



## GOVERNMENT OF KERALA

### Abstract

Local Self Government Department - AMRUT - Kannur Corporation - Judgment of Hon'ble High Court of Kerala dt. 05/11/2020 in WP(C) No. E1 5122/19 (1) - Work Construction of new primary drain, secondary drain and rejuvenation to primary drain - Kanampuzha and connecting works - Complied - Orders Issued

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### LOCAL SELF GOVERNMENT (DC) DEPARTMENT

G.O.(Rt)No.987/2022/LSGD Dated,Thiruvananthapuram, 21-04-2022

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- Read 1 Order of Executive Engineer, Kannur Corporation No. E1 5122/19 (1) dt. 05/11/2020
- 2 Appeal dt. 17/12/2020 filed by Sri. P.V. Akhil, Managing Director, Fastline Projects Pvt. Ltd, Delta Tower, Thana, Kannur before the Secretary, LSGD.
- 3 Judgment of Hon'ble High Court of Kerala in WP(C) No. 15061/2021 dated 30/07/2021.

### ORDER

As per the paper read as 1<sup>st</sup> above, the Managing Director, M/s Fastline Projects Pvt. Ltd, challenging the decision of Kannur Corporation Council terminating the petitioner's contract, for construction of new primary drains, secondary drains , rejuvenation of primary drains - Kanampuzha and connecting works, at the risk and costs of the petitioner, filed appeal before the Secretary, Local Self Government Department . Pending the appeal, as per the order read as 2<sup>nd</sup> paper above, the petitioner is served with notice for recovery of amounts consequent to the termination . Following that Sri. Akhil filed WP(C) No. 15061 before the Honourable High Court prayed , pending disposal of the appeal, recovery may not be continued. In the judgment read as paper 3<sup>rd</sup> above, the Honourable HC, disposed the writ petition ,

without expressing anything on the merits, directing the Secretary, LSGD (additional third respondent) to consider and pass orders on Ext. P 8 appeal, after affording an opportunity of hearing to the petitioner, within three months from the date of receipt of a copy of the judgement. Till then coercive proceedings against the petitioner shall be put on hold.

2. Under Secretary, LSGD was authorised by the Secretary (U) to hear the appellant. Hearing was fixed on 17/03/2022. As per the request of the appellant, it was postponed to 24/03/2022. And hearing was conducted on that date at 3 PM. Sri. Akhil P V (appellant), his advocate T. Ramesh Babu, Sri Sijo V S (Accounts Officer, AMRUT Kerala) and Sri . Ranjith P K Assistant Executive Engineer for Kannur Municipal Corporation were attended the hearing. The supporting documents substantiating the argument from both the parties were received on 02/04/2022 and 05/04/2022.

**3.Argument of the appellant.**

- a. The above appeal is filed against the order of the Executive Engineer on behalf of Kannur Corporation dated 5/11/2020 with No. El 5122/19(1) as per the Council decision No.33 dated 23/10/2020.
- b. The respondents invited a tender for the construction of the new Primary Drains, Secondary Drains, rejuvenation Primary drains Kanampuzha and connecting works. The estimated cost is 5.18 crores. Appellant company is the lowest tenderer and the work was awarded to the company and an agreement was executed on 2.3.2019. As per the agreement the work should be completed within One year, that before March 2020. As per the terms in the agreement No.EE 1-18/18-19, the site of the work was handed over to the appellant on 7.3.2019.
- c. The appellant has started the work and has already completed the work of about 2 crore. For continuing the above work the respondent has not taken any steps to approve the initial levels. Thus Appellant cannot proceed the work and more over the revised estimate were also not approved by the respondents and the part bill was not given to the appellant. In the part bill of Rs. 2 crores, only 80 lakhs were paid to him and now bill for 60 lakhs is still pending and apart from that bill for 30

lakhs and 10 lakhs GST compensation are pending before respondents consultant for preparation of the bills.

d. The appellant has completed the work for 2 crores within 3 months and for past 4 months due to the non-cooperation of the respondents, no work was progressing . The appellant apprehended that if things are going like this they cannot complete the work within the stipulated time. The above work is a Central Government sponsored scheme and the funds will be automatically lapsed after the completion period. As stated above without approving the initial levels by the respondents and also approve the revised estimate and also without paying the part payment of bills already submitted, the appellant couldn't complete the work. The appellant suspected that he cannot complete the work within the specific time due to the irresponsible attitude of the respondents. The respondents have not fixed the boundary stone in the portion of the drains which is already surveyed which resulted stoppage and hindrance to the existing work- which caused heavy loss to the appellant.

e. The appellant informed this fact to the respondents several times through many letters but they did was received not take any fruitful steps. Letter was sent by the appellant to the respondent on 4.12.2019. Thus the appellant approached before this Hon'ble High Court to issue a writ of mandamus as WPC NO. 34560/2019 directing the respondents to terminate the above work after recording the existing measurement and to give direction to the respondents to pay the existing and future bills submitted by him in connection with the above work. Though an interim order was ordered by the Hon'ble High Court not to terminate the work but when the writ petition came up for hearing the Hon'ble High Court is of the view that, the appellant can file suit and seek remedy and thus the appellant withdraw the above writ petition and filed suit before the Munsiff Court Kannur with a prayer for Injunction directing the respondent Mandatory to terminate the work allotted to

the appellant as per the agreement No.EE1-18/18-19 dated 2.3.2019, without any risk and cost of the appellant and also direct the respondents to measure the above work already done by the appellant in the measurement book and such necessary direction. During the pendency of the petition an amount of 2 part bills for Rs. 50 lakhs were paid by the respondents and still Rs. 15 lakhs (including GST Compensation) is still pending.

f. The respondents have not taken any steps to record the existing measurement already completed by the appellant long back and pay the same to the appellant. They have also not extended the time for completion of the above work. Without the cooperation and support of the respondents, the appellant was not in a position to complete the work. The respondents are not paying the GST concession also. Thus the appellant not inclined to complete the work due to the non cooperation and support from respondents.

g. The suit and injunction petition was filed by the appellant in June 2020 and the Hon'ble Court issued notice to the respondents and the respondents were appeared before the Hon'ble Court through Advocate and sought time for filing counter in injunction petition and statements in the suit. So far the respondents have not filed any counter or statements. In the meantime appellant has received an order dated 5/11/2020 and the same was received by registered post on 27/11/2020 from the respondent, in which it is stated that the work was terminated by the respondents at the Risk and cost of the appellant. In that order the respondent requested the appellant to attend for joint measurement of the work done by the appellant. Without filing counter and statements and subject matter is the dispute in the suit, the respondent has no right or a power to terminate the work on risk and cost of the appellant. Thus the appellant has approached Munsiff Court and also before High Court of Kerala much before and agitated this issue while the same is pending before Civil Court for adjudication, now the respondent without filing

counter or statement passing the above order is a legal violation and is illegal. The above act of the respondents during the pendency of the suit is lis pendens.

The Council has no authority to fix the liability without hearing the appellant and without measure the work the appellant has completed. Measurement of work already completed should be recorded in the presence of the appellant and the same should be intimated to the party sufficiently early, which is a mandatory rule for fixing the liability and more over nowhere it stated how they arrived into the conclusion of the amount mentioned in the notice. Before fixing the liability, opportunity should be given and sufficient prior notice should be given to the party before fixing the liability and they should specifically mention in the notice regarding fully/ the damage costed on the side of the appellant for charging and fixing the liability. All these conditions are absent in this case while assessing and fixing the liability. Thus the above order by the Council of members is liable to be set aside and give direction to conduct fresh enquiry. Thus the appellant is entitled for setting aside the order passed to terminate the work on risk and cost of the appellant is illegal and the same to be set aside.

#### **4. Defence from Kannur Corporation**

- Agreement was awarded to P.V. Akhil, Managing Director, Fast line Project Pvt. Ltd, Delta tower, Thane, Kannur by Executive Engineer, Kannur Corporation on 02/03/2019 for the construction of New Primary drains, secondary drains, rejuvenation of primary drains in Kanampuzha and connecting drain works.
- Site was handed over to the contractor on 07/03/2019.
- As per the agreement, time of completion of the work was 12 months i.e 06/03/2020.

- This work was awarded to the contractor after scrutinizing the technical and financial capacity of the firm through pre-qualification tender procedure.
- In this contract the total works were divided into 19 sub works and the total cost of works is Rs. 5, 18,00,000. During the period of contract, out of 19 sub works contractor has partially completed. (80% of 4 sub works).
- The Department had given maximum support to speed up the works and passed two part bills (1st part bill of Rs. 88, 24,302 and second part bill of Rs 53,17,922 ) to the contractor on his demand.
- After receiving the first part bill, contractor started delaying the works and falsely accused department engineers for delaying the works.
- This contractor stopped the work after receiving the part bills & started claiming for more bills. Even after our repeated requests, contractor was throwing tantrums & not resuming the work. Contractor had claimed two part bills of total Rs 1, 41,42,224/ without the approval of the initial level.

Actually initial level is required for a small portion of work where the quantity of desilting is to be assessed, which could be taken any time during the progress of the work. It is also the duty of contractor to engage qualified engineer to prepare levels combined with department officers and get it approved. Contrary to this, he stopped the work and started blaming the Department engineers. He had not appointed any qualified engineer for the supervision of 5.18 crore works as per the Kerala PWD Manual even after their repeated request.

- Revised estimate decision has to be taken by the agreement authority with the approval of corporation Council whenever it is required as

per the site condition & on contractor's request. Contractor has no right to stop the work in order of revised estimate until he is ordered to do so. If the revised estimate is not sanctioned, he should proceed with the original work as per agreement and complete it in time.

- Contractor has not approached the agreement authority or higher office or AMRUT Core Committee or Council for delay in the work. Instead of communicating with the officials and sorting out issues amicably inside office, they took this matter to the Honourable Court. Department had not violated any of the agreement conditions or denied any justice.

- **Stage of Termination of Contract and Risk and cost tender Details**

1) Agreement Date: 02/03/2019

2) Site handed over on: 07/03/2019

3) First part Bill Rs.8830602 was paid to the contractor on 14/06/2019

4) Second part bill Rs.5317922 was passed on 18/09/2019 but payment stopped noticing some defects in the work.

5) Contractor stopped the work without any notice from Oct 2019

6) No response from Contractor side to phone calls and letter for progressing the work

7) Due to this, time to extension not granted by AMRUT Core Committee

8) Final Registered letter for explanation sent on 07/09/2020 and reply was not satisfactory

9) Legal opinion obtained from Standing council on 12/10/2020

10) The Council Resolution No.33 Dt:23/10/2020 decided to terminate the work

11) Termination order on 05/11/2020

12) Letter for combined measurement sent to contractor on 24/11/2020

13) Re-tendered the work at Risk & Cost on 14/01/2021

14) Work awarded to new contractor on 26/02/2021

15) Total quoted amount for the balance work is 3,55,16,450/- & Risk to the contractor is 4378860/-

16) Letter sent to all Departments for information.

### **5. Rule Position.**

Kerala Public Works Department Manual Revised Edition 2012 - Part II- Work Methodology - Section 2116 describes as follows.

#### **2116.1. Termination - Default by Contractor**

As per general conditions of contract, the agreement authority has the power to cancel the contract and arrange the work otherwise in the event of default by the contractor. The agreement authority in exercising the power vested with him shall follow the procedure outlined in the general conditions of the contract. The damages and penalties provided there in and applicable to the particular contract shall also be realised in accordance with the general conditions of contract.

#### **Compensation for delay / Liquidated Damage**

1) If the contractor fails to maintain the required progress as per conditions of contract or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Employer on account of such breach, pay to the employer as liquidated damages an amount calculated @ 0.1% (zero point one percent) of the contract price of the work for every week of delay subject a maximum of 10% of the contract price.

2) The amount of compensation may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the government. In case, the contractor does not achieve a particular milestone mentioned in the conditions of contract or the re-scheduled milestone(s), the amount shown against that mile stone shall be withheld, to be adjusted against the compensation levied at the final grant of extension of time.



3) Withholding of this amount on failure to achieve the completion of work or of milestones shall be automatic without any notice to the contractor.

### **2116.2. Termination of Contract**

The department can terminate the contract and rearrange the work at the risk and cost of contractor in the following cases

1. If the contractor does not turn up for starting the work within the specified period to take charge of the site after executing the agreement.

2. If the contractor does not show the proportionate progress during the extended period of time of completion.

3. If the contractor abandons the work after executing a portion without genuine reason and does not resume or complete it even after specific direction from the Department

4. Fails to make application for extension of time of completion in time.

5. The licence of the contractor whose work has been terminated shall be cancelled with immediate effect and shall be barred from quoting for another work for a minimum period of five years. Contract licence shall not be renewed in his name or different name of a binamy,

6. A company or person or firm once terminated shall be disqualified from participating in any tender in his name or by using a different name or binamy. There shall also be a fine and forfeiture of deposits

#### **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.

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

### **6. General Observation**

Since the Executive Engineer has issued order No. E1 5122/19 (1) dated 5/11/2020 in compliance with the Kerala Public Works Department Manual Revised Edition 2012 - Part II- Work Methodology - Section 2116 and also, conditions are there in the agreement between the appellant and the Executive Engineer , Kannur Corporation regarding the issue, the appeal filed by Sri. P.V. Akhil, Managing Director, M/s Fastline Projects Pvt. Ltd. can be rejected which challenges the decision of Kannur Corporation Council terminating the petitioner's contract for construction of new primary drains, secondary drains , rejuvenation of primary drains - Kanampuzha and connecting works, at the risk and costs of the petitioner and also it requests to stay the implementation of order No. E1 5122/19 (1) dated 5/11/2020 ( in respect of the agreement number 18/19-19 dated 02/03/2019 ) issued by the Executive Engineer on behalf of Kannur Corporation .

7. Government have examined the matter in detail and are pleased to issue orders rejecting the appeal read as paper 2<sup>nd</sup> above filed by Sri. P.V. Akhil, Managing Director, M/s Fastline Projects Pvt. Ltd, challenging the decision of Kannur Corporation Council terminating the petitioner's contract, for construction of new primary drains, secondary drains, rejuvenation of primary drains - Kanampuzha and connecting works, at the risk and costs of the petitioner and to stay the

implementation of order No. E1 5122/19 (1) dated 5/11/2020 (in respect of the agreement number 18/19-19 dated 02/03/2019) issued by the Executive Engineer on behalf of the Kannur Corporation and thus the judgment of the Honourable High Court read as 3<sup>rd</sup> paper above is complied with.

(By order of the Governor)  
BIJU PRABHAKAR  
SECRETARY

To:

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The Principal Accountant General (Audit/ A&E/ LBA &A)

The Information Officer, (Web & New Media) I&PRD

Executive Director, Information Kerala Mission

Stock File/Office Copy

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Section Officer.