

(2021) 08 KL CK 0069

In the High Court Of Kerala

Case No : Writ Petition (C) No. 13587 Of 2021

M/s.Marymatha Infrastructure Pvt.Ltd

APPELLANT

Vs

M/s. Roads And Bridges Development Corporation Kerala Ltd

RESPONDENT

Date of Decision : 09-08-2021

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2021) 08 KL CK 0069

Hon'ble Judges : P.B.Suresh Kumar, J

Bench : Single Bench

Advocate : N.Krishna Prasad, Gayathri Poti, K.V.Manoj Kumar

Final Decision : Allowed

Judgement

P.B.Suresh Kumar, J

1. Petitioner is a contractor. The respondent is an entity owned and controlled by the State of Kerala. The respondent has awarded a construction

work to the petitioner. The contract entered into by the petitioner with the respondent in connection with the work enables the petitioner to terminate

the contract, if payments covered by the Running Account Bills are not disbursed within the time stipulated in the contract. According to the petitioner,

the respondent has not disbursed the amount covered by Running Account Bill No.1 raised in respect of the work within the time stipulated in the

contract despite several requests and they have, therefore, terminated the contract by issuing a notice as stipulated in the contract. After about five

months of the termination of the contract by the petitioner, the respondent has issued a notice to the petitioner, directing them to show cause why the

contract shall not be terminated. The petitioner challenged the show cause notice in W.P.(C) No.12353 of 2021 on the grounds mainly that in terms of

the notice issued by them to the respondent earlier for terminating the contract, the legal relationship between the parties was severed; that though it is open to the respondent to take recourse to the remedies available to them to challenge the correctness of the said notice, they are not entitled to terminate the contract which has already been terminated by the petitioner, and that the show cause notice is, therefore, one issued without jurisdiction. It is also the case of the petitioner that the show cause notice is vitiated by malice, for it is issued infuriated by the firm stand of the petitioner that they will not go back from their decision to terminate the work and with a view to deny the petitioner large amounts due in respect of the subject work and other works satisfactorily executed by the petitioner for the respondent.

2. It is stated by the petitioner that on 22.06.2021, when W.P.(C) No.12353 of 2021 was taken up, this court directed orally that coercive actions shall not be taken against the petitioner in connection with the contract, and the Standing Counsel for the respondent undertook before this court that no further action will be taken in the matter during the pendency of the writ petition. It is also stated by the petitioner that the parties were heard in the said matter thereafter on 24.06.2021 and also on 25.06.2021 and the matter was reserved for orders. It is further stated by the petitioner that while so on 06.07.2017, the respondent has e-mailed to the petitioner Ext.P1 order purporting to terminate the contract and Ext.P2 order blacklisting the petitioner and thereby debarring the petitioner from participating in any of the bids of the respondent. Exts.P1 and P2 are under challenge in the writ petition.

3. The case of the petitioner in the writ petition, in essence, is that Exts.P1 and P2 orders are issued flouting the undertaking given by the Standing Counsel for the respondent before this court on 22.06.2021 in W.P.(C) No.12353 of 2021 and that at any rate, Ext.P2 order blacklisting the petitioner is unsustainable in law being one issued without affording the petitioner an opportunity of hearing. It is also the case of the petitioner that the said orders are vitiated by malice, for the same are issued to wreak vengeance on the petitioner for having terminated the work attributing breach of the terms of the contract on the part of the respondent. In order to substantiate the said case, it is alleged by the petitioner that Exts.P1 and P2 orders

have been published by the respondent in their website and have been widely circulated in the media. It is also alleged by the petitioner that they are shown in the website of the respondent as a blacklisted contractor. It is further alleged by the petitioner that in terms of Ext.P2, the respondent has directed the Chief Engineer of the Public Works Department to take necessary action to debar the petitioner from participating in the future works of the Public Works Department also. In Ext.P2 order, it is observed that the petitioner has falsely claimed before the respondent that the court has directed the respondent in W.P.(C) 12353 of 2021 on 22.06.2021 to refrain from taking any action against them in furtherance to the show cause notice during the pendency of the writ petition. The relevant observation reads thus:

Â

WHEREAS, Vide letter dated 22.06.2021 the contractor falsely claimed that Hon'ble High Court has given directions not to take any action on termination notice

during the pendency of WP(C) 12353/2021 filed by contractor but when confirmed with the counsel of RBDCK it was revealed that Hon'ble Court has given no such

direction on the matter either orally or in writing. In fact Hon'ble High Court has not granted any stay on the matter of termination that is the reason final termination

came into effect. This kind of false information by the contractor shows adopting unethical ways by the contractor for small gains and misleading Hon'ble Court and

employer in this matter and therefore this has to be looked into seriously.â??

The petitioner has taken strong exception to the said observations also in the writ petition asserting that what was informed by them to the respondent

is correct.

4. On 08.07.2021, when the matter came up for admission, on a query from the Court, the learned learned Standing Counsel for the respondent

conceded that Ext.P2 order was passed without affording the petitioner an opportunity of hearing. This Court, in the circumstances, stayed the

operation of Ext.P2 order and directed the matter to be listed on 12.07.2021. This Court did not stay the operation of Ext.P1 order since the case of

the petitioner was that they have terminated the work in terms of the contract

long before Ext.P1 order.

5. In the pre-lunch session on 09.07.2021, the learned counsel for the petitioner made a mention before this Court for a posting of this case in the post-

lunch session, pointing out that urgent orders are required in the matter. As there was no sitting in the post lunch session on that day, this court

directed the matter to be listed on the next working day, viz, 12.07.2021.

6. On 19.07.2021, when this matter was taken up, the learned Senior Counsel for the petitioner pointed out that taking advantage of the fact that

Ext.P1 order has not been stayed by this court and also that the petitioner could not secure a posting of the matter on 9.7.2021, the respondent invoked

Ext.P4 bank guarantee issued by the Muvattupuzha branch of the South Indian Bank to the respondent on behalf of the petitioner in connection with

the work, and collected the proceeds of of the same through messenger on 09.07.2021 itself. It was pointed out that the invocation of the bank

guarantee is also an act performed by the respondent, contrary to the undertaking made before this court in W.P.(C) No.12353 of 2021 on 22.06.2021.

It was also pointed out that the invocation of the bank guarantee is tainted by malice also, as the same was done with a view to crumble the finance of

the petitioner. In the light of the said submissions, this court directed the petitioner to file an affidavit or appropriate interlocutory application for relief

in respect of the invocation of the bank guarantee, and adjourned the matter to 20.7.2021.

7. On 19.07.2021, the petitioner filed an interlocutory application as I.A.No 1 of 2021, seeking a direction to the respondent to reverse the invocation

of Ext.P4 bank guarantee by directing repayment of the amount encashed on 09.07.2021 to the Muvattupuzha branch of the South Indian Bank

Limited. As the said interlocutory application has not reached the court on 20.07.2021 when the mater was taken up, the matter was adjourned to

22.07.2021, on which date, this court heard the learned Senior Counsel for the petitioner as also the learned Standing Counsel for the respondent.

8. The learned Senior Counsel for the petitioner submitted that as in the case of Exts.P1 and P2 orders, even Ext.P4 bank guarantee was invoked by

the respondent flouting the oral undertaking made before this court by the learned Standing Counsel for the respondent on their behalf. It was pointed

out by the learned Senior Counsel that the issue whether the petitioner would

succeed in W.P.(C) No.12353 of 2021 is irrelevant and so long as the said writ petition is pending consideration, the respondent is bound to respect the solemn undertaking made before this Court and it is the duty of this Court to ensure compliance of the same. The learned Senior Counsel came heavily on the aspersions cast on his client by the respondent in Ext.P2 order which is extracted in paragraph 3 above. It was submitted by the learned Senior Counsel that if the said aspersions have been cast as advised by the Standing Counsel for the respondent as stated therein, this court should strongly condemn the aforesaid conduct of the Standing Counsel for the respondent. The learned Senior Counsel, in the circumstances, not only prayed for the orders sought in the above interlocutory application, but also prayed for appropriate orders to ensure that status quo as on 22.06.2021 is restored in relation to the contract in question.

9. In reply to the submissions made by the learned Senior Counsel for the petitioner, the learned Standing Counsel for the respondent pointed out that invocation of the bank guarantee is only a routine affair carried on by the respondent consequent on termination of the contract and the respondent cannot, therefore, be blamed for having invoked the bank guarantee.

10. It is seen that the matter was listed before another bench on 12.07.2021 as this bench was not sitting on that day. The order passed in the matter by the bench before which the matter was listed on 12.07.2021 reads thus:

“When the case is taken up today, the learned Senior counsel appearing for the petitioner submits that after the interim order was passed on 08.07.2021, the respondent has on 09.07.2021 invoked the bank guarantee which had been submitted by the petitioner. It is submitted by the petitioner that no request to stay Ext.P1

was made by the petitioner, since according to the petitioner, they had already invoked the clause in the contract which permitted the contractor to terminate the contract and as such, no further termination was called for.

“The learned counsel are variance with regard to what had happened before the court on 22.06.2021 and 08.07.2021 and it could not be proper for this Court to enquire into the same at this juncture and it will be only proper that the matter is placed before the same learned Judge, who heard the matter on 08.07.2021.

Place the writ petition on 19.07.2021 before the same learned Judge, who passed the interim order staying Ext.P2. The respondent may file counter

affidavit in the

meanwhile. There will be a direction not to take any further action against the petitioner on the basis of the termination of the contract as per Ext.P1.â??

As evident from the extracted order, the counsel for the parties were at variance before that bench on 12.07.2021 as to what has transpired in court

on 22.06.2021, on which day, the petitioner claims that the learned counsel for the respondent undertook before this Court in W.P.(C) No.12353 of

2021 that no coercive action will be taken against them till the disposal of that writ petition and on 08.07.2021, on which day this Court granted the

petitioner an interim order in respect of Ext.P2 order. It is seen that it is in the said circumstances that the matter was directed to be listed before this

court on 19.07.2021, with a direction to the respondent to file their counter affidavit, if any, in the matter in the meanwhile. As evident from the

extracted order, this court directed the respondent on 12.7.2021 to refrain from taking any further action against the petitioner on the basis of Ext.P1

order.

11. The respondent has not filed any counter affidavit in the matter as directed by this court on 12.7.2021. Instead, on 22.7.2021, after the matter was

heard, the respondent has filed an objection in the writ petition stating that no stay has been granted by this Court in W.P.(C) No.12353 of 2021 on

18.06.2021 or on the succeeding posting dates of the case and that since there was no stay in W.P.(C) No.12353 of 2021, the respondent cannot be

found fault with for having issued Exts.P1 and P2 orders and invoked Ext.P4 bank guarantee.

12. Since this Court vividly remembers that on 22.06.2021, when the learned Standing Counsel for the respondent sought an adjournment in W.P.(C)

No.12353 of 2021 on the ground that he did not receive a few documents produced by the petitioner, the learned Senior Counsel for the petitioner

pointed out that the last date for submitting the explanation in terms of the show cause notice was 24.06.2021, indicating that if the matter is not heard

before the said date, the respondent may take further action on the show cause notice. This Court, in the circumstances, orally directed the Standing

Counsel for the respondent to ensure that nothing should happen during the pendency of the writ petition, and the learned Standing Counsel undertook

readily that he will ensure that nothing would happen during the pendency of the

writ petition. In the course of the hearing, when this Court informed the Standing Counsel for the respondent that he has in fact made an undertaking as claimed by the petitioner, the learned Standing Counsel gave an evasive reply and required this Court to verify the recordings in the video conferencing device as to what has transpired in court on 22.06.2021. Though this Court had no doubt that the learned Standing Counsel for the respondent has made an undertaking before this Court on 22.06.2021 that he would ensure that nothing would happen to the petitioner till the disposal of the writ petition, since a doubt is cast by the learned Standing Counsel as to what has transpired in Court on 22.06.2021, this Court verified the recordings made in the video conferencing device on 22.06.2021 and it is found that when the Standing Counsel for the respondent sought an adjournment in the matter on the said day on the ground that he did not receive the documents produced by the petitioner, this Court orally directed the Standing Counsel to ensure that nothing should happen during the pendency of the writ petition, and the learned Standing Counsel has made an undertaking that he will ensure that nothing would happen in the matter during the pendency of the writ petition. "Nothing should happen during the pendency of the writ petition" is the oral direction of the Court recorded in the device and "No doubt, I will ensure that" is the undertaking made by the Standing Counsel for the respondent recorded in the device.

13. In the aforesaid circumstances, with a view to give the respondent one more opportunity to file a counter affidavit in the matter, this court listed the writ petition along with W.P.(C) No.12353 of 2021 on 30.07.2021. On the said date, an adjournment was sought in the matter on behalf of the Standing Counsel for the respondent. This court, in the circumstances, listed the matter to 04.08.2021 with a direction to the respondent to file their counter affidavit, if any, in the matter in the meanwhile.

14. When the matter was taken up on 04.08.2021, it was noticed that the respondent has not filed any counter affidavit in the matter despite the direction issued on 30.07.2021 also. The learned Senior Counsel for the petitioner then pointed out that despite the interim order passed by this court on 08.07.2021 staying the operation of Ext.P2 order and the interim order passed by this court on 12.7.2021, Ext.P2 order has so far not been removed from the website of the respondent and that the petitioner is still shown in the

website of the respondent as a blacklisted contractor. It was contended by the learned Senior counsel that the respondent is showing the petitioner as a blacklisted contractor in their website maliciously, with a view to ensure that the petitioner does not get any other work. It was also pointed out by the learned Senior Counsel that the petitioner was denied two works by other entities in the State after the interim order passed in the matter, solely based on Ext.P2 order issued by the respondent showing the petitioner as a blacklisted contractor in the website of the respondent.

15. In the light of the aforesaid submissions of the Senior Counsel, on 04.08.2021 this court directed the Standing Counsel for the respondent to ascertain and report as to whether the petitioner is still shown as a blacklisted contractor in the website of the respondent on the post lunch session itself. In the post-lunch session, the learned Standing Counsel for the respondent reported that the petitioner was shown in the website of the respondent as a blacklisted contractor, despite the interim order passed by this court on 08.07.2021, and their name was removed from the list of the blacklisted contractors published in the website as directed by him on that day.

16. As mentioned above, when the learned Senior Counsel for the petitioner indicated to the court when W.P.C.No. 12353 of 2021 was taken up for hearing on 22.06.2021 that respondent may take some action against the petitioner after 24.06.2021, this court in fact wanted to pass an interim order in the matter directing the parties to maintain status quo as regards the subject matter, and this court did not pass the order, respecting the oral undertaking given by the Standing Counsel for the respondent as indicated in paragraph 12 above. The respondent cannot ignore the solemn undertaking given by its Counsel merely for the reason that it is not recorded by the court in the proceedings. Flouting such undertakings, taking advantage of the omission on the part of the court in recording the same in the proceedings, according to me, would amount to wilful breach of the undertakings and Contempt of Court, punishable under the Contempt of Courts Act. Needless to say, Exts.P1 and P2 orders passed by the respondent, and the decision of the respondent to invoke the bank guarantee flouting the solemn undertaking given by the Standing Counsel for the respondent before this court are wholly unfair and unsustainable in law.

17. There cannot be any doubt to the proposition that even while undertaking

commercial activities, public entities like the respondent have to act fairly. The materials on record in W.P.(C) No.12353 of 2021 indicate, prima facie, that despite the petitioner having invested sizeable amounts in the project, that too, during the period of the pandemic, Covid 19, there was considerable delay in processing the Running Account Bill No.1 raised in respect of the work. The question whether the petitioner is entitled to terminate the contract on account of the said delay is a question to be adjudicated in the said case. Be that as it may, the materials in the said case also indicate prima facie that when the petitioner terminated the contract, the respondent was persuading the petitioner to withdraw the notice issued by them to terminate the contract and complete the work, offering to the petitioner all sorts of co-operation. The materials in that case also indicate that for reasons best known to the petitioner, they were firm in their stand to terminate the work. If the facts of the case are analysed in the aforesaid background, it could be seen that the respondent was taking a revengeful attitude against the petitioner thereafter. I take this view for the reason that insofar as the petitioner themselves have terminated the work, if the priority of the respondent was for re-arranging the work, there was no impediment in re-arranging the work. The respondent however, after having issued the show cause notice which is impugned in the earlier writ petition, proceeded hastily to terminate the contract from their end also. It is obvious that it is for the purpose of blacklisting the petitioner and for invoking the bank guarantee furnished by the petitioner. It is common knowledge that such actions would seriously prejudice and affect a contractor adversely. In a case of this nature, I do not find any requirement for a public entity like the respondent to issue orders in the nature of Exts.P1 and P2 and invoke the bank guarantee issued by the petitioner, the term of which is not expiring in the near future, at a point of time when a writ petition filed by the petitioner challenging the show cause notice issued by the respondent was heard for admission and reserved by this Court for orders. In fairness, the respondent should have waited till orders are passed in W.P.(C) No.12353 of 2021, before passing orders in the nature of Exts.P1 and P2 and before invoking the bank guarantee furnished by the petitioner. I take this view also having regard to the conduct of the respondent in showing the name of the petitioner as a blacklisted contractor in their website, despite

the order issued by this court staying the operation of the order blacklisting the petitioner. Needless to say, Exts.P1 and P2 and the decision of the

respondent to invoke the bank guarantee are liable to be set at naught, as violative of Article 14 of the Constitution also. That apart, Ext.P2 order

blacklisting the petitioner is liable to be set aside for non-compliance of the principles of natural justice as well.

18. Ext.R1(a) is the letter given by the petitioner to the respondent on 22.06.2021. In terms of Ext.R1(a), the petitioner has informed the respondent

that this court has directed that no action shall be taken against the petitioner on the show cause notice. It is stated in Ext.P2 that the learned Standing

Counsel for the respondent has informed the respondent that no such direction has been issued by this court on 22.06.2021. It is on that premise that

the respondent has cast aspersions on the petitioner as recorded in the said order. As found in the preceding paragraphs, the information passed on by

the petitioner to the respondent in terms of Ext.R1(a) is correct and if what is stated in Ext.P2 is correct, aspersions have been cast on the petitioner

by the respondent on the basis of the incorrect information furnished to them by their counsel. Every counsel appearing in a case must champion the

cause of his client as efficiently and effectively as possible, but fairly and truthfully. It is his duty to inform his client truthfully as to what has transpired

in court. If what is stated by the respondent in Ext.P2 order that counsel for the respondent has informed them that there was no undertaking made in

W.P.(C) No.12353 of 2021 is correct, I must observe that the said conduct of the counsel is liable to be condemned.

In the result, the writ petition is allowed and Exts.P1 and P2 are quashed. There will be a direction to the respondent to reverse the invocation of

Ext.P4 bank guarantee by repayment of the amount encashed on 09.07.2021 to the Muvattupuzha branch of the South Indian Bank Limited, forthwith.