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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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\+ **ARB.A. 31 of 2014 & I.A. No. 21157 of 2014 (for stay)**

ANS CONSTRUCTIONS PVT. LTD. ..... Appellant
Through: Ms. Sadiqua Fatma with Mr. Vijay Purohit, Advocates.

versus

UNION OF INDIA ..... Respondent
Through: Mr. Sanjay Jain, ASG with Mr. Akshay Makhija and Ms. Pallavi Shali, Advocates.

AND

ARB.A. 32 of 2014 & I.A. No. 21160 of 2014 (for stay)

ANS CONSTRUCTIONS PVT. LTD. ..... Appellant
Through: Ms. Sadiqua Fatma with Mr. Vijay Purohit, Advocates.

versus

UNION OF INDIA ..... Respondent
Through: Mr. Sanjay Jain, ASG with Mr. Akshay Makhija and Ms. Pallavi Shali, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **09.01.2015**

1. The challenge in these appeals is to a common order dated 10th October 2014 passed by the learned sole Arbitrator rejecting the application filed by the Appellant/Claimant under Section 17 of the Arbitration and Conciliation Act, 1996 ('Act') in the arbitration proceedings between the Appellant and the Union of India arising out

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of two contracts awarded to the Appellant by the Respondent for construction of the staff quarters at Balrampur, Uttar Pradesh.

2. Initially, the Appellant had filed an application under Section 9 of the Act in the Court of the learned District Judge, Lucknow. The learned District Judge, by an order dated 13th November 2012, restrained the Respondent from encashing the bank guarantees furnished by the Appellant. That order was challenged by the Respondent in the High Court of Allahabad at Lucknow. By an order dated 14th August 2014, the Division Bench of the High Court allowed the appeal in part and modified the order of the learned District Judge. While maintaining the stay on the encashment of bank guarantees, the Division Bench setting aside the findings recorded by the learned District Judge as regards the termination of the contract.

3. It needs to be noted that at that stage the contracts in question were not terminated by the Respondent.

4. The Appellant filed an application under Section 17 of the Act before the learned Arbitrator. The said application became necessary on account of a letter issued by the Respondent on 26th July 2014 to the bank seeking encashment of the bank guarantees furnished by the Appellant. In para 9 of the said application it was stated that the

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Appellant has suffered tremendous loss in executing the contract for the reasons beyond its control. Further it was stated that "The Claimant shall suffer irreparable loss and injury in case the present application is not allowed and the Department is not restrained from encashing the Bank Guarantee". It was alleged that the Respondent's action in seeking encashment of the bank guarantees was arbitrary.

5. The said application was dismissed by the learned Arbitrator by the impugned order dated 10th October 2014. In para 11 of the impugned order the learned Arbitrator observed as under:

> "It is observed that both the parties are alleging opposite party for breach of contract. At present it cannot be concluded that who was at fault in performance of the contract and which party was in breach of contract and such conclusion can only be arrived at the time of making final award after hearing the full case and taking into consideration the oral and written submissions made by both the parties."

6. Thereafter, the learned Arbitrator proceeded to summarize as to what would be the consequence "if the contract is terminated by the Respondent". It must be noticed that at that stage when the learned Arbitrator was considering the application under Section 17 of the Act the Respondent had terminated one of the contracts on 25th September 2014. It had yet to terminate the other contract. There was no occasion for the learned Arbitrator to speculate as to what would happen in the

event of termination of the contract.

7. Learned Arbitrator did not consider the question of balance of convenience at that stage, particularly on account of the fact that even the High Court had not interfered with the order of the learned District Judge granting stay of encashment of the bank guarantees. As of that date, the balance of convenience was in favour of the Appellant and in continuation of the restraint on the Respondent against encashment of the bank guarantees. This aspect, however, was not considered by the learned Arbitrator.

8. On 22nd October 2014 this Court in the present appeals passed an order to the effect that the encashment of the bank guarantees would be subject to the outcome of the appeals. However, it appears that the bank issued a letter dated 20th November 2014 to the Respondent referring the order of this Court and asking the Respondent to peruse the documents "and let us know the facts of the above." As a result, it appears that as of today, the bank guarantees furnished by the Appellant have not yet been encashed.

9. Mr. Sanjay Jain, learned Additional Solicitor General appearing for the Respondent states that the bank was wholly unjustified in declining the encashment of the bank guarantees when there was no

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specific order restraining such encashment.

10. Be that as it may, the Court is of the view that since the bank guarantees have not been encashed as of date and the stay granted by the learned District Judge as affirmed by the Allahabad High Court was continuing till the impugned order of the learned Arbitrator has continued and *de facto* till date, the balance of convenience in continuing that *status quo* lies in favour of the Appellant.

11. Accordingly, the impugned order dated 10th October 2014 of the learned Arbitrator is set aside and the Respondent is restrained from encashing the bank guarantees furnished by the Appellant during the pendency of the arbitral proceedings, subject to the condition that the Appellant will keep the bank guarantees alive till the expiry of one month after passing of the final award by the learned Arbitrator.

12. The appeals are allowed in the above terms. All pending applications are disposed of.

13. Order be given *Dasti* to counsel for the parties.

S. MURALIDHAR, J.

JANUARY 09, 2015
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