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

% ***Date of Judgment: 21st May, 2019***

+ **FAO(OS) (COMM) 113/2019**

NATIONAL PROJECTS CONSTRUCTION CORPORATION LTD

..... Appellant

Through: Mr. Dhruv Mehta, Senior Advocate
with Mr. Rajat Arora and Mr.
Vishalkshi Singh, Advocates

versus

ISHVAKOO (INDIA) PVT LTD

.....Respondent

Through: Mr. Arun Kumar Varma, Senior
Advocate with Mr. Abhay Raj Varma
and Mr. Vishal Nautiyal, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

C.Ms.23732-33/2019 (Exemption)

Allowed subject to all just exceptions. Application stands disposed of.

FAO(OS) (COMM) 113/2019 & CM Appl. APPL. 23731/2019

1. This is an appeal under Section 37 of *the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act')*. The appellant is aggrieved by an order dated 5th April, 2019 passed by a learned Single Judge of this Court on an application filed under Section 9 of the Act. The respondent was the claimant before the Sole Arbitrator appointed by this Court. All the claims of the respondent stand dismissed. The respondent had filed a petition under

Section 34 of the Act. During the pendency of this petition, the respondent made an oral submission before the learned Single Judge, that a sum of Rs.3.5 crores (approximately) be directed to be paid to the respondent. The order passed on 20th September, 2018 and another order dated 30th October, 2018 was assailed by the appellant herein by filing a FAO(OS)(COMM) 271/2018. This Court had then passed the following order on 29th November, 2018: -

“The challenge in this appeal is to the orders dated 20.09.2018 and 30.10.2018.

After some hearing in the matter, it is agreed that without prejudice to the rights and contentions of the parties which have been raised by them in petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the impugned orders may be set aside and the questions raised may be left open to be decided along with objections filed under Section 34 of the Arbitration and Conciliation Act, 1996, by the respondent.

This order will not come in the way of the respondent, in case the respondent chooses to file a fresh petition under Section 9 of the Arbitration and Conciliation Act, 1996.

Legal objections of the appellant herein are kept open.

The present appeal is accordingly disposed of, in the above terms.

All pending applications also stand disposed of.”

2. The respondent-Claimant thereafter made a substantive application under Section 9 of the Act seeking release of a sum of Rs.3.5 crores, which was subject matter of Bank Guarantees, which were furnished by the respondent to the appellant herein, in lieu of the mobilization advance.

3. Mr. Dhruv Mehta, learned senior counsel appearing for the appellant, submits that once the relief granted to the respondent in terms of an order dated 20th September, 2018 was set aside by this Court, the same relief could not have been sought by the respondent nor granted by the learned Single Judge. Additionally, Mr. Mehta submits that till there is final adjudication of the application under Section 34 of the Act, the relief sought and granted to the respondent by the learned Single Judge could not have been granted as there is no averment made in the application under Section 9 of the Act that the appellant herein is likely to leave the jurisdiction of this Court or its financial condition is such that in case a favourable order is passed in favour of the respondent, the appellant would have no means to recover the same. Mr. Mehta contends that this amount is liable to be adjusted by the appellant herein as it formed part of mobilization advance, which was given to the respondent during the pendency of the contract.

4. Mr. Arun Kumar Varma, learned senior counsel appearing for the respondent, submits that the facts of the present case are peculiar, in the sense, that an OMP being OMP 363/2003 was filed by the respondent wherein the following order was passed on 15th December, 2005:-

“The petition is accordingly disposed of recording undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated upon by the arbitrator and even thereafter if petition under Section 34 of the Arbitration Act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees. IA also stands disposed of.”

5. Mr. Varma submits that since the respondent did not have the funds to keep the bank guarantee alive, the bank guarantee was encashed by the appellant herein in September, 2017. He further submits that no claim was made by the appellant herein with regard to the payment of any mobilization advance. No issue was framed in this regard nor counter claim was raised nor there is any finding on this and thus, the appellant cannot enrich themselves on account of the financial situation of the respondent. Mr. Varma further contends that in the absence of any counter-claim before the Arbitrator, this amount cannot fall to the share of the appellant.

6. We have heard the learned senior counsels for the parties. At the outset, we may say that we had granted liberty in our earlier order dated 29th November, 2018 to the respondent to file a fresh petition under Section 9 of the Act, if so advised, and thus, in our view, there is no infirmity as far as filing of a petition under Section 9 of the Act by the respondent is concerned.

7. To appreciate the submission made by learned counsels for the parties, we may note that the following issues were framed by the Arbitral Tribunal on 3rd November, 2014. Two issues are relevant for the purpose of the deciding this appeal and hence we reproduce the same as under: -

“3. Whether the Claimant is entitled to discharge of Bank Guarantees? OPC”

4. Whether the Claimant is entitled to Bank Charges of Rs.77,27,225/- for keeping the Bank Guarantees? OPC”

8. We find by the reading of the Award that issue No.3 has not been decided. In this regard, we reproduce the observations of the Arbitrator in paragraphs No.229 to 232 of the Award, which are as under: -

“229. Issues No.3 and 4 are whether the Claimant is entitled to discharge of the Bank Guarantee and also whether

the claimant is entitled to the sum of Rs.77,27,225/- towards the bank charges for keeping the Bank Guarantee alive.

230. Without adverting to the submissions made by the Parties, the Tribunal finds that the High Court of Delhi, vide Order dated 15.12.2005, passed in O.M.P. No.363/2003 had disposed of the Petition in the following terms:

“The Petition is accordingly disposed of with the undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated by the arbitrator and even thereafter if petition under section 34 of the arbitration act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees. IA also stands disposed of.”

231. Therefore, it can be seen that by its own undertaking, the Claimant was xxxxxxxxxxxx of the above order.

232. In any event, due to the fraudulent and collusive conduct of the Claimant, the Respondent cannot be fastened with any liability and as such, the Tribunal is not inclined to grant any relief in this regard. The Respondent is accordingly, not liable to pay any bank charges.”

9. No doubt, the Arbitrator has decided issue No.4, but in the absence of any decision with regard to issue No.3, it cannot be said as to who is the rightful claimant of the amount which is subject matter of the bank guarantee to the tune of Rs.3.50 crores. Analyzing the situation further, assuming the bank guarantee was not encashed, would the appellant herein be entitled to encash the bank guarantee in the absence of any claim raised by the appellant before the Arbitrator and interestingly, without any decision on issue No.3?

The answer has to be in the negative. Hence, the learned Single Judge has rightly directed that the amount be deposited in this Court, subject to the outcome of the decision on application under Section 34 of the Act. The amount so directed by the learned Single Judge be deposited in this Court within a period of four weeks from today.

10. For the reasons stated above, the appeal alongwith the application is dismissed.

11. No costs.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 21, 2019

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