

HON'BLE SRI JUSTICE S.V.BHATT

W.P. No.24945 OF 2012

ORDER:

The petitioner prays for Mandamus declaring the action of respondents in withholding any amount contrary to Clause 47 of Agreement bearing No.20/2008-09 dated 26.02.2009 in pursuance of Memo No.5217/Reforms/06 dated 23.02.2006 as arbitrary, illegal and unconstitutional.

The petitioner prays for direction to respondents to refund the amounts due to petitioner against furnishing valid Bank Guarantee to an equal amount and continue to release the amounts accumulated to Rs.50 lakhs/100 lakhs against Bank Guarantee and further direct respondents not to withhold any amount towards FSD by way of cash, but by way of Bank Guarantee.

Mr. Prasad Rao, learned counsel for petitioner, limited his submissions to the retention of 2.5% under Clause 6 of Annexure-1 to Memo dated 23.02.2006.

To appreciate the submissions of petitioner, the Court finds it convenient to excerpt Clause 47 of Agreement No.20/2008-09 dated 26.02.2009 and Clause 6 of Annexure-1 to Memo dated 23.02.2006.

“47.1: The department shall retain from each payment due to the contractor @ 7.5% of bill amount until completion of the whole of the works. The retention amount so accumulated will be released up to 5% against the Bank Guarantee in Spells of Rs.50,00/100,00 lakhs (Rupees fifty/hundred Lakhs only).

47.2: On completion of the whole of the Works out of total amount retained (i.e.(7.5%) 5% will be re-paid to the

Contractor and balance (i.e.2.5%) when the Defects Liability Period has passed and the Engineer-in-Charge has certified that all the Defects notified by the Engineer-in-Charge to the Contractor before the end of this period have been corrected.”

“6. Release of retention amount against Bank Guarantee:

Government permits the following procedures for the release of retention amounts:

- i) Release of the retention amount against B.G. in multiples of Rs.25 Lakhs/50 Lakhs.
- ii) The retention amount in multiples of Rs.1000/- against interest bearing securities subject to condition that the rate of progress is maintained.
- iii) The 2.5% EMD that needs recovery in final bill shall be in cash only.”

Mr. Prasad Rao submits that 2.5% EMD retained till the completion of Defects Maintenance Period is put in a fixed deposit, and after completion of Defects Liability Period, the 2.5% retained by respondents is returned with interest accumulated on the FDRS. According to him, the mere transfer of cash representing 2.5% of the retained amount after completion of period is resulting in financial loss to petitioner and prays for appropriate direction.

The learned Government Pleader places reliance upon the stand in the counter affidavit and submits that the release of retention amount is covered by the term of the agreement between the parties. The contention now introduces in a new methodology for release of retention amount by reference to Memo dated 23.02.2006 or independently is impermissible and prays for dismissal of the writ petition.

I have taken note of the prayer of petitioner for a direction to deposit 2.5% in an FDR during the currency of Defects Liability Period and to refund 2.5% amount with accrued interest thereon, and this procedure admittedly is not a term agreed between the parties or the Memo provides for it. Unless and until, even assuming the writ petition is maintainable, the petitioner satisfies the Court that a right on the lines now canvassed in this writ petition is recognised either under the agreement or by Government Orders, this Court cannot in its jurisdiction under Article 226 of the Constitution of India direct alternatives to parties for discharge of mutual obligations under the agreement. The petitioner is aware of the scope of work, various terms and conditions including the release of retention amount right from the date on which the tender process is initiated and the petitioner entered into agreement with respondents. Therefore, in the considered view of this Court, the deviations now prayed for cannot be considered. Except the above, no other submission is made by learned counsel for the petitioner. The limited prayer, for the reasons recorded above, fails and is rejected accordingly.

The writ petition is dismissed. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

S.V. BHATT, J

Date: 07.02.2017

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