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

+ **FAO(OS) (COMM) 25/2019**

UNION OF INDIA

..... Appellant

Through: Mr.Dinesh Agnani, Sr.Advocate
with Mr.L.B.Rai with Mr.Karti Rai,
Advocates.

versus

INTERCITY CABLES PRIVATE LIMITED

..... Respondent

Through: None.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

% **ORDER**
06.02.2019

CM APPL. 5641/2019 (exemption)

1. Allowed, subject to all just exceptions.

CM APPL. 5642/2019 (delay)

2. For the reasons explained in the application, the delay in re-filing the appeal is condoned and the application is allowed.

FAO(OS) (COMM) 25/2019 & CM APPL. 5640/2019 (stay)

3. This appeal is directed against the decision dated 9th October 2018 of the

learned Single Judge dismissing Appellant's OMP (COMM) 429 of 2018 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) challenging an Award dated 25th July 2018.

4. The background facts are that an Advance Purchase Order (APO) dated 25th September 1995 was placed by the Appellant with the Respondent for supply of Optical Fibre Line Terminating Equipment. This was followed by a Purchase Order dated 23rd February 1996, although for a lesser quantity than that indicated in the APO. As part of the terms of the agreement the Respondent was to furnish a performance bank guarantee (PBG). A dispute arose between the parties when the Appellant encashed the above PBG on failure by the Respondent to supply the above equipment. The claim before the learned Arbitrator by the Respondent was for the return of the money as a result of the encashment of the PBG together with interest.

5. Clause 15.2 of the terms of the General (Commercial) Conditions of Contract, which was invoked by the Appellant reads as under:

“15.2 .Delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions: forfeiture of its performance security, imposition of liquidated damages and/or termination of the contract for default.”

6. The learned Arbitrator interpreted Clause 15.2 in light of the decision of the Supreme Court in *M/s. Kailash Nath Associates v. Delhi Development Authority (2003) 4 SCC 136* and concluded that unless the Appellant was able to prove the loss suffered by it on account of non-supply of the equipment by the Respondent, it would not be entitled to invoke Clause 15.2

and encash the PBG.

7. Mr. Dinesh Agnani, learned Senior Counsel for the Appellant, has taken this Court through Clause 15.2, the Award of the learned Arbitrator and the impugned order of the learned Single Judge. The conclusion reached by the learned Single Judge is that the view taken by the learned Arbitrator on an interpretation of Clause 15.2 in light of the evidence placed on record cannot be interfered with under Section 34 of the Act.

8. This Court notes that the learned Arbitrator examined the correspondence between the Appellant and the Respondent as regards non-performance by the Respondent of its obligations and opined that even therein ‘there was no reference’ to the Appellant herein ‘having suffered any loss or there being any likelihood of any loss in future.’ In light of the legal position discussed, the learned Arbitrator concluded that without demonstrating that there was any loss suffered by it, the Appellant could not have encashed the PBG by way of compensation and only on account of the Respondent’s failure to perform its obligation under the contract.

9. The Court is of the view that the disinclination of the learned Single Judge to interfere with the aforementioned Award of the learned Arbitrator is consistent with the legal position explained by the Supreme Court in several decisions, including *Associate Builders v. DDA (2015) 3 SCC 49* as regards the scope of interference by the Court exercising jurisdiction under Section 34 of the Act.

10. Consequently, the Court finds no reason to interfere with impugned

order of the learned Single Judge.

11. The appeal and application are dismissed.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

FEBRUARY 06, 2019

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