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

\+ FAO(OS) 658/2015

M/S NATIONAL BUILDING CONSTRUCTION CORPORATION ..... Appellant

Represented by: Mr.Manoj Kumar Das, Advocate

versus

INDIAN RAILWAYS CONSTRUCTION COMPANY LTD ..... Respondent

Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

O R D E R

% 28.03.2016

1. Limited notice concerning claim No.32 and 33 was issued in the appeal. In spite of being served none appeared for the respondent on February 19, 2016. None appears for the respondent today even at the second call.

2. Having heard learned counsel for the appellant and having perused the award dated May 04, 2007, we are constrained to allow the appeal and set aside the award pertaining to claim No.32 in full and pertaining to claim No.33 concerning only the bank guarantee relating to security deposit, while affirming the award concerning the bank guarantee relating to the mobilization advanced.

3. It is unfortunate that two public sector undertakings wholly owned by the Government of India are in litigation and the Secretaries of the Cadre

Controlling Ministries are unable to resolve the disputes.

4. The respondent had awarded a contract to the appellant to construct a railway station-cum-commercial complex in Navi Mumbai and the dispute between the parties was referred to an Arbitral Tribunal comprising three members.

5. At the forefront of the defence by the appellant was negligence by the respondent in making available the unencumbered site.

6. If there was delay by the respondent in handing over the unencumbered site and there were other defaults attributable to the respondent, its action of terminating the contract would be illegal and consequences had to flow.

7. The learned Arbitrators have found that whereas the appellants took steps to immediately mobilize the site after the work was awarded to it on April 05, 1990 and submitted the bank guarantee for release of mobilization advance, the respondent released the mobilization advanced in driblets and the last sum was released after six months causing handicap in complete mobilization of machinery. The learned Arbitrators have further found that there was delay in handing over working fronts attributable to the respondents. The learned Arbitrators have found that the respondent delayed issuing final drawings and that many drawings had not even been issued when the contract was decided. The learned Arbitrators have also found that the fourth cause of delay was a change in the basic design of the deck slab by the respondent. Thus the act of the respondent in terminating the contract was held to be illegal.

8. In spite thereof, security deposit claimed in sum of ₹6,13,455/- has been permitted to be forfeited by the Arbitral Tribunal, which finding is

contrary to the reasoning in the preceding paragraphs.

9. The award is very lengthy but a perusal thereof shows that part delay has been apportioned to the shoulders of the appellant as well. They seems to be the motivation in not awarding ₹6,13,455/- to the appellant, which was the sum retained by the respondent from the running certified bills for payment.

10. If delay is attributable to both parties and rescission of the contract by the respondent is held to be illegal, the logical conclusion has to be that for the work done the appellant should be entitled to full payment.

11. As regards claim No.33, its foundation was two bank guarantees encashed by the respondent and issued by the banker of the appellant on instructions from the appellant. The bank guarantees were invoked and the money realized.

12. As regards the bank guarantee to secure mobilization advance we see no reason to interfere with the award for the reason learned counsel for the appellant concedes that the amount covered by the guarantee was received by the appellant towards mobilization advance and there is no evidence that the mobilization advance was recovered in full or in part. Thus, award concerning said bank guarantee under claim No.33 has to be upheld.

13. The second bank guarantee was in lieu of a security deposit and for the reasoning concerning setting aside the award pertaining to claim No.32, award pertaining to claim No.33 relating to the second bank guarantee in sum of ₹65.41 lacs has to be set-aside, for the reason if delay was attributable to both parties the respondent could not encash the second bank guarantee which was in the nature of a security deposit.

14. The appeal is disposed of awarding appellant a sum of ₹6,13,455/-

under claim No.32 and ₹65.41 under claim No.33. The award is modified to said extent.

15. No costs.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

MARCH 28, 2016
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