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

+ **ARB. A. (COMM.) 9/2017**

SUPREME INFRASTRUCTURE INDIA LTD. Appellant

Through: Mr Suren Uppal, Ms Sneha Bahul and
Ms Surbhi Gupta, Advocates.

versus

CENTRAL PUBLIC WORKS DEPARTMENT Respondent

Through: Mr Praveen Kumar Jain, Mr Naveen
Kumar Jain and Mr Sachin Kumar
Jain, Advocates with Mr A. K. Gupta,
Executive Engineer of the respondent.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
28.04.2017

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VIBHU BAKHRU, J

IA No.5176/2017

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The appellant has filed the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an order dated 14.03.2017 (hereafter 'the impugned order') passed by the arbitrator rejecting the appellant's application for interim measures of protection under Section 17 of the Act.
4. The appellant had filed the aforesaid application *inter alia* praying

that the amount payable under the final bill be released without adjustment of the liquidated damages.

5. Disputes between the parties arise from a contract for construction of Additional Office Complex for the Supreme Court of India that was awarded to the appellant on 24.09.2012. Thereafter, the parties entered into an agreement dated 15.10.2012. The notice to proceed was issued on 16.10.2012 and the works were to be completed within a period of 660 days thereafter; that is on or before 06.08.2014. Admittedly, the works were delayed. The respondent terminated the agreement on 24.07.2014 and forfeited the bank guarantees furnished by the appellant as well as earnest money deposit. The appellant contends that such action was arbitrary.

6. The respondent issued a letter dated 09.03.2016 informing the appellant that its final bill had been checked and finalised at minus ₹9,33,12,495/- and called upon the appellant to deposit the said amount. Aggrieved by the same, the appellant moved this court under Section 9 of the Act. The said petition was disposed of on 27.05.2016; this court granted liberty to the appellant to make a claim before the DRC and further directed that pending decision of the DRC, no coercive steps be taken to recover the aforesaid amount. The disputes between the parties were subsequently referred to the arbitral tribunal.

7. Admittedly, there were certain delays in execution of the works and the appellant claims that the said delays were solely on account of the respondent and at any rate for reasons not within the control of the appellant. This is disputed by the respondent who claims that the works were delayed on account of lack of performance on the part of the appellant.

8. In terms of clause 2 of the agreement between the parties, the respondent is entitled to recover compensation at the rate of 1.5% of the contract value per month of delay in completion of the works subject to the maximum of 10% of the contract value.

9. The respondent has in terms of the aforesaid clause, imposed liquidated damages of ₹26,71,35,344/- out of which ₹17,38,22,849/- has been adjusted by the respondent from the amounts payable to the appellant. Further the respondent intended to recover the balance from amounts due to the appellant in respect of other contracts being executed by it, which is permissible in terms of clause 29 of the instant contract.

10. In the circumstances, the appellant filed an application under Section 17 of the Act, *inter alia* praying as under:

- “a. Stay against any act of Respondent in pursuance to the notice dated 30.12.2015, with the wrongful invocation of clause 2 of the agreement whereby the Respondent has imposed liquidated damages to the tune of Rs. 26,71,35,344/- and which includes the consequent letters dated 09.03.2016 and 03.08.2016.
- b. Direct the Respondent to release the payment of Rs. 17,38,22,849/- being admittedly payable in favour of applicant company, with interest of 18% to be calculated from the date July 2014 of raising of the 13th RA Bill till its realization, thereof.
- c. Grant stay against any act of Respondent in pursuance of the notice dated 06.12.2016, which seeks the rectification of the defects by the Applicant under the para 8 of the Particular Specification of the Contract Agreement which stands terminated on 24.06.2014.”

11. As noted above, it is not disputed that the works were delayed. The

question whether the appellant or the respondent would be responsible for the delay is one of the main disputes between the parties and, therefore, the question of levy of liquidated damages under clause 2 of the agreement would be a contentious issue, which would be required to be determined by the arbitrator.

12. The arbitrator considered the same and held that claims and counter claims were required to be dealt in the final award and stay of the action taken under clause 2 would not be in accordance with the provisions of Section 17 of the Act.

13. The arbitrator also noted that liquidated damages amounting to ₹26,71,35,344/- were imposed out of which ₹17,38,22,849/- was already adjusted by the respondent in the final bill. In addition, the respondent was also seeking to recover balance money of ₹9,33,12,495/- by recovering the same from other payments payable to the appellant in respect of other works being executed for different units of CPWD. The arbitrator held that the same would amount to coercive action against the appellant and, accordingly, restrained the respondent from recovering the same subject to the respondent being secured by way of a bank guarantee.

14. It is seen that the arbitrator had exercised his discretion to determine whether at an interim stage, the respondent ought to be directed to make payments of the amounts levied by it and had determined that an affirmative order directing the respondent to make the payment, pending adjudication of the disputes was not warranted and the disputes were required to be first determined on merits. The scope of Section 17 of the Act is limited to directing interim measures of protection and an affirmative direction to

direct payment of money pending adjudication of disputes is rarely granted. Such orders are issued only where the petitioner is able to establish a strong *prima facie* case on merits as well as a case of extreme hardship/injury. In the present case, the arbitrator has held "*that the matter has to be dealt on merits and then only any decision can be arrived at after dealing with the claims and counterclaims of both parties on merits. Hence granting stay at this stage on action taken by respondent under clause 2 of contract Agreement will not be in accordance with provisions of section 17 of arbitration and Conciliation Act 1996 (Amended)*".

15. It is trite law that the appellate court shall not interfere in the discretion exercised by the first court, unless the same is found to be unsustainable on a principle of law or is found to be arbitrary or perverse. In **Wander Ltd. and Another. v. Antox India P. Ltd.**: 1990 Supp SCC 727, the Supreme Court had explained the above principle in the following words:

".....the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify

interference with the trial court's exercise of discretion."

16. This court does not find that on the anvil of the aforesaid principles, any interference with the impugned order is warranted.

17. The appeal and the pending application are accordingly, dismissed.
No order as to costs.

VIBHU BAKHRU, J

APRIL 28, 2017
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