
(2015) 08 KL CK 0077

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23721 of 2015 (M)

Salim P.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Citation : (2015) 08 KL CK 0077

Hon'ble Judges : Anil K. Narendran, J

Bench : Single Bench

Advocate : Jomy George, Sebastian Thomas, P. Rejinark, K.B. Sony, Deepak Mohan and A. Mini Joseph, for the Appellant; Sojan James, Sr. Government Pleader, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anil K. Narendran, J—The petitioner is a Contractor, who had undertaken various construction works for the Public Works Department and as evident from Ext. P3 non-payment certificate issued by the 4th respondent dated 20.7.2015, a total amount of Rs. 12,14,155/- is pending payment for want of letter of credit.

2. While so, the Public Works Department invited tender for execution of Pre-monsoon work, 2015 for rectification of water accumulated reaches and repairs to various roads under Roads Section, Tirur. As evident from Ext. P1 selection notice, the tender submitted by the petitioner was accepted at 27.66% below the estimate rate and the petitioner was asked to produce bank guarantee for security deposit of Rs. 34,700/- as per Ext. P6 Government order dated 5.1.2015, out of which 50% of the security deposit and performance guarantee of Rs. 2,05,100/- should be in the form of Treasury Deposit for the fulfilment of the contract for which necessary declaration in the form of bank guarantee from Nationalised/Scheduled Bank for a period of 18 months should be produced. It is relying Ext. P3 non-payment certificate, the petitioner is contending that, when a total sum of Rs. 12,14,155/- is pending payment, the 2nd respondent has absolutely no justification in insisting the petitioner to produce security deposit

as well as performance guarantee, without adjusting the amount covered by Ext. P3.

3. Ext. P4 Circular issued by the Government dated 7.3.2003 deals with adjustment of amounts due to the Contractors under completed works towards security deposit for new contracts being awarded. A reading of Ext. P4 Circular would show that the said circular was issued pursuant to the judgment of this Court dated 20.1.2003 in O.P. No. 1943/2003.

4. On 22.7.2015, the petitioner made Ext. P2 request before the 2nd respondent to adjust the security deposit and performance guarantee referred to in Ext. P1 from the pending payment covered by Ext. P3 non-payment certificate. But the said request was turned down by Ext. P5 communication dated 22.7.2015, relying on Ext. P6 Government Order dated 5.1.2015, which provides that 50% of the performance guarantee will be in the form of Treasury Deposit and rest in the form of Bank guarantee or any other form prescribed in the revised PWD Manual.

5. It was in such circumstances, the petitioner has approached this Court in this Writ Petition seeking a writ of mandamus commanding the respondents to pay immediately the amount mentioned in Ext. P3 non-payment certificate with 18% interest. The petitioner has also sought for a writ of mandamus commanding the respondents to permit him to enter into the agreement for execution of the work awarded under Ext. P1 by adjusting the necessary amount as mentioned in Ext. P3 towards security deposit and performance guarantee.

6. I heard arguments of the learned counsel for the petitioner and the learned Government Pleader for the respondents.

7. The fact that a sum of Rs. 12,14,155/- is pending payment to the petitioner for want of letter of credit, in respect of the works already undertaken by him, which is evident from Ext. P3 non-payment certificate issued by the 4th respondent, is not in dispute. By Ext. P1, the petitioner was asked to furnish security deposit of Rs. 34,700/- and performance guarantee of Rs. 2,05,100/- in the form of Treasury Deposit for fulfilment of the contract for which necessary declaration in the form of Bank guarantee from a Nationalised/scheduled Bank for a validity of 18 months should be produced. On receipt of Ext. P1, the petitioner submitted Ext. P2 request before the 2nd respondent to adjust the pending payment covered by Ext. P3 non-payment certificate towards performance guarantee and security deposit to be deposited in terms of Ext. P1. But the said request was turned down by the 2nd respondent vide Ext. P5 communication, relying on Ext. P6 Government order.

8. It is a fact that, going by Ext. P6 Government order, at least 50% of the security deposit will be in the form of a Treasury deposit and the rest in the form of bank guarantee or any other form prescribed in the revised PWD Manual. But it has to be noticed that respondents have absolutely no dispute regarding the work undertaken by the petitioner, covered by Ext. P3 nonpayment certificate,

and the fact that a total sum of Rs. 12,14,155/- is still pending payment. If that be so, merely for the reason that the provisions under Ext. P6 enable the respondents to insist 50% of the security deposit in the form of a Treasury Deposit and the rest in the form of bank guarantee or any other forms prescribed in the revised PWD Manual, the petitioner should not be denied an opportunity to offer the unpaid amount covered by Ext. P3 non-payment certificate as performance guarantee/security deposit for executing the agreement in terms of Ext. P1 selection notice.

9. In *State of Kerala v. P. Edward John* (2015 (3) KHC 867) a Division Bench of this Court (in which I was a party) held that as per Article 180, except in accordance with the provisions of Articles 184 and 185 of the Kerala Financial Code, no Government servant may enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures. The provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work. When the provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work, the contractors are legally entitled for such payments without any delay, as they are undertaking the contract work on the legitimate expectation and promise that payment will be made at any rate immediately after the completion of work. Paras. 10 to 17 of the judgment reads thus:

"10. The Kerala Financial Code (hereinafter referred to as "the Financial Code") contains rules relating to all financial transactions of Government which fall into two broad classes, viz., receipts and disbursements; which should be followed by every Government servant in the matter of receipt, custody and disbursement of Government money. These rules are supplementary to the rules contained in the Kerala Treasury Code and should be applied in conjunction with them. Chapter VII of the Financial Code deals with "works". Article 163 of the Financial Code provides that, the rules in Chapter VII are applicable to departments in General and are supplemented for particular departments by the detailed rules and orders contained in the respective department manuals and codes and any other special orders applicable to them. Article 165 provides further that, the Public Works Department (PWD) is responsible for the execution of all works which the Government have not specifically allotted to other departments. Article 178 deals with "method of executing works" and Article 180 deals with "provision of funds". As per Article 180, except in accordance with the provisions of Articles 184 and 185 of that Code, no Government servant may enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures.

11. Article 184 of the Financial Code deals with "starting of work without a sanctioned estimate or without adequate funds having been provided". As per Article 184, if a higher authority orders a Government servant, on any ground whatever, to start a work for which an estimate is required under the rules but no estimate has been sanctioned or for which adequate funds have not been provided and no competent authority has undertaken to provide the necessary funds, before the liability matures (whether an estimate has been sanctioned or not), it should convey the order to start the work to him in writing. A Government servant who starts any such work without a written order from a higher authority and a Government servant who issues a written order to start a work otherwise than in accordance with the rules will be liable to be held personally responsible for paying for the work done if it is found that his action was not fully justified by very exceptional circumstances. Similarly, Article 185 of the Code, which deals with "starting a work in an emergency" provides that, it is occasionally necessary for a Government servant to start a work immediately on the occurrence of some sudden, unforeseen emergency, e.g., the breaching of the bund of an irrigation work, without waiting for an estimate to be sanctioned and funds provided. A Government servant who does this should report the facts at once to his immediate superior and to the Accountant General.

12. In the case on hand, the work in question is "Improvements to Thirupurathoor-Pulluvila Road between Ch.2/600 to Ch.5/600" executed in terms of Ext. B1 agreement dated 14.12.2002 entered into between the respondent/plaintiff and the second appellant/second defendant acting for and on behalf of the Government of Kerala. The appellants/ defendants have no case that the work in question falls within the sweep of Article 184 or 185 of the Financial Code. In such circumstances, the irresistible conclusion which can be drawn is that, the work in question falls within the sweep of Article 180 of the Financial Code, which mandates the second appellant/second defendant not to enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures.

13. Chapter X of the Kerala Public Works Department Manual (pre-revised) deals with preparation of "estimates" for works to be executed. As per Para.10.2.4.1 of the PWD Manual, an estimate can become operative for execution by PWD only when funds are available. Generally, even when technical sanction is issued the availability of funds will be examined and the source of funds noted in the sanctions. The usual sources of funds for execution of works are enumerated in clauses (a) to (f) in Para.10.2.4.2 of the PWD Manual. Similar provisions are there in Section 1801.1.4 of the Kerala Public Works Department Manual Revised Edition-2012.

14. Chapter XV of the Kerala PWD Manual (Pre-revised) deals with "tenders and arrangement of contracts". As per clause (c) in Para.15.2.2 of the PWD Manual, before tenders are invited for a work, there should be ample provision of funds

for the work in the budget. If there is only a token provision in the budget, the work shall be put to tender only if additional funds can be found by diversion or otherwise. Similarly, Section 2003 of the Kerala PWD Manual Revised Edition-2012 provides for arrangement of works having administrative and technical sanctions with proportionate provisions of funds in the budget for the year through bids (tenders).

15. In *Anirudhan v. State of Kerala* (1999 (3) KLT 1) a Division Bench of this Court held that, "having regard to the explicit terms of Article 180 of Kerala Financial Code and Para.15 of the Kerala PWD Manual it is clear that Government are duty bound to make payments to the work completed. The aforesaid provision, which would unambiguously command that no work shall be tendered except with the availability of complete funds, has given rise to a promise or representation and it is on that basis alone the contractors come forward to undertake the work, plan their work programme and arrange for the employment of staff and engagement of machinery and incur large investments." Repelling the argument advanced on behalf of the State that, principles of seniority has to be maintained in the matter of payments for the works completed, the Division Bench held further that, "principles of seniority is totally irrational and opposed to the mandate under the Financial Code, PWD Manual and provisions of the agreement. The Financial Code and the PWD Manual provide for complete funding and tendering and only thereafter the work is to be called. The arrears, as pointed out by the contractors and also by the State, are accumulating only because of violation of the rules by not providing full funds as provided in the rules. The Government has to make payments strictly in time." The Division Bench held that disbursement of arrears to the contractors should be on the principle of "first done first paid". In view of the undertaking given by the State that, all the contractors who have filed writ petitions and appeals on or before 23.6.99 will be paid within four months, the Division Bench did not award any interest for delayed payment; but it was made clear that, the State shall pay the amounts to the contractors within the aforesaid period, failing which the State shall pay interest at the rate of 18% per annum to all such contractors and that, interest is payable on the matured liability after the completion of one month's time from the date of completion of the work with reference to each contractor. The judgment in *Anirudhan's* case (*supra*) was referred to by a Full Bench of this Court in *State of Kerala v. Anil* (2002 (1) KLT 371).

16. The provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work. The fact that, after the completion of work final measurements were recorded and a final bill in terms of such measurements was drawn up and passed for payment on 29.9.2003 is not in dispute. But, according to the appellants/defendants, they could not make payment due to paucity of funds and the same was released to the respondent/plaintiff in terms of priority in the department concerned and as per availability of funds and letter of credit. They would also contend that, the

respondent/plaintiff is not entitled for any interest for delayed payment, since going by Exts. B4 and B5 judgment/order of this Court any payment to the contractors can be made only in accordance with priority based on the date of registration of the bill and subject to availability of funds.

17. When the provisions in the Kerala Financial Code, PWD Manual and the contract for execution of the work mandate payment of part bill during the progress of work and final bill immediately after the completion of the work, the contractors are legally entitled for such payments without any delay, as they are undertaking the contract work on the legitimate expectation and promise that payment will be made at any rate immediately after the completion of work. Going by the terms of the agreement a contractor has to deposit a sum amounting to 5% of the cost of the work undertaken by him as security for the due performance of the contract and all damages payable by the contractor under the terms of the contract shall be deducted by the Executive Engineer concerned by adjustment of a sufficient part of the security deposit or from any other sum due, or which may become due to the contractor by the Government. In addition to this, a deduction of 10% from all the payments made to the contractor shall be made by the Executive Engineer concerned as guarantee fund, which shall be released to the contractor only after the work is completed to the satisfaction of the department and it is finally taken over by the department. When payment of part bills is delayed indefinitely, the contractors are constrained to complete the entire work within the time stipulated in the contract by investing the entire funds raised by them, which in most of the cases would be borrowed funds from banks or financial institutions at higher rate of interest."

10. During the course of arguments, the learned counsel for the petitioner submitted that the petitioner is mainly pressing relief No. (ii), namely adjustment of necessary amount mentioned in Ext. P3 non-payment certificate towards security deposit and performance guarantee as demanded in Ext. P1, since payment of bill amount can be effected only in terms of priority based on the date of registration of the bills, in terms of the judgments/orders passed by this Court.

In such circumstances, this Writ Petition is disposed of directing the 2nd respondent to permit the petitioner to enter into an agreement pursuant to Ext. P1 selection notice for execution of Pre-monsoon work, 2015 for rectification of water accumulated reaches and repairs to various roads under Roads Section, Tirur by treating the amount available under Ext. P3 non-payment certificate towards security deposit as well as performance guarantee. This will be subject to the specific condition that the 2nd respondent will be at liberty to earmark the requisite amount covered by Ext. P3 non-payment certificate towards security deposit and performance guarantee in terms of Ext. P1 selection notice and the said amount need be disbursed to the petitioner only subject to successful completion of work covered by Ext. P1 and subject to the terms of the contract

to be executed in terms of Ext. P1.