IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

THURSDAY, THE 10TH DAY OF APRIL 2025 / 20TH CHAITHRA, 1947

RFA NO. 341 OF 2017

AGAINST THE JUDGMENT AND DECREE DATED 28.06.2016 IN OS NO.234 OF 2007 OF I ADDITIONAL SUB COURT, KOZHIKODE

APPELLANT/PLAINTIFF:

STATE OF KERALA,
REPRESENTED BY SUPERINTENDING ENGINEER,
NATIONAL HIGHWAY NORTH CIRCLE, P.W.D. COMPLEX,
KOZHIKODE.

BY ADV SRI.SUNIL KUMAR KURIAKOSE, GOVERNMENT PLEADER

RESPONDENT/DEFENDANT:

M.ALAVIKUTTY ALIAS BABU,
P.W.D. CONTRACTOR, RESIDING AT CHALAYAM PURATH,
KONDOTTY AMSOM, KOLATHER DESOM, THURAKKAL, KONDOTTY,
MALAPPURAM.

BY ADVS.
SMT.AMRIN FATHIMA
SRI.BABU KARUKAPADATH
SRI.K.M.FAISAL KALAMASSERY
SRI.MITHUN BABY JOHN
SRI.RAHUL ROY
SMT.M.A.VAHEEDA BABU
SRI.P.U.VINOD KUMAR

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 10.04.2025, ALONG WITH RFA.201/2017 & CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

THURSDAY, THE 10TH DAY OF APRIL 2025 / 20TH CHAITHRA, 1947

RFA NO. 201 OF 2017

AGAINST THE JUDGMENT AND DECREE DATED 28.06.2016 IN OS NO.234 OF 2007 OF I ADDITIONAL SUB COURT, KOZHIKODE

NAME AND ADDRESS OF THE APPELLANT/DEFENDANT:

M.ALAVIKUTTY @ BABU,
AGED 31 YEARS,
S/O LATE AHAMMED KUTTY,PWD CONTRACTOR,
RESIDING AT CHELAMPURATH HOUSE,THURAKKAL PO,
KONDOTTY AMSOM,KOLATHUR DESOM, MALAPPURAM DISTRICT.

BY ADVS.
SMT.M.A.VAHEEDA BABU
SMT.AMRIN FATHIMA
SRI.K.M.FAISAL KALAMASSERY
SRI.MITHUN BABY JOHN
SRI.J.RAMKUMAR
SRI.P.U.VINOD KUMAR

NAME AND ADDRESS OF THE RESPONDENT/PLAINTIFF:

STATE OF KERALA,
REPRESENTED BY THE SPERINTENDING ENGINEER,
NATIONAL HIGHWAY, NORTH CIRCLE,PWD COMPLEX,
KOZHIKODE-673001.

BY ADV SRI.SUNIL KUMAR KURIAKOSE, GOVERNMENT PLEADER

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 10.04.2025, ALONG WITH RFA.341/2017 & CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

THURSDAY, THE 10TH DAY OF APRIL 2025 / 20TH CHAITHRA, 1947

RFA NO.(INDIGENT) No.145 OF 2022

AGAINST THE JUDGMENT AND DECREE DATED 28/06/2016 IN OS NO.62 OF 2008 OF 1st ADDITIONAL SUB COURT, KOZHIKODE

NAME AND ADDRESS OF THE APPELLANT/PLAINTIFF:

ALAVIKUTTY ALIAS BABU,
AGED 31 YEARS,
S/O LATE AHAMED KUTTY, PWD CONTRACTOR,
RESIDING AT CHELAMBURATH HOUSE, THURAKKAL PO.,
KONDOTTY AMSOM, KOLATHUR DESOM,
ERNAD TALUK IN MALAPPURAM DISTRICT.

BY ADVS.
BABU KARUKAPADATH
M.A.VAHEEDA BABU
K.M.FAISAL (KALAMASSERY)
P.U.VINOD KUMAR
MITHUN BABY JOHN
J.RAMKUMAR
AMRIN FATHIMA

RESPONDENTS/DEFENDANTS:

1 **STATE OF KERALA,**
REPRESENTED BY THE SECRETARY, KERALA PUBLIC WORKS DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, THIRUVANANTHAPURAM DISTRICT-695001.

2 **THE CHIEF ENGINEER,**
NATIONAL HIGHWAY, KERALA PUBLIC WORKS DEPARTMENT, VAZHUTHACAUD, THIRUVANANTHAPURAM 695001.

3 THE SUPERINTENDING ENGINEER,
KERALA PUBLIC WORKS DEPARTMENT, NATIONAL HIGHWAY(NORTH CIRCLE), PWD COMPLEX IN NAGARAM AMSOM DESOM,
KOZHIKODE TALUK, KOZHIKODE DISTRICT 673001.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 10.04.2025, ALONG WITH RFA.341/2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SATHISH NINAN &
SHOBA ANNAMMA EAPEN, JJ.
= =
R.F.A. Nos.341, 201 of 2017 & 145 of 2022
= =
Dated this the 10th day of April, 2025

J U D G M E N T

Sathish Ninan, J.

RFA No.341 of 2017 and RFA No.201/2017 are by the plaintiff and the defendant respectively, in OS 234/2007. The suit was by the Department, for a declaration that the defendant-Contractor committed breach of contract, and for damages. It was decreed in part by the trial court. RFA 145/2022 is filed by the Contractor, challenging the dismissal of his suit for a declaration that the termination of the contract by the Department is void, and for realisation of money. The suit was dismissed by the trial court. As noticed, the suits are by the Department and the Contractor, against each other.

2. Ext.A1 agreement dated 11.03.2004 was entered into between the parties with regard to the work of “Improvement of Riding Quality Works” in Km. 42/000 to 55/000 of NH-212. The work was to be completed within three months. According to the Department, the site was handed over to the contractor on 19.03.2004. In spite of repeated instructions, both oral and in writing, the contractor failed to execute the work. After issuing Ext.A7 show cause notice dated 27.05.2005, the contract was terminated as per Ext.A11 order dated 29.07.2005. The contractor was put on notice that, as per the terms of the contract he was liable to compensate the Department for the loss sustained on the breach.

3. The Department filed the suit OS 234/2007 seeking a declaration that the contractor committed breach of the contract and for realisation of an amount of ₹ 1,63,35,794/-, which is allegedly the loss suffered consequent on the breach of contract by the contractor.

4. The contractor denied that he had committed breach of the contract. It was contended that the Department did not hand over the site on 19.03.2004 as claimed. There were several obstructions at the site for carrying out the works. The level measurements were not taken by the authorities in spite of repeated requests. There was heavy rainfall, preventing carrying out of the work. It was contended that he was always ready and willing to carry out the work but it could not be carried out for the aforesaid reasons. It was contended that part of the work was done and that he was willing to complete the same. The termination of the contract was alleged to be illegal. By way of OS 62/2008 the contractor sought a declaration that the termination of the contract is void, and claimed ₹ 79,14,000/- from the Department under various heads including, return of security deposit and performance guarantee, value of work done etc.

5. The trial court found that the contractor committed breach of contract; the reasons urged by the defendant for the non-performance were not accepted. With regard to the claim for damages, the trial court held that the Department failed to establish the same. Accordingly, but for declaring that the breach of contract was committed by the contractor, all other reliefs claimed by the parties against each other were declined.

6. We have heard Sri.Sunil Kumar Kuriakose, the learned Government Pleader on behalf of the Department, and Sri.Babu Karukappadath, the learned counsel for the contractor.

7. The points that arise for determination are :-

(i) Is the finding of the trial court that the contractor committed breach of contract, founded on evidence?

(ii) Was the trial court right in having declined the Department the relief of damages?

(iii) Do the decree and judgment of the trial court warrant any interference?

8. The contract was entered into on 11.03.2004 and the period for performance was three months. The termination of the contract was under Ext.A11, dated 29.07.2005. The conduct of both parties reveal that they did not intend time to be the essence of the contract, or at any rate, both the parties were willing to accept extended performance. The reasons projected by the contractor for the delay and non-performance are (a) the delay in handing over the site, (b) failure of the Department to abate the hindrances/obstructions to carry out the work, (c) delay on the part of the Department to take initial level measurements, and (4) heavy rains preventing carrying out the work.

9. Though the contractor would contend that there was delay in handing over of the site, there is not even a single communication by the contractor to the Department whereby he had voiced such a grievance and required them to hand over the site for starting the work. On the other hand, it is the definite case of the

Department that the site was handed over on 19.03.2004 i.e 8 days after the agreement. Ext.A2 is the communication dated 26.08.2004 by the Department to the contractor wherein it is mentioned that the site was handed over. Such statement with regard to the handing over of the site is reiterated by the Department in Ext.A4 communication dated 21.12.2004. The contractor never controverted it. Therefore, the said contention of the contractor is bound to fail.

10. With regard to the alleged failure on the part of the Department to remove the hindrance/obstructions at the site to enable carrying out of the work, the learned counsel for the contractor would, by referring to Ext.B1, a document maintained by the Department, which gives details of the works arranged for the period ranging from 11.03.2004 to 29.07.2005, contend that, as is evident therefrom various works including construction of retaining walls, drains, filling up of potholes etc. were being carried out at the very same

site, simultaneously, by different contractors. Going by the nature of work involved, unless unhindered site is provided, the contract could not have been executed, it is argued. Here it is relevant to note that, there is no material to find that the contractor had at any point of time raised such a grievance before the Department. If the grievance of the contractor was that he was unable to carry out the work consequent on such hindrances, he should have immediately brought it to the notice of the Department. In the absence of any evidence in such regard, such contention can only fail.

11. That apart, it is to be noticed that the other works undertaken by the other contractors as mentioned in Ext.B1, to which the attention of this court was drawn by the learned counsel for the contractor, were all completed well within the stipulated time of completion in the year 2004 itself. With regard to the contract in question, it is evident that the Department was willing to accept the performance of the contract

even beyond the year 2004. They did not seek any damages for not carrying out the work within the original stipulated period of 3 months or even in the year 2004. Since the Department was willing to accept the work even if it was done at least in the year 2005, the hindrance if at all any at the site due to the other works at the site could not extend beyond the year 2004. Therefore, for the said reason also, the non-carrying out of the work alleging hindrance/obstruction, cannot be justified.

12. The next contention of the contractor is with regard to the failure on the part of the Department to take initial level measurements. The work involved being with regard to the soling of the road, it is necessary that the initial level of measurements ought to be taken, without which the quantity of work done could not be correctly assessed. The level measurements were taken only in February, 2005. Therefore, the contractor could not be faulted for not having carrying out the work, it

is contended.

13. It is the case of the Department that, as per the nature of the work involved, taking of initial level measurement is irrelevant and the payment is to be on area basis. This is evident from Ext.A3 communication by the Department to the contractor wherein it is stated "*As a registered contractor you should be well aware, that there is no need to take level measurements for BUSG Work since the same is measured and paid on area basis only*". In the written statement by the Department in OS 62/08 it is admitted that the initial level measurements were taken on 01.02.2005, 03.02.2005 and 04.02.2005 and it was reported on 15.02.2005. However, it is reiterated therein that such exercise was done at the instance of the contractor who insisted that without initial level measurement he cannot do the work. Therein they still maintain that taking of initial level measurement was not necessary. Ext.B2 is a reply obtained by the contractor from the Department in his query under the Right to Information Act. Therein also it has been

stated that the level measurements were reported to the CTE on 15.02.2005. The learned counsel for the contractor would rely on Page No.145 of Ext.A1 agreement which provides that joint measurements with precision instruments are to be taken prior to commencement of work. It suggests that taking of initial level measurement would be necessary.

14. Even considering that taking of initial level measurement was necessary for carrying out the work and it was completed only by 15.02.2005, still the Department was prepared to accept the performance of the contract after that. It would have been sufficient if the contractor had completed the work within three months from 15.02.2005. However, he failed to do so. In Ext.A10 communication letter by the contractor to the Department it is stated that the levels were reported on 15.01.2005 (though by the records it is 15.02.2005) and that he started works on the 26th. In Ext.A5 communication by the Department to the contractor, dated

28.03.2005, it has been stated that, though the contractor started the work on 11.03.2005, it was not done as per the specifications and the work was stopped. The contractor was asked to rectify the defects pointed by the officers. No reply was sent to Ext.A5 communication by the contractor. It is thereafter on 27.05.2005 that the Department issued Ext.A7 show cause notice to the contractor pointing out that he had done work only on one day and that too not as per specifications, and that the contract is liable to be terminated at his risk and costs. Noticeably, the said notice (Ext.A7) was issued only on 27.05.2005 ie. after a period of three months from the reporting of the initial level measurement. It shows that, even after the taking of the initial level measurement the contractor had the contract period of three months for performance of the contract. Still the contractor failed to carry out the work. Therefore, the contention of the contractor that the failure to carry out the work was

due to the delay on the part of the Department in taking initial level measurements does not hold good.

15. The next contention of the contractor is pointing out climatic conditions. According to him there were heavy rains during the entire period which prevented him from carrying out the work. Relying on the “Specifications For Road and Bridge Works” issued by the Ministry of Road Transport and Highways published by the Indian Roads Congress, the learned counsel for the contractor would argue that the work, which included ‘prime coat over granular base, build up spray grout, bituminous pavement layers’ etc. cannot be carried out unless the surface is dry. Therefore, the continuous rains in the year prevented him from carrying out the work, it is argued. To substantiate that there were rains during this period, he relied on Ext.B16 communication from the Indian Meteorological Department, Government of India, providing a data with regard to the daily rain fall in the area concerned during the

relevant period. A perusal of the same would show that it would not support the claim of the contractor. The report evidences that there were not much rains after the taking of the initial level measurements on 15.02.2005. Hence the said document would not come to the aid of the contractor. The fact that there were rains in the year 2004, consequent to which the contractor was unable to do work, has been acknowledged by the Assistant Engineer in Ext.B5 communication sent to the Assistant Executive Engineer. But we have already excluded the entire period up to 15.02.2005 to the benefit of the contractor. We are confining ourselves to the question as to whether there was failure on the part of the contractor to do work treating the period of commencement as 15.02.2002. There is no communication there after, whereby he voiced any grievance regarding any of the above heads as disabling him from carrying out the work. None of the grievances projected by him subsisted after 15.02.2005. The contractor could have

very well completed the work within three months from 15.02.2005. It is on the failure to do so that Ext.A7 show cause notice for termination of the contract was issued by the Department on 27.05.2005. It was followed by Ext.A11 termination notice dated 29.07.2005. Therefore, it can only be held that the breach of the contract was committed by the contractor and that the termination was justified. The trial court was right in having held so.

16. With regard to the claim of the Department for damages, it is their case that consequent to the breach of the contract by the contractor the Department had to make alternate arrangements. The court found that there is paucity of evidence with regard to the rearrangement of work and also the damages. The court found that there is no evidence to show the details of the work executed under the subsequent agreement as claimed by the Department. The learned Government Pleader would contend that Exts.A13 and A14 have been produced by the

Department to prove the damages. Ext.A13 is a communication by the Department to one M/s C.Vijayan and Co., in connection with acceptance of his bid dated 18.11.2005 for execution of "IRQP 2003-04-Improvements of Riding Quality Works from km 42/00 to 55/00 of NH-212". Ext.A14 is the intimation by the Department to the contractor pointing out the damages and claiming the same. These two documents amply justify the claim for damages, is the argument of the learned Government Pleader.

17. The assessment of damages by the Department was challenged by the contractor before this Court in W.P.(C) Nos.27585/2005 and 10998/2006. As per Ext.B15 judgment this Court held that the Department cannot be an arbiter in its own cause and that the damages are to be assessed through the forum of civil court. Therefore, it was obligatory on the part of the Department to produce the relevant materials relating to the subsequent tender, prove the identity of the works etc.

No document is produced by the Department to prove the mode in which the alternate arrangement was made. But for the reference in Ext.A13 that the allotment was preceded by a bid, no documents in the said regard are produced. The nature and quantity of the work in respect of such bid if any was invited is not available on record. Without proving that the nature of the work covered under the subsequent arrangement was the very same as that in Ext.A1 agreement, the damages could not be assessed by the court. Mere production of Ext.A13 communication is not sufficient to prove the damages suffered. It was in the absence of any material in the said regard that the court held that there is dearth of material to find the damages suffered by the Department. In the absence of specific details, the trial court without awarding further damages merely permitted the security amount to be forfeited. On the particular facts of the case we find that the trial court was justified in holding so.

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18. On the discussions as above, we concur with the findings of the trial court. The decree and judgment of the trial court warrants no interference.

Resultantly, the appeals fail and are dismissed. No costs.

Sd/-
SATHISH NINAN
JUDGE

Sd/-
SHOBA ANNAMMA EAPEN
JUDGE

kns/-

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P.S. To Judge