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

+ **ARB.A. 9/2008**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through: Mr. Sandeep Sethi, Sr. Adv. with Ms.
Padma Priya, Advocate

versus

PRAKASH-ATLANTA (JOINT VENTURE) Respondent
Through: Mr. Sandeep Sharma, Advocate

+ **ARB.A. 18/2008**

M/S PRAKASH ATLANTA JV Appellant
Through: Mr. Sandeep Sharma, Advocate

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent
Through: Mr. Sandeep Sethi, Sr. Adv. with Ms.
Padma Priya, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
04.10.2010

1. These two appeals have been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 to impugn the interim order passed by the arbitral tribunal on 16.06.2008. The first appeal has been preferred by NHAI against the contractor, Prakash -Atlanta(JV), whereby the NHAI impugns the entire order. The second appeal has been preferred by the Contractor, Prakash Atlanta JV against NHAI challenging the impugned order partially insofar as the arbitral tribunal has not directed payment of the

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amount of Rs.28,84,43,061/- to the contractor, but has directed that the said amount be kept in a fixed deposit by the NHAI. For the sake of clarity, the NHAI is referred to as the appellant and the Contractor Prakash-Atlanta(JV) is referred to as the respondent.

2. The appellant awarded the contract for construction of segment of Lucknow Bypass connecting NH-25 and NH-28 via NH-56 passing through Lucknow City in the State of Uttar Pradesh (Contract Package No.EW-15/UP) to the respondent. The contractual work was not completed within the contractual period of 30 months. The respondent/contractor terminated the contract on 14.03.2008 alleging various breaches by the appellant NHAI. Thereafter, the contract was also terminated by the appellant NHAI vide notice dated 24.03.2008. Various bank guarantees given by the respondent contractor amounting to Rs.28,84,43,061/- towards performance guarantee and towards security for advances given to the contractor were also invoked by the NHAI.

3. The respondent filed a petition under section 9 of the Act before this Court being OMP No.181/2008 to restrain the encashment of the said bank guarantees. However, before the matter was taken up by the court for consideration, it appears that the bank guarantees had already been encashed and monies thereunder received by appellant NHAI.

4. On 30.04.2008, the Court took up OMP No.181/2008. The statement of the appellant herein that all bank guarantees have been encashed was

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recorded by the court in its order. The Court took note of the fact that the arbitration agreement between the parties had been invoked and that the respondent contractor had sought recovery of the amount recovered by NHAI under the said bank guarantees on the ground that the invocation of the bank guarantees was illegal. The Court disposed of petition under section 9 of the Act with a direction that the appellant NHAI shall keep the funds available with them till further orders are passed by the arbitral tribunal, which was expected to be constituted shortly. The Court permitted the parties to file an application before the arbitral tribunal in this respect.

5. So far as the equipments and machineries etc. of the respondent/contractor are concerned, the same were sought to be taken possession of by the NHAI by invoking clause 61.1 of the agreement, which reads as under:

"61.1 All materials on the Site, Plant, Equipment, Temporary Works and Works are deemed to be the property of the Employer if the contract is terminated because of a contractor's default".

6. In this background, the respondent/contractor filed an application before the arbitral tribunal under section 17 of the Act to seek two reliefs, namely, (i) for refund of the encashed bank guarantee amount realized by the appellant NHAI amounting to Rs.28,84,43,061/-; and (ii) for release of materials, plant, materials and equipments, temporary works etc. lying at the site, seized by the appellant NHAI.

7. By the impugned order, the arbitral tribunal has firstly directed the NHAI to place an amount of Rs.28,84,43,061/- in a fixed deposit account with the State Bank of India for such duration as it may consider most beneficial, to be renewed from time to time until final orders are passed by the arbitral tribunal. It was directed that this direction be complied with before 21.06.2008. On the second aspect, the tribunal has directed the appellant NHAI to return all the equipments, materials etc. to the respondent contractor within 15 days after preparation of joint inventory.

8. As aforesaid, the appellant/NHAI is aggrieved by both the directions issued by the arbitral tribunal, whereas the grievance of the respondent/contractor is that the amounts which have been directed to be placed in a fixed deposit should, instead, have been released to the respondent/contractor.

9. The submission of Mr. Sandeep Sethi, learned senior counsel appearing for the petitioner is that the impugned order is illegal and not justified. He submits that the arbitral tribunal has not given any basis for the direction issued to the appellant NHAI to keep the aforesaid amount in a fixed deposit with the State Bank of India. The arbitral tribunal has neither considered the prima facie case nor given any reasons as to why the monies lying with the NHAI amounting to Rs.28,84,43,061/- were required to be placed in a separate account with the State Bank of India. He submits that the NHAI is a statutory corporation carrying out the task of laying national

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highways throughout the country. The corporation has been set up by the Union of India. It is not the arbitral tribunal has expressed any doubt with regard to the liquidity position of the appellant/NHAI.

10. Mr. Sethi further submits that since one of the substantive claims of the respondent before the arbitral tribunal is to seek refund of the money received under the said guarantees, without adjudication of the issue as to whether the encashment of the bank guarantees were legal and justified, the arbitral tribunal could not have directed the appellant to place the aforesaid amounts in a fixed deposit with State Bank of India.

11. So far as the second issue is concerned, Mr. Sethi has placed strong reliance on the decision of the Supreme Court in the case of **K.P.M Builders Pvt. Ltd. v. NHAI & Anr.** in Civil Appeal Nos.3300-3301 of 2008 decided on 25.02.2010. He submits that merely because the respondent/contractor had issued the notice of termination prior to that issued by appellant NHAI, the right of the NHAI under clause 61.1 of the agreement cannot be denied, as it is the case of the NHAI that it is respondent/contractor who is in default.

12. In response, Mr. Sandeep Sharma, learned counsel for the respondent submits that the order directing the deposit the amount of Rs.28,84,43,061/- in a fixed deposit with the State Bank of India has been passed following the order dated 30.04.2008 passed by this Court in OMP No.181/2008. He submits that, in fact, the arbitral tribunal should have directed the refund of the said amount to the respondent/contractor.

13. Mr. Sharma submits that the respondent/contractor had been able to establish a very strong prima facie case before the arbitral tribunal, which led to the passing of the said order. Mr. Sharma submits that though the contract was awarded on 27.07.2001 and the works had to be completed within a period of 30 months, the works under the contract continued and the respondent terminated the contract on 14.03.2008. He submits that though the value of the work awarded to the respondent/contractor was to the tune of Rs.158 crores, even after payment of Rs.170 crores, the works could not be completed as there had been large scale variation in quantities in respect of 95% of the items in the BOQ. He submits that even according to the NHAI's own Consultant, the cost of the work had gone up to Rs.220 crores.

14. Mr. Sharma submits that after considering these aspects, the arbitral tribunal had directed that the NHAI should preserve the amount realized from the respondent/contractor in a fixed deposit with the State Bank of India, so that the respondent is able to recover the said amount, along with interest, if eventually the claim of the respondent is allowed by the arbitral tribunal.

15. So far as the second aspect is concerned, Mr. Sharma submits that the order made by the arbitral tribunal directing the return of the equipments and materials etc. does not survive in view of the subsequent order passed by the arbitral tribunal on 28.12.2009. He submits that the

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arbitral tribunal has in fact appointed a valuer to assess the value of the equipment etc. so that the same could be disposed of by the appellant/NHAI. He submits that the arbitral tribunal is right in its conclusion that the contract which had been terminated by the respondent/contractor on 14.03.2008 could possibly not have been once again terminated by the appellant NHAI vide notice dated 24.03.2008. He submits that clause 61.1 could be invoked only when the contract is terminated by NHAI because of the contractors default. As that eventually did not arise, clause 61.1 could not be resorted to by the appellant/NHAI.

16. Having heard learned counsels for the parties, with due respect to the arbitral tribunal, I am of the view that the interim order cannot be sustained and deserves to be set aside in its entirety.

17. A perusal of the impugned order shows that the same has been passed in its second hearing held by the arbitral tribunal. The arbitral tribunal has only recorded that it has heard the counsels for the parties at some length. Even according to the arbitral tribunal, it has not gone into matters of dispute and differences which are the subject matter of reference before it, by observing that it may prejudice the case of the parties before it. The tribunal has not even indicated that it had found a strong prima facie case in favour of the respondent, as contended by the respondent. In any event, no reasons have been indicated for the so-called prima facie view, as claimed by the respondent.

18. Even if it were to be assumed that the respondent/contractor had, in fact, made out a strong prima facie case before the arbitral tribunal, that by itself could not have been a valid ground to require the appellant/NHAI to keep the amount of Rs.28,84,43,061/- in a fixed deposit with State Bank of India. The order of this court in OMP No.181/2008 was already in force. The said order required the NHAI/appellant to keep the funds available. The said order obviously did not mean that the appellant was required to keep the amount in a fixed deposit. It only meant that if and when the arbitral tribunal makes an executable award to pay the amount to the respondent/contractor, the respondent/contractor should be able to recover the same.

19. The order requiring the deposit of the aforesaid amount in a fixed deposit could possibly have been made by the arbitral tribunal, only after recording satisfaction to the effect that the amount, if not so preserved, may be taken away and that the respondent/contractor may not be able to recover the amount and execute the award that may eventually be passed in its favour by the arbitral tribunal for the said amount.

20. From the impugned order, it appears that the arbitral tribunal has not even addressed itself to that issue. The credibility and solvency of the appellant/NHAI has not been doubted. It is a statutory corporation constituted by the Central Government. This being the position, there was no justification to require the said amount of Rs.28,84,43,061/- being placed

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in a fixed deposit with State Bank of India. The amount in question is not a small amount, and there was no justification in disabling the appellant from using the said amount to carry out its operations. Eventually, if arbitral tribunal finds in favour of the respondent/contractor, it can certainly make an award for refund of the said amount along with interest at an appropriate rate. The reasoning given by the tribunal that the amount recovered by the appellant by encashment may merge with other monies if not retained in a fixed deposit and would lose its identity, with due respect, does not at all appeal to me. The monies having come into the coffers of the appellant NHAI have already merged with the monies lying in its account. The colour of the monies held by the appellant NHAI is the same, whether it is the one received by encashment of the bank guarantees furnished by the respondent, or in any other way. There is no rationale in keeping those very monies, which have been received on encashment of the bank guarantees of the respondent, separately to meet the possible claim of the respondent.

21. So far as the second aspect is concerned, there again I find that the impugned award is fallacious and cannot be sustained. Merely because the notice of termination was first issued by the respondent/contractor on 14.03.2008, followed by the termination notice issued by the appellant/NHAI on 24.03.2008, in my view, that would not take away the right of the appellant/NHAI to invoke clause 61.1 of the agreement between the parties. Clause 61.1 can be invoked when : (i) the contract is terminated, and (ii) according to the NHAI, the contractor is in default.

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22. The contractor, who may be in default cannot, by merely sending a notice of termination before it being sent by the NHAI, avoid the consequences which flow from clause 61.1 of the contract between the parties. If the interpretation adopted by the arbitral tribunal were to be accepted, it would lead to an absurd situation. Even in cases where the contractor is, in fact, in default he would be able to avoid the consequences provided for in clause 61.1 by sending a notice of termination of the contract before such a notice is issued by the NHAI.

23. The submission of Mr. Sharma that the impugned order insofar as it directs that the return of the equipment, materials etc. does not survive on account of the passing of the order dated 28.12.2009 does not appear to be correct. The order dated 28.12.2009 itself records that by the time the said order came to be passed, the impugned order had been stayed by this court in these very proceedings. The order dated 28.12.2009, therefore, proceeded on that basis. However, if the impugned order insofar as the second aspect is not appropriately dealt with, and the order in respect thereof is sustained, the rights of the respondent to seek return of the equipment, plant etc. would certainly revive.

24. Since I have found merit in the appeal preferred by the appellant NHAI, the consequence is that the appeal filed by the respondent contractor must fail. The grievance of the respondent is that the arbitral tribunal should have released the amount of Rs. 28,84,43,061/- to the respondent is wholly

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unfounded. Unless the arbitral tribunal has adjudicated the disputes between the parties finally, the said relief possibly could not have been granted by way of an interim order. For the aforesaid reasons, I allow this appeal preferred by the appellant NHA and set aside the impugned order passed by the arbitral tribunal dated 16.06.2008. The appeal preferred by the respondent contractor is dismissed being devoid of any merit. Any observation made herein shall not come in the way of the arbitral tribunal in passing the final award. The appellant shall be entitled to costs quantified at Rs.30,000/-.

OCTOBER 04, 2010

sr

Sd/-

VIPIN SANGHI, J