

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

FRIDAY, THE 30TH DAY OF JANUARY 2015/10TH MAGHA, 1936

WP(C).No. 301 of 2009 (J)

PETITIONER(S) :

DEVADAS, S/O.VASUDEVAN, AGED 48 YEARS,
S.M.TUBE WELLS, ADINAD NORTH P.O., KARUNAGAPPALLY.

BY ADVS.SRI.LEO GEORGE
SMT.SANDHYA RADHAKRISHNAN

RESPONDENT(S) :

1. KERALA WATER AUTHORITY, REPRESENTED BY
ITS MANAGING DIRECTOR, KERALA WATER AUTHORITY
JALA BHAVAN, VELLAYAMBALAM, THIRUVANANTHAPURAM.

2. MANAGING DIRECTOR, KERALA WATER
AUTHORITY, JALA BHAVAN, VELLAYAMBALAM
THIRUVANANTHAPURAM.

3. THE EXECUTIVE ENGINEER, KERALA WATER
AUTHORITY, WATER SUPPLY DIVISION, KOLLAM.

4. THE ASSISTANT EXECUTIVE ENGINEER,
W.S.SUB DIVISION, KERALA WATER AUTHORITY, KOLLAM.

5. THE ASSISTANT ENGINEER, W.S.SECTION II,
KERALA WATER AUTHORITY, KOLLAM.

6. THE DISTRICT COLLECTOR, KOLLAM.

R1-R5 BY ADV. SRI.M.DINESH, SC, KERALA WATER AUTHORITY
R1-R5 BY ADV. SRI.GEORGE MATHEW, SC, KERALA WATER AUTHORITY
R6 BY GOVERNMENT PLEADER SRI. SOJAN JAMES

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
30-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 301 of 2009

EXHIBITS

PETITIONERS EXHIBITS

EXHIBIT P1: COPY OF THE COMMUNICATION BEARING NO.DB3-654/05 ISSUED BY THE THIRD RESPONDENT TO THE PETITIONER DATED 25/5/2007.

EXHIBIT P2: COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE SECOND RESPONDENT DATED 15.12.2008.

RESPONDENTS EXHIBITS:

EXHIBIT R1(A): COPY OF WORK ORDER NO.DB3-654/05 DATED 25.05.07.

EXHIBIT R1(B): COPY OF TENDER SCHEDULE AND ACCEPTED SCHEDULE DATED 15.05,2007.

EXHIBIT R1(C): COPY OF WORK CONTRACT AND SPECIAL CONDITION.

EXHIBIT R1(D): COPY OF AGREEMENT DATED 5.6.2007.

EXHIBIT R1(E): COPY OF NOTICE INVITING TENDERS FOR WORKS DATED 15.5.2007.

EXHIBIT :R2(A): COPY OF THE WORK ORDER NO.DB3-654/05 DATED 25.5.2007

EXHIBIT R2(B): COPY OF THE AGREEMENT NO.48/07-08/EE/WS DN.Q DATED 5.06.2007 OF THE EXECUTIVE ENGINEER, WATER SUPPLY DIVISION, KOLLAM (INCLUDING SPECIAL CONDITIONS).

EXHIBIT R2(C): COPY OF THE ACCEPTED SCHEDULE

TRUE COPY

P.A. TO JUDGE

SKV

C.K.ABDUL REHIM, J

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W.P.(C). No.301 OF 2009

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Dated this the 30th day of January, 2015

JUDGMENT

The petitioner is a Contractor who was awarded with the work of digging of a Tube Well for the 1st respondent authority. Ext.P1 is the work order issued by the 3rd respondent, after accepting the tender submitted by the petitioner. According to the petitioner, the work in question was completed within the scheduled time and on completion of the work the measurement was taken by the 5th respondent and it was counter checked by respondents 3 and 4, which were endorsed in the Measurement Book. It is contended that, Bill for payment of the contract amount was prepared by the 5th respondent on 15.6.2007 and respondents 4 and 5 have accorded sanction for payment of a sum of Rs.5,59,580/-. But the Bill was not honored by the respondent authority and no payment was effected. It is stated that, after completion of the work by the petitioner the 1st respondent authority had constructed a pump house at the site and installed the pump and allied equipments

and operated the pump considerably for a long period. It is learnt that certain repairs were carried out by the authority subsequently and after such repair the authority was not able to get the expected quantity of water from the Tube Well, and the payment is withheld on that basis. According to the petitioner, since the work in question was completed by him satisfactorily within the scheduled time, there is no justification for withholding the payment. Hence this writ petition is filed seeking appropriate directions for disbursal of the contract amount.

2. In a statement filed by the Standing Counsel appearing on behalf of the respondents on 18.8.2009, it is admitted that the work in question was completed by the petitioner on 15.6.2007 and measurements were taken and recorded by the 5th respondent and it was duly check measured by the 4th respondent. It is also admitted that Bill for the work was prepared on 16.6.2007. It is further admitted that the pump house was constructed and the pump set was erected subsequently and continuous

pumping of water from the Tube Well had started on 26.9.2007, after flushing. But the Tube Well became out of order on 17.11.2007 and the pumping was interrupted. Attempts made to take out the pump set for conducting repair was not successful because the pump box stuck inside the Tube Well and it could be taken out only with the help of special tools, on 10.4.2008. Thereafter the Ground Water Department had developed the tube Well and another pump was fitted on 17.6.2008. But the pump set could be erected only at a depth of 46.50 metres wherein it got blocked. However, it is admitted that the previous erection was at a depth of 45 metres. It is stated that, after a few days of erecting the pump, water level in Tube Well fell down and pumping was again interrupted. It is felt that, for continued pumping it is necessary to increase the suction depth, which was impossible due to failure of the casing pipe, and hence the scheme was to shut down. According to the respondents, required quantity of water could not be drawn from the Tube Well due to failure on the casing pipe

and that payment to the petitioner can be made only after getting the minimum required discharge of 15000 LPH.

3. In the reply affidavit filed by the petitioner it is contended that, when continuous pumping on the Tube Well was started on 26.9.2007 and continued till 17.11.2007, sufficient discharge of water was there from the Tube Well. It is specifically stated that, on 30.8.2007 when the trial run of the pump set was conducted, the authority got discharge at the rate of more than 25000 LPH and it was only thereafter the bill was prepared for payment. The respondents have subsequently filed a detailed counter affidavit, in which the above facts were reiterated. An additional contention was taken to the effect that, the petitioner will be entitled for payment only after getting a minimum intake of 15000/- LPH from the Tube Well, as per the special condition incorporated in the work contract, copy of which is produced as Ext.R1(c). It is contended that the payment can be made only after getting minimum discharge of 15000 LPH. Since the required quantity of

water cannot be suck from the Tube Well due to the failure of the casing pipe, intention of the scheme could not be fulfilled. It is further stated in the counter affidavit that, repair of the Well must be done by the contractor since the defect was occurred within the guarantee period as mentioned in the agreement (Ext.R1(e)).

4. Facts revealed out of the rival pleadings are that, the work in question was satisfactorily completed on 15.6.2007 and the Bill was prepared on 15.6.2007, after taking measurement which was counter checked. It is further evident that pumping of water from the Tube Well was commenced after erection of the pump house and the pump, with effect from 30.8.2007 and the pumping continued till 17.7.2007. It is also evident that the pump which was broke down was taken out from the well on 10.4.2008 and thereafter the well was developed by the Ground Water Department on 20.5.2008. It is admitted that a new pump was erected on 17.6.2008 and after few days water level in the Tube Well fell down and pumping was

interrupted. Can payment due to the petitioner be withheld under the above mentioned circumstances, is the crucial question to be decided. One of the allegation is that the new pump could not be erected at a depth of 48 metres but only 46.50 metres. But there is an admission to the affect that after completion of the work, the 1st pump was erected at a a depth of 48 metres and it was operated with sufficient discharge from 26.9.2007 till 17.11.2007, for about 2 ½ months. The well in question was shut down after erection of the new pump on 17.6.2008, clearly after a period of one year from the date of completion of the work. Eventhough a vague allegation is made to the affect that the required quantity of water could not be sucked out due to the failure of the casing pipe, there is nothing to indicate that there was any defect occurred in the drilling of the Tube Well erected by the petitioner. Admittedly the Tube Well was erected by the ground water department after about one year of completion of the work. Further there is a clear admission that the work was completed satisfactorily

by the petitioner and the measurements were approved and the Bill was prepared. Therefore this court is of the considered opinion that the payment cannot be denied based on any defect in the work executed by the petitioner.

5. Another contention raised on behalf of the respondents is that, the payment can be made only on ensuring discharge of 15000 LPH from the Tube Well, as per the special conditions incorporated alongwith the work contract. Learned counsel for the petitioner contended that, before taking measurement and approval of the contract Bill 'yield test' was conducted and the Bill was prepared only after being satisfied that there was sufficient discharge. Evnethough the respondents have not mentioned anything about such 'yield test' conducted, there is an admission from the part of the respondents that pumping was conducted from 26.9.2007 till 17.11.2007. The respondents have no case that during the said period there was any deficiency in the quantity of discharge from the Tube Well. According to the version of the respondent the

pump set was replaced after further developing the Tube Well on 17.6.2008 and at that time pump set can be erected only at a depth of 46.50 meters. A vague allegation is raised to the effect that it was due to failure of the 'casing pipe'. But it is admitted that the 1st pump was erected at a depth of 48 meters and therefore, even if there occurred any failure in the casing pipe, it was only a subsequent development which occurred after a period of one year of completion of the work. Hence it is evident that the respondents are not at all justified attributing any defect with respect to the completion of the work in question.

6. It is more pertinent to note that at no point of time the respondent have pointed out any such defects to the petitioner nor any demand was made to rectify any such defect. Merely because a special condition is incorporated in the work contract, it cannot be insisted that the petitioner should ensure the required quantity of discharge all through out, even after the lapse of more than one year. Since it is evident that the pump set was erected and it was run with

satisfactory discharge from 26.9.2007 to 7.11.2007, payment cannot be denied based on the special condition in the work contract.

7. Lastly, contention with respect to the allegation that the defect occurred within the guarantee period, need consideration. Learned counsel appearing for the petitioner had drawn attention of this court to the conditions incorporated in the tender document (Ext.R1(e)). Referring to Clause 43 therein it is pointed out that, the petitioner is at an obligation to get the defects if any rectified, only within three months, if noticed. It only enables the respondent to recover the cost from the contractor if he fails to rectify the defect noticed within the time limit, and if such defect was rectified by the Department. According to the learned counsel, the respondents have never pointed out any defect which need to be rectified, within the period stipulated under the above clause. Hence the refusal to make payment of the contractor based on an allegation that there occurred defect during the period of guarantee, is also

not sustainable.

8. This court takes note of the fact that, after completion of the work and after preparation of the Bill the payment was denied since 16.6.2007 onwards. The petitioner was never issued with any notice calling upon him either to rectify any defect or to conduct any repair at any point of time. Even the reason for denial of payment to the petitioner was never intimated to him. It is only in the statement and the counter affidavit filed before this court that for the first time the respondents are raising certain objections. The action in this regard on the part of the respondents 3 to 5 is clearly unreasonable and arbitrary. However, it is noticed that respondents 3 to 5 has not taken any ultimate decision in the matter. Therefore this court is of the considered opinion that a direction to the 3rd respondent to take a decision with respect to disbursal of payments due to the petitioner, within a time limit, would achieve the interest of justice.

9. Hence this writ petition is hereby disposed of by

directing the 3rd respondent to consider the matter, in view of the observations contained herein above, and to take a final decision with respect to disbursal of payments due to the petitioner based on the contract Bill prepared, and to take necessary follow up steps at the earliest, if found necessary after affording an opportunity of personal hearing to the petitioner. A decision in this regard shall be taken and communicated to the petitioner at the earliest possible, at any rate, within a period of six weeks from the date of receipt of a copy of this judgment.

C.K.ABDUL REHIM, JUDGE.

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