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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 02.03.2020

Judgment Delivered on : 23.03.2020

WPC No. 601 of 2020

- M/s Gannon Dunkerley & Company Limited, Private Company registered under Company Act, 1956, Having its Registered Office at B-228, Okhla Industrial Area Phase-1, New Delhi 110020 Through its General Manager (Project) (authorized representative) Shri Sanjeev Parashar S/o Shri R.K. Parashar

---- Petitioner

Versus

1. South East Central Railway Through Its General Manager, Bilaspur Chhattisgarh
2. Chief Administrative Officer (Constration) South East Central Railway, Office At Jagmal Chowk Road, Railway Settlement, Bilaspur Chhattisgarh 495004
3. Chief Engineer / Con-II, South East Central Railway, Office At Jagmal Chowk Road, Railway Settlement, Bilaspur Chhattisgarh 495004
4. Deputy Chief Engineer/ Con-II South East Central Railway, Office At Jagmal Chowk Road, Railway Settlement, Bilaspur Chhattisgarh 495004
5. Deputy Chief Engineer/ Construction E. C. Railway, Renukut Turra, Pipari (Renukut) District Sonebhadra (U. P.) 231221
6. Deputy Chief Engineer (Construction) Office Railway Hospital Campus, Shahdol Pin 484001
7. Chief Administrator Officer (South) East Central Railway, Hazipur, Office of The Chief Administrative Officer/ Construction, E.C.Railway, Mahendrughat, Patna 800004
8. Chief Administrator Officer (North) East Central Railway, Hazipur, Office of The Chief Administrative Officer/ Construction, E.C.Railway, Mahendrughat, Patna 800004
9. Chief Project Manager-I Rail Vikas Nigam Limited, Old Kaveri School Complex (Near Health Centre, Western Township) DLW Varanashi (U. P.) Pin 221004

10. The Managing Director Indian Railway Construction Company (IRCON) Bilaspur Chhattisgarh
11. The Managing Director Rail Vikas Nigam Limited (RVNL), New Delhi
12. The Managing Director Rail India Technical And Economical Services Limited (RITES) New Delhi 11001
13. East Coast Railways Through General Manger, District Bhubhaneshwar Orissa
14. East Central Railways Through General Manager District Hazipur Bihar
15. East Coast Railways Through General Manager, District Bhubhaneshwar Orissa

---- Respondents

WPC No. 602 of 2020

- M/s Gannon Dunkerley & Company Limited, Private Company registered under Company Act, 1956, Having its Registered Office at B-228, Okhla Industrial Area Phase-1, New Delhi 110020 Through its General Manager (Project) (authorized representative) Shri Sanjeev Parashar S/o Shri R.K. Parashar

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Versus

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15. East Coast Railways Through General Manager, District Bhubhaneshwar Orissa

---- Respondents

For Petitioner	:	Mr. Prafull N. Bharat, Advocate
For Respondents-SECR	:	Mr. Abhishek Sinha, Standing Counsel

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

CAV JUDGMENT

Per P. R. Ramachandra Menon, Chief Justice

1. (a) Whether the Awarder of a contract can recover or withhold the amounts payable to the Contractor in respect of the same or such

other contracts with the Awarder towards the lapses/losses caused from the part of the Contractor without its being adjudicated/quantified by way of Arbitration or by a competent Court of law?

(b) Whether the Awarder would be justified in instructing other similar entities for not disbursing the dues payable to the Contractor in respect of the work contracts awarded by them; referring to the alleged loss to be compensated to the former ?

(c) Whether availability of 'alternative remedy' is an absolute bar, in view of the limited scope of judicial scrutiny in respect of contractual matters and if so, is there any exception?

(d) Can the 'Arbitration clause', if any, in the agreement with the Awarder will take care of the situation in respect of the work contracts awarded by others to justify the withholding / recovery on the instructions given by the former Awarder and if not, can it not to be tested by this Court, invoking the power under Article 226 of the Constitution of India ?

These are some of the important questions projected in these writ petitions.

2. Both the above writ petitions have been filed by the very same Contractor in respect of the two different causes of action arising from two different contracts awarded by the Respondent-South East Central Railway ('SECR', in short). Parties, pleadings and proceedings are referred to as given in WPC No. 601 of 2020, except where it is separately adverted to.

3. Heard Mr. Prafull N. Bharat, the learned Counsel appearing for the Petitioner and Mr. Abhishek Sinha, the learned Standing Counsel appearing on behalf of the Respondent-SECR at length, with reference to the pleadings raised by both the sides.

4. For dealing with the questions formulated above, it is necessary to have a brief idea as to the factual sequence. The SECR (Awarder) issued a Notice Inviting Tender ('NIT', in short) bearing No. CEC/BSP/15-16/147 for "Execution of earth work in formation, construction of major and minor bridges, supply of machine-crushed stone ballast, transportation of P.Way materials, execution of P.Way works, welding and other allied miscellaneous works between Singpur (In) to Badhwapara (In) and Mudaria (In) to Karkali (Ex) in connection with construction of Anuppur-Katni 3rd line of Bilaspur Division of the SECR", stipulating the period of execution of the work as 2 years. (In the case of WPC No. 602 of 2020, the NIT was having No. CEC/BSP/15-16/144 and the work was similar, but in connection with the different segments in the same Railway line). The Petitioner turned out to be the successful bidder and Letter of Intent ('LOI', in short) dated 27.12.2016 was issued for the total value of Rs.158,91,17,636/-. The Petitioner was asked to submit the Performance Security of Rs.7,94,55,882/- (based on the contract amount), which was stated as satisfied. (In the case of WPC No. 602 of 2020, in connection with the other contract, the total value as shown in the LOI dated 27.12.2016 was Rs.113,00,88,555/- and the Performance Security asked to be satisfied was Rs.5,65,04,428/-). In both the cases, formal agreements were executed on 24.03.2017 and as per the terms and

conditions, the SECR had to issue the Final Location Survey, General Arrangement Drawing and L-Section to the Petitioner so as to enable them to commence the work.

5. The Petitioner points out that, for commencing the work, the site had to be made available to the Petitioner. For undertaking the Final Location Survey and preparation of Drawing, which was a time consuming task, the SECR had issued a separate tender, which ultimately came to be terminated and the said work was also added on to the scope of work assigned to the Petitioner, by executing necessary proceedings. According to the Petitioner, even after 10 months from the date of issuance of the LOI, the requirements to be satisfied from the part of the SECR were not honoured and the approved Drawings were handed over by the SECR only in the year 2019, by virtue of which it was not possible for the Petitioner to have the work executed within the stipulated time of 2 years. It is brought on record that the Petitioner had availed various advances from the SECR and according to the Petitioner, they had executed the works worth Rs. 35.52 crores; out of which payment was made only to an extent of Rs.29.36 crores and that amounts were pending due under different heads like GST, PVC, Claim etc. At the same time, because of the cash crunch in the market conditions, the Petitioner was also affected much and hence the Bank Guarantee of Rs.8.74 crores expired on 19.06.2019 could not be renewed by the Petitioner; though two other Bank Guarantees worth Rs.8.74 and 7.94 crores were intact and still available with the Respondent-SECR.

6. Taking stock of the situation, the period of the contract was extended by the Respondent-SECR by 'six' months as per order dated 05.02.2019, to be valid till 30.06.2019. Thereafter, another order was issued on 22.08.2019, whereby second time extension was granted to the Petitioner by six months again i.e. till 31.12.2019. Despite this, a '07 days' notice' was issued to the Petitioner on 30.10.2019, alleging slow progress of work ignoring the instructions of the Engineer-in-charge of site and as to violation of labour laws. Though a reply was submitted by the Petitioner, it was not properly considered and another notice of '48 hours' was issued on 22.11.2019 to substantiate the progress; simultaneously directing the Petitioner to extend the validity of the Bank Guarantee. Here again, the Petitioner submitted reply on 25.11.2019 explaining the facts and circumstances; but without any regard to the same, Annexure P/8 order was issued on 28.11.2019, whereby the contract was put an end to and the security deposit and performance guarantee furnished by the Petitioner were ordered to be appropriated/encashed. Shortly thereafter, i.e. on 02.12.2019, Annexure-P/9 notice was issued to the Petitioner for undertaking the final measurement as per terms of the contract; in response to which the Petitioner submitted a representation on 06.01.2020 explaining the position. Giving scant regards to the explanation, the balance work was re-tendered by the Respondent-SECR on 31.12.2019 (which is not under challenge in these writ petitions).

7. On the very same day of calling the Petitioner to have the final measurement i.e. on 02.12.2019, Annexure-P/12 communication was issued by the Respondent-SECR to several other Railway

Establishments, who had awarded various contracts to the Petitioner, as to the need for recovery of about 24.177 crores and asking them to withhold the said amount from the amounts payable to the Petitioner by the said authorities as above. One of the said Railway Establishments with whom the Petitioner has entered into contract for various works, in the meanwhile, issued Annexure-P/13 dated 04.02.2020 returning the Bill presented by the Petitioner on performing the works, with reference to Annexure-P/12 dated 02.12.2019 issued by the Respondent-SECR. This is stated as totally high-handed in all respects and hence the challenge in the writ petition, with the following prayers:

> "10.1 This Hon'ble Court may kindly be pleased to issue an appropriate Writ or Order or direction thereby calling for the records in respect of contract No. 307/Karkeli – Lorha & Chaindia – New Kathi / 3rd Line APR – KTE/SECR/16, dated 24.03.2017.
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> 10.2 That, this Hon'ble Court may kindly be pleased to issue an appropriate writ/direction for setting aside the impugned termination order dated 28.11.2019 (ANNEXURE – P/8) issued by the respondent no. 3 and declare the same to be illegal, arbitrary and non-est in the eyes of law.
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> 10.3. That, this Hon'ble Court may also be pleased to consequentially quash and set aside the impugned circulars dated 02.12.2019. Annexure P-13.
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> 10.4 That, this Hon'ble Court may also be pleased to direct the respondents to reinstate the contract of the petitioner and process the pending bills etc. of the petitioner in accordance with law.
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> 10.5 That, the Hon'ble Court may be pleased to grant any other relief which the Hon'ble Court deems fit and proper in the facts and circumstances of the present case.
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> 10.6 That, the Hon'ble Court in the facts and circumstances of the present case may further be pleased to grant cost of the petition to the petitioner."

8. The Respondent-SECR has filed reply, mainly contending that the writ petition is not maintainable by virtue of the alternative remedy available by way of Arbitration; that there was total lapse on the part of Petitioner in performing the work awarded to them; that despite the lapse of 'three' years (initial two years and the subsequent two extensions of six months each), only 16.01% of the total works had been completed by the Petitioner and that much amounts have already been drawn as advance but it has been misused/diverted. According to the Respondent-SECR, as many as five '07 days' notice' were issued dealing with the deficit work and to improve the progress in terms of the work schedule, but of no avail. The Petitioner was given two extensions, out of which the first extension was of six months including the extension of two months without penalty under Clause 17A of the GCC (General Conditions of Contract) as two months' time was necessary for the Petitioner to have finalized the drawings and the balance four months with penalty under Clause 17B of the GCC. The second extension of six months was with penalty under Clause 17B of the GCC and it was due to the lapse solely on part of the Petitioner.

9. There is no challenge or dispute from the part of the Petitioner in respect of the two extensions and as such, the plea of delay in giving approved drawings is without any basis. The Respondent-SECR points out that the Petitioner had taken the Mobilization Advance to a tune of Rs.15,89,11,764/-, against which two Bank Guarantees of Rs.8,74,01,470/- each were submitted. One of the above two Bank Guarantees bearing No. 2017/54 issued by the Corporation Bank,

Mumbai expired on 19.06.2019, which was never renewed by the Petitioner despite the repeated requests, virtually making the advance amount released by the Awarder getting unsecured; more so when there was no performance to the requisite extent. It was only to secure the total amount to be recovered by the Awarder (to a tune of Rs.24.177 crores) that, Annexure-P/12 communication was issued to the other Establishments which is quite in tune with the terms agreed by the Petitioner and as supported by the paragraphs 52 and 52A of the GCC, reserving such rights in favour of the Respondent-SECR. There is also an allegation by the Respondent-SECR that the Petitioner, after availing the advance for 'Steel' to tune of Rs.4,52,78,208.96/-, quantum of steel having a value of only Rs.75,75,489.71/- alone was used for the work and the balance advance amount has been misappropriated. To show the course and conduct of the Petitioner, reference is also made to Annexure-R/15 (collectively) contending that 'three', out of the four contracts awarded by the East Central Railway Mahendrughat, Patna have been terminated; particulars of which have been given in paragraph 21 of the return. Respondent-SECR asserts that the action pursued in issuing Annexrue-P/8 and P/12 is only in larger public interest, to protect and safeguard the public money and to ensure that the loss caused to the Government exchequer on being adjudicated by the competent forum / Court of Law is not limited to a 'paper decree' and hence no interference is warranted by this Court.

10. The Petitioner has filed a rejoinder producing some additional documents as per Annexure-P/15 and P/16, virtually reiterating the contentions in the

writ petition. The Petitioner contends that a total sum of Rs. 111.78 crores is due from the Respondent-SECR to the Petitioner in respect of the various works done and further that the Respondent-SECR had already forfeited the Performance Guarantee of Rs. 7.95 crores and the Bank Guarantee against Mobilization Advance of Rs.8.75 crores. Similarly, in the case of the other contract i.e. subject matter of WPC No. 602 of 2020, it is stated that an amount of Rs. 83.20 crores is due to be paid to the Petitioner by the Respondent-SECR.

11. Mr. Prafull N. Bharat, the learned counsel for the Petitioner adverted to the sequence of events as pleaded and noted as above. It is the contention of the Petitioner that there is no right or authority for the Respondent-SECR (Awarder) to recover or withhold any amount payable to the Petitioner without being adjudicated by an Arbitrator. There is a self contained mechanism in the contract and availing the same, the Petitioner has already moved the Chief Engineer (Departmental Arbitrator) and that the matter is pending. This being the position, it is never for the Respondent-SECR (Awarder) to have caused the recovery / retention of the amount payable to the Petitioner by the other Railway Establishments by sending Annexure-P/12, leading to issuance of Annexure-P/13. It is pointed out that the proceedings of the other Railway Establishments by way of Annexure-P/13 {issued with reference to Annexure-P/12 request of the Respondent-SECR (Awarder)} cannot be a subject matter for Arbitration and hence the alleged alternative remedy cannot be an efficacious one. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Union of India and Others v. Tantia Construction***

Private Limited[1] (paragraphs 31, 32, 33 & 34), which was also an instance of Railway contract.

12. According to Mr. Abhishek Sinha, the learned Standing Counsel appearing for the Respondent-SECR, there is serious dispute with regard to the factual aspects, which requires evidence to be adduced and hence it cannot be adjudicated by this Court invoking the jurisdiction under Article 226 of the Constitution of India. The learned counsel points out that the Petitioner is totally silent as to when the Drawings were prepared and submitted by the Petitioner for approval. It is also pointed out that the contract awarded was a composite contract which included the work to be done under several heads, where the approved Drawings had no role to play. Despite the lapse of the initial period of two years and the subsequent extended period of one year (by way of two extensions), the total performance displayed is only to a meagre extent of 16.01%, in respect of which the Petitioner has already obtained an advance of about Rs. 25.44 crores. There were various complaints from the part of the labourers and also the suppliers of materials, that their wages/payments in respect of supply were not cleared by the Petitioner and hence requiring the Respondent-SECR to have it satisfied. The details of the lapses/failures from the part of the Petitioner have been given in a tabulated form, which reveals the scope of work and also the extent of work performed by the Petitioner.

13. In respect of the various heads/works, it is pointed out that no work was done after June, 2019 and that the total lethargy on the part of the

[1] (2011) 5 SCC 697

Petitioner made the Respondent-SECR to issue several '07 days' notices' in terms of the agreement/GCC to improve and display substantial progress, but the Petitioner did not pay any heed to the same. Admittedly, the Petitioner even did not renew the Bank Guarantee which expired on 19.06.2019 and in the said circumstance, there was no other alternative for the Respondent-SECR, than to withhold the amounts payable to him under different heads and to protect the public money by making a request to the other Railway Establishments vide Annexure-P/12; which is stated as strictly in conformity with paragraphs 52 and 52A as agreed to by the Petitioner enabling the Awarder / Respondent-SECR to exercise such lien. It is also pointed out that Annexure-P/12 is not an order to cause recovery, but a request to withhold the amount payable to the Petitioner, till the matter was adjudicated in accordance with law. The learned counsel further points out that, as borne by Annexure-P/13, the circumstances under which the Bill submitted by the Petitioner has been returned have been mentioned and the Awarder of the contract has only required the Petitioner to 'clarify' the fact. This being the position, the averment that the Respondent-SECR has required all the other Railways/Establishments mentioned in Annexure-P/12 to withhold the sum of Rs.24.177 crores, which will take the total figure to several folds, is not having any basis and that it is open for the Petitioner to substantiate the position before the Railways concerned that appropriate extent has already been withheld and to release the balance.

14. The learned Standing Counsel for the Respondent-SECR submits that the idea and understanding of the Petitioner that no amount can be withheld

without adjudicating it by an Arbitrator / Court of Law, placing reliance on ruling rendered by the Apex Court in ***Gangotri Enterprises Limited v. Union of India***[2] is quite wrong and misconceived; as the said ruling has been declared as *per incurium* as per the subsequent ruling rendered by the Apex Court in ***State of Gujarat Through Chief Secretary and Another v. Amber Builders***[3]***.*** The learned counsel also submits that the final measurements have already been taken, the arbitration has not been commenced and that the course of action pursued by the Railways in causing the amounts to be withheld is clearly sustainable in view of the ruling rendered by the Apex Court in ***Union of India v. Concrete Products and Construction Company and Others***[4] (paragraphs 15, 17 & 18), where Clauses 2401 and 2403 of Indian Railways Standard (IRS) Conditions of Contract (which is almost in *pari materia* to paragraphs 52 and 52A sought to be relied on in the instant case). The learned counsel further submits that, though alternative remedy is not an absolute bar, it has to be with reference to the circumstances / exceptions carved out as per the decision rendered by the Apex Court in ***Commissioner of Income Tax and Others v. Chhabil Dass Agarwal*** [5] (paragraphs 10,11 & 12) to the effect that, it is a rule of policy, rather than rule of law, which requirements have not been satisfied in the instant case.

15. The learned counsel for the Petitioner submits in reply that, the sequence of events clearly shows that even if it is arguable that there is some lapse on the part of the Petitioner, the Respondent-SECR was equally or more

[2] (2016) 11 SCC 720
[3] 2020 SCC OnLine SC 13
[4] (2014) 4 SCC 416
[5] (2014) 1 SCC 603

responsible for the delay involved and the right of the Railways to cause withholding of the amount is only “to the extent of loss caused” and never beyond. It is stated that the course and proceedings sought to be pursued by the Respondent-SECR are *per se* wrong and illegal in all respects and interference of this Court is warranted, lest all the contracts entered by the Petitioner with other Railway Establishments should come to a stand still, if amounts are not released by such Establishments merely with reference to Annexure-P/12 issued by the Respondent-SECR.

16. With regard to the availability of alternative remedy and the challenge on the maintainability of the writ petition, the Respondent-SECR have sought to place reliance on ***Tantia Construction Private Limited*** (supra). Even there, the Apex Court has held that it is well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court. In the said case, the Apex Court held that injustice, whenever and wherever takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution, thus, justifying the interference made by the High Court, entertaining and disposing the writ petition filed by the Respondent-Company.

17. Scope of interference by the High Court, in contractual matters, exercising the power under Article 226 of the Constitution of India, where efficacious alternative remedy is available, has been explained by the Apex Court in ***Chhabil Dass Agarwal*** (supra). The law laid down by the Apex Court in

Ram and Shyam Co. v. State of Haryana[6] that if an appeal is from "Caesar to Caesar's wife", the existence of alternative remedy would be a mirage and an exercise in futility; was specifically taken note of and it was held that the remedy under the statute, however must be effective and not a mere formality with no substantial relief. The Apex Court summed up that the question of alternative remedy/ exhaustion of remedies was having '**Exceptions**' (illustrative and non-exhaustive) which were enumerated as below :

> (i) Where remedy available under statute is not effective but only mere formality with no substantial relief,
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> (ii) where statutory authority not acted in accordance with provisions of enactment in question, or
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> (iii) where statutory authority acted in defiance of fundamental principles of judicial procedure, or
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> (iv) where statutory authority resorted to invoke provisions which are repealed, or
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> (v) where statutory authority passed an order in total violation of principles of natural justice.

On applying the law to the given facts and circumstances, we are of the view that the Petitioner does not come within the 'Exception' as mentioned by the Apex Court and the challenge against the termination of the tender vide Annexure-P/8 or issuance of re-tender as per Annexure-P/10 can be agitated only by way of other appropriate remedy, where evidence has to be taken to have the matter finalized on merits and not by way of writ petition filed under Article 226 of the Constitution of India.

18. The Petitioner has not challenged the Annexure-P/10 re-tender proceedings, but for filing Annexure-P/11 representation against the

[6] (1985) 3 SCC 267

termination of the contract ordered as per Annexure-P/8 dated 28.11.2019. In respect of the challenge raised against Annexure-P/8 termination, the contention of the Petitioner is that the work could not be completed within time because of the lapse from the part of the Railways in making the site available; in handing over the General Arrangement Drawing and in satisfying various other requirements as mentioned already. It was for this reason that the time was originally extended, without incorporating any penalty clause, which however stands clarified from the part of the Railways. According to the Railways, despite the lapse of three years (including the extended period of one year by way of two separate spells of six months each), only 16.01% of the work has been completed by the Petitioner and part of the advance released has already been misused/ misdiverted. Several '07 days-notices' have already been issued; followed by the ultimate '48 hours' notice and it was only because no progress was demonstrated, that the contract came to be terminated as per Annexure-P/8. From the nature of contentions raised, it is easily discernible that there are serious disputed questions of facts, which cannot be adjudicated by this Court in a proceeding under Article 226 of the Constitution of India. It is for the Petitioner to pursue appropriate remedy, in accordance with law, based on the terms of the agreement executed in this regard; more so in view of the law declared by the Apex Court on the point.

19. With regard to right of the Respondent-SECR to withhold or cause to withhold amounts payable to the Contractor in respect of the same or other contracts or even in relation to the contracts executed by the

Contractor with some other entities, reliance is sought to be placed on paragraphs 52 and 52A of the GCC, which are reproduced below :

> **"52. Withholding And Lien In Respect Of Sums Claimed :** Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Railway shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor and for the purpose aforesaid, the Railway shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Railway shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same contract or any other contract with this or any other Railway or any Department of the Central Government pending finalization or adjudication of any such claim.
>
> It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Railway will be kept withheld or retained as such by the Railways till the claim arising out of or under the contract is determined by the Arbitrator (if the contract governed by the Arbitration Clause) or by the competent court as the case may be and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Railway shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/ limited company, as the case may be whether in his individual capacity or otherwise."
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> **52-A Lien In Respect Of Claims In Other Contracts:**
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> (i) Any sum of money due and payable to the Contractor (including the Security Deposit returnable to him) under the contract may withheld or retained by way of lien by the Railway, against any claim of this or any other Railway or any other Department of the Central

Government in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with this or any other Railway or any other Department of the Central Government.

(ii) However, recovery of claims or Railway in regard to terminated contracts may be made from the Final Bills, Security Deposits and Performance Guarantees of other contract or contracts, executed by the contractor. The Performance Guarantees submitted by the Contractor against other contracts, if required, may be withheld and encashed. In addition, 10% of each subsequent 'on-account bill' may be withheld, if required, for recovery of Railway's dues against the terminated contract.

{Authority : Railway Board's letter no. 2010/CE-I (Spl.)/CT/41, Dated 27.04.2011}

(iii) It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Railway will be kept withheld or retained as such by the Railway till the claim arising out of or under any other contract is either mutually settled or determined by arbitration, if the other contract is governed by Arbitration Clause or by the competent court as the case may be and contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor."

20. The above condition has been accepted and agreed to be enforced by the Petitioner and as such, the Petitioner cannot now take a U-turn. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Concrete Products and Construction Company*** (supra) (paragraphs 15, 17 & 18). Paragraph 16 of the said judgment extracts Clause 2401 of the India Railways Standard (IRS) Conditions of Contract which is in *pari materia* with the relevant paragraphs of the GCC (52 & 52A) and hence Clauses 2401 and 2403 are reproduced below :

"16. Clause Nos. 2401 and 2403 are as under:-

"**2401.** Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the purchaser till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor."

2403. Lien in respect of claims in other contracts:

a) Any sum of money due and payable, to the contractor (including the security deposit, returnable to him) under the contract may withhold or retain by way of lien by the purchaser or the Government against any claim of the purchaser or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the purchaser or the Government.

b) It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Purchaser or the Government will be kept withheld or retained as such by the purchaser or the Government till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the contractor shall have no claim for interest or damages

> whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor."

21. Clause 2401 confers right upon the Awarder to withhold amounts to the extent as claimed from any sum or sums found to be payable or may become payable to the Contractor under the same or any other contracts with the purchaser from the Government. Clause 2403 stipulates that the Contractor shall have no claim for interest or damages on this account or any other ground in respect of any sum of money withheld or retained under the said Clause. But, the fact remains that the case considered by the Apex Court was in respect of the amount withheld by the same Awarder and not by a different entity. However, since there is no dispute to the fact that the Petitioner has subscribed the signature to the terms and conditions, which includes paragraphs 52 / 52A of the GCC, the Petitioner cannot take a U-turn and contend that Annexure-P/12 issued by the Respondent-SECR to the other Railways, seeking to withhold an amount of Rs.24.177 crores is wrong or illegal, to be interdicted by this Court. This is more so since, Annexure-P/12, as conceded by the learned standing counsel for the Respondent-SECR, is not an order but a request to the other entities, who have awarded contract to the Petitioner and it may or may not be acted upon by the latter. Since it has been acted upon by the East Central Railway, Renukut, who has issued Annexure-P/13 to the Petitioner 'to clarify' the position, it is still open for the Petitioner to clarify the facts and figures to their satisfaction and to have appropriate remedy, in accordance with law, before the appropriate forum.

22. As mentioned already, with regard to the right to have issued Annexure-P/12 by the Respondent-SECR to the other Railways / Entities, who have awarded work contracts to the Petitioner, it is pointed out by the learned counsel for the Petitioner that, no such withholding of any amount is possible before the liability is actually quantified by way of appropriate legal proceedings, by way of Arbitration or by a Court of law. Reliance is sought to be placed on ***Gangotri Enterprises Limited*** (supra). ***Gangotri Enterprises Limited*** (supra), which was rendered primarily based on the judgment of a 'Two Judges' Bench of the Apex Court in ***Union of India v. Raman Iron Foundry***[7], where it was held that the Government had no right to appropriate the amount claimed without getting it first adjudicated. The judgment in ***Raman Iron Foundry*** (supra) was specifically overruled by a 'Three Judges' Bench of the Apex Court in ***H.M. Kamaluddin Ansari & Co. v. Union of India***[8]. The Union of India, in the said case conceded that, it had no objection in 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 by virtue of the relevant clause in the standard contract, ample power was conferred upon the Union of India to withhold the amount and the plea that no injunction order could be passed restraining the Union of India from withholding the amount, alone was virtually accepted. Taking note of the declaration as above, it was observed by the Apex Court in paragraph 22 of the judgment in ***Amber Builders*** (supra) that the judgment rendered by the Apex Court in ***Gangotri Enterprises Limited*** (supra) was *per incuriam;* because it had

[7] (1974) 2 SCC 231
[8] (1983) 4 SCC 417

relied upon ***Raman Iron Foundry*** (supra) which was specifically overruled by 'Three Judges' Bench in ***H.M. Kamaluddin Ansari*** (supra).

23. In the instant case, it is relevant to note that the contention of the Respondent-SECR is not to have the amounts payable to the Petitioner by the other Railways / Awarders to be 'appropriated or recovered'. Annexure-P/12 only requests to withhold the amount, which is stated as based on paragraph 52 / 52A of the GCC. In writing a letter or request by the Respondent-SECR to the other entities; more so by virtue of paragraph 52 / 52A of the GCC, as agreed to by the Petitioner, cannot be termed as illegal in any manner; though it cannot have any force of law. If anybody has acted on the basis of Annexure-P/12, like Annexure-P/13 issued by the East Central Railway, Renukut (which only requires the Petitioner to 'clarify' the position and not an order effecting or withholding the amount due to the Petitioner), it is open for the Petitioner to have it challenged before the appropriate forum / Court having jurisdiction on the cause of action mentioned therein, by way of separate proceedings, in accordance of law.

24. However, one thing to be noted is that, even according to the Respondent-SECR, Annexure-P/12 is only a 'request' and hence the various Entities / Railways, mentioned in Annexure-P/12 to whom it has been issued, are not bound to act upon the same. If they act upon the same and if the amount payable to the Petitioner is withhold from the amounts payable in respect of such contracts awarded by the said Entities, it is always open for the Petitioner to have it challenged by way of

appropriate proceedings before appropriate Court. Even if the right of the Respondent-SECR to cause to withhold amounts payable to the Petitioner by other Entities is as agreed or conceded by the Petitioner (based on paragraph 52 / 52A of the GCC), it is not known whether any reciprocal agreement is there between the Petitioner and the other Entities named in Annexure-P/12, who had awarded work to the Petitioner. If the Petitioner has not agreed to deduction or withholding of any such amount, based on the request of some other Entity (as in the case of Respondent-SECR) by the Entities mentioned in Annexure-P/12 and if such Entity has simply withheld the amount payable to the Petitioner merely on the basis of a request issued by the 1st Respondent-SECR, whether it will stand in the eye of law, is a matter for consideration, as and when such question is raised. If all or any of the Entities in Annexure-P/12 withholds the amounts payable to the Petitioner in respect of the work done pursuant to the contract awarded to them, the ongoing works may come to a stand still, because of non-payment of salary to the employees or satisfaction of the statutory dues or in effecting payments to the supplier of the materials. This will adversely affect the rights and interest of such Awarders of the contract as well and their work also may get frustrated, in turn, adversely affecting the public interest. This will turn to a situation where it will make the Petitioner (the alleged defaulter in respect of the work awarded by the 1st Respondent-SECR) always a defaulter and it may make it difficult for the other Entities to justify their action for stoppage of work by the Petitioner; for want of reciprocal agreements to sustain it. We are mentioning it here only because of the mentioning of the right of the Respondent-SECR to withhold amounts payable by such other Entities to the Petitioner with reference to paragraph 52 / 52A of the GCC, upon which the possible consequence also may not be easy to be ignored.

25. In the above facts and circumstances, making it clear that the Entities mentioned in Annexure-P/12 are not bound to act upon Annexure-P/12 request issued by the 1st Respondent-SECR, as conceded by the Respondent-SECR, we decline interference and the appeals are dismissed. This is without prejudice to the rights and liberties of the Petitioner to pursue other appropriate action, if at all any adverse consequence is resulted because of the action pursued by the Entities mentioned in Annexure-P/12, before the appropriate forum/ Court, in accordance with law.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Chandra