

(2010) 02 KL CK 0004
In the High Court Of Kerala
Case No : W.A. No. 1229 of 2009

State of Kerala and Others

APPELLANT

Vs

K. Baburaj and Others

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Citation : (2011) 4 KLJ 391

Hon'ble Judges : Thottathil B. Radhakrishnan, J; Kurian Joseph, J

Bench : Division Bench

Advocate : K. Meera G.P, for the Appellant; T.K. Marthandan Unnithan, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, Ag. C.J.

1. The state, of Kerala, the Kerala state Rural Development Agency, hereinafter referred to as the "KSRDA", representing the Pradhan Manthri Gram Sadak Yojana (PMGSY) for Kerala State and the Member Secretary of the KSROA have filed this appeal challenging the judgment quashing the decision of the Superintending Engineer. the competent authority under the PMGSY, rescinding the contract awarded to the writ petitioner contractor and forfeiting his security deposit without prejudice to any action that the State may take to realise damages. The learned Single Judge has held that the aforesaid decision of the superintending Engineer, Ext. P21, could not have been issued or enforced since the case is one. where breach of contract: has been committed by the authorities of the State also and that in view of the reciprocal promises, the writ petitioner could not have been penalized, as has been done in Ext. P21 and the re-is no reason why he should be made liable for the consequences as if he has committed a breach of contract, The writ petition was accordingly ordered quashing Ext. P21 to the extent the security deposit, by way of bank guarantee, has been forfeited. The bank guarantee amount and all remaining amounts that may be due for the work that the writ petitioner has done, were directed to be

paid to him in a time bound manner.

2. Since an appeal placed by the contractor before the standing Empowered committee was decided against; him on a majority rather than on complete consensus and because this court was of the view that what ought to be ultimately secured is the public interest to have the rural development project in question completed, an attempt was made in that regard by convening an in-chamber proceedings presided by one among us, following the interim order dated 27.1.2010. Nothing fruitful came out, either for a negotiated settlement, or to ensure that the work is carried out through the "same contractor. The matter was hence heard on merits.

3. The learned senior Government Pleader argued that the contentions in the writ, petition and the counter affidavit before the learned single Judge generated disputes on questions of facts which could not have been resolved on the basis of affidavits and the writ petitioner should have been relegated to appropriate remedies before the civil court and the writ court should not have interfered with the matter. It was, pithily, pointed out that the writ petitioner did not: complete the work within the original time frame as agreed or even within the extended time limit. Since the writ petitioner could not be fully exonerated from discharging his obligations under the contract. It ought to have been held that the writ petitioner is not entitled to return of the security deposit, it is contended.

4. The learned counsel for the writ petitioner, contesting the writ appeal argued that on the basis of the materials, the findings in the impugned judgment cannot be impeached and a perusal of documents on record would show that the officials of the State would themselves vouchsafe that the work was being carried on smoothly and good progress was achieved and there was no reason for the abrupt action of termination of contract. It is argued that the situation created by the officials essentially resulted in harassment and victimization and the untimely encashment of the bank guarantee and transmission of information as to the cancellation of contract had put the contractor to untold peril and misery and that he, a youngster, going by the materials, had done the best within his abilities to carry out the work under circumstances where the site was not appropriately handed over and the alignment had various obstructions as noticeable among the materials on record.

5. A perusal of the impugned judgment shows that the learned Judge adverted to and considered different materials to arrive at the conclusion that the writ petitioner cannot be held to have been solely liable for the failure to complete the work and, that, therefore, the impugned order to the extent the security deposit and the bank guarantee have been forfeited, deserves to be quashed. In doing so, advertence has been made to paragraph 4B of Ext. P12 which is the first order of the competent authority, the superintending Engineer, The competent authority concedes to the presence of electric posts and cables, telephone posts and cables, as also pipelines in certain chainages of the three roads which the writ petitioner was to lay. However the competent authority took the stand that,

it did not amount to obstacles so as to adversely affect the road work as most of them were on the side of the proposed roads and that the contractor could have constructed the road without any difficulty. This view is sought to be buttressed by the competent authority by stating that the contractor had done the road work upto second layer metalling in one of the roads, first layer metalling in another road and G.S.B. laying in the third. Though the competent authority noticed that the residential building owned by smt.Mininiol M.T. and Sri.George were also in the alignment, that authority took the stand that the existence of the residential building did not cause any difficulty as obstruction as it was on the side of the alignment and that, later, the building was also vacated. However, the competent authority quite candidly agreed that the contractor cannot remove the obstacles on his own accord. The competent authority stated that the employer (Government) had taken timely and fruitful action in removing the posts, pipes etc, then and there. Referring to these contents of Ext. P12, the learned Judge noted that it was not the case of the appellants herein that the obstacles were removed but on the other hand, according to them, the obstacles could not have stood in the way of the contractor in making progress or completing the work undertaken by him.

6. The learned single judge also referred to Exts. P13 to P16 and Exts. P24 to P26. Ext. P13 is a Government order dated 19.2.2007 which, inter alia, states that the telephone and electric posts, as also the telephone and electric cables and the water distribution pipes lying underneath the surface have to be removed at Government expenses in relation to PMGSY programme. By that Government Order, directions were issued as to the disbursement of such expenditure from the funds of the District Panchayats and also prove the programme implementation units. Ext. P14 dated 02-03-2007 records that the Assistant Engineer of Pampakkuda Block Panchayat had requested the Assistant Engineer of the KSE Board to remove the electric posts at the different positions mentioned in that letter. Exts. P15 evidences that the secretary of the Pampakkuda Block Panchayat had written co the Project Director of D.P.A.U. making reference to the representation of the contractor. The said letter dated-26-06-2007 records the progress achieved in the work and states that the residential building of Minimol George was removed before 23-5-2007 and that different steps have been taken for removal of water lines of the Kerala Wafer Authority and other utilities were being shifted. Accordingly, the Block Panchayat Secretary had recommended that the application of the petitioner for enlargement of time by nine months from 01-05-2007 is being recommended to be granted. Ext. P15 discloses different factors which cannot be attributed to the contractor for the delay in the work. In Ext. P16, the Executive Engineer recommends to the superintending Engineer that extension of time be granted to the contractor up to 21-12-2007. It contains the clear admission that there was delay in getting funds from the Government for shifting the utilities. On 02-6-2007, the District Collector had convened a meeting of the representatives of BSNL, KSEB and KWA after remittance of the fund to the concerned

departments by the District collector. In that meeting, it was agreed that the shifting of the utilities would be made by 15-6-2007. It is recorded therein that by the date of that letter, i.e. 28-06-2007, almost all the major bottlenecks have been cleared, including, the shifting of one house in the alignment and the contractor can do the work smoothly.

7. In Ext. P24, referred to in the impugned judgment; a document issued on 13-11-2006 by the Executive Engineer to the Superintending Engineer, it is clearly stated that the time of completion of the work may be extended upto to May 2007 since a lapse of 7 months had occurred due to delay in shifting of pipelines, telephone post and electric post and approval of initial levels. Along with that letter, the application for extension of time of completion and revised work permit was submitted for approval. In his letter dated 5-10-2006, the contractor had stated that non-shifting of electric post, water supply lines etc, and untimely rain have affected the progress of the work. He, therefore, requested to extend the time of completion upto 30-6-2007.

8. It has to be at once recalled that with the passage of time, the cost of bitumen had indisputably escalated. This fact was not controverted before us either. We find that the materials show the repeated requests of the contractor for revision of rates in the cost of bitumen. Accordingly, we also see in Ext. P15, that the Executive Engineer says that the question of the payment for difference in cost of bitumen has to be decided by the higher authorities.

9. The Superintending Engineer records in Ext. P25 that the Executive Engineer, Poverty Alleviation Unit has reported on 13-11-2006 that the reason stated by the contractor are genuine and that the period for completion may be extended. In Ext. P26 dated 10-09-2007, the proceedings of the Executive Engineer, it is categorically stated-that the work is in progress and the contractor's request for part payment was being considered in those proceedings.

10. With the aforesaid materials, the learned Judge held that there was abundant evidence to show that there has been inordinate delay on the part of the respondents In the writ petition In removing the obstacles at the work site. Having considered the materials on record, we do not find any ground to disagree with the findings of the learned Judge.

11. Proceeding further, the Learned Judge refers to Ext. P19 which is passed by the chairman and official Member of the Empowered Committee rejecting the appeal of the contractor, The learned judge noticed that: the said committee had not adverted to and considered any of the reasons for the delay and the failure on the part of the respondents in the writ petition in removing the obstacles, while endeavouring to fasten the liability on the contractor for the failure to complete the work. Contrasting to that, are the views expressed in the dissenting note of the Member of the committee, who is referred to as a non-official member, He is a retired Chief Engineer of the PWD, He is not the nominee of the contractor. The non-official member comes into the picture by the Department

providing a panel of three members and the contractor choosing one among them. It would not be therefore behoveful to say that he is merely a nominee of the contractor. Advertina to Ext. P23, the views of the said non-departmental member, the learned judge has held that the said member has examined the issue in its totality and has recommended discharge of the contractor, we have gone through Ext. P23 and Ext. P19, the majority view and we find no ground to disagree with the impugned judgment that the recommendation in Ext. P23 that the contractor be discharged of his obligation? was made after a thorough examination of the issues in its totality.

12. With the aforesaid, we find that the findings rendered by the learned Judge are essentially on the basis of the documents of the respondents in the writ petition, Those are documents, the contents of which, cannot be disputed by the. respondents, who are the appellants herein. The findings, therefore, cannot be treated as those that could not have been rendered on the basis of the affidavits and documents. We overrule the contentions to the contrary, as raised and argued on behalf of the appellants,

13. With this, we may examine certain other materials also.

14. Ext. P4 is the general conditions of contract, clause 24 provides a dispute redressal system. Sub-clause 3 thereof provides the composition of the Empowered standing Committee which should have three members. One official member, not below the rank of Additional secretary- to the State Government, shall be the Chairman. Another official member Is one not below the rank of chief Engineer, The third member is a non-official member who will be technical expert of chief Engineer"s level selected by the contractor from a panel of three persons given to him by the employer, we refer to this clause to show the importance of the non-official member coming from the rank of chief Engineer, "The Identity of the non-official member Is not left to the volition of the contractor, He is compelled to choose one from among the panel of three technical experts as may be offered by the employer. Having noticed this composition, we may proceed to note that the majority opinion as contained in Ext. P19 does not, in any manner, criticize the findings of the non-official member in Ext. P23 on the technical merits, it only proceeds to say that on the materials, the official members, including the Chairman are of a particular view and do not agree with the views of the non-official member., the over-all assessment of the fact situation by the non-official member in - Ext. P23 has inspired confidence in the learned judge to state that the said view has been expressed by the non-official member after examining the issue in its totality, resulting in the recommendation that the contractor be discharged of his responsibilities under the contract, Therefore, it is a case where there was clear divergence of opinion between the official technical expert and the nontechnical expert. The chairman of the Standing committee is, in terms of the contract agreement, required only to be one who is not below the rank of Additional Secretary to Government. VIth this, we have necessarily to take that the totality of the facts having been assessed by both the technical

experts, the learned judge was justified in exercising the equitable writ jurisdiction to conclude that in the light of the materials available on record, the benefit of the decision should go in favour of the contractor when the wealth of the materials showed that the obstacles owing to different bottlenecks available in the alignment, such as electric posts, telephone posts, electric and telephone under ground cables and pipelines of the Water Authority were not removed to provide free use of the site,

15. Reverting to Ext. P4, the contract: document, clauses 52 and 53 provide for termination and its consequences. Clause 55 provides for release from performance. clauses 11 and 12 respectively denote employer's risks and contractor's risks. The employer is responsible, for the excepted risks as are enumerated in clause 11.1 and contractor's risks are all risks of loss of or damage to physical property and of personal injury and death which arise during and in consequence of the performance of the contract other than the excepted risks, referred to in clause 11.1. Therefore, in the event of any eventual it resulting in the risks of loss of or damage to physical property and of personal injury and death which arise during and In consequence of the performance of the contract other than the risks of war, invasion, act of foreign enemies, rebellion, revolution, insurrection or military or usurped power, civil war, riot commotion or disorder, natural calamities and contamination from any nuclear fuel or nuclear waste or radioactive toxic explosive, or a cause due solely to the design of the works, other than the contractor's design; the contractor would run the risk. Clause 19,1 of Ext. P4 provides that the contractor shall be responsible for the safety of all activities on the site. If the content of the risks that the taken into consideration In the backdrop of the facts and the conclusions available on materials, any loss or damage to any property belonging to the KSEB, KW.A. or BSNL or any risk occurring out of any occurring or other failure of the electric lines, telephone lines and any resultant loss to property and/or life, would fall as s risk on the contractor, Does the bargain between the parties, in Ext. P4. provide for it? In our considered view, the answer to this is in the negative.

16. In our view, it is in the aforesaid backdrop and context, that clause 21.1 regarding possession of the site has to be understood. We quote hereunder clause 21.1.

21. Possession of the site.

21.1. the employer shall hand over complete or part possession of the site the contractor seven days in advance of the construction programme. At the start of the work, the employer shall hand over the possession of atleast 15% of the site.

17. The appellants would contend that the site was completely handed over though the contractual obligation is that 75% of the site was to be handed over before start of the work.

18. We may at once remind ourselves that the contractor has the obligation to visit and take stock of the ground realities at site and Inspect the site at least

prior to quoting for the work, We have necessarily to presume that the contractor, a literate person," signed the contract document with open eyes. This is a fundamental principle. But the question would be as to what was the bargain as to the site that has to be handed over, or, 75% of which has to be handed over, at the commencement of the work, is it sufficient for the employer (department) to point out to the contractor, the alignment through which the roads have to be laid without making available the land free from any intermeddling, at least by statutory authorities and private persons who would assert right, title or possession over any parcel of the land? The contractor's bargaining power at site has to be taken as one that would be submissive to those of the authorities under the KSE Board, BSNL, KWA and other statutory functionaries who wield statutory power to ensure that the installations of such authorities relating to electric and telephone posts and pipe lines are not touched by any other person, it is also candidly admitted even in Ext. P19 that the contractor could not have removed the hindrance available in the site by himself. He had, obviously, therefore to wait for the mercy of the utility providers and the department which has entrusted the work to him to provide the site where he, with the help of his men, machinery and materials can carry on the work. This is just not possible in situations like the case in hand where, admittedly, the electric lines continue to run; the electric posts continue to stand; the water lines, electric and telephone cables continue to lie embedded under ground. The plea of the appellants that the contractor had, in spite of all these, done a good lot of metalling work; does not inspire confidence. It only makes us think that a good lot of public money would have been vested, when such metalling work and laying of roads is done and thereafter, attempting to retrieve and pull out the electric posts, telephone posts and under ground cables and pipes which come within the alignment. This is common man's knowledge and this is the common scenario of which even judicial notice can be taken of..

19. Fruitful cohesiveness attained by coherent liaising among different wings of governance, including those providing utilities for the common good, is the only answer to such a situation, if the PMGSY authorities, the KSRDA authorities, the District Panchayat, the Grama Panchayat, the different other limbs of the State of Kerala, the KSEB, KWA and the BSNL could not stand hand-in-hand and undertake a sustainable effort for timely discharge of their obligations in relation to such an activity, the sufferer ultimately is only the exchequer which belongs to "we, the People", Yet, the situation would be one where it has to be necessarily concluded that the bargain between the parties as to the quality of the site that is to be made available for the purpose of the contract was never satisfied in a manner on the basis of which the employer appellants could mulct the responsibility on the contractor for not having done the work, in time.

20. With the aforesaid, we do not find any legal or factual infirmity or error in the matter of appreciation of the evidence by the learned judge, The writ appeal fails. Before parting with the case, we need to remind all concerned that situations like this have surely"; to be excluded in larger public interest, It is

stated that the PMGSY and other schemes through which funds flow for various rural development activities are always moved by first taking into account, the total expenditure that could be incurred through such schemes for a particular project. This, obviously, means that time hound execution is sine qua non.. on the facts of this case, having regard to the extensions of time granted, -it is impossible to hold that time was of the essence of "the contract, it has necessarily to be stated that the resultant situation that has led to the ultimate failure of the mechanism to see that three rural roads are in place has occurred only because of lack of proper correlation between the different wings of governance and Inability to come together by moving the decision making process, providing funds and materials for the optimal utility, to ensure that no time is lost in such projects. It may be well advised in public interest to consider the need for a monitoring committee under which umbrella, could fall all the statutory or non-statutory establishments, to free bottlenecks during the execution of such works so that a more evolved mechanism of management of such issues could be in place.

In the result, this writ appeal fail- and the same is accordingly dismissed. No costs, Time for compliance of the directions of the learned single nudge is extended by a period of one month from today.