.

5. Apparently, the said instruction was passed on to the petitioner by the Assistant Engineer, PWD Roads Section, Njarakkal, respondent No.6, as per Exhibit P6 letter dated 07.12.2021. The case of the petitioner is that the petitioner was obstructed from carrying out scarification by members of the local public, including the elected representatives of the local Panchayat, which according to the petitioner, is recorded in Exhibit P7 letter dated 07.12.2021 submitted by the petitioner to the Superintending Engineer, respondent No.3.

6. Therefore, according to the petitioner, the intermediate levels could not be reported, since as per the instructions contained in Exhibits P5 and P6, the same was possible only after the scarification was done and before the GSB layer was laid. Anyhow, it is admitted that the petitioner was subsequently instructed orally by the Assistant Executive Engineer, PWD Roads Sub division, North Paravur, 5th respondent, to take levels after GSB layer was laid. It seems, as per Exhibit P8 letter dated 03.03.2022, the petitioner sought written confirmation of the same, since it deviated from the earlier instructions.

7. It is further submitted that the above stated work was severely affected by the consequences of pandemic Covid-19, such as shortage of men and materials, and that the shortage of material, in particular, persisted throughout the course of the work and contributed immensely to slow the progress of the work. It is also submitted that the materials as per Exhibit P3 agreement were not available in the market, which also contributed to the slow progress of the work. That apart, it is submitted that there were only limited number of crusher units operational in Ernakulam District, which according to the petitioner, is recorded in Exhibit P9 minutes of the hearing conducted by the Superintending Engineer, PWD Roads Division, Central Circle, Aluva, respondent No.3, dated 19.05.2022. It seems, the petitioner, in that regard, had issued Exhibit P10 letter dated 28.05.2022 to the Superintending Engineer.

8. It is further contended that the onset of monsoon and heavy rains and

flooding in the area also led to the delay in work. The sum and substance of the contention advanced by the petitioner is that various factors beyond the control of the petitioner delayed the progress of the work and the petitioner cannot be blamed for the same. Further, due to heavy rains, turbulent sea water and the nature of the soil and site, the petitioner had to execute excess quantities and the petitioner has issued Exhibit P11 letter dated 26.08.2022 to the Superintending Engineer, respondent No. 3, which according to the petitioner, was supported by the Assistant Engineer, 6th respondent, vide Exhibit P12 report dated 27.08.2022. The said aspect was supported by the report of the Assistant Executive Engineer, 5th respondent, vide Exhibit P13 report dated 02.09.2022.

9. Therefore, it is submitted that in spite of earnest efforts made by the petitioner, no action was initiated in respect of the excess quantity claimed by the petitioner. Anyhow, it is admitted that the petitioner, as per Exhibit P14 letter dated 16.09.2022, has requested for extension of time of completion. It seems, Exhibit P15 letter dated 16.09.2022 is issued by the Assistant Engineer, respondent No.6, to the Assistant Executive Engineer, respondent No. 5, supporting the time extension sought for by the petitioner. Even though the petitioner has sought for extension of time upto 31.03.2023, it was granted only upto 17.12.2022, despite the recommendation made by the Assistant Executive Engineer upto 31.03.2023, without fine.

10. Anyhow, it is submitted that in spite of the extension of time, the initial levels of the work were not yet approved by the respondents. It seems, as per Exhibit P16 communication dated 23.11.2022, the Superintending Engineer, respondent No.3, issued a communication to the Executive Engineer, 4th respondent, seeking a detailed level proposal report and an explanation for delay in the submission of initial levels.

11. According to the petitioner, a hearing was held on 09.12.2022 by the Superintending Engineer, respondent No.3, to take stock of the work. It is the case of the petitioner that the petitioner's submission that the slow progress of the work at that stage was due to the financial crisis brought about due to the delay in payment of the petitioner's bills, has been recorded in Exhibit P17 minutes of hearing dated 09.12.2022. While so, on 03.01.2023, the petitioner, as per Exhibit P18, again sought for extension of time of completion till 31.03.2023.

12. In the meanwhile, on 05.01.2023, the Assistant Executive Engineer, 5th respondent, submitted Exhibit P20 corrected initial level proposal to the Executive Engineer, respondent No.4. According to the petitioner, the Superintending Engineer, PWD (Buildings), Central Circle, Thrissur, at that point of time, arbitrarily and illegally cancelled the petitioner's Class A Contractors licence vide Exhibit P21 letter dated 09.01.2023. Admittedly, Exhibit P21 order dated 09.01.2023 arises out of the termination of another work undertaken by the petitioner and the same is under challenge in W.P.(C) No. 328 of 2023. Therefore, it is submitted that consequent to Exhibit P21 order cancelling the petitioner's contractors licence, the bank imposed a debit freeze on the

petitioner's account effectively rendering it impossible for the petitioner to carry out any further work.

13. However, on 12.01.2023, Exhibit P22 supplemental agreement was entered into by and between the petitioner and the Superintending Engineer, respondent No. 3, giving effect to Exhibit P18 order. According to the petitioner, the petitioner, vide Exhibit P23 dated 31.01.2023, reported that the work could not progress due to tipper, quarry and crusher strikes. It is further submitted that initial levels were finally approved only on 06.02.2023 i.e., after the petitioner's licence had been suspended as per Exhibit P21 order dated 09.01.2023.

14. While so, on 27.02.2023, the Superintending Engineer, respondent No.3, issued Exhibit P24 notice dated 27.02.2023 to the petitioner stating that the work would be terminated at the petitioner's risk and cost, if the petitioner did not re-commence the work, completely ignoring the issues that had led him not being able to execute the work any longer. Narrating the said alleged incident, the petitioner has submitted Exhibit P25 representation dated 28.02.2023, pointing out that an amount of Rs.1,20,12,245.95 is due to the petitioner and that the same is withheld due to the failure on the part of the respondents itself in approving the initial levels. Anyhow, on 15.03.2023, the impugned Exhibit P26 order was issued terminating the work of the petitioner. According to the petitioner, Exhibit P26 is arbitrary and illegal; that Exhibit P26 order perversely interprets the petitioner's submissions in Exhibit P25 representation to find fault with the petitioner for facing the consequences of the illegal actions of the respondents surrounding Exhibit P26 order.

15. That apart, it is contended that Exhibit P26 order does not address any of the actual issues regarding the work that were raised by the petitioner in Exhibit P25. It is also argued that the petitioner has made earnest efforts to carry out the work to the extent possible and the delay had occurred due to the reasons that are not attributable to the petitioner. It is further contended that the respondents had not even approved the initial levels for the work till 06.02.2023, which was supposed to be done before the commencement of the work by the petitioner.

16. Therefore, the sum and substance of the contention advanced by the petitioner is that the petitioner cannot be compelled to carry out the work when the petitioner is not being paid for the work already done and when the initial levels for the work were not approved more than one year after Exhibit P3 was entered into. Therefore, it is contended that the petitioner is unable to maintain the liquidity required for executing the work due to the acts and omission of the respondents, consequent to which the petitioner cannot be compelled to execute the work that would lead to its financial ruin. The learned counsel has relied upon Section 56 of the Indian Contract Act, 1872 to establish the same.

17. The petitioner has also relied upon Section 55 of the Act, 1872 to state that since the respondents have failed to execute their part of contract, time is not

the essence of the contract. The petitioner has also placed reliance upon the judgments of the Apex Court in J.G. Engineers Private Limited v. Union of India [(2011) 5 SCC 758]; Food Corporation of India v. Kamadhenu Cattle Feed Industries [(1993) 1 SCC 71]; State of Karnataka v. Shree Rameshwara Rice Mills [(1987) 2 SCC 160]; Tulsi Narayan Garg v. M.P. Road Development Authority, Bhopal [(2019 SCC Online SC 1158)], and various other judgments of the Honourable Supreme Court to canvass the proposition that the State and its instrumentalities, even in contractual matters, are liable to adhere to the fundamental rights guaranteed under Part III of the Constitution of India, especially the rights emanating from Article 14 of the Constitution of India.

18. I have heard the learned counsel for the petitioner Sri. Santhosh Mathew and the learned Special Government Pleader Sri. K.V. Manoj Kumar, and perused the pleadings and materials on record.

19. The deliberation of facts made above would make it clear that the sole question to be considered is whether any manner of interference is required to Exhibit P26 order of termination passed by the Superintending Engineer. It is quite clear and evident that the petitioner has not started the work after submitting the initial level alleging that the initial level was not approved by the respondents. But, fact remains, even according to the petitioner, even though as per Exhibits P5 and P6 observation Memos, directions were issued to the Executive Engineer to report the intermediate levels after scarifying the existing carriageway and rolling the scarified materials before laying the GSB layer, the petitioner was subsequently instructed orally by the 5th respondent to take measures after GSB layer was laid.

20. The case projected by the petitioner is that even though the petitioner has sought for a written confirmation as per Exhibit P8 letter, it was not given. Admittedly, the petitioner does not have an established case that the petitioner was, in any way, prevented from proceeding with the work. However, the contention of the petitioner therein is that various factors beyond its control, including shortage of materials for executing the work, precluded it from starting the work. I am of the view that the petitioner, being an experienced contractor, especially in road work, should be well aware of the availability or shortage of any materials within a reasonable area. After undertaking the work and executing the agreement to complete the work within a time period, the petitioner is not expected to violate the terms and conditions of the contract entered into by and between the parties stating that due to the factors beyond its control, the work could not be completed.

21. It is an admitted fact that the petitioner has sought for extension of time which was granted initially for a period of three months from 17.09.2022 upto 17.12.2022 by executing Exhibit P22 supplemental agreement. The petitioner has again sought for extension of time which was granted upto 31.01.2023 imposing a fine of Rs.1,15,556/-. Having executed the supplemental agreements, the petitioner cannot turn around and say that it could not complete the work

due to reasons beyond its control and other force majeure factors. It is also equally important to note that the circumstances leading to the execution of supplemental agreements is not under challenge. Which means, on the basis of the request made by the petitioner, time of completion was extended, which, in turn, is a clear indicator to show that the petitioner was responsible for the delay in executing the work.

22. On a perusal of the documents available on record and Exhibit P26 impugned order, it is clear that various communications were issued to the petitioner to complete the work at the earliest possible. It seems various conferences were held in the presence of the Member of the Legislative Assembly concerned and the District Collector. It is evident that since the work in question is a road work, the public has also protested the slow progress of the work. Anyhow, in spite of the two extensions given, the petitioner has not achieved any progress. However, the petitioner has a case that since it was not paid the amounts for the work done, the contract has become impossible to be performed and by virtue of Section 56 of the Contract Act, 1872, the petitioner cannot be compelled to perform the agreement executed by and between the parties.

23. In my considered opinion, even though force majeure factors are put forth by the petitioner, it could not establish the same by producing convincing materials before this Court. It may be true, in contractual matters also, the writ court may be justified in interfering even with the factual findings rendered by the State or its instrumentalities. But, in order to arrive at such a conclusion, there should be adequate materials to justify such an action.

24. It may be true, the Assistant Engineer and the Assistant Executive Engineer might have made recommendations on the basis of the request made by the petitioner. But, ultimately, the agreement authority has to take a decision. In fact, as pointed out above, extensions were granted as sought for by the petitioner and despite the same, it could not achieve sufficient progress in the work. It is quite clear and evident from Exhibit P2 letter of acceptance issued by the Superintending Engineer that the work had to be completed within 12 months and as per the bar chart submitted. The letter of acceptance is dated 01.07.2021. However, the petitioner could not make any required progress, despite the communications issued by the agreement authority and other officials, and in spite of extending the time of completion of the work twice.

25. Considering the facts and figures, I am of the view that the petitioner has not made out a case of arbitrariness, illegality or unfairness in Exhibit P26 order, especially due to the fact that enough and more opportunities were provided to the petitioner; that the petitioner was heard, and that even the petitioner made an assurance that the work would be started immediately after the strike of the tipper lorries were over. It is also clear that despite the extended time, and beyond the period the petitioner hesitated to re-start the work

26. That apart, it is categoric and clear from the submissions made by the

petitioner in the writ petition itself that he is unable to perform the work, even though he has a contention that the work is now impossible to be performed, consequent to the action on the part of the respondents. I am of the view that payment is to be effected on the basis of the agreement executed by and between the parties. It is also not in dispute that as per the agreement executed by and between the parties and the General Terms and Conditions of the contract, if the terms and conditions are violated, the agreement authority is vested with ample powers to terminate the contract.

27. The contention advanced by the petitioner, relying upon various judgments of the Apex Court that the agreement authority is not vested with powers to terminate the contract and for that purpose the agreement authority has to approach the civil court, in my considered opinion, is not having any foundation or basis.

28. Considering the facts and figures, I am of the view that reliance placed by the petitioner on the proposition of law laid down by the Apex Court in the judgments specifically mentioned in the grounds of the writ petition, would not come to the rescue of the petitioner, since action was initiated by the respondents on the basis of the clear terms and conditions contained under the agreement executed by and between the parties and the tender documents. The petitioner has no case that the terms and conditions of the agreement is forbidden by law, illegal, void, opposed to public policy, or unconscionable, to make it nugatory or impossible to be performed or acted upon.

29. Therefore, needless to say, the agreement binds the parties to it; and in this case having not acted upon in terms of the agreement by the petitioner, the agreement authority was legally correct and justified in terminating the contract. In that view of the matter it cannot be said that the petitioner was able to establish any case of illegality, malades, irrationality, arbitrariness or any such legal infirmities justifying to exercise the powers conferred on this court under article 226 of the Constitution of India.

Needless to say, the writ petition fails and accordingly it is dismissed.