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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(COMM) 1005/2018

AYG REALITY PRIVATE LIMITED ..... Plaintiff

Through: Mr.Jayant Mehta, Mr.Anjuman  
Tripathy & Ms.Smiti Verma,  
Advocates

versus

NBCC (INDIA) LIMITED & ANR. .... Defendants

Through: Mr.Rajinder Wali, Advocate for D-1  
Mr.Ankit Paushyayan, Advocate for  
D-2.

**CORAM:**

**HON'BLE MR. JUSTICE PRATEEK JALAN**

**ORDER**

% **13.01.2020**

**I.A.12354/2019 (under Order XXXIX Rules 1 & 2 of the CPC)**

1. The plaintiff has filed the suit challenging the invocation of certain bank guarantees by defendant No.1, which were furnished by the plaintiff in relation to a contract for construction of a subsidiary training centre for the Border Security Force [hereinafter, "BSF"] at Chakur, District Latur. The work had been awarded by the BSF to defendant No.1 for engineering and construction as project managers, and the plaintiff was thereafter awarded the construction contract.

2. The contention of the plaintiff in this application is that the work has been completed and the defect liability period [hereinafter "DLP"] has also lapsed for three of the packages under the contract, being packages I-A, I-B and II-B. The plaintiff therefore seeks release of the

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bank guarantees submitted by it in relation to these three packages. Mr. Jayant Mehta, learned counsel for the plaintiff, has drawn my attention to Clauses 9 and 10 of the General Conditions of Contract [hereinafter, "GCC"] entered into between the parties, which provide as follows:

#### **"9.0 PERFORMANCE GUARANTEE**

*Within 10 days (ten) from the date of issue of letter of award or within such extended time as may be granted by NBCC in writing, the contractor shall submit to NBCC a performance bank guarantee in the form appended, from any Nationalized bank, equivalent to 5% (five percent only) of the contract value for the due and proper execution of the contract. This bank guarantee shall remain valid upto 90 (ninety) days after the end of defects liability period.*

*In case the contractor fails to submit the performance guarantee of the requisite amount within the stipulated period or extended period, letter of intent will stand withdrawn and EMD of contractor shall be forfeited.*

xxxx                      xxx                      xxx

#### **10.0 SECURITY DEPOSIT/RETENTION MONEY**

*The security deposit of the retention money shall be deducted from each running bill of the contractor at 5% (five percent only) of the gross value of the Running Account bill. The Earnest Money Deposited by the tenderer in the form of D.D. only will be treated as part of the security deposit. The lumpsum (consolidated) EMD amount deposited by the Contractor at the time of registration with NBCC shall not be adjusted for security deposit.*



*The security deposit or retention money shall be refunded to the contractor after expiry of defects liability period (referred to in Clause No.74) or on payment of the amount of the final bill whichever is later.*

*If the amount of Security Deposit deduction in cash is more than Rs.10.00 lakhs (Rupees Ten lakhs only), the excess amount can be refunded to contractor against submission of Bank Guarantee of equivalent amount from a Nationalized Bank in the prescribed proforma of NBCC”*

3. Mr.Mehta submits that under Clause 9 of the GCC, the performance bank guarantee was to remain valid upto 90 days after the end of the DLP. As far as the security deposit is concerned, it was to be returned to the plaintiff after expiry of the DLP or on payment of the amount of the final bill, whichever is later. The DLP is defined in Clause 7.4 of the GCC, which reads as follows:

**“74.0 DEFECTS LIABILITY PERIOD**

*The contractor shall be responsible for the rectification of defects in the works for a period twelve months from the date of taking over of the works by the Owner/Client. Any defects discovered and brought to the notice of the contractor forthwith shall be attended to and rectified by him at his own cost and expense. In case the contractor fails to carry out these rectifications, the same may without prejudice to any other right or remedy available, be got rectified by NBCC at the cost and expense of the contractor.”*

4. Relying upon the aforesaid clause, Mr.Mehta submits that the performance bank guarantee, as well as the amount of security deposit, are liable to be released as the DLP of 12 months lapsed more than 90



days ago. According to the plaintiff's averments in the application, the sites for various buildings in the three packages were handed over between 30.04.2013 to 24.01.2018. However, defendant No.1 disputes the dates of handing over of the works by the plaintiff to it or to the BSF. With the reply to the application, defendant No.1 has annexed a letter dated 23.04.2018, addressed to the plaintiff wherein various dates of handing over of the works have been mentioned. Even according to the dates accepted by defendant No.1, *prima facie* it appears that the DLP would be over in respect of all the components of work under the three packages, except of barrack No.2 in package I-B. However, Mr.Rajinder Wali, learned counsel for defendant No.1, submits that the DLP has not yet concluded, as the defects notified to the plaintiff have not been rectified. According to Mr.Wali, the plaintiff has requested extension of time on various occasions which have been provisionally granted by defendant No.1, subject to approval of the BSF. He states that the plaintiff's workmen remain on the site even today for the purpose of rectification of the work. I do not find any specific contention in the reply to the application to this effect.

5. In view of the aforesaid, defendant No.1 is directed to file a further affidavit, within two weeks, stating clearly as to whether it has granted extensions of contract in favour of the plaintiff, and if so the terminal date of the last extension. Further, the status of the plaintiff's involvement in the project, as of today, shall also be disclosed.



6. At this stage, Mr.Mehta has handed over a copy of a letter dated 30.11.2019, addressed by defendant No.1 to the plaintiff, wherein it is stated that the final bills of all the packages have been prepared. The plaintiff shall place the letter dated 30.11.2019 on record, on affidavit, within one week from today, and the affidavit to be filed by defendant No.1 shall deal with the said letter as well.

7. List on 11.03.2020.

8. The interim order dated 21.10.2019, will continue to bind the parties.

**PRATEEK JALAN, J**

**JANUARY 13, 2020**

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