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

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Date of Decision : March 22, 2016

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FAO(OS) 258/2015

M/S NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Appellant

Represented by: Mr.Ravi Sikri, Sr.Advocate instructed
by Mr.Mukesh Kumar, Mr.Vivek
Paul and Mr.Deepak Yadav,
Advocates

versus

LUCKNOW VARANASI TOLLWAYS
PVT LTD

..... Respondent

Represented by: Mr.Arvind Nigam, Sr.Advocate/
Amicus Curiae and Mr.Kirti Uppal,
Sr.Advocate instructed by Mr.Chirag,
Mr.M.Shroff, Mr.Siddharth Chopra
and Ms.Swati Vaibhav, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. OMP No.190/2015 filed by the appellant laying a challenge to an award dated January 19, 2015 has been dismissed by the learned Single Judge.
2. A notice inviting tender was issued by the appellant and as per Article

4 whereof save and except what was expressly provided in Articles 4, 9, 10, 24, 34, 44 and 47 the respective rights and obligations of the parties under the agreement were subject to satisfaction in full of the conditions precedent specified in clause 4.1. As per clause 4.1.3 of Article 4, amongst other condition precedents required to be satisfied by the respondent was to provide performance security to NHAI. As per clause 4.1.2 after performance security was provided the respondent could have called upon NHAI to perform its condition precedents which were listed in sub-paras (a) to (e) of clause 4.1.2.

3. Admittedly the respondent did not provide the performance security. No work commenced and the dispute reached the lap of the Arbitral Tribunal and the pleadings of the parties show that case of the respondent was that the State Support Agreement referred to in clause 47.3 of the tender documents was breached by the appellant and in the absence thereof it could not mobilize resources. That its obligation to provide a performance guarantee was contingent to the appellant providing it with the State Support Agreement.

4. Clause 47.3 of the tender documents reads as under:-

“47.3 State Support Agreement

The Concessionaire acknowledges that it has received from the Authority a certified true copy of the agreement executed between MoRTH and the State Government for providing the support and services specified therein (the “State Support Agreement”), and the Parties hereto agree to make their best endeavours to procure the support of the state Government.”

5. The clause records that the respondent has received from the appellant

a certified true copy of the agreement executed between MoRTH (Ministry of Road, Transport and Highways) and the State Government for providing the support and services specified in the State Support Agreement. Now, this is admittedly a false fact recorded because the appellant did not have any State Support Agreement executed by the State in which the highway had to be laid and the appellant recorded a false fact in the notice inviting tender. The bidders could not change the terms of the NIT.

6. The State Support Agreement was admittedly entered into between MoRTH and the State Government on February 26, 2014. The contract was executed on March 14, 2012. Completion period was 30 months. It is apparent that 23 months would have been consumed for work to commence had the respondent not terminated the contract earlier. We note that the State Support Agreement was executed between MoRTH and the State Government when arbitration proceedings were on.

7. Case of the appellant was that by not submitting the performance guarantee the respondent was in breach and thus it was entitled to encash the bid security sum of ₹10.44 crores secured by bank guarantees.

8. The Arbitral Tribunal has held that the respondent was not obliged to furnish any performance security. Thus it has been directed that the bank guarantees cannot be encashed and should be returned.

9. Various reasons have been recorded by the Arbitral Tribunal, and we need not summarize the same because in our opinion law declared by North, J. in the decision reported as 78 LT 35 Archer Vs. Stone would squarely apply in which he observed : *‘A man with impunity may tell a lie in gross in the course of negotiation for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the*

contract or its subject matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract.' Under the Chapter of 'Defences to Action' concerning 'Misrepresentation' in para 697 of 'A Treatise on the Specific Performance of Contracts' Sixth Edition by Fry, a principle of equity has been traced to the said decision i.e. if a statement which is material to the contract built on, is false, it would be unconscionable for the party having made the statement to enforce the contract.

10. Learned counsel for the appellant does not dispute the fact MoRTH had not executed any State Support Agreement when the notice inviting tender was published and that none was executed even when arbitration proceedings commenced. The State Support Agreement was executed on February 26, 2014 during arbitration proceedings.

11. The importance of the State Support Agreement was that only then financial institutions would have extended a credit facility to the respondent. We only highlight that for a contract of this magnitude i.e. of highway construction where thousands of crores have to be mobilized by concessionaires and money recovered through toll collected by the concessionaries, no bank would extend a credit unless the risk to the project is minimised. Land acquisition cost is a major component of every highway. The non-execution of the State Support Agreement was a hindrance for the respondent to have mobilized the resources.

12. In our opinion, independent of whether the obligation of the respondent was contingent to the performance of obligations by the appellant and the findings in the award that it was, the appellant cannot

maintain any claim against the respondent for having played a fraud by telling a lie appurtenant.

13. The appeal is dismissed but without any order as to costs.

CM No.8629/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 22, 2016

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