(2014) 10 KL CK 0167

In the High Court Of Kerala

Case No : R.P. No. 565 of 2014 (N) in WP (C). 15536/2014

The Superintending Engineer, Public Works Department	APPELLANT
Vs	
Dora Infrastructures and Properties (P) Ltd.	RESPONDENT

Date of Decision : 23-10-2014

Acts Referred:
Contract Act, 1872 — Section 10

Citation : (2014) 10 KL CK 0167

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : S. Abdul Salam, Sr. Government Pleader, Advocate for the Appellant; Philip J. Vettickattu, Advocate for the Respondent

Judgement

K. Harilal, J.—This review petition is directed against the interim order dated 4/7/2014, directing the review petitioners to pay the admitted amount, as evidenced by Exts. P12 and P14, to the 1st respondent within a period of one month from the date of the order. The review petitioners are the respondents in W.P. (C) No. 15536/2014 of this Court.

2. The 1st respondent is a Private Limited Company engaged in construction of buildings. The company had undertaken 4 construction works under Exts. P1, P3, P5 and P7 in different bids held by the review petitioners and a huge amount under different final bills is pending due to the 1st respondent. Hence the writ petition is filed praying for issuance of a writ of mandamus directing the review petitioners to disburse the amount due to the 1st respondent forthwith.

3. It is the case of the 1st respondent company that the amount quantified in Exts. P12 and P14 is the admitted amount due to the company. So, an interim relief is also sought for directing the review petitioners to disburse the said amount to the 1st respondent forthwith. The said order granting the interim relief, as prayed for, is sought to be reviewed in this review petition.

4. The review petitioners are aggrieved by the time bound direction contained in

the said order. According to the review petitioners, the time bound direction would contravene the direction in the earlier order of this Court in C.C.C. No. 803/2000 and other connected cases. As per the said direction in the order, the State Government is liable to maintain list of contractors who are eligible to get the admitted dues from the Government and disbursement can be made according to seniority only. In the above order, the Division Bench of this Court has observed that the Government shall not overlook the seniority of contractors who are awaiting for payment of bills and entitled to get the admitted amounts. In the light of the above observation, the Government has introduced a system of beneficiaries under the name and style as "Effective Management Letter of Credit Issuance (EMLI) and thereafter, the Government have been maintaining seniority list for the disbursement of the amounts due to the contractors. Thus, the direction in the impugned order would contravene the direction of this Court laid down in the above decision. Moreover, the respondent/contractor has entered into agreements with the Government in all the works entrusted to him and a special clause recognising the criterion of seniority has been included in all the agreements with the related works. Therefore, the respondent/contractor is not entitled to get the admitted amount within the time specified in the interim order. Therefore, the impugned order passed in contravention to the proposition held by the Division Bench of this Court is liable to be reviewed under the revisional jurisdiction.

5. The 1st respondent has filed a counter statement contending as follows: The review petitioners have been granted with works under Exts. P1, P3, P5 and P7. They have already finished the said work in accordance with the satisfaction of the respondents and awaiting for payment of Rs. 5,34,96,433/-, the admitted amount due to them. According to the 1st respondent, the review petition is filed after the period of the time limit specified in the interim order and it was filed as an attempt to avoid or delay the contempt proceedings. Hence there is no bona fides in the petition. The review petitioners have not raised any ground alleging that there is an error apparent on the face of the record and therefore, the review petition itself is not maintainable. The interim order was passed after hearing the review petitioners also and the review petitioners have neither filed a counter affidavit opposing the interim relief or final reliefs prayed for; nor raised any of these contentions at the time of hearing. If the review petitioners were really aggrieved by the granting of the interim order, they could have filed an appeal instead of filing a review petition. Moreover, the review petition was filed after the expiry of the time limit stipulated by this Court. The allegation that the interim order is passed in violation of the direction contained in the order dated 28/10/2002 in C.C.C. No. 803/2000 and other connected cases is absolutely incorrect and raised only to mislead this Court. The directions in the said order have no relevancy at all as the same is applicable to the parties in that case only. The allegation that this Court has directed the Government to maintain the seniority list and effect payment in accordance with the same is incorrect and the said allegation is a misinterpretation made to suit their own convenience. The

maintenance of the seniority list and disbursement of amounts in accordance with the same itself is a procedure adopted in violation of the provisions under the Kerala Financial Code, PWD Manual and the decision of this Court in Anirudhan v. Government of Kerala (1999) 3 KLT 1).

6. Sri. Abdul Salam, the learned senior Government Pleader appearing for the review petitioners advanced arguments in support of the grounds raised in the Memorandum of Review Petition. The main point canvassed before me is that the direction in the interim order contravenes the order of this Court in C.C.C. No. 803/2000 laid down by the Division Bench of this Court. Per contra, Sri. Philip J. Vettyikkattil, the learned counsel for the 1st respondent advanced arguments opposing the contention that the time bound direction in the impugned order would contravene the direction in the order passed by the Division Bench of this Court. In support of his arguments, he drew my attention to the relevant provisions of the PWD Manual Revised Edition 2012, Kerala Financial Code and the decision of this Court in Anirudhan v. Government of Kerala (1999) 3 KLT 1).

7. Admittedly, the impugned order sought to be reviewed is an interim order only. Similarly, the amount directed to be paid is an admitted amount only due to the 1st respondent. It is also pertinent to note that the respondents have no case that the Government has no fund or Government is suffering from financial scarcity or some more time is required for effecting payment. As rightly pointed out by the learned counsel for the respondent, the circumstances in which this Court was constrained to pass the said interim order are relevant and significant in this context of review. Firstly, this Writ Petition came up for admission on 19/6/2014. On that day, the learned Government Pleader was directed to get instructions and posted the case to 26/6/2014. On 26/6/2014, there was no instruction from the learned Government Pleader and the learned Government Pleader prayed for time and the case was posted to 2/7/2014. On that day also, there was no instruction from the learned Government Pleader and the learned Government Pleader again prayed for time. Then the case was again posted to 4/7/2014. On that day, the learned Government Pleader also admitted that the amount covered under Exts. P12 and P14 is the admitted amount due to the 1st respondent. Heard the learned counsel for the 1st respondent, admitted the writ petition and passed the impugned order under challenge on the satisfaction of a prima facie case in his favour. Thus, despite granting of several opportunities to file a counter statement, the respondents have neither filed a counter statement raising contentions raised afresh in this Review Petition nor raised these contentions at the time of passing the impugned order. Moreover, it is seen that the Review Petition is also filed on the day on which the time granted to comply the order has expired. Had the respondents been really aggrieved, they could have filed a counter statement with a prayer to vacate the interim order or to dismiss the Writ Petition itself within the time granted in the impugned interim order to pay the amount. In this Review Petition also, the review petitioner has no case that there is any mistake or error apparent on the face of the record or these contentions were not within their knowledge or could not be raised by

them at the time of passing the interim order. A contention which could have been raised either in the counter statement or at the time of passing the impugned order; but not raised at both occasions is not liable to be considered afresh in the review petition, particularly when the review petitioners have no case that those contentions were not within their knowledge or could not be raised despite due diligence. In short, the review is not maintainable as the same is an appeal in disguise.

8. Even though the review petition is not maintainable, judicial discipline necessarily to be maintained by this Court constrains me to examine the question whether the direction in the interim order would contravene earlier order of this Court in C.C.C. No. 803/2000? Here, I must remember that even if this review petition is not maintainable, I am inclined to suo motu review the impugned order, if the same is passed in contravention to the direction in the order passed by the Division Bench of this Court. In the above view, I am inclined to consider the grounds raised in this revision petition on merits also.

9. Firstly, the question is whether the interim order is passed in contravention to the direction in the order passed in C.C.C. No. 803/2000? Going by the above order it could be seen that the above order is an interim order passed, in a batch of Contempt of Court Cases, by the Division Bench of this Court on the basis of the agreement arrived at between the parties in that case. In the first paragraph of the order it is stated that "we feel that as an interim measure, the following directions agreed upon between the parties could be given". Further, the interim order reads as follows:

"2. It was agreed by all concerned that the arrears due to different contractors for the work done under the Public Works Department and Irrigation Department of the State of Kerala, excluding Centrally Sponsored Schemes, Externally Aided Projects and Schemes assisted by financial institutions or agencies will be paid on a priority basis. It is not submitted before us that in any one of the cases the claim is put forward regarding the excluded category of contractors. A priority list for payment has been prepared by the State and it is produced before this court by the learned Additional Advocate General. It will be open to the learned counsel appearing on behalf of the parties in the above mentioned cases to examine the priority list to find out whether the parties'' names are placed in the correct position... For the time being, we will proceed on the basis of the priority list prepared and produced by the State, before this court.

2. xxxxxxxx xxxxxxxx xxxxxxxx

3. Admittedly, the entire arrears due to the Contractors upto date cannot be cleared with the above amount. It was under these circumstances, all the parties before us agreed that the available amount can be disbursed to the parties on priority basis.

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5. We, therefore, direct that the arrears due, upto and inclusive of 1998-99 will be paid out of the above amount of Rs. 150 Crores strictly on the basis of priority list prepared and produced before us by the State, from 10th November, 2000 onwards.. The above direction will be binding on all the petitioners in the Writ Petitions pending and disposed of before this court in the matter regarding the payment of arrears due under the contract with the PWD or the Irrigation Department".

On a conjoint reading of the above paragraphs, I have no hesitation to hold that the direction in the above Contempt of Court Cases is binding to the parties in that cases only as there is no general direction to prepare and on maintain seniority list for the disbursement of payments in future for all contract works under the P.W.D. Therefore, I find that the direction in the interim order under challenge does not contravene the direction or observation of the Division Bench of this Court in C.C.C. No. 803/2000.

10. Coming to the next point, the question is whether the interim direction sought to be reviewed is illegal or unsustainable, in view of the special clause in the agreements permitting the respondents to maintain seniority list? The learned counsel for the 1st respondent drew my attention to Clause 10.2.3.5. of the P.W.D. Manual and Clause 1801.1.2. of the PWD Manual Revised Edition, 2012 and Sec. 180 of the Kerala Financial Code and the decision of this Court in Anirudhan v. Government of Kerala (1999) 3 KLT 1). According to Clause 10.2.3.5. of the P.W.D. Manual, before Technical Sanction is issued, there should be funds available for execution of the work either through budget provision or through diversion from other works under the prescribed rules for such diversion or by deposit in the case of deposit works. As per Clause 1801.1.2. of the PWD Manual Revised Edition, 2012, before Administrative Sanction is issued, availability of funds shall be ensured for execution of the work either through budget provision or through diversion from other works under the prescribed rules for such diversion or by deposit in the case of deposit works. As per Art. 180 of the Kerala Financial Code, except in accordance with the provisions of Articles 184 and 185, 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. Going by the above provision, I am of the opinion that the Government has no authority to enter into a contract for the execution of a work unless funds have been duly provided. Here the Government has no case that sufficient fund is not available with the Government. If that be so, there is no illegality in directing the review petitioners to pay the admitted amount within a specified period. The above view is further supported by the decision of this Court in

Anirudhan v. Government of Kerala (1999) 3 KLT 1). In this decision, the Division Bench of this Court considered the issue whether the P.W.D. has right to maintain a seniority list and disburse pending amount due to the contractors accordingly, and answered negatively. The relevant paragraph of the above decision is extracted as given below:

"19. It is held by decisions of Court that an executive agency must be vigorously held to the standards by which it professes its action to be judged. This principle has been accepted by the Apex Court in many cases. Having regard to the explicit terms of Art. 180 of Kerala Financial Code and 15 of the Kerala P.W.D. Manual it is clear that Government are duty bound to make payments to the work completed. The aforesaid provision, in our opinion 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. Thus upon the strength of the promise and representation the contractors act or change their position by undertaking various steps as aforesaid and also claim 5% security deposit which, according to the contractors, is also made either by borrowings at high rate of interest or from diversion or from their own funds. Non-payment of the amounts due to the contractors will cause grave injustice to them. It is held that the contractors are engaged by the State on their expectation and therefore cannot be denied their legal dues. A citizen is entitled in law to insist that the State will go by the procedure which it has laid down. In all these cases the State has entered into a contract undertaking payment upon satisfactory completion of the work. The Government has also undertaken to pay the other amounts for the work done as per the agreement. Therefore, the Government, in our opinion cannot be permitted to violate the solemn contracts. Such a position would be contrary to the clear mandate under the Constitution for the State to act free from unfairness. We are also unable to accept the argument of the learned Advocate General that the principles of seniority has to be maintained. We are of the opinion that principles of seniority is totally irrational and opposed to the mandate under the Financial Code. P.W.D. Manual and provisions of the agreement. As already noticed, the Financial Code and the P.W.D. 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 figures furnished to us by the State would show that arrears have gone up steeply as is clear from the statement".

In view of the above decision, I find that even if such a Clause is incorporated in the agreement, it cannot be enforced as the same would contravene the above decision of this Court and such Clauses cannot be treated as an impediment in the way of passing interim orders directing the review petitioners to pay the admitted amount. Moreover, an agreement made for an unlawful object cannot be enforced as a valid contract under Sec. 10 of the Indian Contract Act also.

12. In the light of the above discussions, I find that this review petition itself is not maintainable under law and the direction in the interim order does not violate or contravene the direction of this Court in C.C.C. No. 803/2000. Per contra, the direction under challenge is supported by the decision in Anirudhan v. Government of Kerala (1999) 3 KLT 1).

Hence I find that this Review Petition is not maintainable as well as devoid of merits and dismissed accordingly.