

(2013) 05 MP CK 0091
In the Madhya Pradesh High Court
Case No : Writ Petition No. 1 of 2013

M/s. Telecommunication Consultants India Ltd.

APPELLANT

Vs

State of M.P., Madhya Pradesh Road Development
Corporation Limited, and Madhya Pradesh Road Development
Corporation Limited

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Citation : (2013) 4 MPJR 20

Hon'ble Judges : Krishn Kumar Lahoti, Acting C.J.; Subhash Kakade, J

Bench : Division Bench

Advocate : Abhijeet A. Awasthi, for the Appellant; Jaideep Singh, Learned Dy. Government Advocate for Respondent No. 1 and Shri Himanshu Mishra, Learned Counsel for Respondents No. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Krishn Kumar Lahoti, Actg. C.J.

1. The petitioner has sought following reliefs:-

(a) Issue a writ of certiorari or any other appropriate writs/orders/directions, quashing the letter dated 7.11.2012 (Annexure P-15) issued by the respondents.

(b) Issue a writ of mandamus or any other appropriate writs/orders/directions, directing the respondent to forthwith release Bank Guarantee No. L43/BG/77/07 dated 29.03.2007 for Rs. 70,74,500/-, furnished by the petitioner towards Performance Security for the Pichore-Dinara-Datia Road Project.

(c) Issue a writ of mandamus or any other appropriate writs/orders/directions, directing the respondent to forthwith release a sum of Rs. 7,096,929/-, retained by the respondent towards Retention Money in respect of the Pichore-Dinara-Datia Road Project.

(d) Issue appropriate writs/orders/directions to prohibit/restraining the

respondents from taking any coercive action against the petitioner.

(e) Pass such other and further orders as are deemed just and proper in the facts and circumstances of the case.

Case of the petitioner is that the petitioner entered into a contract for construction of Pichore-Dinara-Datia Road. The aforesaid work was completed, but because of some dispute in respect of the aforesaid contract the Respondents No. 2 and 3 have directed recovery of a sum of Rs. 1.39 crores against the petitioner. Now the respondents are recovering the aforesaid amount from the petitioner in respect of another contract namely Katni-Pawai-Amangaj Road. This petition has been filed on the ground that until and unless there is specific condition in the contract, Respondents No. 2 and 3 cannot recover the aforesaid amount from the contractor. Reliance has been placed on a Division Bench judgment of this Court dated 9.10.2012 passed in Writ Petition No. 5925/2012 (M/s Telecommunications Consultants India Ltd. Vs. Madhya Pradesh Rural Road Development Authority and another.

2. Learned counsel for Respondents No. 2 and 3 has opposed the aforesaid contention and submitted that under Clause 15.4(c) of the agreement the respondents No. 2 and 3 were well within their rights and jurisdiction to recover the aforesaid loss from the petitioner. Clause 15.4(c) of the agreement which relates to the present contract reads thus:-

15.4 (c) - recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation at Date of Termination]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

3. From perusal of the aforesaid, it is apparent that the aforesaid clause empowers the respondents to recover from the contractor any losses and damages incurred by the employer and any extra costs of completing the works, after allowing for any sum due to the Contractor under Sub-Clause 15.3. The aforesaid clause further stipulates that after recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor. Sub-Clause 15.3 reads as under:-

15.3 - As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the contractor for work executed in accordance with the Contract.

4. But from the perusal of the aforesaid provisions, it is clear that the contract does not contain any clause which empowers the Authority to recover the amount, in the event of termination of a particular contract, from other contracts awarded to the same contractor. For that purpose there should be a specific

stipulation in the contract and in absence of any such stipulation, the recovery of some other contract awarded, to the contractor cannot be recovered from the present contract. In W.P. No. 5925/2012 a Division Bench has held thus:-

This order shall also govern the disposal of Writ Petition Nos. 17192/2010, 17901/2011, 5930/2011, 5925/2012, 9629/2012, 10126/2012, 12240/2012 and 18157/2011 because they involve a common issue and were heard together.

2. The petitioners are contractors claiming themselves to have been carrying out various Central And State Governments projects particularly regarding up-gradation and construction of roads. Respondent, Madhya Pradesh Rural Road Development Authority (in short, "the Authority") is an agency of the Government of Madhya Pradesh under the Road Development Department. The petitioners entered into number of agreements with the Authority for construction of various roads vide different packages under the Pradhan Mantri Gramin Sadak Yojana. For each package separate independent contract was entered into between them having no inter-se relation with the contracts of other packages. The main grievance of petitioners I that the Authority has illegally withheld the payment of amount in the event of termination of a contract of a particular package from the amount payable to the contractor in respect of contracts of other packages. The petitioners have, therefore, prayed that the Authority be directed not to withhold their such payments and to release the same immediately.

3. The Authority, on the other hand, has justified its action of withholding and recovery of amount by relying upon Clause 53.1 of the contract.

4. We, therefore, have to examine whether the action of the Authority of withholding the amount payable to the contractors in the event of termination of a contract of a particular package from the contracts of other packages of the same contractor is valid under law.

5. Clause 53.1 of the contract reads as under:-

53.1 If the contract is terminated because of a fundamental breach of contract by the contractor, the engineer shall issue a certificate for value of the work done and materials ordered less liquidated damages, if any, less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed as indicated in the Contract Data. If the total amount due to the Employer "exceeds any payment due to the Contractor, the difference shall be recovered from the security deposit and performance security, if any amount is still left un-recovered it will be a debt payable to the Employer.

(emphasis supplied)

6. As already mentioned above, for each package of road construction work, separate independent contract has been entered into between the petitioners and the Authority irrespective of the number of contracts of different packages

awarded to any particular contractor. The contract does not contain any clause which empowers the Authority to recover the amount in the event of termination of a particular contract from other contracts awarded to the same contractor. The mode of payment upon termination of contract is provided in the above quoted Clause 53.1 and, therefore, it must be strictly followed by both the parties to a contract. If the total amount due to the Authority exceeds any payment due to the contractor, the difference shall be recovered from the security deposit and performance security of that particular contract. The expressions "if any amount is still left un-recovered, it will be a debt payable to the Employer" in the Clause does not authorize the Authority to recover the amount automatically from other contracts of the same contractor. The debt is neither a decree nor an award. The Authority, therefore, has to first initiate either arbitration proceedings or file a suit for recovery of debt and it cannot automatically recover the amount as debt by withholding the payment in respect of other contract works of other packages as there is no provision of this nature in the contract. Further, withholding of the amount of other contracts of other packages may create complications adverse to the contractor and may prejudice his interest in those contracts.

7. Our this view also finds support from a Division Bench decision of this High Court in Writ Petition No. 17782/2011 wherein it is held that in the absence of any clause in a contract empowering the Employer to recover the amount due under the contract in question, recovery of security from the other contracts awarded to that contractor is not permissible.

8. We, therefore, direct the Authority not to withhold the payment of petitioners of a particular contract from the packages of other contract works of those contractors and immediately release the same.

9. With the above direction, the petitions are allowed and the orders passed by the Authority, contrary to our direction, are quashed. However, no costs.

5. As the controversy in the present case is identical, we find that Respondents No. 2 and 3 have acted beyond their jurisdiction in directing recovery of loss of certain amount caused to them in respect of Katni-Pawai-Amangaj Road Project from the earlier contract, which was an independent separate contract. In view of the law laid down by Division Bench of this Court in W.P. No. 5925/2012 (supra) the aforesaid action of the respondents cannot be upheld and the same is accordingly quashed.

6. Accordingly, this writ petition is allowed. The respondents are directed to release the aforesaid retained amount of the petitioner forthwith. However, the respondents shall be free to initiate fresh proceedings in accordance with law for recovery of any loss in so far as it relates to works contract of Katni-Pawai-Amangaj Road. Considering the facts and circumstances of the case, there shall be no order as to costs.