

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 10TH DAY OF FEBRUARY 2023 / 21ST MAGHA, 1944

WA NO. 2319 OF 2019

AGAINST THE JUDGMENTWP(C) 4786/2019 OF HIGH COURT OF KERALA

APPELLANT/S:

K.C.ANTONY,
AGED 60 YEARS
S/O.LATE CHACKO, CONTRACTOR, KAITHACKAL HOUSE,
CHEMMALAMATTOM P.O., ERATTUPETTA - VIA, KOTTAYAM
DISTRICT, PIN-686529.

BY ADVS.
JACOB P.ALEX
SRI.JOSEPH P.ALEX
SHRI.MANU SANKAR P.
ANISH JOSE ANTONY

RESPONDENT/S:

- 1 STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT, PUBLIC
WORKS DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.
- 2 THE CHIEF ENGINEER,
PUBLIC WORKS DEPARTMENT, ROADS AND BRIDGES, PUBLIC
OFFICES, MUSEUM P.O., THIRUVANANTHAPURAM-695033.
- 3 THE SUPERINTENDING ENGINEER,
PWD (ROADS AND BRIDGES), SOUTH CIRCLE,
THIRUVANANTHAPURAM-695033.

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- 4 THE EXECUTIVE ENGINEER,
PWD (ROADS AND BRIDGES), KOTTAYAM, PIN-686001.
- 5 KERALA STATE CONSTRUCTION CORPORATION,
OLD PWD STORE COMPOUND, PMG, VIKAS BHAVAN P.O.,
BEHIND BSNL OFFICE, THIRUVANANTHAPURAM-695033,
REPRESENTED BY ITS GENERAL MANAGER .
- 6 K.R.RADHAKRISHNAN,
KIZHAKKEMURAYIL HOUSE, KADANADU PO, AMICOMPU,
KOTTAYAM, PIN-686653.
- BY ADVS.
GOVERNMENT PLEADER (BY ORDER)
SRI.M.RAJAGOPALAN NAIR FOR R5
SRI.G.BIJU
- SHRI GEORGE MATHEW FOR R6
GOVERNMENT PLEADER SHRI K.V.MANOJ FOR R1 TO R4

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 7.2.2023, THE
COURT ON 10/2/2023 DELIVERED THE FOLLOWING:

A.MUHAMED MUSTAQUE & SHOBA ANNAMMA EAPEN, JJ.

W.A.No.2319/2019

Dated this the 10th day of February, 2023

J U D G M E N T

A.Muhamed Mustaque, J.

The fate of this appeal, at the instance of the writ petitioner, is based on a turn of events subsequent to the disposal of the writ petition.

2. The appellant is a contractor for executing the work relating to a road of a project sponsored by NABARD. The contract was terminated at the risk and cost of the appellant and another contractor was engaged to complete the work. The work was awarded to the Kerala State Construction Corporation. The Corporation in turn awarded the work to the appellant. The challenge regarding

termination of the contract was unsuccessful as well as the claim for the bills for the work executed by the appellant including the release of security deposit.

3. We are not detailing the facts involved in this case obviously for the reason that we are now deciding this appeal based on admitted facts which are borne on the record.

4. Admittedly, as per 7th and part bill, the appellant was entitled to Rs.58,23,726/-. As seen from Annexure-A12, PWD already collected this amount from NABARD. It is also admitted in the affidavit filed along with I.A.No.2/2022 by PWD before this Court on 3/12/2019 that a sum of Rs.13,09,411/- is due under the 8th and final bill. As seen from Annexure-A10 produced along with I.A.No.1/2022 in the writ appeal, a sum of Rs.2,42,688.77 has been quantified as damage suffered. No other claim has been raised by PWD from the appellant. No one has a case that the

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new contractor engaged after the termination of the contract with the appellant has done the work covered by the part and 7th bill and 8th and final bill above.

5. The learned Government Pleader placed reliance on PWD manual, revised in 2012, which reads thus :

2116.2.1. Realisation of loss on account of termination

An amount equal to 30% of the cost of the remaining works at agreed rates of the terminated contract shall be recovered from the defaulted contractor towards the risk and cost. The contractor shall be directed to remit the risk and cost amount within three months. There is no need to wait till the work is arranged alternatively through another contractor and the total loss sustainable due to the default of the original contractor is assessed. Such loss, if any, shall be realised after completion of the work. If he fails to remit the amount within this periods following steps can be adopted for realisation of loss. The amount can be realised from the following.

2. EMD/Security
3. Bill amount / retention if any due to the contract.
4. Any dues from department to the contract.
5. Bank Guarantee / Performance Guarantee or By filling civil suit against the contractor

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It was argued that the appellant is bound by a contract and based on the clause of PWD manual as above, the appellant can claim an amount only less than the amount covered by the clause as above. The learned Government Pleader also placed reliance on the judgment of the Apex Court in **State of Gujarat Through Chief Secretary and Another v. Amber Builders [(2020) 2 SCC 540]**.

6. The learned Senior Counsel appearing for the appellant, on the other hand, placing reliance on the judgment of the Apex Court in **M.P.Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited and Others [2022 SCC Online SC 1591]** submitted that the Court is not precluded from issuing any directions in the matter of contract, and any arbitrary action of the State or its instrumentality can be interfered with by invoking writ jurisdiction.

7. Placing reliance on **Amber Builders** case, the learned Government Pleader rightly pointed out

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that it is not necessary for the Government to have a recourse to adjudication, to withhold or recover any amount based on contract. The point in this case is in context to, not only the authority of the Government to withhold or recover the amount due to the contractor on a premise of breach of contract, but also on the authority of the Government to retain any amount in excess of the loss already quantified by them.

8. The State and its instrumentalities are expected to deal with the citizens in a fair manner in all circumstances. In a normal course, if the Government had not quantified the loss, the Court cannot order release of the amount agreed to be recovered, based on the contract. But that does not mean that the Court cannot order release of the withheld amount in excess of the loss already quantified by the public officials. The admitted amount in this matter cannot be withheld except for the loss to be calculated by the

Government. The stipulation in the PWD Manual to recover 30% of the cost of the remaining works to offset the possible loss likely to suffer on breach of contract by the contractor. If the amount has been already calculated withholding any amount beyond the alleged loss suffered is arbitrary and illegal.

9. We, in such circumstances, are of the view that the admitted amount under part and 7th and 8th and final bills, be released to the appellant, except the amount calculated towards damages and loss. The security deposit and any other amount payable to the appellant towards performance guarantee as per the contract also be released to the appellant. We make it clear that, if the appellant has any other claim, other than that of the admitted amounts as above under part and 7th and 8th and final bills including the withheld amount, he can approach the civil court. With liberty as above, we dispose of this appeal.

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Needful shall be done to comply with the direction to release the amount as above to the Construction Corporation within one month. The Construction Corporation, on receipt of the amount, shall release the amount to the appellant within a further period of one month. No costs.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

SHOBA ANNAMMA EAPEN, JUDGE

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