

REPORTED

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

+ **FAO(OS) 158/2008**

KAMALA CONSTRUCTION COMPANY Appellant

Through: Mr. G.C. Rawal, Sr. Adv. with
Mr. Kuljeet Rawal, Adv.

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Through: Mr. Rajeshwar Kumar Gupta, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

% **01.04.2008**

: **DR. MUKUNDAKAM SHARMA, CJ. (ORAL)**

1. This appeal is directed against the judgment and order dated 26th March, 2008 passed by the learned Single Judge disposing of the application of the plaintiff under Order 39 Rule 1 & 2 of the Code of Civil Procedure being IA No.5493/2004 holding that the said application has no merit and consequently the same was dismissed.
2. The appellant herein has filed a suit for injunction and declaration that

the respondent-defendant be restrained from encashing the bank guarantee/bid security furnished by the appellant and a declaration that the attempt to forfeit the bid security as a consequence of the withdrawal of awarded contract was void and illegal. While issuing summons in the aforesaid suit, the learned Single Judge also passed an order of ex parte interim injunction restraining the defendant from encashing the bank guarantee furnished by the appellant. We agree by the said order passed in the application under Order 39 Rule 1 & 2 CPC which is registered as IA No.6976/2005. In the impugned order, the said application of the appellant filed and registered as IA No.5493/2005 which was the application under Order 39 Rule 1 & 2 and the application of the respondent which is IA No.6976/2005 were disposed of in the aforesaid manner. The learned Single Judge in the impugned order considered the issues raised by the appellant for making absolute the interim injunction which was passed and on a consideration thereof, recorded that the General Manager of the respondent-National Highway Authority of India Limited, had the power and jurisdiction to invoke the said bank guarantee and therefore contentions raised were without merit. The learned counsel appearing for the appellant is being aggrieved by the aforesaid findings recorded by the learned Single Judge.

3. We have heard learned counsel for the parties. The contention that is raised before us is that the General Manager could not have invoked the bank guarantee as he was not authorised to do so and being not an employer as also envisaged in para 71 Clause 1.1 of the bank guarantee of the bid document. It

is also stated that bank guarantee is not being invoked in terms of the bank guarantee agreement and in support of the aforesaid contention, counsel appearing for the appellant has relied upon the decision of the Supreme Court in ***Hindustan Construction Company Limited Vs. State of Bihar & Ors. Reported at AIR 1999 SC 3710.*** It is also submitted by counsel appearing for the appellant that if the injunction is not granted in favour of the appellant, the suit itself would become infructuous and therefore, according to him, the impugned order is required to be set aside and quashed.

4. We have considered the aforesaid submission in the light of the records. The similar contentions were also raised before the learned Single Judge who has considered the said contention in depth in paragraph 10. He has also considered the ratio of the decision of the Supreme Court in ***Hindustan Construction Company Limited (Supra)*** and has held that the said decision is not applicable to the facts and circumstances of the case because in the said case, it was apparent that the said bank guarantee could be invoked by the Chairman and not by the Chief Manager and none else. Where the bank guarantee was issued in favour of the National Highway Authority of India, it could be invoked by successor or assignee. The learned Single Judge has given cogent decision for conclusion arrived at which would be found to be very reasonable. The documents on record would also indicate that the bid documents were invited by the General Manager. The notice inviting tender is part of the record. It was issued by Mr. Ajit Kumar, General Manager. In

paragraph 3 of the same, it was stated that the bidder may obtain further information in support at the office of the National Highway Authority of India from Mr. Ajit Kumar, General manager. In paragraph 6 of the notice, it was also mentioned that all bids must be delivered to Mr. Ajit Kumar, General Manager, National Highway Authority of India. The bank guarantee was also executed in favour of the National Highway Authority and not in the name of Chairman who is stated to be employer as defined. The letter dated 28th April, 2005 i.e. the letter of acceptance of the tender of the appellant, was also signed by the said general manager who invoked the bank guarantee. There is a statement on record and the material to show that the General Manager was authorised to award the contract and he was also authorised to invoke the bank guarantee. It is established from the various documents placed on record that there was correspondence between the appellant and the National Highway Authorities which was either addressed to the General Manager or signed by him. Therefore, the learned Single Judge was justified in holding that it is incorrect to submit that the bank guarantee could be invoked by the Chairman of the National Highway Authority of India and none else. So far as the decision of the defendant-construction company is concerned, the same is rendered in the light of the facts which are clearly distinguishable. In the said case, it was the Chief Engineer who invoked the bank guarantee in terms of the clause itself.

In that view of the matter, we may also refer to the findings of the

learned Supreme Court recorded in paragraph 20 of the same judgment wherein it is clearly held by the Supreme Court that since the bank guarantee was furnished in the said case in the favour of the Chief Engineer, there is no definition of the Chief Engineer, in the guarantee and it was provided that the Chief Engineer was included as General Manager. Accordingly, the invocation was thus wholly wrong and bank is under no obligation to perform the same. In the present case, the bank guarantee was addressed to the National Highway Authority of India. It is also very clear from the record that all the correspondence and all steps in the matter were being taken by the General Manager. Therefore, even the letter dated 28th April, 2005 which is the letter of acceptance of the tender of the appellant, was written by the General Manager and therefore the General Manager appears to be wholly competent to accept and also to invoke the bank guarantee.

In that view of the matter, prima facie findings recorded by the learned Single Judge for temporary injunction cannot be said to be infructuous because temporary injunction was not granted in favour of the appellant. If later on, it is found that invocation is without jurisdiction, the amount can be recovered by the appellant if the suit is decided in its favour. So far as the definition of employer which is strictly relied upon by the counsel for the appellant, is concerned, the same includes not the Chairman but also includes his successors, assignees and that the General Manager has been given the authority and has been, therefore, brought within the aforesaid expression.

In this view of the matter, we find no merit in the appeal which is hereby dismissed.

CHIEF JUSTICE

REVA KHETRAPAL, J

April 01, 2008

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