IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

WP(C).No. 27420 of 2014 (B)

PETITIONER(S):

JOSE THOMAS M.,
GOVERNMENT CONTRACTOR, JOSE BUNGALOW,
PIDAVOOR.P.O., PATHANAPURAM,
KOLLAM DISTRICT - 691 625 &
LEAD PARTNER OF JBC VALIYATH (JOINT VENTURE)

BY ADVS.SRI.K.BABU THOMAS
SMT.MARYKUTTY BABU.

RESPONDENT(S):

1. UNION OF INDIA,
REPRESENTED BY THE GENERAL MANAGER,
SOUTHERN RAILWAYS,
SOUTHERN RAILWAY HEAD QUARTERS OFFICE, PARK TOWN,
CHENNAI- 600 003.

2. THE CHIEF ENGINEER (CONSTRUCTION)
SOUTHERN RAILWAY ERNAKULAM, KOCHI - 682 016.

3. THE DEPUTY FINANCIAL ADVISOR & CHIEF ACCOUNTS OFFICER,
SOUTHERN RAILWAY ERNAKULAM, KOCHI - 682 016.

BY SRI.C.S.DIAS, SC, RAILWAYS.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24-02-2015, THE COURT ON 22/05/2015 DELIVERED THE FOLLOWING:

rvs.

WP(C).No. 27420 of 2014 (B)

APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT P1: TRUE COPY OF RELEVANT PORTION OF THE AGREEMENT LETTER OF ACCEPTANCE & TENDER DOCUMENTS INCLUDING CLAUSE 16.1 OF THE GCC.

EXHIBIT P2: TRUE COPY OF RELEVANT PORTION OF BILLS PAID BY THE RESPONDENTS BETWEEN 26/08/2011 AND 15/09/2014 SHOWING RECOVERY/ ADJUSTMENT OF RS.1,05,91,285/-.

EXHIBIT P3: TRUE COPY OF REPRESENTATION OF THE PETITIONER TO THE 2ND RESPONDENT FOR CONVERTING SECURITY DEPOSIT TO INTEREST BEARING FIXED DEPOSIT IN BANK.

EXHIBIT P4: TRUE COPY OF LETTER OF THE 2ND RESPONDENT REFUSING TO CONVERT SECURITY DEPOSIT TO INTEREST BEARING DEPOSIT IN THE BANK.

EXHIBIT P5: TRUE COPY OF REPRESENTATION OF THE PETITIONER TO THE RESPONDENTS REQUESTING RELEASE OF SECURITY DEPOSIT.

EXHIBIT P6: TRUE COPY OF ORDER OF THE 2ND RESPONDENT FOR RELEASE THE SECURITY DEPOSIT ON ACCEPTING BANK GUARANTEE/FDR FOR EQUAL AMOUNT.

RESPONDENT(S)' EXHIBITS :

NIL.

/TRUE COPY/

P.A.TO JUDGE

RVS.

A.V.RAMAKRISHNA PILLAI, J.

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W.P(C) No.27420 of 2014

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Dated this the 22nd day of May, 2015

JUDGMENT

Aggrieved by the refusal of the respondents to release the security deposit amount to the petitioner on accepting bank guarantee for an equivalent amount issued by M/s. Federal Bank Ltd., the petitioner has come up before this Court.

2. Work was awarded to the petitioner, who is a contractor, by the respondents in connection with the development of railway line between Quilon Junction and Virudunagar Junction. Ext.P1 agreement dated 22.7.2011 with initial contract rate of ₹16,74,23,835/- was executed. As specified in clause 13 of the instructions to the bidders in Ext.P1, 5% of the contract value i.e. ₹83,71,129/- had to be deposited as security. The petitioner alleges that the respondents have adjusted the earnest money deposit of ₹9,82,000/- furnished by the petitioner along with the tender

submitted for the work towards security deposit. The petitioner further alleges that the respondents have recovered ₹96,09,285/- towards security deposit from running account bills paid to the petitioner between 26.8.2011 and 15.9.2014 as per Ext.P2.

3. The petitioner further alleges that as on 15.9.2014, the respondents have accounted the value of the works carried out and completed by the petitioner for ₹22,46,08,909/- as against the value of the works of ₹16,74,23,835/-, envisaged in Ext.P1 agreement which is more than 135% of the contract rate. The petitioner further alleges that he has completed the whole work as instructed by the respondents, except new items of work.

4. The grievance of the petitioner is that for the security deposit amount of ₹1,05,91,285/- withheld by the respondents, the petitioner was paying interest to the financier bank. The petitioner alleges that the respondents are bound to release the aforesaid amount retained by them on accepting bank guarantee for an equivalent amount issued

by the Federal Bank Ltd., Pathanapuram branch, to enable him to earn interest on the amount withheld by them and their refusal to release the same is illegal and violates his fundamental rights.

5. In the counter affidavit filed by the respondents, they have contended that as per clause (13) of Ext.P1 agreement of works, the petitioner has agreed to the stipulation that 5% of the contract value would be the security deposit and the said amount would be recovered at the rate of 10% from the running bills of the contract, if the value of the contract is less than ₹50/- crores.

6. According to them, it was specifically stipulated in the said conditions that if the contract value is less than ₹50/- crores, no other mode of collecting security deposit would be accepted. According to them, there is a special note that, no interest would be payable on the security deposit.

7. They would further contend that the work is still in progress and as per clause 13.3 of Ext.P1 agreement security deposit shall be

returned to the contractor only after the physical completion of the work as certified by the competent authority and after the expiry of maintenance period and after passing the bill certified by the competent authority.

8. Arguments have been heard.

9. The prayer of the petitioner is to direct the respondent railway to release the security amount of ₹1,05,91,285/- accepting the bank guarantee for an equivalent amount. The definite stand taken by the respondent railway is that the work has not been completed and the work that are to be completed is continuing with the earlier work. Therefore, according to the respondent railway, the petitioner is seeking a premature release of the security deposit.

10. However, the learned counsel for the petitioner inviting my attention to Ext.P6 would argue that the work was completed in all respects. It was also pointed out by the learned counsel for the petitioner that the petitioner is not praying for a release of the

security deposit, but is only for substitution by a bank guarantee.

11. The learned standing counsel for the respondent railway inviting my attention to Ext.P1 submitted that there is no provision in Ext.P1 for such conversion. By Ext.P6 dated 3.7.2014, it is directed to convert cash credit available with the railways to bank guarantee or fixed deposit, for an equivalent amount, noticing that the petitioner has carried out the works valued more than the contract. This fact is not reflected in the counter affidavit filed by the respondents.

12. It was submitted by the learned counsel for the petitioner that the whole works included in Ext.P1 and additional works ordered were completed on 15.9.2014 with the value of works at ₹22,46,08,909/- as against the contract rate of ₹16,74,23,835/- in Ext.P1. It was pointed out that no dispute arose to notify the same demanding arbitration in view of the direction in Ext.P6 dated 3.7.2014 for conversion of cash security available with the respondents. Therefore, I am not inclined to accept the submission

made by the learned standing counsel for the railway that the petitioner had alternate remedy of arbitration as per clauses 64(1)(i) and 64(1)(ii) of the General Conditions of Contract (GCC). The so called alternate and efficacious remedy suggested for adjudication would arise only when there is disputed questions of fact.

13. The conversion of cash security available with the respondents to bank guarantee for an equivalent amount as ordered in Ext.p6 dated 3.7.2014 is not the return of security deposit dealt with in clause 13 of Ext.P1. The respondents could not point out any provision in the agreement preventing conversion of cash security available with the railways to bank guarantee. The security deposit as stipulated in clause 16(1) of GCC is for due and faithful fulfillment of the contract as specified in clause 3.5 in Ext.P1.

14. As the whole work valued before 20.10.2014 has been completed as payment of ₹22,46,08,909/- was made on 15.9.2014 as against the contract value of ₹16,74,23,835/-, included in Ext.P1

agreement, it can be concluded that a faithful fulfillment of contract has been accomplished. The question of return of security deposit does not arise in conversion of cash security available with the railways to bank guarantee.

15. The petitioner points out that he is paying 14.75% per annum with monthly rests to the financier bank. The respondents are bound to know the rate of interest on loans extended by commercial banks as they have already realised more than ₹ 36 lakhs by way of interest on the mobilisation of advance paid for the commencement of the works. The conversion of cash deposit available to a FDR/bank guarantee with an equivalent amount ordered in Ext.P6 is not in derogation of any of the provisions in Ext.P5. Therefore, on a consideration of the entire materials now placed on record, this Court is of the view that the petitioner is entitled to the reliefs prayed for.

In the result, the writ petition is allowed. Ext.P4 is quashed. The respondents are directed to release ₹1,05,91,285/-

retained by them towards security deposit on accepting bank guarantee for an equivalent amount issued by M/s. Federal Bank Ltd., Pathanapuram to enable the petitioner to realise interest on the amounts ratained with them. This shall be done within one month from the date of receipt of a copy of this judgment.

Sd/-
A.V.RAMAKRISHNA PILLAI
JUDGE

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