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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 112/2018, CM Nos. 27318-27319/2018**
INDIAN RAILWAY CONSTRUCTION COMPANY LIMITED

..... Appellant

Through: Mr. S. S. Hegde, Adv. with
Mrs. Farhat Jahan Rehmani,
Mr. Rakesh Saini &
Mr. Shanti Prakash, Advs.

versus

**NATIONAL BUILDINGS CONSTRUCTION CORPORATION
LIMITED**

..... Respondent

Through: Mr. Arvind Minocha, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
14.08.2018

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CM. No. 27318/2018 (for delay)

This is an application filed by the appellant seeking condonation of 426 days delay in filing the appeal challenging the order dated March 3, 2017 and 76 days delay in filing the appeal against the order February 16, 2018. The ground urged is primarily for administrative reasons, the delay has occurred. In any case, as the learned Single Judge has dismissed the review petition both on delay and merits, we proceeded to examine the appeal on merits as well and for the reasons stated in the application, we condone the delay of 426 and 76 days in filing the appeal.

The application stands disposed of.

FAO(OS) 112/2018

1. The present appeal has been filed by the appellant Indian Railway Construction Company Limited (IRCON) challenging the order dated March 3, 2017 passed in OMP No. 166/2012 whereby the petition filed by the respondent NBCC under Section 34 of the Arbitration and Conciliation Act, 1966 (Act in short) impugning the award dated November 4, 2016 of the Arbitral Tribunal has been allowed and the Review Petition of the appellant being 69/2018, I.A. No. 2129/2018 (for delay of 301 days in filing the petition) and I.A. No. 2128 /2018 (for stay) in OMP. No. 166/2012 have been dismissed.

2. The challenge of the respondent to the award dated November 4, 2016 under Section 34 of the Act was confined to two specific items (i) dismissal of the respondent's claim for refund of two security deposits and (ii) partial award qua Counter-claim no. 3 in favour of the appellant. In so far item no.(i) above is concerned, the same was primarily relatable to the Claim nos. 33 and 34 and the Tribunal based its conclusion on Clause 17.4 of the Contract which permitted the forfeiture of the security deposit. The plea of the respondent NBCC was that on one hand, the Arbitral Tribunal came to a conclusion that termination of the contract by IRCON in terms of Clause

60.1 of the General Conditions of the Contract was bad in law, but on the other hand, the Arbitral Tribunal allowed the claim nos. 33 and 34 by relying on Clause 17.4. Whereas, the case of the appellant was that the Arbitral Tribunal only held that the termination with reference to Clause 60.1 was bad in law, but justified the termination with reference to Clause 17.4 of the contract.

3. The learned Single Judge was of the view that once the Arbitral Tribunal found termination with reference to Clause 60.1 was not justified and it was not case of the appellant IRCON that it could justify the termination of the contract with reference to Clause 59.1 of the GCC or under Clause 17.4, the Arbitral Tribunal should have directed the return of the security deposit of the NBCC, the respondent herein. In other words, it held the rejection by the Arbitral Tribunal of Claim Nos. 33 and 34 of NBCC to the extent it concerned the return of the security deposit amounts, i.e., Rs.5,57,486 plus Rs.60,85,840/- is contrary to the Arbitral Tribunal's own finding and set aside the same.

4. On the aspect of item (ii) which was relatable to the counter-claim no. 3 of IRCON for a total sum Rs.3,65,38,806/- towards interest on various advances given to NBCC more particularly with regard to two specific

advances being (1) *special advance* and (2) *advances against hypothecation of equipment*, learned Single Judge has accepted the contention of the respondent NBCC that there is no provision towards interest on these two advances in the contract. The Id. Single Judge also held as there is no clause in the contract or other justification has been shown by the appellant / IRCON which can form the basis of the Arbitral Tribunal's conclusion as regards the above two items and in particular awarding of 18% interest the award in respect of IRCON's counter-claim no.3, is untenable and set aside the same.

5. Mr. S.S. Hegde, learned counsel appearing for the appellant would submit that even though learned Single Judge has set aside the termination of the contract under Clause 60.1 as unjustified and improper, the termination could still be upheld in view of Clauses 59.1 and 17.4. We are not impressed by that argument, as the appellant having not challenged the finding of the Arbitral Tribunal in the award qua clause 60.1 and it was not the case of the appellant that termination can be justified under Clauses 59.1 / 17.4, even assuming such a conclusion of the Arbitral Tribunal was of its own without any pleadings or evidence, the conclusion cannot be interfered with. In fact, Mr. Hegde has conceded this aspect during arguments. In view

of that matter, we do not find any reason to interfere with the conclusion of the learned Single Judge with regard to the issue of refund of two security deposits. On the second aspect of setting aside the conclusion of the Arbitral Tribunal in the award qua the counter-claim no.3, which is relatable to grant of 18% interest on *special advance and advance against hypothecation of equipment*, Mr. Hegde relied upon the supplementary agreement executed between the parties, wherein clause (ii) (Page 34 of the paper book) suggest grant of 18% interest on special advance, only (and not on advance against hypothecation of equipment). In fact we find the Arbitral Tribunal in Para 47.1 of the Award did note the contention on behalf of the IRCON wherein reference is made to various advances and the interest payable, which depict the special advance, as per supplementary agreement. Mr. Hegde is right in contending that in view of such a stipulation in the supplementary agreement, the learned Single Judge could not have set aside the grant of interest by the Arbitral Tribunal at least qua special advance.

6. The conclusion of the learned Single Judge that there is no such stipulation appears to be not correct and to that extent, the order of the learned Single Judge is liable to be set aside and the grant of 18% interest by

the Arbitral Tribunal in so far as the special advance is concerned need to be upheld. As there is no stipulation for giving interest of 18% on advance for the hypothecation of equipment, the conclusion of the learned Single Judge in that regard is upheld. The appeal is partly allowed on the above terms.

CM No. 27319/2018 (for stay)

Dismissed as infructuous.

THE CHIEF JUSTICE, J

V. KAMESWAR RAO, J

AUGUST 14, 2018/jg