

Chief Engineer (Nw) vs A2Z Engineers & Pile Foundation

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Court : Kerala

Decided On : Aug-31-2021

Judge : Honourable the Chief Justice Mr.S.Manikumar,Honourable Mr. Justice Shaji P.Chaly

Appeal No. : WA/927/2021

Appellant : Chief Engineer (Nw)

Respondent : A2Z Engineers & Pile Foundation

Judgement :

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR & THE HONOURABLE MR. JUSTICE SHAJI P.CHALY TUESDAY, THE 31ST DAY OF AUGUST 2021 / 9TH BHADRA, 1943 WA NO. 927 OF 2021 AGAINST THE ORDER IN R.P. NO. 191 OF 2021 AND JUDGMENT IN WP(C) APPELLANT/S: 1 CHIEF ENGINEER (NW) MILITARY ENGINEER SERVICE , NAVAL BASE P.O, KOCHI-682 004. 2 GARRISON ENGINEER (P), INA EZHIMALA, KANNUR-670 310 BY ADV SRI. P. VIJAYAKUMAR, ASG SMT.MINI GOPINATH, CGC RESPONDENT/S: A2Z ENGINEERS & PILE

FOUNDATION MUNDAMVELI, KOCHI-682 507, REPRESENTED BY ITS PROPRIETOR, MR. MEJULAL.

OTHER PRESENT: SRI. P.VIJAYAKUMAR, ASG FOR APPELLANT, SRI. DEEPU THANKAN FOR RESPONDENT THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 31.08.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: W. A. No. 927 of 2021 -2-

JUDGMENT

S. Manikumar, C. J. Before the writ court in W. P. (C) No. 24578 of 2020, petitioner has sought for the following reliefs:-

(i) issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to accept the Running Account Receipts as submitted and to be submitted by the petitioner based upon Condition 63 of the General Conditions of Contract for the work contract namely Construction of Critical Requirement of Certain Dwelling Units Outside Map at INS Ezhimala;

(ii) issue a writ of certiorari or any other appropriate writ,

order or direction directing the respondents to call for the records

leading to Exhibit P-10 and quash the same;

(iii) Issue a writ of mandamus or appropriate writ or

order or direction declaring that petitioner entitled to raise its

claim under section condition 63 of Exhibit P3 along with the RARs and final bills;

(iv) issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to pay the difference of amount retained from Exhibit P6 & P-7 RARs. W. A. No. 927 of 2021 -3-

2. Short facts leading to the writ petition are as hereunder:-

According to the petitioner, A2Z Engineers and Pile Foundation is a proprietorship concern engaged in the business of construction and it is enlisted as "S CLASS" contractor of Military Engineer Services. Military Engineer Service (MES) is a special agency under the Ministry of Defence of Government of India, which awards works contracts for the Defence Department. Petitioner has contended that A2Z Engineers and Pile Foundation was awarded with a contract for Construction of Critical Requirement of Certain Dwelling Units Outside Map at INS Ezhimala by the respondents. As per General condition No. 63 of the contracts, if there is an increase in the price of the materials or wages over and above 10%, reimbursement has to be made to the contractor by MES, and if there is decrease in the price of the materials or wages of the labourers, refund has to be made by the contractor to MES. Petitioner has further contended that Government of Kerala as per Ext. P5 notification under Minimum Wages Act, have enhanced the daily wages of the workers after the submission of the tender, W. A. No. 927 of 2021 -4- which has resulted in payment of additional amount to the labourers by the petitioner. The writ petitioner has submitted that the proof of the next running account receipts, incorporating the enhanced rates, actually paid to the workers, was submitted. However, the same was rejected for the reason that the clause for escalation is not in the contract. Petitioner has also contended that the Empirical formula-based Escalation clause is not available in the contract, but contended that condition 63 is very much an integral part of the contract, as per the mandate of MoD, which enables the contractor to seek for enhanced rate, during the currency of the contract itself, and that the said clause is available only for contracts having less than 2 years tenure.

3. After considering the rival contentions, prayers and the supporting documents, on 16.12.2020, in W. P. (C) No. 24578 of 2020, writ court has passed the following order:-

The petitioner is claiming enhancement of wages on the basis of the revision of minimum wages ordered by the Government in Ext.P5 notification dated 29.07.2019. General condition number 63 of Ext.P3

provides for enhancement of rates in the event of increase in wages over and above 10% and for reimbursement to the contractor. Therefore there shall be a

W. A. No. 927 of 2021 -5- direction to the respondents to consider the request of the petitioner in Exts.P6 and P7 in the light of condition 63 of Ext.P3 with reference to Ext. P5 and to effect payment subject to the result of Writ Petition, within a period of one month.

4. Being aggrieved, Chief Engineer (NW), Military Engineer

Service, Kochi, has filed a review petition No. 191 of 2021, against the interim order dated 16.12.2020 made in W. P. (C) No. 24578 of 2020, on the following grounds:- A. This Court was pleased to pass the interim order mainly persuaded by clause 63 of General conditions of contract which provided for hike in rates up to 10%, in the event of any corresponding hikes required under statutory orders, which have come into force after finalization of contract, and further in the light of gazette notification dated 20.08.2019, providing for hike in wages in respect of various categories of construction workers. But in the instant case, admittedly, the contract was finalized on 13.11.2019, clause 63, the writ petitioner is not entitled to any increase, since the tender was finally accepted much after Ext. P5, on 13.11.19, and clause 63 providing for increase in wages due to statutory

order upto ten percent of the price and/or wages prevailing at the

time of acceptance of the tender for the work, would not be W. A. No. 927 of 2021 -6- applicable. B. In the instant case, the contract was finalized on 13.11.2019, after written negotiations as revealed under AnnexureR1(e) and R1(f) dated 24.10.2019 and 01.11.2019, clearly implying that the writ petitioner was aware of the hike and the final reduced offer was made by him, after taking into account of such statutory hikes, finding that even under the reduced terms offered by him, the contract was still viable and profitable. Accordingly, there is no valid right nor justification for the petitioner for claiming further hike, after consciously conceding to a lower rates, after knowing the implications of the statutory hike with effect from 20.08.2019. C. The remedy or dispute resolution as provided under clause 39 of

Special Conditions and further remedy of Arbitration offered under clause 70 of the general conditions are more efficacious since the contract provides for a mechanism of resolution through an expert body to ensure that there is a fair and reasonable resolution after complete assessment of the factual and technical aspects involved by the expert body. In this context it is settled law that a writ remedy will not be available if there is effective alternate remedy. W. A. No. 927 of 2021 -7-

5. After considering the rival submissions, by order dated 26.03.2021, writ court dismissed the review petition and at paragraph Nos. 6 to 9 held thus:-

6. Having heard the contentions on both sides it is seen that the notice inviting tender was issued on 17.05.2019 fixing the last date for submitting tender as 02.08.2019. The petitioner submitted its bid on 29.07.2019. Ext.P2 letter of acceptance from the 1st respondent was issued on 13.11.2019. Ext P5 notification revising minimum wages was published in the gazette dated 20.08.2019, subsequent to the last date fixed for submitting tender. The respondents/review Petitioners do not have a case that the petitioner could have altered any of the items of its bid including the amount it had offered in the bid, once it was already submitted and even after the last date fixed for receipt of the bids. As pointed out by the learned counsel for the writ petitioner, Appendix A along with R1(f) does not relate to the labour charges. Therefore the correspondence covered by Exts. R1(e) and (f) was not with respect to the wages relating to labour. It is also relevant to note that writ petitioner was only answering the queries/request made by the Review Petitioner with respect to the rates relating to certain items specified therein. Therefore it cannot be said that petitioner ought to have informed the respondent about the wage revision also along with that or separately.

7. Yet another contention is that petitioner should have raised his grievance before the Dispute Resolution Board in W. A. No. 927 of 2021 -8- accordance with sub Clause 1 of Clause 39A(2) of Annexure R1(i) Special Conditions of contract, relevant portion of which reads as follows:-

1. During execution of the work or after completion or after determination / cancellation / termination of the all disputes between the parties to contract arising out of the contract (except those for which decision of Accepting Officer or any other officer (CWE) and/or GE) is expressed to be final and binding) including any disagreement by either party with any action or inaction, opinion, instruction, certificate of valuation by the Accepting Officer or his nominee the matter in dispute shall in the first phase be referred to the Dispute Resolution Board (DRB) in case of disagreement with the decision of such DRE, any party may invoke arbitration clause

8. The petitioner has filed a reply affidavit pointing out

that Garrison Engineer i.e the 1st respondent/the review petitioner is the final authority in respect of the contract and finality attains to his decision and therefore the mechanism provided for dispute resolution in sub clause 1 would not apply. There is no answer for the review petitioner on this. Same is the case with clause 70 of the General Conditions of contract in Ext. P3 also.

9. In the aforesaid circumstances, I find that when the

respondents themselves have in Clause 63 of Ext.P3 provided for reimbursement of enhanced/reduced wages for the labourers, in tune with the orders like Ext.P5, that cannot be a matter either to be considered in an arbitration as per clause 70 or as per the provisions contained in the special conditions in Ext.R1(i). The Review Petition is accordingly dismissed. W. A. No. 927 of 2021 -9-

6. The said order in R. P. No. 191 of 2021 dated 26.03.2021 is

assailed before us in W. A. No. 927 of 2021, on the grounds inter alia that the writ court ought to have considered that, consideration of the request of the writ petitioner in terms of clause 63, would amount to granting the final relief itself, which is impermissible. There are other grounds as well.

7. On the above grounds, Mr. P. Vijayakumar, learned Assistant Solicitor General of India, made submissions seeking reversal of the

order made in R. P. No. 191 of 2021 dated 26.03.2021.

8. Though Mr. Deepu Thankan, learned counsel for the

respondent, made submissions to sustain the order dated 26.03.2021 in R. P. No. 191 of 2021, giving due consideration to the averments and the main relief sought for in the writ petition, as well as the discussion in the review petition, with reference to clause No. 63 of Ext. P3, and the arbitration clause, we are of the view that the writ court, has virtually addressed the contentions made in the writ petition, without there being a counter affidavit or statement of facts, as the case may be, to be filed in the writ petition, though arguments were advanced, and arrived at the conclusion that the writ petitioner / respondent is entitled to the benefit of clause 63 in Ext. P3, and thus held that, the W. A. No. 927 of 2021 -10-abovesaid issue cannot be a matter either to be considered in the arbitration proceedings as per clause 17 or as per the provisions contained in the special conditions in Ext. R1(i).

9. Going through the materials, it is manifestly clear that writ

court, by way of an interim order, has virtually granted the main relief sought for in the writ petition, which is not admissible in the light of the following decisions, taken note of.

(i) In *Deoraj v. State of Maharashtra* reported in AIR 2004 SC 1975, the Hon'ble Supreme Court at para 12, held as follows: "Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case - of a standard much higher than just prima facie

case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare

W. A. No. 927 of 2021 -11- cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent."

(ii) The Hon'ble Supreme Court in State of U.P v. Ram

Sukhi Devi, [(2005) 9 SCC 733] held that final relief cannot be granted by way of interim relief. Paragraph 8 of the aforesaid decision is extracted hereunder:- "To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other

considerations. [See Assistant Collector of Central Excise, West Bengal v. Dunlop India Ltd. (1985 (1) SCC 260 at p. 265), State of Rajasthan v. M/s Swaika Properties (1985 (3) SCC 217 at p.224), State of U.P. and Ors. v. Visheshwar (1995 Supp (3) SCC 590), Bharatbhushan Sonaji Kshirsagar (Dr.) v. Abdul Khalik Mohd. Musa and Ors. (1995 Supp (2) SCC 593), Shiv Shankar and Ors. v. Board of Directors, U.P.S.R.T.C. and Anr. (1995 Supp (2) SCC 726) and Commissioner/Secretary to Govt. Health and Medical

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Education Department Civil Sectt., Jammu v. Dr. Ashok Kumar Kohli (1995 Supp (4) SCC 214).] No basis has been indicated as to why learned Single Judge thought the course as directed was necessary to be adopted. Even it was not indicated that a prima facie case was made out though as noted above that itself is not sufficient. We, therefore, set aside the order passed by learned Single Judge as affirmed by the Division Bench without expressing any opinion on the merits of the case we have interfered primarily on the ground that the final relief has been granted at an interim stage without justifiable reasons. Since the controversy lies within a very narrow compass, we request the High Court to dispose of the matter as early as practicable preferably within six months from the date of receipt of this judgment."

10. In the light of the discussion and decisions quoted supra, we are inclined to interfere with the order dated 26.03.2021 in R. P. No. 191 of 2021 and the order dated 16.12.2021 in W. P. (C) No. 24578 of 2021.

11. Appellants are directed to file counter affidavit / statement of

facts with documents, as the case may be, to the writ petition, within

two weeks from the date of receipt of a copy of this judgment.

12. Having regard to the submission of the respondent herein

that the work tendered has to be completed within the stipulated time and without sufficient payment the same cannot be done, and that if the work is not completed within the stipulated time, it would cause W. A. No. 927 of 2021 -13- irreparable hardship, appellants are directed to file counter affidavit within the time, as stated supra, and that the respondent is at liberty to seek for indulgence of the writ court for early hearing of the writ petition. Registry is directed to place the matter before the writ court as per roster. With the above directions, writ appeal is allowed. Sd/- S. MANIKUMAR CHIEF JUSTICE Sd/- SHAJI P. CHALY JUDGE Eb ///TRUE COPY/// P. A. TO JUDGE

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