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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 1811/2013 & O.A. 107/2018, I.As. 11541-11542/2018

GOVT OF NCT OF DELHI

..... Plaintiff

Through: Ms. Warisha Farasat, Advocate with
Ms. Shruti Narayan, Advocate.

versus

M/S BHARAT CONSTRUCTION CORPORATION Defendant

Through: Mr. Shiv Khorana, Advocate.

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Date of Decision: 20th November, 2018

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. On the last date of hearing, learned counsel for plaintiff had prayed for some time so as to facilitate Principal Secretary, PWD, to take a decision as he had been on leave and had recently rejoined his duties.
2. Today, learned counsel for plaintiff has handed over a letter dated 16th November, 2018. The relevant portion of the same is reproduced as under:-

“In continuation to this office above referred letters vide which the status of seeking the withdrawal permission from the competent authority informed. In this matter, the permission for withdrawal of the case, as advised, is not received from the

Deptt i.e. PWD and the Sectt., GNCTD. Hence, your office is requested in this circumstance as Ld. Counsel to proceed with the continuation of the case before the Hon'ble Delhi High Court. The above status of non acceptance of the withdrawal permission by the competent authority is already informed to your kind office.

It is for your information and for legal proceedings accordingly please."

3. It is pertinent to mention that the present suit has been filed by the plaintiff-State for recovery of Rs.2,84,74,094/- along with interest @18% per annum on the ground that the defendant did not complete the construction work of the Orthopaedic Block at the LNJP Hospital by 26th November, 2004.
4. The defendant had filed its claims before the Arbitrator in accordance with the agreed Dispute Resolution Mechanism between the parties.
5. However, the plaintiff's claim for compensation under Clause 2 of the Agreement was not referred to the Arbitrator as it was an excepted matter.
6. The Arbitrator in his award dated 27th June, 2016, has held that the plaintiff was responsible for the delay in execution of the project.
7. Learned counsel for defendant states that in view of the aforesaid finding by the learned Arbitrator, the present suit is liable to be dismissed.
8. The Supreme Court in ***J.G. Engineers Private Limited Vs. Union of India and Another, (2011) 5 SCC 758*** has held as under:-

"22. In view of the above, the question whether the appellant was responsible or the respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding

that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore, even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency were excepted matters, they were not relevant for deciding Claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach.

23. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of the respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that the provisions which make the decision of the Superintending Engineer or the Engineer-in-charge final and conclusive, will be irrelevant. Therefore, the arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the arbitrator on Items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.”

(emphasis supplied)

9. At this stage, learned counsel for plaintiff informs this Court that the plaintiff has challenged the Arbitral Award dated 27th June, 2016 before the the Court of Mr. Ramesh Kumar-II, Additional District Judge (Central), Tis Hazari Courts, Delhi, by way of Arb.Pet. No.84860 of 2016.

10. In the opinion this Court, as long as the finding of the Arbitrator remains that the defendant was not responsible for the delay, the question of the plaintiff levying liquidated damages or claiming compensation would not arise.

11. Consequently, this Court is of the view that the present suit is barred and is not maintainable. However, it is clarified that the plaintiff would be at liberty to file the suit if the finding of the Arbitrator is overturned in Arb.Pet. No.84860 of 2016 or proceedings arising therefrom.

12. Accordingly, the present suit and applications are dismissed with liberty to the plaintiff to file a fresh suit in the event the finding of the Arbitrator with regard to the delay is overturned.

13. Registry is directed to issue to an authorised representative of the plaintiff a certificate authorizing him/her to receive back from the Collector the full amount of the Court fee paid by it in the present suit.

MANMOHAN, J

NOVEMBER 20, 2018

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