

(2009) 12 MAD CK 0083

In the Madras High Court

Case No : Writ Petition No. 444 of 2007 and M.P. No. 1 of 2007

Rukmani

APPELLANT

Vs

Kandamangalam Panchayat Union

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Constitution of India, 1950 — Article 258
General Clauses Act, 1897 — Section 27
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 1 CTC 511

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : A. Shanmugapriya, for Mr. V. Raghavachari, for the Appellant; V.R. Thangavelu, for the Respondent

Final Decision : Allowed

Judgement

V. Dhanapalan, J.—The proceedings of the respondent in Na.Ka.A3/4397/2006, dated 18.12.2006 cancelling the work order as well as the registration are under challenge in this Writ Petition. The case of the petitioner is that she is a registered panchayat union contractor. She has done substantial work for the local body and semi Government organisation. Under the Parliament Member Constituency Development Scheme, the petitioner was allotted the construction work of school building by the respondent. The estimate for the construction work is around Rs. 3.75 lakhs. The respondent-Panchayat Union dragged the execution of the agreement as a result of which the petitioner was not able to carry on the work. In the meanwhile, the respondent-Panchayat on 1.12.2006 issued a notice calling upon the petitioner to finish the project. The petitioner submitted her reply to the notice explaining the reasons for the delay in taking up the project. While so, the respondent straightaway passed the impugned order dated 18.12.2006 cancelling the work allotted to the petitioner as well as removing the name of the petitioner from the Register of Contractors. Aggrieved by such removal of her name from the Register of Contractors, the petitioner has

approached this Court by filing the present Writ Petition.

2. Counter affidavit had been filed on behalf of respondents wherein the following facts have been set out:

The petitioner was awarded a contract of construction of a school building at L.R. Palayam on 29.8.2006 at an estimated cost of Rs. 3.75 on the basis of the tender offered by her at 0.50% less estimate rate. The said work was to be completed within a period of 60 days from the date of entrustment. As the work was not completed till 1.12.2006, a notice dated 1.12.2006 was issued to the petitioner indicating that action would be taken against her for non-completion of the work. In the reply to the said notice, the petitioner besides alleging various factors which were totally irrelevant, had requested to revise the estimate cost on the ground that the price of the material had gone up. The escalation of cost was due to the petitioner failing to complete the building work within the stipulated time. The petitioner had not submitted her reply to the notice dated 1.12.2006. Consequently, by proceedings dated 18.12.2006 the petitioner was removed from the Register of Contractor of the Panchayat Union. Thus, the counter affidavit sought for the dismissal of the Writ Petition.

3. I have heard Mrs. A. Shanmugapriya, learned counsel appearing for the petitioner and Mr. V.R. Thangaelu learned counsel appearing for the respondent.

4. The learned counsel appearing for the petitioner would submit that the impugned order has been passed without issuing any notice to the petitioner as per Rule 13(7) of the Tamil Nadu Panchayats (Preparation of Plans and Estimates for Works and mode and Conditions of Contractors) Rules, 1988 (hereinafter called as the Rules). Even assuming that a notice has been issued to the petitioner, the same cannot stand to legal scrutiny as the notice was sent through certificate of posting. Hence, according to the learned counsel appearing for the petitioner, the impugned order is liable to be set aside. In support of his contention the learned counsel for the petitioner relied on the decision in R.L. Narang Vs. Commissioner of Income Tax, New Delhi, of the said judgment are usefully extracted here under:

10. Coming to the next question of service by post, the provisions of Section 27 of the General Clauses Act, 1897 are relevant. Section 27 provides that where any Central Act or Regulation authorises or requires any document to be served by post, then, unless a different intention is drawn, the service shall be deemed to be effected properly if a correctly addressed and stamped letter containing the document is dispatched by registered post; and unless the contrary is proved, such a letter would be deemed to have been delivered in the ordinary course of post. The I.T. Act is a Central Act and Section 282 provides for service by post. As such the provisions of Section 27 of the General Clauses Act, 1897, are applicable. From perusing Section 27 of the General clauses Act, it is apparent that in order to presume service having been effected, the document or letter should be sent by registered post.

11. In the present cases, as noticed above, the reminders were issued under certificate of posting and not by registered post. It would, therefore, appear to us that there is nothing on the record to indicate that proper and valid service was, in fact, effected nor can any presumption be drawn. We also feel that not much importance can be attached to the non-filing of an affidavit by the assessee as the AAC accepted their version without an affidavit. Once their statement with regard to non-service had been accepted by the AAC and no affidavit had been asked for thereafter at the stage of the Tribunal, we think that the lack of an affidavit is not material.

5. Per contra, the learned counsel appearing for the respondent would submit that the petitioner has not completed the work within the stipulated time and hence a notice was issued on 1.11.2006 for cancelling the registration for which no reply was sent by the petitioner. Therefore, according to the learned counsel for the respondent, the work order was cancelled and the name of the petitioner was removed from the register. Learned counsel appearing for the respondent would further submit that the notice was served on the petitioner through certificate of posting which is a valid service. In support of his contention, the learned counsel for the respondent relied on the decision in *M. Ramesh Vs. Vankadara Sunil Kumar*, . Paragraph 6 of the said judgment is usefully extracted here under:

6. The averments in the Complaint show that on the same day on which first respondent sent the statutory notice by registered post, he sent a notice under Certificate of Posting also to the petitioner and produced that Certificate as document number along with the Complaint. Notice sent under certificate of posting also would be valid statutory notice, since Section 138 of the Act does not mandate that the notice under that Section has to be sent only by registered post. Therefore, in view of the presumption that a letter addressed to the correct address of the addressee would be deemed to have been received by the addressee, the contention that there is no valid statutory notice, prima facie cannot be accepted, since the question whether the address mentioned in the Certificate of Posting is the correct address of the petitioner or not can be decided only after trial.

6. On the basis of the above pleadings, I have heard the learned counsel for the parties and also given my thoughtful consideration to the rival submissions and analysed the decisions relied on by the learned counsel.

7. In this case, it is seen that the petitioner is a registered contractor and she has been allotted the construction work of a school building by the respondent under the Parliament Member Constituency Development Scheme. There was execution of an agreement between the petitioner and the respondent consequent to which the petitioner carried out the work. While so, there was a notice dated 1.12.2006 issued by the respondent calling upon the petitioner to finish the project for which the petitioner has submitted her explanation stating the reasons for the delay in taking up the project. However, the respondent has

passed the impugned order removing the name of the petitioner from the Register of Contractors and aggrieved by the same, the petitioner has approached this Court.

8. This has been refuted by the respondent by stating that the petitioner had requested to revise the estimate cost on the ground that the price of the materials had gone up. The escalation of the cost was due to the petitioner failing to complete the building work within the stipulated time and therefore a notice was issued to her on 1.12.2006 to explain the same. But the petitioner had not submitted her reply to the said notice. Consequently, the impugned proceeding has been passed on 18.12.2006 removing the petitioner from the Register of Contractors of the respondent Panchayat Union.

9. On the scrutiny of the above, the question that arises for consideration is, whether before passing the impugned order of removing the name of the petitioner from the Register of Contractors of a Panchayat Union, the respondent has followed the procedure contemplated under the Rules?

10. In this case, it would be relevant to analyse the provision for the removal of a contractor from the Register. The procedure contemplated is provided under sub-clause (7) of Rule 13 of which reads as follows:

Rule 13(7): The names of the Contractors may be removed from the Register of Contractors by the Executive Authority or Commissioner or Secretary as the case may be, for any proved misconduct or for any financial incapacity or for any other reasons:

Provided that before ordering the removal of the name of any Contractor from the Register, a notice in writing shall be given to him to show cause against such removal and his explanation be obtained in writing for consideration and place the details for consideration of the Village Panchayat or Panchayat Union Council or District Panchayat as the case may be.

11. A reading of the above provision would make it clear that a contractor who has registered his name with the Panchayat Union may be removed from the Register of Contractors, however, before doing so, a notice in writing shall be given to him to show cause against such removal and his explanation be obtained in writing for consideration and place the details for consideration of the Panchayat Union.

12. To examine whether the said provision has been complied with by the respondent or not; whether a notice was sent in writing to the petitioner to show cause or not, this Court directed the respondent to produce the records and accordingly the records were produced before this Court.

13. In this regard, the procedure to be followed in making an effective service and the rules contemplated therein are silent in the relevant provisions of the Tamil Nadu Panchayats Act, 1994 and the rules made thereunder. Therefore, it is necessary to analyse the legal position as to what could be the effective service

of notice in order to give an opportunity to the petitioner to show cause against the action that has been taken to remove her name from the Register of Contractors and to make her to explain the same in writing for consideration.

14. A perusal of the said records would show that a notice by way of certificate of posting has been sent to the petitioner on 1.11.2006. If so, then the next question that arises for consideration is whether this could be a service of notice as contemplated under the said Rules.

15. While that being the position, to achieve the object of effective service of notice, it would be relevant to refer to what is the provision under the General Clauses Act, 1897. The relevant provision viz., Section 27 reads as follows:

27. Meaning of service by post.-- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

In the absence of any provision in the relevant Act or Rules, then General Clauses Act will apply. The relevant Act for consideration is the Tamil Nadu Panchayats Act and the Rules framed thereunder.

16. According to the General Clauses Act, the definition of the Central Act is as follows:

(7) "Central Act" shall mean an Act of Parliament, and shall include-

(a) an Act of the Dominion Legislature or of the Indian Legislature passed before the commencement of the Constitution, and

(b) an Act made before such commencement by the Governor-General in Council or the Governor-General acting in a legislative capacity;

(8)(b)(i) in relation to functions entrusted under clause (1) of Article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;

17. Therefore, while giving consideration to the above provision of law and the above rule under the Tamil Nadu Panchayats Act, 1994, it has to be pointed out that the said rule contemplates only service of notice but there is no provision to the effect that what could be the mode of service.

18. So, in the absence of any provision to mean what is the mode of service, we have to see the applicability of the General Clauses Act, 1897, and the Tamil Nadu General Clauses Act, 1891. From a perusal of Section 27 of the General Clauses Act, it is apparent that in order to presume service having been effected

the document or letter should be sent by registered post.

19. It is evident that the Tamil Nadu General Clauses Act is the ancient one in the series of General Clauses Act. Thereafter, the General Clauses Act, 1897, Central Act, came into effect. Two of the State enactments viz., The Bengal General Clauses Act, 1899 and The Bombay General Clauses Act, 1904, have been placed before this Court, wherein a similar provision u/s 28 as in the case of Central Act u/s 27 has been provided and, therefore, the said State Acts have applied the analogy drawn in the application of General Clauses Act, in case of proper service by post.

20. In the above circumstances, as the Central Act and the parallel enactments of the State are having a provision for proper mode of service by registered post, an inference can be drawn in this case also that Tamil Nadu General Clauses Act being the oldest one and the said Act is not having a similar provision, it could be construed that the intention of the Central enactment and the subsequent parallel enactments of other States would give a meaningful construction that any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

21. Therefore, in the case on hand, the service of notice, before removing the name of the petitioner from the register of contract, could be effected only by Registered Post and not by Certificate of Posting, as shown in the records of the respondent.

22. It is seen from the records that the notice has been sent by Certificate of Posting and not by a registered post. It would, therefore, appear to this Court that there is nothing on record to indicate that proper and valid service was in fact effected nor could any presumption be drawn.

23. A vehement contention has been raised by the counsel appearing for the respondent by citing the decision of the High Court of Andhra Pradesh as referred to above stating that a notice sent under Certificate of Posting also would be a valid statutory notice. However, while analysing - the above decision, it could be seen that in addition to the registered post, a notice under Certificate of Posting was also sent to the petitioner and hence the complainant produced that certificate as document along with the Complaint filed u/s 138 of the Negotiable Instruments Act. Thus, in the absence of any Registered Post, there cannot be any presumption that the notice was served.

24. A perusal of the records would reveal that there is no documentary evidence to show that the petitioner has received the notice dated 1.12.2006 and therefore she would not have sent any reply to the notice. As there were

conflicting materials and contradictory versions that there was a notice dated 1.12.2006 and a show cause notice dated 1.11.2006 which is prior to the issuance of notice of calling for explanation, it could not be construed that there was a valid notice sent in writing to the petitioner before removing her name from the Register of Contractors. In the decision of the Delhi High Court in R.L. Narang Vs. Commissioner of Income Tax, New Delhi, the ratio laid down in effect is the proposition to be applicable to this case.

25. The learned counsel for the respondent raised a point that this Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

26. In the present case, in the absence of any specific provision as to what would be the mode of service, before passing the order impugned, a notice in writing as per Rule 13(7) of the Tamil Nadu Panchayats (Preparation of Plans and Estimates for Works and Mode and Conditions of Contractors) Rules, 1988, ought to have been sent to the petitioner by Registered Post. Were it a Registered Post, then, the presumption would be that the notice had been sent to the petitioner and on receipt of the acknowledgement, there was likelihood of the happenings in the common course and the natural events. Since the notice, as stated above, had not been served in proper mode, but the same was sent under Certificate of Posting, it could not be presumed that the notice was served on the person concerned viz., the petitioner. Therefore, the point raised by the learned counsel appearing for the respondent, in this regard, cannot have legs to stand. Upon perusing the material records and analysing the relevant provisions of the General Clauses Act, 1897, along with other State enactments, and after giving due consideration to the decisions relied on by either side, I am of the considered opinion that there was no notice in writing served to the petitioner and thus the order of removal of the petitioner from the Register of Contractors suffered from legal infirmity and therefore it cannot be sustained. Accordingly the impugned order of the respondent dated 18.12.2006 is liable to be set aside and the same is set aside. However, in the instant case, it is open to the respondent to issue fresh notice in writing to show cause and proceed further and this order shall not prevent them from proceeding in accordance with the rules and the procedure contemplated. The Writ Petition is allowed with the above direction. No costs. Consequently the connected M.P. is closed.