
(2000) 03 KL CK 0035
In the High Court Of Kerala
Case No : O.P. No. 15265 of 1993

P.V. Paily

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-03-2000

Acts Referred:

Contract Act, 1872 — Section 73

Citation : AIR 2000 Ker 268 : (2000) KLJ 594

Hon'ble Judges : K.S. Radhakrishnan, J

Bench : Single Bench

Advocate : K.L. Varghese, for the Appellant; C.T. Ravikumar, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—Question that has come up for consideration in this case is whether the second respondent. Executive Engineer, could determine the loss sustained by the Government due to breach of an agreement dated 31-5-1986 entered into between the petitioner and the second respondent.

2. The work of repairs to Peruvallur Sluice Elavally Panchayat was awarded to the petitioner as per agreement dated 31-5-1986. The amount shown in the agreement was Rs. 1,08,898/- and the security deposit was Rs. 5,450/-. As per the agreement, the time for completion of the above work as two months from the date of handing over site. According to the petitioner, the site was handed over only on 5-5-1987. As per clause 4 of the agreement, time was the essence of the contract and petitioner had to complete 60% of the work during the first month and 100% in the second month. Work had to be completed as per the Schedule to the agreement.

3. Petitioner submits that for Initial work as per item 2 of the schedule, 178 bags of cement was required, which was not supplied by the second respondent. According to him, as per clause 10 of conditions of contract, when an estimate

provides for use of any special description of materials, the same had to be supplied from the Executive Engineer's store or if it was required that the petitioner should use certain stores to be provided by the Executive Engineer, a memorandum had to be attached showing the particulars of stores showing the rates, place of delivery, etc. According to petitioner, sufficient bags of cement were not supplied by the District Division Stores at Thrissur, since cement was not available. Even though petitioner approached the second respondent, second respondent issued an indent for only 100 bags of cement. Hence he could not proceed with the work.

4. According to the department, work could not be completed due to the default committed by the petitioner. According to the department, due to non-availability of cement in the District Division Stores, Thrissur, sanction for 100 bags of cement was issued from the Divisional Officer on 25-3-1987 so as to take delivery from the Kerala State Warehousing Corporation, Vadakkanchery. However, petitioner failed to take delivery of the cement from the Corporation. Further, it was stated that the petitioner had not collected sand and steel for completing the work and even though several registered notices were issued to the petitioner, he had not taken any steps to complete the work, and consequently, department had to award the contract to another person at the petitioner's risk and costs. Later second respondent assessed the liability at Rs. 1,80,703/-.

5. Counsel for the petitioner, Shri. K. L. Varghese submitted that the second respondent has no power to fix the liability in case of breach of contract. Counsel submitted that only after determining the liability, respondents could have proceeded to recover the amount. Counsel submitted that petitioner had not committed any breach of contract, and work could not be completed due to the fault of the department. In any view of the matter, counsel submitted that second respondent cannot resolve the dispute since he is a party to the contract. Counsel referred to the decision of the Supreme Court in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, . Reference was also made to the decisions of this Court in Latheef v. Superintending Engineer ILR (1993) Ker 426: V.P. Kunhammed Vs. State of Kerala and Others, and also a judgment of this Court in O.P. No. 1009 of 1993.

6. Learned Government Pleader, Sri C. T. Ravikumar, on the other hand, relied upon clause 2 of Conditions of Contract and clause 49 of the Special Conditions to contend that second respondent has got power to fix the damages.

7. In order to examine the rival contentions, it is necessary to consider certain terms of the agreement entered into between the parties. In this connection it is profitable to refer to Clauses 1, 2, 13 and 49 which are extracted below :

1. The person whose tender may be accepted shall, before the date fixed for commencing the work, if so required sign an agreement, and a bond, of which forms are deposited in the Executive Engineer's Office and shall pay for all

stamps and legal expenses incidental thereto, and he shall deposit in Treasury challan a sum amounting to (5) five per cent on the cost of the work undertaken by him, as security for the due performance of his contract. All damages payable by the contractor under the terms of his contract, may be deducted by the Executive Engineer from, or paid by the sale or adjustment of a sufficient part of this security deposit or from the interest of any such Government of India security, or from any other sums due, or which may become due to him by the Government.

2. In every case in which under any clause or clauses of this contract the contractor shall have rendered himself liable to damages amounting to the whole of his security deposit, the Executive Engineer shall have power either to rescind the contract altogether or to have the work completed without further notice at the contractor's risk or expenses as he may deem best suited to the interest of the Government and the contractor shall have no claim to compensation for any loss that may accrue from any materials he may have collected or engagements he may have entered into, on account of the work and in the latter case the Executive Engineer shall have power to deduct whatever amount may be expended on the completion of the work from any sums that may be due or become due from the Government to the contractor on account of this or any other work or recover such sums from him and his assets movable and immovable under the provisions of the Revenue Recovery Act for the time being in force as if they were arrears of land revenue or otherwise as Government may choose and in case the contract shall be rescinded under the provisions aforesaid the contractor shall not be entitled to recover or be paid any sum for any work theretofore actually performed under this contract unless and until the Executive Engineer shall have certified the performance of such work and the value thereof, and he shall only be entitled to be paid the value so certified.

13. Before commencing work or within a week after the date when the acceptance of the tender has been intimated to him, the tenderer shall deposit a sum sufficient to make up the balance of 4 per cent of the probable value of contract with together which the amount of earnest money deposited shall be treated as security for the proper fulfilment of the same and shall execute an agreement for the work in the P.W. Schedule form. If he fails to do this or in the case of PW contracts maintain a specified rate of progress (to be specified in each case in the tender schedule) the earnest money and security deposit shall be forfeited to Government and fresh tenders shall be called for or the matters otherwise disposed off. If as a result of such measures due to the default of the tenderer to pay the requisite deposit, sign contracts or take possession of the work any loss to Government results, the same will be recovered from him as arrears of revenue, but should it be a saving to Government, the original contractor shall have no claim whatever to the difference. Recoveries on this or any other account will be made from the sum that may be due to the contractor on this or any other subsisting contracts or under the Revenue Recovery Act, or otherwise the Government may decide.

Note :-- 1. If the amount of contract does not exceed Rs. 5 lakhs, the amount of security will be 4%. If the amount of contract exceeds Rs. 5 lakhs the amount of security will be 2 per cent subject to a minimum of Rs. 20,000/-.

(2) Investment in Treasury Savings Bank will alone be treated as acceptable form of security.

49. The date fixed by the Superintending Engineer for the commencement and completion of works, as entered in this agreement shall be strictly observed by the contractor who shall pay damages at the rates of (1) one per cent on the estimated value of the contract remains uncommenced or unfinished, after the proper date and further to ensure good progress during the execution of works, the contractor shall be bound unless the contractor provides otherwise in all cases in which the time allowed for a work exceed one month to complete. One-fourth of the whole work to be done when one-fourth of the whole time allowed for it has elapsed, one-half of the work when one half of time has elapsed and three-fourths of work when three-fourths of time has elapsed and the penalty for the failure in either of these cases shall likewise be that the contractor shall be subject to pay daily damages at the rate of (1) one per cent on the estimated value of the amount of work that should be completed by that time. Provided always that entire amount of damages to be paid under the provisions of this clause shall not exceed in the whole amount of retention plus the security deposit. All damages payable under the provisions of this clause or clause 12 of the conditions of contract shall be considered as liquidated damages to be applied to the use of this Government without reference to the actual loss sustained owing to the delay.

8. Both parties agreed that they never wanted the dispute to be referred to an arbitrator, which is evident from the agreement itself. In fact arbitration clause was scored off from the agreement on consent of parties. Agreement stated that in case of dispute, the matter need not be referred to an arbitrator. Learned Government Pleader submitted since the arbitration clause has already been deleted on consent of parties. second respondent has got power on the basis of above mentioned clauses to determine the liability since petitioner committed breach. It is difficult to accept the contention of learned Government Pleader. Evidently, second respondent is a party to the agreement. When there is a breach of contract, party to the contract cannot determine as to who has committed breach. Damages could be recovered from the person who has committed breach only after the same is determined. Clauses abovementioned only say that damages payable under clause 49 or 12 of the conditions of contract would be considered as liquidated damages and could be recovered and no power has been conferred on the other contracting party to determine the damages. There is also nothing to show that parties had ever agreed that in case of breach of contract the dispute could be resolved by the second respondent. Petitioner has also not admitted the liability.

9. Supreme Court in State of Karnataka Vs. Shree Rameshwara Rice Mills,

Thirthahalli, dealing with all most Identical clause held that it could not argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages is a subsidiary and consequential power and not the primary power. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract.

10. It is a fundamental rule in the administration of Justice that a person cannot be judged in a cause wherein he is interested; *nemo, sibi esse judex vel suis jus dicere debet*. i.e. no man can judge his own cause. House of Lords in *Dimes v. Grand Junction Canal Co.* (1852) 3 HL Cas 759 held that decrees of Lord Cottenham, L.C. in favour of the canal company were voidable and must be reversed on the ground that when he made the decrees he was a shareholder of the company and this fact was unknown to the other parties to the suit. It is of utmost importance, said Lord Campbell, that the maxim that no man is to be a Judge in his own cause should be held sacred. This principle was reiterated in *R. v. Barnsley MBC.* (1976) 3 All ER 452 and in *Herring v. Templeman* (1973) 3 All ER 569.

11. In view of the abovementioned judicial pronouncements, I am of the view that even if, parties have agreed that in case of dispute, the matter shall not be referred to arbitration, that cannot confer any power on the one party to fix liability on the plea that the other contracting party has committed breach. I am of the view that since petitioner had not admitted the liability and not admitted the breach of contract the matter has to be resolved not by one of the parties to the contract, but by the properly constituted forum. Only after determination of the liability, the damages could be recovered from the petitioner.

In the abovementioned circumstances, writ petition is allowed and Exts. P6, P7 and P9 will stand quashed.