

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

+ **FAO No. 325/2017**

% **1st August, 2017**

M/S MONI TRADERS

..... Appellant

Through: Mr R. Rajappan, Advocate

versus

GOVT OF NCT OF DELHI

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 27241/2017 (for exemption)

Exemption allowed subject to all just exceptions.

CM stands disposed of.

FAO No. 325/2017

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the judgment of the court below dated 05.04.2017, whereby the objections filed by the appellant under Section 34 of the Act have been dismissed and the Award dated 04.02.2016 of the arbitration tribunal upheld.

2. By the Award, the respondent has been allowed to forfeit the security deposit/performance guarantee which is the only aspect which is argued before this Court.

3. The facts of the case are that a contract was entered into between the appellant/contractor and the respondent for a sum of Rs.67.62 lacs dated 20.11.2012 which was to commence on 04.12.2012 allowing six months time for completion of removal of obstructions in the bed of NG drain like steel girders/RCC pipe, dumped malba, building rubbish etc. and protection work on both sides bank on the Mall Road bridge.

4. Appellant commenced the work but abandoned the work on account of heavy seepage which could not be overcome despite dewatering operations being carried out alleging impossibilities in conditions of performance. Respondent rescinded the contract vide letter dated 15.06.2013, that is, after the six months period of completion of the contract. Respondent thereafter forfeited the earnest money and the performance guarantee amount which was disputed by the appellant as a claimant in the arbitration proceedings.

5. The issue argued before this Court on behalf of appellant is that the earnest money and the performance guarantee could not be forfeited unless losses were proved by respondent as required by Section 74 of the Indian Contract Act, 1872. It is argued that the court below ought to have relied upon the judgment of the Supreme Court in the case of ***Hind Construction Contractors By Its Sole Proprietor Bhikam-Chand Mulchand Jain (Dead) By LRs vs. State of Maharashtra, AIR 1979 SC 720*** which held that as the time was not the essence of the contract, there cannot be forfeiture by invoking Section 74 of the Contract Act. It is argued on behalf of appellant that court below wrong relied upon the judgment of the Supreme Court in the case of ***State of Gujarat vs. Dahyabhai Zaverbhai, AIR 1997 SC 2701*** and which judgment approved the action of forfeiture of security deposit as per clause of the contract on abandonment of work by the contractor.

6. In my opinion, appellant cannot place reliance upon the ***Hind Construction Contractors*** case (*supra*) inasmuch as in that case the issue was of extension of time and consequently, once there was a provision for extension of time hence disentitlement of the owner of

the project to rescind the contract, whereas in the present case the fact of the matter is that appellant has been found to have abandoned the contract. Further, the rescission of the contract by the respondent is after the period of six months given in the contract as the six months period commenced on 04.12.2012 and the rescission letter is dated 15.06.2013. In my opinion, therefore, the judgment in ***Dahyabhai Zaverbhai's*** case (*supra*) squarely applies and which entitles the forfeiture of the security deposit on account of abandonment of the contract.

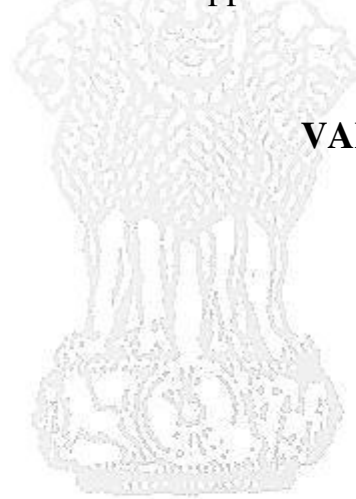
7. In my opinion there is another reason for rejecting the argument urged on behalf of appellant inasmuch as whether the losses have to be proved to have been caused or not depends on the nature of the contract. If nature of the contract is such that losses which occur cannot be proved, then there is no requirement of losses having to be proved in order to forfeit the earnest money vide ***ONGC Ltd. vs. Saw Pipes Ltd.***, (2003) 5 SCC 705 and ***Kailash Nath Associates vs. Delhi Development Authority and Another***, (2015) 4 SCC 136. In a contract of cleaning a drain before the onset of the monsoon season and which is not completed even after onset of monsoon season what

would be the loss of the respondent cannot be calculated in terms of money and, therefore, keeping in mind the nature of the contract, the respondent was entitled to forfeiture of security deposit/performance guarantee. Accordingly, I reject the argument of the appellant that the security deposit/performance guarantee could not have been forfeited without proving of the losses.

8. There is no merit in the appeal. Dismissed.

AUGUST 01, 2017/SR

VALMIKI J. MEHTA, J



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