Wilson V. vs the State of Kerala

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Court : Kerala

Decided On : Jan-25-2024

Judge : Honourable Mr. Justice Devan Ramachandran

Appeal No. : WP(C)/32096/2022

Appellant : Wilson V.

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN THURSDAY, THE 25TH DAY OF JANUARY 2024 / 5TH MAGHA, 1945 WP(C) NO. 25233 OF 2022 PETITIONER: VARGHESE SCARIA, S/O P.T. SCARIA, AGED 30 YEARS, RESIDING AT PAZHUKKANIYIL HOUSE, PUTHUPARIYARAM.P.O, THODUPUZHA, IDUKKI DISTRICT, PIN-685 608. BY ADVS. C.H.ABDUL RASAC ABDUL RAOOF PALLIPATH K.R.AVINASH RESPONDENTS:

1 THE STATE OF KERALA REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT SECRETARIAT,

THIRUVANATHAPURAM, PIN-695014. 2 THE PUBLIC WORKS DEPARTMENT REPRESENTED BY ITS SECRETARY, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM- 695001. 3 THE CHIEF ENGINEER PUBLIC WORKS DEPARTMENT, 3RD FLOOR, REVENUE COMPLEX, PUBLIC OFFICE BUILDING, THIRUVANATHAPURAM. 695014. 4 THE FINANCE DEPARTMENT (INDUSTRIES AND PUBLIC WORKS- B) REPRESENTED BY ITS SECRETARY, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM- 695001. 5 THE SENIOR FINANCE OFFICER OFFICE OF THE CHIEF ENGINEER, PUBLIC WORKS DEPARTMENT (ROADS & BRIDGES), THYCADU, THIRUVANATHAPURAM, PIN -

SMT. VIDYA KURIAKOSE, GP THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 25.01.2024, ALONG WITH WP(C).32096/2022, 32568/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN THURSDAY, THE 25TH DAY OF JANUARY 2024 / 5TH MAGHA, 1945 WP(C) NO. 32096 OF 2022 PETITIONER:

WILSON V, AGED 54 YEARS S/O.VIJAYAN, RESIDING AT PUTHENPURACKAL, AYIRAMTHENGU, ALUMPEDIKA P.O., OCHIRA, PIN - 690 547. BY ADVS. R.LAKSHMI NARAYAN R.RANJANIE PARVATI M. PAI NEVIL ZACHARIA MATHEW RESPONDENTS: 1 THE STATE OF KERALA REPRESENTED BY ITS SECRETARY, FINANCE (INDUSTRIES AND PUBLIC WORKS - B DEPARTMENT), SECRETARIAT, CENTRAL STADIUM, MAHATMA GANDHI ROAD, PALAYAM, THIRUVANANTHAPURAM - 695 001. 2 THE CHIEF ENGINEER HARBOUR ENGINEER DEPARTMENT, TRIVANDRUM VIZHINJAM ROAD, KAMALESHWARAM, THIRUVANANTHAPURAM - 695 009. 3 THE EXECUTIVE ENGINEER ALAPUZHA HARBOUR

ENGINEERING DIVISION OFFICE, MUNICIPAL SATHRAM BUILDING, DISTRICT COURT ROAD, ALAPPUZHA - 688 013. 4 THE ASSISTANT EXECUTIVE ENGINEER HARBOUR ENGINEER SUB DIVISION, KARUNGAPPALLY, KOLLAM - 690 518. 5 THE ASSISTANT ENGINEER HARBOUR ENGINEER AZHEEKKAL SECTION - 1, KARUNGAPPALLY, KOLLAM - 690 518. SRI. SUNIL K.KURIAKOSE, GP THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON

25.01.2024, ALONG WITH WP(C).25233/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN THURSDAY, THE 25TH DAY OF JANUARY 2024 / 5TH MAGHA, 1945 WP(C) NO. 32568 OF 2023 PETITIONER: PRABHAKARAN AGED 65 YEARS S/O GOVINDAN, GEE PRABHA, OORUTTUKALA, NEYYATTINKARA.P.O., THIRUVANANTHAPURAM, PIN - 695121 BY ADVS. R.T.PRADEEP P.BIJIMON M.BINDUDAS RESPONDENTS:

1 PRINCIPAL SECRETARY TO GOVERNMENT DEPARTMENT OF FINANCE, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001 2 SECRETARY TO GOVERNMENT PUBLIC WORKS DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001 3 SUPERINTENDING ENGINEER PWD ROADS SOUTH CIRCLE, PMG, THIRUVANANTHAPURAM,, PIN - 695033 4 EXECUTIVE ENGINEER ROADS DIVISION KOLLAM, CHINNAKKADA BEACH ROAD, KOLLAM, PIN - 691001 5 ADDL.R5 NABARD REPRESENTED BY DISTRICT DEVELOPMENT MANAGER, KERALA REGIONAL OFFICE, PUNNEN ROAD, STATUE, THIRUVANATHAPURAM, KERALA. (ADDL.R5 IS IMPLEADED AS PER ORDER DATED 25.01.2024 IN I.A.NO.1/2023)

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON

25.01.2024, ALONG WITH WP(C).25233/2022 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: C.R

JUDGMENT

The petitioners in these cases are contractors who have entered into contracts with the Public Works Department (PWD)of the Government of Kerala, qua road work involving bitumen.

2. The petitioners assert that as per four Government Orders, namely, the ones dated 13.11.2018, 17.04.2020, 25.09.2020 and 30.04.2021, certain specific benefits were given to all the contractors, which enabled them to claim the difference of the cost of bitumen between the date of the Agreement and the date of invoice; and that though the Authorities had granted such benefits to various others, they have been singled out and discriminated, in being denied it.

3. Smt.R.Ranjanie - learned counsel appearing for the petitioners in WP(C)No.32096/2022, assertively argued that the flow of benefit from the afore four Government

Orders clearly was available to her client - whose Agreement was entered into on 17.11.2022, which is evident from Exts.P8, P13, P15 and P16 - but that it has not been afforded to him, though; through the subsequent Government Order dated 26.08.2022, the Government made it clear that the payment of the price difference, as ordered in the aforementioned four Government Orders, would stand withdrawn with retrospective effect, but for all future tenders alone. She, therefore argued that her client is entitled to claim the benefits, as admitted in Ext.P8; and thus, prayed that the respondents be directed to disburse the amount mentioned therein without any avoidable delay.

4. Sri.R.T.Pradeep, Sri.Abdul Rasac and

the learned counsel appearing for petitioners in WP(C)Nos.32568/2023 and 25233/2022 also made analogous assertions, contending that their clients are also entitled to the benefit of the difference of cost of bitumen, under the aforementioned four Government Orders. They also, therefore, prayed that the reliefs sought for in their respective writ petition be granted.

5. However, in response, Sri.K.V.Manojkumar - learned Government Pleader, submitted that the petitioners cannot impel any claim, as has been done in these cases at this time because, in the

judgment delivered in M/s Malabar Tech v. State

of Kerala [WP(C)No.22964/2021], a learned Judge of this Court has made it indubitably limpid that the benefits of the aforementioned Government Orders are intended only for those contractors

who were continuing with their work

without challenge, it would not be available to the petitioners to argue to the contrary and to claim such benefit, even when they admit unequivocally that none of their works contracted were continuing as on 01.11.2018; especially when, even the tendering processes, based on which such contracts were given, were much after that date. He, therefore, prayed that these writ petitions be dismissed.

6. Though I have been parsimonious to some

extent in recording the pleaded factual details and the submissions made on behalf of the parties, I have indited the essential aspects projected in these cases.

7. As noticed, the controversy in these cases has its genesis in an admitted price escalation of bitumen, which was noticed by the Government in the year, 2018, which lead them to issue the aforementioned order, one after the other.

8. For the sake of convenience, except otherwise specified, exhibits will be referred to in the judgment as they appear in WP(C)NO.25233/2022.

9. When one examines the first of the

Government Orders referred to and relied upon by the petitioners, namely that dated 13.11.2018 - produced as Ext.P1 - the Government allowed the benefit therein to the contractors because, the price of bitumen, as on April, 2018 was found to have increased by 33% and therefore, it was clarified that the price difference of bitumen on the date of closing of the tenders and the date of invoice - specifying such invoice date to be on or after 01.11.2018 - will be paid to the contractor, on production of the original invoice, for the actual quantity consumed.

10. Subsequently, the Managing Director of a

Labour Contract Society appears to have moved the Government, seeking a clarification of the afore order, to the effect whether the payment as afore can be reckoned as being the period between the date of Agreement and the period of invoice; and this was acceded to by it, through the subsequent Government Order dated 17.04.2020 - namely Ext.P2. It is pertinent herein that while the Government modified Clause No.1 of Ext.P1 Government Order, only to the extent that the price difference of bitumen as on the date of Agreement and the date of invoice - still specifying that, if it on or after 01.11.2018 - can be paid to or from the contractor - as the case may be; but without altering the category of the contractors, to whom such benefits would flow.

11. That being so, the Chairman of the Builders Association of India, then transpires

to have approached the Government, seeking a further clarification whether, for open bidders, the price difference of bitumen, as on the date of closing of the tenders and the date of invoice (on or after 01.11.2018), will become payable. The Government seen to have acceded to this

request; and thus issued the 3rd Government Order

dated 25.09.2020, namely Ext.P3, virtually restoring the original clause of Ext.P1, saying that the price difference as on the date of closing of tenders and the date of invoice - provided it is on or after 01.11.2018 - will be payable.

12. Here again, the category of contractors to which the benefit was to flow was not altered, namely those whose works were ongoing as on 01.11.2018.

13. The matter did not end here.

14. A further representation appears to have been preferred made by the All Kerala Contractors Association and the Builders Association of India, to the Government, seeking clarification as to the rate while calculating

the allowable price difference and if E

30.04.2021, namely Ext.P4, specifying the rates (with which we are not concerned about in these cases) and clarifying that the said Government

Order will apply for all ongoing works and works

for which Agreements are executed after 01.11.2018 (sic) (emphasis applied).

15. Interestingly, it is the emphasised

portion of Ext.P4, which is now being relied upon by the petitioners, to claim that they would be entitled to the price difference of bitumen, as mentioned in the afore four Government Orders, even for contracts, the bid process of which was much after 01.11.2018; and axiomatically, Agreements and closure of tender, being also after that date.

16. To get a grip of the controversy in question, one must certainly closely analyse the impact of the four Government Orders mentioned above.

17. As I have already said earlier, the

modifications through Exts.P2, P3 and

originally specified in Ext.P1 Government Order, which was issued on 13.11.2018; and at no point of time - which is virtually without contest - were the category of contractors entitled to the benefit thereunder, modified or altered - it continuing to be only those whose works were continuing as on 01.11.2018.

18. In such perspective, when one examines

Ext.P4 with some care, it will be discernible that, while clarifying that the said order will apply to works, for which the Agreements are executed after 01.11.2018, it indubitably took into its fold, the prescriptions in Ex.P3 Government Order dated 17.04.2020.

19. In other words, only those works, of which the date of closing of tenders was completed before 01.11.2018, would obtain the benefit of the price difference of bitumen, until such time as the invoice was issued, provided it was done after 01.11.2018; and it is this that has been made applicable even to contracts that were entered into after 01.11.2018, through Ext.P4.

20. To paraphrase, Ext.P4 clarifies that

contracts for which the tender was closed prior to 01.11.2018, but the Agreements qua which had not been entered until that date or thereafter, would still inure to the contractors the original benefit under Ext.P1 Government Order, modified subsequently through Exts.P2, P3 and P4; but not in any other scenario.

21. Obviously, therefore, for the petitioners to now receive any benefit, they must establish that the contracts which they have entered into, were the ones with respect to which the tenders were closed prior to 01.11.2018, but the Agreements for which were entered into after that the said date.

22. However, it is without dispute that each

of the contracts involved in these cases had even its parturition after 01.11.2018; and that the tender processes and Agreements began and were entered into much later - even years thereafter.

23. That being said, I am obligated to

consider the further argument of Smt.R.Renjanie, that the Government Order subsequent to the afore orders, namely the one dated 26.08.2022 - a copy which has been produced by her as Ext.P11 along with her writ petition, namely WP(C)No.32096/2022 - would render the position luculent that, even though contracts which were entered into after

01.11.2018 would get the benefit of the aforementioned Exts.P1, P2 P3 and P4 Government Orders.

24. In this regard, when one examines the

aforesaid Government Order, closely, it gets rendered limpid, that the said order was issued based on the objections raised by the Controller and Auditor General, who recommended that, since contractors who entered into contract later were bound to quote their rates after proper study of the fluctuation of market rates, they cannot be

given any further benefit. This propelled the additional Chief Secretary (Finance), to issue the aforesaid Government Order, clarifying that the price difference/recovery of Price

reduction of bitumen ordered by Government order

dated as first to fourth, discontinued with prospective effect, for all future tenders(sic).

25. It is thus ineluctable that, even when the aforesaid Government Order was issued, the Government was only referring to the earlier Orders mentioned therein, namely Exts.P1 to P4.

26. As has been already been assessed above, Exts.P1 to P4 Government Orders never extended

any benefit, as mentioned therein, to any category of contractors, other than those whose works were continuing as on 01.11.2018; and whose tenders were closed prior to that date, though Agreements were entered into subsequent to it. As long as this classification remained without change in all the Government Orders - with only the nature of the benefits being modified from time to time, as also the rates - any contractor who did not fall within that species surely cannot obtain any benefit under its ambit. However, it reflects from the pleadings on record in some of these writ petitions and in particular (WC)No.32096/2022, that, without being aware of this, some of the officers continued to offer such benefits to ineligible contractors, including the petitioners herein; and this is illustratively manifested from Ext.P8, produced along with WP(C)No.32096/2022.

27. That being so, the acme question here is whether the recommendations/observations made by

the officers would entitle benefit to contractors, even when they are forensically not entitled to it, going by the Government Orders which they rely upon, for seeking such.

28. The answer to this can certainly be only to the negative because, the entitlement of a person squarely would depend upon the prescriptions in law; and if it is proscribed, it cannot be granted, even if it is recommended by any Authority, either being oblivious to its sweep, or for other reasons.

29. In the afore backdrop, it becomes without any doubt that, it was unnecessary for the Government to have issued the Government

Order dated 26.08.2022 (produced as Ext.P11 in

WP(C)No.32096/2022) because, what was sought to be taken away through that Order - prospectively or otherwise - were benefits that were never available to any class of contractors, except those who are covered by Exts.P1 to P4. As far as the latter class, namely, those covered by Exts.P1 to P4, is concerned, the aforesaid Government Order dated 26.08.2022 can certainly not apply because, their rights have already been crystallized and vested, for the singular reason that their works were ongoing as on 01.11.2018.

30. No doubt, in such perspective, the view

adopted by a learned Judge of this Court in M/s Malabar Tech (supra), certainly travels on the same lines as my observations above; and am in affirmation of the same. In fact, in paragraph 22 of the said judgment, the learned Judge concluded on this issue as under;

> The benefit or advantage conferred under Ext.P8 Government Order is intended only for those projects of the contractors which were ongoing projects as on 01.11.2018. The modifications effected by Exts.P8, P9 and P10 orders would obviously apply only to those ongoing contract works as on 01.11.2018, as contemplated by Ext.P8 Government Order. As Exts.P8 to P10 Government Orders are intended to apply only to ongoing contract works as on 01.11.2018, those orders cannot be made applicable to the works undertaken by the petitioners, subsequently, which were not ongoing works as on 01.11.2018.

31. This Court is also aware that in Mohammed

Ahnas.B v. State of Kerala [WPC 19474/2022], another learned Judge of this Court took the same view, concluding as under in paragraph 21 thereof. Moreover, I do not think that the contention raised by the petitioner on

account of Exhibit P4 Government Order

dated 30.04.2021 revising the Government

Order dated 13.11.2018 that he is entitled

> to get the benefit of the said Government Order, cannot be sustained, since the original Government Order for payment of the price escalation of the bitumen dated 13.11.2018 was issued by the Government to tackle the situation of an unprecedented increase of bitumen that has happened in the year 2018 consequent to the enhanced price of petroleum products and thus, increasing the price of bitumen by 33%. All the subsequent revision made by the Government and relied upon by the petitioner is only the revision of the Government Order dated 13.11.2018. Therefore, I am of the view that the said Government Orders would not enure to the benefit of the petitioner who has entered into the contract on 21.12.2020 with definite terms and conditions.

In the afore circumstances, these writ petitions are dismissed, without any further orders. Sd/- DEVAN RAMACHANDRAN JUDGE SAS APPENDIX OF WP(C) 32096/2022 PETITIONERS EXHIBITS: Exhibit P1 THE TRUE COPY OF THE ORDER NO.D6/2793/21/EEHED

(A) DATED 1/11/2021, ISSUED BY THE 3RD

RESPONDENT TO THE PETITIONER. Exhibit P2 THE TRUE COPY OF THE SELECTION NOTICE DATED OF THE PETITIONER. Exhibit P3 THE TRUE COPY OF THE AGREEMENT DATED AND THE 3RD RESPONDENT. Exhibit P4 THE TRUE COPY OF GOVERNMENT ORDER (RT) NO.3815/21/FIN. DATED 30/4/2021. Exhibit P5 THE TRUE COPY OF THE RELEVANT PAGES OF MEASUREMENT BOOK (M BOOK), IN RESPECT OF THE WORK DONE BY THE PETITIONER. Exhibit P6 THE TRUE COPY OF THE COMPLETION REPORT DATED NIL, COUNTERSIGNED BY RESPONDENT 3 TO 5. Exhibit P7 THE TRUE COPY OF THE TAX INVOICE DATED INDUSTRIES DEVELOPMENT CORPORATION LIMITED. Exhibit P8 THE TRUE COPY OF THE HAND RECEIPT NO.1/2022- 2023/AE-I DATED 13/5/2022 ISSUED BY THE 5TH RESPONDENT. Exhibit P9 THE TRUE COPY OF THE REPRESENTATION DATED 2ND RESPONDENT. Exhibit P10 THE TRUE COPY OF THE REPRESENTATION DATED 3RD RESPONDENT. Exhibit P11 THE TRUE COPY OF GOVERNMENT ORDER DATED Exhibit P12 THE TRUE COPY OF THE NEWS REPORT IN MATHRUBHUMI DAILY DATED 5/9/2022. Exhibit P -13 THE TRUE COPY OF THE COMMUNICATION DATED 29.11.2022 ISSUED BY THE SECOND RESPONDENT TO THE THIRD RESPONDENT Exhibit P-14 THE TRUE COPY OF THE GOVERNMENT ORDER DATED 17.4.2020 ISSUED PRIOR TO EXT.P4 BEARING NO. G.O.(RT) NO.2816/2020./FIN. DATED 17.4.2020 Exhibit P-15 THE TRUE COPY OF THE COMMUNICATION DATED

1.3.2023 ISSUED BY THE 2ND RESPONDENT TO THE ADDITIONAL CHIEF SECRETARY, FINANCE (WCD) DEPARTMENT, GOVERNMENT SECRETARIAT, DATED 1.3.2023 Exhibit P-16 THE TRUE COPY OF THE LETTER DATED 18.04.2023, ISSUED BY THE ADDITIONAL CHIEF SECRETARY(FINANCE) TO THE 2ND RESPONDENT Exhibit P - 17 THE TRUE

COPY OF THE GOVERNMENT ORDER DATED 13.11.2018 BEARING NO. GO.(RT)NO. 9386/2018 FIN RESPONDENT EXHIBITS Exhibit R3(a) A TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT DATED 11.11.2021 IN WRIT PETITION (CIVIL) NO.22964/2021 AND CONNECTED CASES APPENDIX OF WP(C) 32568/2023

PETITIONER EXHIBITS Exhibit P1 TRUE COPY OF G.O. (RT) NO.9386/2018/FIN DATED 13.11.2018 BY THE FINANCE DEPARTMENT Exhibit P2 TRUE COPY OF G.O. (RT) NO.3815/2021/FIN DATED 30.4.2021 BY FINANCE DEPARTMENT Exhibit P3 TRUE COPY OF G.O. (P) NO.96/2022/FIN DATED 26.8.2022 Exhibit P4 TRUE COPY OF THE BILL DATED 26.3.2022 TO A

TUNE OF RS.4203587/- FOR THE DIFFERENTIAL PRICE OF BITUMEN AND EMULSION WITH RESPECT TO THE WORK OF PETITIONER WHICH WAS SUBMITTED BEFORE 4TH RESPONDENT BY THE ASST. EXECUTIVE ENGINEER, PWD ROADS SUB DIVISION, PUNALUR WITH THE INVOICES OF PURCHASE

Exhibit P5 TRUE COPY OF G.O. (P) NO.63/2023/FIN DATED 26.6.2023 BY FINANCE DEPARTMENT Exhibit P6 TRUE COPY OF REPRESENTATION DATED 11.9.2023 BEFORE 1ST AND 2ND RESPONDENTS BY PETITIONER APPENDIX OF WP(C) 25233/2022 PETITIONERS EXHIBITS: Exhibit P1 TRUE COPY OF THE G.O.(RT)NO.9386/2018/FIN DATED 13.11.2018 . Exhibit P2 TRUE COPY OF THE GO NO. 2816/2020 DATED 17.04.2020 Exhibit P3 TRUE COPY OF THE GO NO. 550/2020 DATED 25.09.2020 Exhibit P4 TRUE COPY OF THE ORDER NO. GO 3815/2021 DATED 30.04.2021 Exhibit P5 TRUE COPY OF THE INFORMATION RECEIVED THROUGH THE RIGHT TO INFORMATION DATED 08.04.2022 ISSUED BY THE 3RD RESPONDENT Exhibit P6 TRUE COPY OF THE INFORMATION DATED 28.03.2022 OBTAINED THROUGH THE RIGHT TO INFORMATION ACT FROM THE 3RD RESPONDENT Exhibit P7 TRUE COPY OF THE REPRESENTATION DATED 11.08.2022 FILED BEFORE 3RD RESPONDENT