RA-CW-486-2013
IN CWP-3431-2013

M/s Lord Shiva Construction Co. Pvt. Ltd.
Vs.
State of Haryana & others

Present: Mr. Puneet Bali, Senior Advocate, with
Ms. Neha Sonawane and Mr. Arun Gupta, Advocates,
for the petitioner.

Mr. A.K.Bansal, Advocate,
for the applicant-respondents.

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In the present writ petition, the petitioner has sought a writ of certiorari for quashing memo dated 24.09.2012, whereby a sum of Rs.1,29,27,458/- was retained due towards the petitioner on account of completed contracts of (1) Upgradation of Ganibar NH-1 to Sanoli Khurd SH-116, ID-825 and (2) Upgradation of (a) NH-1 to SH-14 upto Bhalsi Village RD 0 to 18.78 and (b) NH-1 to Sikanderpur upto Refinery Road RD 0 to 8.25 ID-836. The said amount was retained by the respondents on account of recoveries from the petitioner in the contracts i.e. (i) Upgradation of road from Israna Kard-Bhaupur in Panipat District (ID-948); (ii) Upgradation of road from SH-14 Urlana Khurd + Police Station Urlana Kalan approach road in Panipat District (ID-949) and (iii) Upgradation of Madlauda-Bal Jattan via Khandra (ID-950).

The writ petition was disposed of by a Division Bench of this Court on 10.07.2013 relying upon the judgment of the Hon'ble Supreme Court in <u>Union of India Vs. Raman Iron Foundry AIR 1974 SC 1265</u> inter alia holding that the right of a party aggrieved by breach of contract is to sue for damages and the claim for damages does not become a debt until adjudication. There has to be adjudication by a judicial forum or by arbitration. Having said so, the Bench ordered as under:

> "The respondents in the present case have sought to recover the amount without following the process of law and even today they insist

> that the action taken should be upheld. Ex-facie, the action is not sustainable and contrary to the settled legal position.
>
> The impugned memorandum dated 24.09.2012 issued on the basis of the alleged liquidated damages is, thus, quashed with a natural sequitur that the amount so deducted in pursuance thereto would be paid to the petitioner in accordance with law. The petitioner would also be entitled to costs quantified at Rs.7500/-."

Now the applicant-respondents have sought review of the said order pointing out that the judgment in Raman Iron Foundry's case (supra) has been explained and partly overruled in later judgment reported as M/s H.M.Kamaluddin Ansari and Co. Vs. Union of India & others (1983) 4 SCC 417. It is, thus, contended that the directions, as reproduced above, run counter to the judgment of the Hon'ble Supreme Court.

After tendering no objection to the deletion of the aforesaid two paragraphs, learned counsel for the petitioner contends that the respondents may be justified to retain the amount due from the other contracts, but have no right to retain the amount of liquidated damages without its adjudication.

We have heard learned counsel for the parties and find that the finding recorded in Raman Iron Foundry's case (supra) to the effect that liquidated damages have to be adjudicated upon, has not been set aside by any other judgment of the Hon'ble Supreme Court, but the power to retain the amount due from the other contracts has been upheld. In M/s H.M.Kamaluddin Ansari & Co. case (supra), it has been held to the following effect:

> "28. Clause 18 of the standard form of contract earlier was slightly differently worded and it read 'whenever under this contract any sum of money is recoverable from and payable by the contractor'. But this formula was deliberately and advisedly altered when the present standard form was introduced and instead the words 'whenever any claim for payment of a sum of money arises' were substituted and this change in phraseology indicated that in order 622 to attract the applicability of the present cl. 18, it was not necessary that there should

be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money ’t by the contractor irrespective of the fact whether such sum of money was presently due and payable or not. ....

29. The Court itself while interpreting cl. 18 of the contract has observed:

> "It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of cl. 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is well settled rule of interpretation applicable alike to instruments as to statutes ....".

But while dealing with another aspect of cl. 18 observed to the contrary that it should not be construed as a statute. It may, however, be pointed out that even after the change in the language of cl. 18 of the standard agreement the Union of India cannot be injuncted from withholding the amount under other bills of the contractor. But it can certainly be injuncted from recovering or appropriating it to the damages claimed.

xxx xxx

31. We are clearly of the view that an injunction order restraining respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor-appellant. Such an order was clearly beyond the purview of cl. (b) of s. 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount Lying with it in respect of other claims of the contractor towards its claim for damages. But certainly cl. 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.”

Challenge in the present writ petition is to the communication dated 24.09.2012 (Annexure P-24), wherein the reference has to be made to two Annexures i.e. Annexure-1 i.e. the amount recoverable from the petitioner and Annexure-2 i.e. the amount payable to the petitioner. Clause 46.2 of the contract reads as under:

“**46.2** The Performance Security and additional performance security for routine maintenance shall be valid until a date 45 days from the date of issue

> of certificate of completion of construction work and maintenance work subject to the condition that if the performance security is in the form of a Bank Guarantee, the period of validity of Bank Guarantee could be one year initially. However, the contractor would get this Bank Guarantee extended in such a way that an amount equal to five per cent of the contract price is always available with employer until 45 days after the lapse of Defect Liability Period. If the contractor falls to maintain above Performance Security, the Employer would recover the same from any dues payable to the contractor."

The amount has been retained as per the terms of the contract. The petitioner cannot seek any direction to pay the amount retained, which is in fact conceded position in law by the petitioner. Therefore, the respondents are entitled to withhold the amount due to the petitioner from other accounts.

In view of the above, the present review application is allowed by deleting paragraphs, as reproduced above. Consequently, the writ petition stands dismissed. However, it shall be open to the petitioner to dispute the withheld amount as per the agreed procedure, in terms of the agreement.

[HEMANT GUPTA]
JUDGE

21.08.2015
'D.Gulati'/Vimal

[AUGUSTINE GEORGE MASIH]
JUDGE