

(2024) 02 KL CK 0205
In the High Court Of Kerala
Case No : Writ Appeal No.1688 Of 2023

M/s RDS Projects Ltd

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 23-02-2024

Acts Referred:

Kerala High Court Act, 1958 — Section 5

Citation : (2024) 02 KL CK 0205

Hon'ble Judges : A. J. Desai, CJ;V.G. Arun, J

Bench : Division Bench

Advocate : E.K.Nandakumar, M.Gopikrishnan Nambiar, K.John Mathai, Jai Mohan, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, Raja Kannan, Rajive R. Raj, K.Gopalakrishna Kurup, K.V.Manoj Kumar, Dushyant Dave

Final Decision : Allowed

Judgement

A.J. Desai, CJ

1. The challenge in this appeal filed under Section 5 of the Kerala High Court Act, 1958 is against the judgment dated 23.08.2023 delivered by a learned Single Judge of this Court dismissing W.P.(C) No.17363/2023 filed by the present appellant, by upholding Ext. P49 order dated 27.06.2023 passed by the Superintending Engineer, NH (Central) Circle, Vyttila, Kochi, 3rd respondent, blacklisting the appellant and barring it from quoting for other works for a period of five years and simultaneously cancelling the appellant's 'A' Class contractor's licence, on account of poor workmanship, and further disqualifying the appellant from participating in any tender in its own name or by using a different name or benami and also withholding the security deposit of Rs.2,00,000/- until further orders, is purported exercise of the power under clause 2116.2 of PWD Manual.

2. The short facts arising from the records are as under: 2.1 The appellant/petitioner is a company incorporated under the Companies Act, 1956, and has been offering building solutions for a broad range of construction and engineering

projects since 1992. It is the case of the petitioner that the company has completed over a hundred projects throughout India, out of which, 45 projects are in Kerala, of which 23 are construction of bridges.

2.2 The Roads and Bridges Development Corporation of Kerala Limited (hereinafter referred to as RBDCKL) invited tenders for the construction of a flyover on National Highway-66 at Palarivattom, Ernakulam. After due process, the petitioner was awarded the said work being the lowest tenderer. Accordingly, the petitioner executed an agreement dated 4.3.2014 (Exhibit-P3) with the RBDCKL. As per the said agreement, the site had to be handed over to the petitioner company on 1.6.2014, and the work was required to be completed within 24 months from the date of the agreement.

2.3 It is the case of the petitioner that the structural work, except for the wearing coat, was completed by June 2016 and that, as the inauguration of the flyover was scheduled to be held on 12.10.2016, the company was forced to complete the work of wearing coats in the monsoon period itself. As per the statement of the petitioner, the work was thus completed on 20.09.2016.

2.4 According to the petitioner, there was an error in the approved drawings and due to the formation of potholes, there occurred stagnation of water and dust collection on the expansion joints. To remedy the defects, the issue was reported to the structural consultant viz., M/s. Nagesh Consultancy, for expert advice.

2.5 It is the further case of the petitioner that the consultant, along with the representatives of RBDCKL and another company viz., KITCO Ltd., which offers consultancy services in architectural, engineering, technical management and financial sectors, inspected the site and forwarded their drawings for rectification of the joints. Thereafter, on 16.11.2016, a review meeting was held by RBDCKL, and as per Exhibit-P5 minutes, it was decided to take corrective steps to rectify the defects in the expansion joints between two strip seal expansion joints. As per the decision of the aforesaid meeting, the balance drain works were started on 18.11.2016.

2.6 The petitioner submits that, based on the views of the consultant, Exhibits P6 and P7 requests were made for rehabilitation/rectification of joints, which were never heeded to, and the traffic continued to ply through the flyover. The petitioner also availed services from one M/s. Sanfield India Pvt. Ltd., for testing certain materials.

2.7 It is the case of the petitioner that, as per the request made, one Dr. Aravindan, a retired professor of IIT Madras and head of M/s. Sree Giri Consultants, along with a team inspected the flyover on 07.11.2016 and 29.10.2017, and thereafter, prepared a detailed structural design check and submitted Exhibit P11 report before the RBDCKL. It is submitted that as per clause 20.2 of the agreement dated 4.3.2014, it was the responsibility of the petitioner to rectify any defects during the defect liability period at its own costs, to the satisfaction of the Engineer, KITCO. It is stated that even though the

RBDCKL was intimated with regard to the nature of defects and methodology to rectify the same, no action/steps were taken to enable the petitioner to execute such work at its own expense.

2.8 It is the further case of the petitioner that without considering the various proposals submitted by it for rehabilitation of the flyover, RBDCKL engaged IIT Madras to assess the condition of the flyover and suggest rehabilitation measures. After conducting a scientific study, the IIT Madras approved the methodology for bearing replacement of span P18-AP2 submitted by KITCO. By communication dated 19.03.2019 (Exhibit P12), IIT Madras informed the RBDCKL about the corrected methodology submitted by the Engineer was approved by IIT Madras.

2.9 It is the case of the petitioner that the methodology suggested by IIT Madras was, in essence, the same as the methodology suggested by the petitioner. Finally, by communication dated 28.03.2019, RBDCKL permitted the petitioner to conduct repair works as per the methodology approved by the IIT Madras. It is also the case of the petitioner that the repair works, as suggested, were completed under the supervision of IIT Madras and RBDCKL as well as the expert panel of three Chief Engineers deputed by the State of Kerala. The company expended a sum of Rs.2.63 Crores for the repair works and except the expansion joint of the span P18-AP2, all other repair works, as suggested, were commenced on 01.05.2019 and completed on 02.06.2019, under the supervision of the engineers and Dr. P. Alagasundaramoorthy of IIT Madras. By Exhibit P15 letter dated 29.07.2019, the petitioner informed RBDCKL and KITCO that the site was ready for replacement of the final bearing in span P18-AP2 and sought permission for completion of all the rectification works by 05.08.2019. Again, by Exhibit P16 communication dated 18.09.2019, the petitioner informed RBDCKL and KITCO to complete the balance work; however, there was no reply from RBDCKL.

2.10 Petitioner has further stated that the Government of Kerala, being dissatisfied with the inspection report and the remedial measures of IIT Madras, sought clarification from Dr. E. Sreedharan, the Principal Advisor of Delhi Metro Rail Corporation (DMRC for short). It is alleged by the petitioner that Dr. E. Sreedharan, without conducting a scientific study or even physical verification, submitted reports dated 03.07.2019, 14.09.2019 and 19.09.2019, contrary to the report of IIT Madras. Pursuant thereto, Dr. E. Sreedharan submitted a recommendation dated 03.07.2019 before the Government of Kerala for rehabilitation of the bridge by dismantling 17 RCC spans and replacing them with PSC girders.

2.11 In view of the different reports, the Government of Kerala constituted a committee to examine both the reports, i.e., the reports of the IIT Madras and Dr. E. Sreedharan. The petitioner further alleges that the committee so constituted, without conducting any scientific study, submitted a report dated 04.10.2019. The Government of Kerala, by passing an order dated 25.10.2019

(Exhibit P17), accepted the recommendation of the technical committee appointed by it to resolve the dispute, and decided that the DMRC should take over the bridge for rehabilitation and further directed the RBDCKL to realise the loss sustained from the petitioner.

2.12 Considering the contents of the reports, an FIR in Vigilance Case No. 1/2019 was also filed in the Court of Vigilance and Anti-corruption Bureau, Muvattupuzha, against the petitioner. The petitioner challenged the order dated 25.10.2019 (Exhibit P17) by filing W.P.(C) No.30487/2019 before this Court, and the learned Single Judge stayed all coercive action, including the attachment of the bank account of the petitioner.

2.13 The petitioner had also filed W.P.(C) No.26030/2019 seeking a direction to conduct a load test on the bridge. Since other Public Interest Litigations were preferred with regard to the flyover in question, all the matters were heard together, and by an order dated 21.11.2019 (Exhibit-P19), a Division Bench of this Court directed the State of Kerala to conduct a load test of the Palarivattom flyover through an approved qualified agency capable of conducting such a test, with notice to all the stakeholders.

2.14 The said decision was challenged by the State of Kerala before the Hon'ble Supreme Court. The Hon'ble Apex Court, by judgment dated 22nd September 2020 in Civil Appeal Nos.3239-3246 of 2020, arising out of SLP(C) Nos.3008-3015 of 2020, set aside the judgment delivered by the Division Bench of this Court, by which, a fresh load test was ordered to be conducted.

2.15 Subsequent to the judgment of the Hon'ble Apex Court, Government of Kerala passed another order, viz., Exhibit-P21, granting administrative sanction to DMRC for rehabilitation of the Palarivattom flyover, with a further direction to realise the cost of rehabilitation from the petitioner. The petitioner thereafter filed Civil Suit No.80/2021 before the Commercial Court, Ernakulam, on the ground of breach of contract, seeking recovery of the amount due to the petitioner and for a declaration that the Government Orders dated 25.10.2019 and 07.10.2020 are illegal, ab initio void and non est in law. The RBDCKL also instituted a suit, being C.S. No.240/2022, before the Commercial Court, Ernakulam, for realisation of a sum of Rs.24,52,22,498/- being the alleged loss incurred for the demolition and reconstruction of the flyover in question. Both these suits are pending before the concerned court.

2.16 When the petitioner was excluded from participating in the bid process for another project of the Government of Kerala, a writ petition, being W.P.(C) No.31556/2019, came to be filed challenging the action of the Government, since the petitioner was never blacklisted. The said writ petition was admitted, and by judgment dated 04.05.2020, a learned Single Judge of this Court disposed of the same with a direction to the State authorities to conclude the blacklisting process as early as possible.

2.17 Subsequent to the direction issued by this Court, the 3rd respondent, i.e.,

the Superintending Engineer, Public Works Department, NH (Central) Circle, Vyttila, Cochin, issued a notice dated 8.2.2023 (Exhibit P42), calling upon the Managing Director of the appellant company why action for blacklisting the company should not be undertaken and also requiring the petitioner to remain present on 21.02.2023 before the Superintending Engineer. Exhibit P42 notice was challenged by the appellant by way of W.P.(C) No. 5722/2023 on the ground that the said notice does not disclose any reasons for the proposed action of blacklisting the petitioner.

2.18 The above said writ petition came to be disposed of by judgment dated 20.02.2023, directing the Superintending Engineer, PWD, to provide the details with respect to the blacklisting procedure adopted, so as to enable the petitioner to file a suitable reply when he appears before the said authority for hearing. In compliance with the said order, by communication dated 5.5.2023, the Superintending Engineer supplied the details regarding the allegations raised against the petitioner. The petitioner submitted its reply dated 26.05.2023, raising various issues regarding the proposed action of blacklisting initiated by the Superintending Engineer. After considering the material on record and the reply submitted by the petitioner, the Superintending Engineer passed the impugned Exhibit P49 order on 27.06.2023. Being aggrieved by the said order, the captioned writ petition is filed.

2.19 In response to the notice issued by the learned Single Judge, the Executive Engineer, Public Works Department, NH, Central Circle, Vyttila, on behalf of the 3rd respondent, filed a detailed counter affidavit dated 24.07.2023 along with certain documents. After considering the rival submissions and the materials on record, the learned Single Judge dismissed the writ petition by the impugned judgment. Hence, this appeal.

3. Learned Senior Counsel Sri. Dushyant Dave, ably assisted by Adv. Sri. Jai Mohan and Adv. Sri. Rajive R. Raj, for the appellant, challenged the authority on the part of the State of Kerala to pass Exhibit P49 order dated 27.06.2023, blacklisting the appellant. It was argued that the appellant had entered into an agreement with the Roads and Bridges Development Corporation of Kerala Limited, a company registered under the Companies Act and thus, an independent legal entity. Therefore only the RBDCKL can take action in case of breach of contract entered between the appellant and RBDCKL.

4. Being a public limited company, RBDCKL is governed by clause 4 of its Articles of Association. The Articles of Association empower the Directors of the company to institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officers. By taking us through clause 34.12 of the Articles of Association of RBDCKL, he would submit that the company can be sued or can sue with regard to any claims or demands by or against the company.

5. Learned Senior Counsel would further submit that as per clause 34.28 of the Articles of Association, the Directors can enter into all such negotiations and

contracts and rescind and vary all such contracts. He would also submit that the control of the Government under clause 35 of the Articles of Association is only with respect to (a) increasing or reducing the authorised capital of the company; (b) winding up of the company; and (c) taking or otherwise acquiring or holding shares in any other company exceeding Rs.5 Crores. He would, therefore, submit that issues arising out of the subject contract can only be dealt with by RBDCKL and not by the State of Kerala, as has been done in the case on hand. Learned Senior Counsel would, therefore, submit that the decision taken by the State of Kerala regarding blacklisting the appellant is patently illegal for lack of authority, jurisdiction or power to deal with the alleged breach of contract between two independent entities.

6. He would further submit that a public limited company is equal to a natural person and a legal entity. In support of the said submission, he has relied upon a decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of Tata Engineering and Locomotive Co. Ltd. v. State of Bihar [(1964) 6 SCR 885]. He would submit that, being an individual legal entity, it can sue or be sued exclusively for its own purpose. He would further submit that RBDCKL has already filed a civil suit for recovery of money before a competent civil court, which is pending for final disposal.

7. Sri. Dushyant Dave would further submit that the State of Kerala is only a shareholder of the company and, therefore, the State of Kerala and its departments cannot take any action on behalf of RBDCKL, including blacklisting a contractor on the ground of alleged breach of contract. In support of his submission, the learned Senior Counsel has relied upon the decision of the Hon'ble Apex Court in the case of Heavy Engineering Mazdoor Union v. State of Bihar & Ors. [(1969) 1 SCC 765]. He would, therefore, submit that the decision taken by the State authorities with respect to the blacklisting of the appellant is void ab initio and requires to be quashed and set aside.

8. The learned Senior Counsel would further submit that the State of Kerala has undertaken the action of blacklisting under the PWD Manual, which governs only the contractors who are registered under the said manual and have entered into contracts for executing works with the Kerala PWD. In paragraph 1902 of the PWD Manual, which provides the rules for registration of contractors executing works in the Kerala PWD, it has been explicitly stated that only those persons who have registered themselves as contractors under these rules would be entitled to submit tenders for the work in PWD. He would submit that the subject work was assigned to the present appellant not by the State of Kerala but by a company, viz., RBDCKL, and therefore, the action taken with regard to the blacklisting of a registered contractor under the PWD Manual is misconceived, inappropriate, and that the authority ought not have passed such an order when the appellant had never entered into a contract for execution of works with the Kerala PWD.

9. It was argued that neither at the time of inviting tenders by the RBDCKL nor

at the time of execution of the contract, it was mentioned that the contract would be covered by the Kerala PWD Manual. In the absence of specific conditions, the Government of Kerala cannot initiate any action against the contracting party for the so-called breach of the manual and blacklist a contractor who had entered into an agreement with a legal entity, viz., RBDCKL, of which the Government is the shareholder. No powers are assigned to the State of Kerala in the Memorandum of Articles of RBDCKL to take any action for blacklisting a contractor. He would submit that merely for the reason that only registered contractors were permitted to participate in the tender process, the State of Kerala is not empowered to take action on the ground of alleged breach of contract between a private entity and a public limited company, i.e., RBDCKL. He would also submit that, even though, as per clause 5.1(b) of the tender agreement, a contract shall be governed by and be construed in accordance with the governing law of India and also the laws in force in the State of Kerala, that does not mean that the government can take action against the contractor for alleged breach of contract. The only interpretation that can be arrived at from the above clause is the applicability of laws rather than the terms and conditions of the PWD Manual, which would apply only when a party enters into a contract with any department of the State of Kerala. He would also submit that RBDCKL is not a department but a company having its own articles of association. Therefore, on these grounds also, the action taken by the State authorities to blacklist the petitioner is required to be quashed and set aside.

10. The learned Senior Counsel appearing for the appellant would further submit that the alleged breach of contract is by a non-Government entity and, therefore, the PWD Manual would not be applicable to the present appellant. He would also submit that the powers under paragraph 1917 of the Manual regarding blacklisting of a contractor by the registering authority cannot be exercised against the present contractor/appellant, which has entered into an agreement with a third party, i.e., RBDCKL.

11. Alternatively, he would submit that the reason for blacklisting the appellant recorded in Exhibit P49 order dated 27.06.2023 is poor workmanship. He would submit that a contractor can be blacklisted only on specific grounds, which are referred to in paragraph 1917 of the PWD Manual. One of the reasons referred to therein is clause 1917(vii), which is poor workmanship. Clause (viii) was inserted by G.O.(Rt.) No.552/2020/PWD dated 23.06.2020. He would further submit that this clause would also not be applicable to the appellant since the parties have entered into a contract much before the insertion of the aforesaid clause. Therefore, on this ground also, Exhibit P49 order is required to be quashed.

12. By taking us through the order impugned dated 27.06.2023 (Exhibit P49), he would further submit that the same is a non-reasoned order and is therefore required to be quashed on that ground also.

13. On the other hand, learned Advocate General Sri. K. Gopalakrishna Kurup, ably assisted by Sri. K.V. Manojkumar, learned Senior Government Pleader for

the State, has opposed the writ appeal and supported the order which was impugned in the writ petition and the judgment delivered by the learned Single Judge.

14. He would submit that the RBDCKL is a Government company, and while inviting tenders, a specific condition was mentioned that only registered contractors are permitted to take part in the tender and, therefore, it is implied that the Government is the final authority to deal with the issues that arise with regard to the contract entered into between the contractor and tenderer company.

15. By taking us through clause 5.1(b) of the agreement, he would submit that it has been made clear therein that the contract shall be governed by and construed in accordance with the governing law of India as well as the laws in force in the State of Kerala. He, therefore, would submit that the petitioner was fully aware that, while entering into a contract with RBDCKL, the PWD Manual would be applicable with respect to the agreement entered into between the parties.

16. Learned Advocate General would further submit that under the PWD Manual, a person can be blacklisted on various grounds, including poor workmanship. By taking us through clause 1917 of the Manual, which deals with blacklisting, he would submit that clause (viii) was inserted with effect from 26.03.2020. He would argue that the submissions made by the learned Senior Counsel for the appellant that an amendment in the Manual subsequent to the contract is not applicable is misconceived, since the issue with regard to the poor workmanship subsisted till 2023. He would submit that action was taken after getting reports from several authorities regarding the poor workmanship on the part of the contractor. The State is bound to blacklist the contractor if there is poor workmanship and the contractor's registration is also liable to be cancelled.

17. In support of his submissions, the learned Advocate General has relied on the decision of the Hon'ble Apex Court in Patel Engineering Limited v. Union of India and Another reported in (2012) 11 SCC 257. He would submit that in the said decision, the Hon'ble Apex Court has held that, empowering the Government to blacklist a person has the effect of preventing a person from the privilege and advantage of entering into a lawful relationship with the Government for purposes of gains, when the Government has come to the conclusion that there was poor workmanship on that person's part. He would submit that the decision to blacklist was taken based on the technical committee's report and not by relying upon clause 1917 of the Kerala PWD Manual.

18. By taking us through the order dated 7.6.1999, which has been produced for the first time before this Court, the learned Advocate General submitted that the Roads Development Corporation formed by the Government was renamed as the Roads and Bridges Development Corporation of Kerala Limited and, therefore, it is a part and parcel of the Government of Kerala.

19. By relying upon another decision of the Hon'ble Apex Court in the case of Kulja Industries Ltd. v. Chief Gen. Manager W.T. Proj. BSNL [AIR 2014 SC 9], the learned Advocate General would submit that the scope of judicial review with regard to the decision of blacklisting a contractor is narrow and the writ court may be loath to interfere with such a decision.

20. By taking us through the invitation for bids (IFB) issued by the RBDCKL, wherein it is explicitly stated that the Government of Kerala had assigned the project in question to RBDCKL, it is argued that the petitioner was fully aware of the control of the State of Kerala with regard to the contract in question. He would submit that the State of Kerala has taken the impugned decision after going through various reports and had to carry out the repair works through another contractor, sustaining huge loss, for which a suit has already been filed. The filing of suits by the parties would not debar the authorities from blacklisting the contractor. As the decision to blacklist the petitioner was in accordance with law, the learned Single Judge has committed no error in dismissing the writ petition. The learned Advocate General, therefore, prayed that this appeal be dismissed.

21. We have heard the learned Advocates for the respective parties and perused the documents, including the impugned judgment.

22. It is an undisputed fact that RBDCKL is a company registered under the Companies Act, 2013. It is true that by order dated 7.6.1999, the Road Development Corporation was renamed as the Roads and Bridges Development Corporation of Kerala Limited (RBDCKL) by the Government of Kerala. However, the new entity has been registered as a company under the provisions of the Companies Act, 2013 and is therefore, a legal entity that has to deal with its issues in accordance with the Articles of Association of the company as well as the other general laws in force.

23. As per the Articles of Association, the company is a public limited company, and as per Article 4, the company is to be governed by the Articles. The Articles of Association empower the company to increase, reduce and alter its capital, issue new shares, transfer shares, etc. That apart, the Government can appoint directors from time to time apart from the nominee directors. Going through the Articles of Association, it can also be seen that specific powers are given to the directors, particularly under clause 34.12, which reads as under:

"To institute, conduct, defend, compound or abandon any legal proceedings by or against the Company or it's officers or otherwise the affairs of the Company, and also to compound and allow time for payment or satisfaction of any debt due or of any claims or demands by or against the Company."

24. It is also evident from the Articles of Association that the Director has the power to enter into negotiations of a contract under clause 34.28, which reads as under:

"To enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts, deeds and things in the name and on behalf of the Company as they may consider expedient for or in relation to any of the matters aforesaid or otherwise for the purpose of the Company."

25. As per clause 35 of the Articles of Association, the Government is the only holder of the company. The said clause reads as under:

"DIRECTIONS BY THE GOVERNMENT

35. Subject to the Provisions of the Act, the chairman shall reserve for the approval of the Government any proposals or decisions of the Board in respect of the following matters namely :-

- a. Increasing or reducing authorized capital of the Company.
- b. Winding up of the Company.
- c. Taking or otherwise acquiring or holding shares in any other Company exceeding Rs.5 Crores.

26. From the above clauses of the Articles of Association, it is clear that RBDCKL, which had entered into an agreement, is empowered to take legal action, including the institution of a suit which has already been filed before a competent civil court. Therefore, when the company is inviting tenders and intends to see that specific terms and conditions are to be impliedly read in the contract, it has the power to clarify while inviting tenders from registered contractors that the Kerala PWD Manual would govern the contract. In the present case, there is no specific reference with regard to the applicability of the PWD Manual in the tender notice. Therefore, the submission made by the learned Advocate General that assigning the project in question to RBDCKL is sufficient to deal with the issue regarding breach of contract as per the PWD Manual, cannot be countenanced. It is the legitimate expectation of the participants to know the implications and rights regarding the contract. That apart, it was the duty of the RBDCKL, while inviting tenders, to specifically state that the Kerala PWD Manual would be applicable to the party entering into the agreement for executing the work. That apart, even while entering into an agreement in the year 2014, nothing was mentioned about the applicability of the Kerala PWD Manual. We have gone through the Agreement No.RBDC/Work/04/2014 entered into between RBDCKL and the present petitioner. We do not find any such clause referred to in the agreement. The present appellant is a Contractor within the meaning of clause 1.1(a) (ii) of the conditions of the contract, whereas RBDCKL is an Employer within the meaning of clause 1.1(a)(i). The said clauses read as under:

"Definitions

1.1 In the Contract (as hereinafter defined) the following words and expressions shall have the meanings hereby assigned to them, except where the context otherwise requires:

(a)(i) "Employer" means the person named as such in Part II of these Conditions and the legal successors in title to such person, but not (except with the consent of the Contractor) any assignee of such person.

(ii) "Contractor" means the person whose tender has been accepted by the Employer and the legal successors in title to such person, but not (except with the consent of the Employer) any assignee of such person."

27. For our consideration, clauses 49.2 and 49.4 of the conditions of the contract for works of civil engineering construction, which are relevant, are reproduced hereunder:

"49.2 - Completion of outstanding Work and Remedying Defects - To the intent that the Works shall, at or as soon as practicable, after the expiration of the Defects Liability Period, be delivered to the Employer in the condition required by the Contract, fair wear and tear excepted, to the satisfaction of the Engineer, the Contractor shall:

(a) complete the work, if any, outstanding on the date stated in the Taking-Over Certificate as soon as practicable after such date, and

(b) execute all such work of amendment, reconstruction and remedying defects, shrinkages or other faults as the Engineer may, during the Defects Liability Period or within 14 days after the expiration, as a result of an inspection made by or on behalf of the Engineer prior to its expiration, instruct the Contractor to execute.

"49.4 - Contractor's Failure to Carry Out Instructions - In case of default on the part of the Contractor in carrying out such instruction within a reasonable time, the employer shall be entitled to employ and pay other persons to carry out the same and if such work which, in the opinion of the Engineer, the Contractor was liable to do at his own cost under the Contract, then all costs consequent thereon or incidental thereto shall after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Employer, and may be deducted by the Employer from any monies due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly with a copy to the Employer."

28. The remedies available under clause 63.1 of the conditions of the contract read as under:

"If the Contractor is deemed by law unable to pay his debts as they fall due, or enters into voluntary or involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favour of, his creditors, or agrees to carry out the Contract under a committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation relating to organisation, arrangement or readjustment of debts,

proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, or if the Contractor has contravened Sub Clause 3.1, or has an execution levied on his goods, or if the Engineer certifies to the Employer, with a copy to the Contractor, that, in his opinion, the Contractor:

(a) has repudiated the Contract:

(b) without reasonable excuse has failed

(i) to commence the Works in accordance with Sub-Clause 41.1, or

(ii) to proceed with the Works, or any Section thereof, within 28 days after receiving notice pursuant to Sub-Clause 46.1.

(c) has failed to comply with a notice issued pursuant to Sub-Clause 37.4 or an instruction issued pursuant to Sub-Clause 39.1 within 28 days after having received it,

(d) despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, or

(e) has contravened Sub-Clause 4.1.

then the Employer may, after giving 14 days' notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of the obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to complete the Works. The Employer or such other contractor may use for such completion so much of the Contractor's Equipment, Temporary works and materials as he or they may think proper."

29. Apart from the six important clauses referred to above, since the learned Advocate General has made several references regarding the applicability of the PWD manual, we would refer to clause 5.1 of the General Conditions of Contract, which reads as under:

"5.1 (a) Language

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(b) Law

The contract shall be governed by and construed in accordance with the governing law of India and also the laws in force in the State of Kerala and no suit or other proceeding relating to the Contract shall be filed or taken by the

contractor in any court of law except a court of law having jurisdiction in Ernakulam district which shall hear and determine all actions and proceedings connection with and arising out of the Contract, and the Contractor shall submit to the jurisdiction of the aforesaid Court of Law for the purpose of any such action and proceedings.

(c) The Customs and Security Requirements

The Contractor shall comply with all regulations for the time being imposed by the Customs and port Security Authorities in respect of the passage of plant, vehicles, materials and personnel through custom barriers.

In case of any ambiguities or discrepancies, the priority shall be as under:

1. Agreement.
2. Priced Bill of Quantities, Correspondence after submitting bid and before Letter of acceptance/modification/amendments.
3. Technical Specifications.
4. Technical specifications (Part C) MOST
5. Special conditions of contract, and Contract data.
6. General Conditions of Contract- Conditions of Particular Applications
7. General conditions of contract (FIDIC)"

30. On a plain reading of the above clause, the submission made by the learned Advocate General that the Kerala PWD Manual would apply, since the laws of the State of Kerala govern the contract cannot be accepted because the PWD Manual is not a law. Therefore, the submission about the applicability of the manual is liable to be rejected.

31. As stated hereinabove, merely because the State of Kerala is holding the shares in a public limited company, the company cannot ordinarily be presumed to be a department or agent of the State. The Hon'ble Apex Court, in the case of Heavy Engineering Mazdoor Union (cited supra), held as under:

"5. It is true that besides the Central Government having contributed the entire share capital, extensive powers are conferred on it, including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries payable by the company to its employees. But these powers are derived from the company's memorandum of association and the articles of association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides such a corporation can easily be identified as the agent of the State as in *Graham v. Public Works Commissioners*, 1901 (2) KB 781 where Phillimore, J. said that the Crown does in

certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals. In the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government. [See *State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam*, 1964 (4) SCR 99 at p. 188 : AIR 1963 SC 1811 at p. 1849 per Shah, J. and *Tamlin v. Hannaford*, 1950 (1) KB 18 at pp. 25, 26] Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions. (Cf: *London County Territorial and Auxiliary Force Association v. Nichols*, 1948 (2) All ER 432.)”

32. Having carefully considered the above aspects, we are of the considered opinion that in the absence of any specific provision in the agreement as to the applicability of the PWD Manual, the State authorities have no power to pass the impugned Exhibit-P49 order, i.e., blacklisting the contractor for the alleged poor workmanship. Therefore, only on that ground, the appeal is required to be allowed. Accordingly, we allow the appeal by setting aside the judgment delivered by the learned Single Judge dated 23.08.2023 in W.P.(C) No.17363 of 2023 and quash Exhibit P49 order dated 27.06.2023 issued by the 3rd respondent.

We make it clear that the question as to who has committed breach of contract, whether accepting the expert committee’s report is legal or not, the amount of damage sustained by either party and whether poor workmanship is a reason for blacklisting, have not been discussed in this judgment, since suits filed by both parties are pending before the competent civil court.