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

% Judgment delivered on: 15.01.2016

+ **WP(C) No.1682/2015 & 17914/2015 (u/s 8 of Arbitration & Conciliation Act), CM Nos.3028/2015 (stay)**

M/S N. KUMAR ASSOCIATES INTERNATIONAL Petitioner

versus

UNION OF INDIA Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sagar Dhama with Mr Kshitiz Ahuja,
Advocates.

For the Respondent : Mr Amitara Poddar, Advocate.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner had participated in tender No.79/14-15 dated 18.07.2014 for the work "House Keeping of Yamuna Rest House, Rail Niwas, Annexe Yamuna & ORH near Rail Club in the section of SSE/W/Transit Camp under ADEN/E-II". The petitioner's bid was accepted by the competent authority. The petitioner had made, inter alia, an earnest money deposit of Rs1.80 lakhs alongwith the tender and the same was retained as security money of the work. A letter of acceptance

was issued to the petitioner by the competent authority of the Northern Railways on 12.08.2014. It was indicated in the letter of acceptance that the contract value of the work would be Rs 66,34,505.04 and that the performance guarantee amounting to Rs 3,31,730/- was required to be deposited within 30 days failing which penal interest @ 15% per annum would be charged as per tender condition No.5.2.1(a). The said tender condition No.5.2.1(a) reads as under:-

“5.2 Performance Guarantee:

5.2.1 The procedure for obtaining Performance Guarantee is outlined below:

- (a) The successful bidder shall have to submit a Performance Guarantee (PG) within 30 (Thirty) days from the date of issue of letter of Acceptance (LOA). Extension of time for submission of PG beyond 30(Thirty) days and upto 60 days from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a penal interest of 15% per annum shall be charged for the delay beyond (Thirty) days, i.e. from 31st day after the date of issue of LOA. In case the contractor fails to submit the requisite PG even after 60 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shall be debarred from the participating in re-tender for that work.

- (b) xxxx xxxx xxxx xxxx

2. The petitioner did not deposit the performance guarantee within the

initial period of 30 days stipulated in the said tender condition. However, the petitioner deposited the performance guarantee alongwith interest @ 15% per annum on 13.10.2014. The respondent thereupon issued a letter dated 23.12.2014 terminating the contract and forfeiting the earnest money of Rs1.80 lakhs. The respondent also debarred the petitioner from participating in future tenders for the subject work. The petitioner is aggrieved by the said letter dated 23.12.2014.

3. The impugned letter dated 23.12.2014 is set out hereinbelow:-

“NORTHERN RAILWAY

**DRM OFFICE
NEW DELHI**

**128-W/269/79/14-15/WE
Dated: 23.12.2014**

**M/s. N. Kumar Associates International,
Starlink Navalkunj Building,
Linking Road (Bandra),
Mumbai-400050**

Sub:- House Keeping of Yamuna Rest House, Rail Niwas, Annexe Yamuna & ORH near Rail Club in the section of SSE/W/Transit Camp under ADEN/E-II.

Ref:- Acceptance letter of even no. dated 12.08.2014.

Dear Sir,

The contract for the above mentioned work has awarded to you vide this office acceptance letter of even no. dated 12.08.2014. As per tender condition No.5.2.1(a) you were required to deposit P.G.@ 5% of contract value amounting to Rs.3,31,730/- positively within 30 days from the date of issue of acceptance letter failing

which interest @ 15% p.a. was leviable from 31st days to 60 days i.e. upto 10.10.2014.

As per tender condition No.5.2.1

- (a) The successful bidder shall have to submit a Performance Guarantee (PG) within 30 (Thirty) days from the date of issue of letter of Acceptance (LOA). Extension of time for submission of PG beyond 30(Thirty) days and upto 60 days from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a penal interest of 15% per annum shall be charged for the delay beyond (Thirty) days, i.e. from 31st day after the date of issue of LOA. In case the contractor fails to submit the requisite PG even after 60 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shall be debarred from the participating in re-tender for that work.

But you have failed to deposit the required amount of Performance Guarantee within the stipulated period, hence the contract is hereby terminated with immediate effect as per GCC and the earnest money deposited by you alongwith tender in the shape of FDR No.341137 dated 16.07.14 of Rs.1,80,000/- issued by State Bank of India, Mumbai, is forfeited. You are also debarred to participate in future tender for the subjected work. Please note.

This issue without prejudice.

Your's faithfully

Divl. Engineer Estate-1
Northern Railway, New Delhi
For & on behalf of President of India

Copy to:- 1. Sr. DFM, N.Rly., New Delhi for information with request to get the above mentioned FDR encashed in favour of Railway immediately.

2. ADEN/E-II/NDLS for information & necessary action please.”

4. The contention of the learned counsel for the petitioner is that the contract could not have been terminated because of the reason that the

performance guarantee was furnished on 13.10.2014 and the same was within time. He submitted that the 59th day from the issuance of the letter of acceptance was on 10.10.2014. The 60th day fell on 11.10.2014, which was a holiday. This fact is admitted by the learned counsel for the respondent. The next day i.e. 12.10.2014 was also a holiday being a Sunday. Therefore, the next date on which the petitioner could have submitted the performance guarantee was 13.10.2014, which was a Monday. It is on that date that the performance guarantee was, in fact, submitted. This principle of computation of time is also indicated in Clause 10 of the General Clauses Act, 1897, which although does not strictly apply to the present case, would be the basis of the aforesaid principle that if a thing is to be done by particular day and if on that day the office is closed, the said thing could be done on the next working day. This is exactly what has happened in the present case. Therefore, we are of the view that the termination of the contract was not in order.

5. The performance guarantee amount has already been returned to the petitioner after it had been encashed by the respondent. The EMD, however, had been forfeited and, therefore, the same is liable to be returned to the petitioner. It also follows that the debarment order has to

be set aside. It is, accordingly, set aside.

6. We are making it clear that, in the meanwhile, as the contract had been awarded to some other party, we are not interfering with that contract. But if the petitioner has any surviving grievance or claim left, he is free to do so before any appropriate forum in accordance with law. Insofar as this petition is concerned, we are making it clear that the impugned order dated 23.12.2014 is set aside to the extent that the earnest money deposit be returned to the petitioner forthwith with interest @ 6% per annum and that the petitioner shall not be debarred from participating in future tenders with regard to the subject work, the debarment having been set aside.

7. The writ petition is allowed to the aforesaid extent. All the pending applications stand disposed of.

8. Costs of Rs10,000/- be paid by the respondent to the petitioner within four weeks.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

JANUARY 15, 2016/st