

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 29<sup>TH</sup> DAY OF JUNE 2022 / 8TH ASHADHA, 1944

WA NO. 517 OF 2022

AGAINST THE JUDGMENT IN WP(C) 1240/2022 OF HIGH COURT OF KERALA DATED 11.2.2022

**APPELLANT/PETITIONER:**

SIBI N.K., AGED 44 YEARS, S/O. KUMARAN, WORKS CONTRACTOR,  
NADUPARAMBIL HOUSE, VELANCODE P.O., KOZHIKODE DISTRICT 673 580.

BY ADV BABU JOSEPH KURUVATHAZHA

**RESPONDENTS/RESPONDENTS:**

- 1 SUPERINTENDING ENGINEER, PUBLIC WORKS DEPARTMENT, NORTH CIRCLE,  
PWD COMPLEX, MANANCHIRA, KOZHIKODE, PIN-673001.
- 2 THE EXECUTIVE ENGINEER, PUBLIC WORKS DEPARTMENT, ROADS DIVISION,  
VELLIMADUKUNNU, KOZHIKODE-673018.
- 3 THE ASSISTANT EXECUTIVE ENGINEER, PUBLIC WORKS DEPARTMENT,  
ROADS SUB DIVISION, KOYILANDI, KOZHIKODE DISTRICT, PIN-673305.
- 4 THE ASSISTANT ENGINEER, PUBLIC WORKS DEPARTMENT, ROADS SECTION,  
BALUSSERY, KOZHIKODE DISTRICT-673308.
- 5 THE CHIEF ENGINEER, PUBLIC WORKS DEPARTMENT, ROADS DIVISION,  
SECRETARIAT, THIRUVANANTHAPURAM, PIN-695001.
- 6 THE STATE OF KERALA, REPRESENTED BY THE SECRETARY, PUBLIC WORKS  
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695 001.

SRI.V.TEKCHAND, SENIOR GOVERNMENT PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29.06.2022, THE COURT ON THE  
SAME DAY DELIVERED THE FOLLOWING:

## JUDGMENT

Dated this the 29<sup>th</sup> day of June 2022

**Shaji P. Chaly, J.**

This writ appeal is filed by the appellant challenging the judgment of the learned Single Judge dated 11<sup>th</sup> February, 2022 in W.P. (C)No.1240/2022 whereby, the learned Single Judge dismissed the writ petition holding that in spite of the extensions granted by the authority to complete the contract awarded, appellant was not able to complete the work and going by the history of the progress of the work the court is not inclined to interfere with Ext.P9 order of termination passed by the respondents.

2. Brief material facts for the disposal of the appeal are as follows:

The appellant, a Government Contractor was awarded with the improvement work of a PWD Road in Kozhikode district with an agreed PAC of about Rs.257 lakhs as per Ext.P1 contract entered into with the Superintending Engineer – the first respondent. However, the appellant could not complete the work in time due to various reasons such as, covid-19 pandemic, substantial variation and deviations in both quantities and items of works, etc. It is the case of the appellant that the revised estimate incorporating the variations, submitted to the 5<sup>th</sup>

respondent/the Chief Engineer, Public Works Department is not yet decided. According to the appellant, none of the letters submitted before the authorities are pending consideration. It is further submitted that all the major works like those of culverts drains, tarring by BM & BC are completed and only minor works to the extent of about 5%, such as providing Handrails, road marking and paving tiles over footpath alone are remaining to be completed which will consume only less than one month's time; however, Ext.P5 part bill submitted as early as in August 2021 is not responded.

3. The Superintending Engineer – first respondent has filed a detailed counter affidavit refuting the allegations and averments made in the writ petition and sought for dismissal of the writ petition.

4. Learned Single Judge, after taking into consideration the pros and cons and facts and figures available on record, has held as follows:

“11. From the pleadings, it is evident that the petitioner entered into an agreement with the 1st respondent for improvement of the road in question on 01.11.2018. The period fixed for completion of the work was nine months. The pleadings in the case would show that Ext.R1(a) selection notice dated 19.09.2018 was issued on the petitioner. The petitioner came forward to execute the agreement only on 01.11.2018. There is a delay of nearly one month even for executing the agreement. The agreement was executed after imposition of a fine of Rs.25,000/-.

12. The site was handed over to the petitioner on 09.11.2018. Hence, the work had to be completed by 08.08.2019. However, the petitioner did not proceed with the work promptly. Going by the terms of the agreement, the petitioner is responsible to co-ordinate with service providers for cutting of trees, shifting of utilities, removal of encroachments, etc. The petitioner's contention is that the hindrance free site was delayed and all permissions were received only by May, 2020. Even assuming that the delay in getting hindrance free site was attributable to the respondents, the fact remains that the hindrance free site was available from 05.05.2020 onwards. Even thereafter, as of now, more than 19 months have elapsed. The total period for completion of the work originally allocated to the petitioner is nine months. Even after 20 months since May, 2020, the petitioner could not complete the work.

13. The counter affidavit filed by the respondents would show that electrical lines were shifted in the month of January, 2020. Even after shifting of electrical lines in January, 2020, the petitioner did not start the surfacing work. The petitioner completed the first coat of tarring work only by 16.11.2020, that is about six months from completing that surface work. This fact reflects the slow progress of the work of the petitioner. As pointed out by the learned Government Pleader, though Covid- 19 pandemic may have marginally affected the progress of the work, the fact remains that the Government had relaxed Covid- 19 restrictions in the matter of PWD works and the lockdown restrictions were also lifted by the Government soon.

14. Exts.R1(i) to R1(o) would show that the respondents have been insisting the petitioner to resume and complete the work. However, the petitioner could not complete the work even within the extended time. It was in such circumstances that Ext.P9 order of termination was issued to the petitioner. The original agreement was on 08.08.2019. The site was handed over on 09.11.2018. The work had to be originally completed by 08.08.2019. The petitioner was granted extension. Still the contention of the petitioner is that if he gets further time, he will be able to

complete the work. Going by the history of the progress of the work, this Court is not inclined to interfere in the matter. The writ petition is therefore dismissed.

The petitioner submits that he will be able to complete the work if 15 days time is granted. The petitioner will be at liberty to approach the competent among the respondents and seek remedies in that regard.”

5. It is thus challenging the legality and correctness of the judgment of the learned Single judge, the writ appeal is preferred.

6. Heard senior advocate Sri.Kurian George Kannanthanam assisted by Adv.Babu Joseph Kuruvathazha, learned counsel for the appellant, and Sri.V.Tekchand, learned Senior Government Pleader for the respondents.

7. The sole question to be considered is whether any interference is required to the judgment of the learned Single Judge. The paramount contention advanced by the learned Senior Counsel for the appellant is that appellant had duly executed more than 90% of the work and the time required to complete the balance work was only 15 days and therefore, taking into account the said aspect, learned Single Judge ought to have enlarged the time by 15 days enabling the appellant to complete the entire balance work. It is also the case of the appellant that more than Rs.2.25 crores was due to the appellant in connection with the execution of the work and since the appellant had executed more than

90% of the work, it was totally illegal on the part of the first respondent to terminate the contract by issuing Ext.P9 order at the risk and cost of the appellant. That apart, it is contended that Ext.P9 order is passed in absolute violation of the principles of natural justice, since it is passed without appropriately appreciating the contentions raised in Ext.P8 explanation offered by the appellant. It is further submitted that the work is now re-tendered and the bidder is given three months time to complete the work, and therefore, the contention advanced is that since the time sought by the appellant is only 15 days, a larger time provided in the new tender notification for completion of the work is bad and illegal.

8. On the other hand, learned Senior Government Pleader submitted that sufficient opportunity was given to the appellant to complete the work by extending the time period prescribed under the contract entered into by and between the parties. However, the appellant has failed to make use of the said opportunities and has adopted a lethargic attitude, which persuaded the first respondent to terminate the work, in order to salvage a totally adverse situation prevailing against public interest.

9. On evaluation of Ext.P9 termination order, we find that the site was handed over to the appellant on 9.11.2018 with a time period of 9 months for completion of the work. The appellant could not complete the work and sought for extension of time, and accordingly extension was granted upto 30.10.2020 without fine. However, the work was not completed and again sought time and accordingly, the time period was extended upto 15.4.2021 with fine of Rs.50,000/-. Even in spite of the extension granted without fine and with fine, the work was not completed. Therefore again, on request, time period was extended upto 30.8.2021 with a fine of Rs.1,00,000/- and again extended upto 30.11.2021 with fine of Rs.1,00,000/- in accordance with the provisions of the standard bid document. In spite of all these earnest efforts made by the first respondent, the appellant has failed to complete the work and it was thereupon that, steps were taken to protect the interest of the Government, in terms of the contractual conditions and notice inviting tender, to terminate the contract at the risk and cost of the appellant.

10. Having gone through the material on record and the rival submissions, we have no hesitation to hold that the learned Single Judge was right in dismissing the writ petition. In a pre-contractual stage, the writ court is primarily concerned with whether there is administrative

power to award a contract and if so, whether there is any patent illegality in awarding the contract. In a post-contractual stage, a writ court considering a writ petition needs to only consider as to whether there was any arbitrary exercise of power or any other illegality committed by the statutory authority while performing the terms of the contract, including its termination. The assimilation of facts would show that the Superintending Engineer has given sufficient opportunities to the appellant to complete the work by granting successive extension of time as are deliberated above. But in spite of the due diligence shown by the authority to ensure completion of the work, the appellant has failed to co-operate with the work and complete the same. After all, the action was taken on the basis of the terms and conditions of a commercial contract entered into by and between the parties and therefore, the parties are liable to adhere to the stipulations contained under the relevant rules and specifications of the notice inviting tender and the executed contract. So also, interference of a writ court in contractual matters would be slow, and unless and until it is established by the aggrieved that the action is abhorrent, it is trite and well settled in law that a writ court shall not interfere. Thus said, competent parties having wilfully entered into a contract with open eyes, they are presumed to be

aware and wary of the benefits and burdens arising from the same.

In that view of the matter, we have no hesitation to hold that the appellant has failed to establish any jurisdictional error or other legal infirmities justifying our interference in an intra court appeal filed under Section 5 of the Kerala High Court Act, 1958. Needless to say, appeal fails, accordingly it is dismissed.

**sd/-**  
**S.MANIKUMAR**  
**CHIEF JUSTICE**

**sd/-**  
**SHAJI P. CHALY**  
**JUDGE**

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APPENDIX

ANNEXURE A1: TRUE COPY OF THE REPRESENTATION DATED 25.2.2022 SUBMITTED BY THE APPELLANT BEFORE THE 1ST RESPONDENT.

ANNEXURE A2: TRUE COPY OF THE NOTICE INVITING TENDER DATED 8.2.2022 ISSUED BY THE 1ST RESPONDENT.

ANNEXURE A3: TRUE COPY OF THE JUDGMENT OF THE HON'BLE COURT DATED 9.3.2022 IN W.P.(C)NO.7310/2022.

ANNEXURE A4: TRUE COPY OF THE PROCEEDING DATED 10.3.2022 OF THE 1ST RESPONDENT.

ANNEXURE A5: TRUE COPY OF THE JUDGMENT OF THE HON'BLE COURT DATED 4.4.2022 IN W.A.430/2022.

ANNEXURE A6: TRUE COPY OF THE REPRESENTATION DATED 23.5.2022 SUBMITTED BY THE APPELLANT BEFORE THE RESPONDENTS 1 TO 3 HEREIN AND THE CHIEF ENGINEER.

ANNEXURE A7: TRUE COPY OF THE POSTAL RECEIPTS, PERTAINING TO THE SENDING OF ANNEXURE A6 REPRESENTATION THROUGH REGISTERED POST.

// TRUE COPY //

P.S. TO JUDGE