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Ct-08

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FMAT 392 of 2022

with

CAN 1 of 2022

(Assigned)

Oscorp Industries Pvt. Ltd.

Vs.

Union of India & Ors.

Mr. Animesh Paul

... For the Appellant

Mr. Ashok Kumar Chakraborti,

Addl. Solicitor General

Mr. Siddhartha Lahiri

... For the Respondent Railways

Although we are of the view that reasoning for refusal to pass ad-interim order of injunction in favour of the appellant is not sustainable in law but having regard to the fact that the bank guarantee has already been invoked during the pendency of the proceeding, the prayer for an order of injunction restraining invocation of bank guarantee has now become redundant, however, the appreciation expressed with regard to the re-tendering and allotment of work to a new contractor cannot be brushed aside. Even if it is found that the termination could be proper for the work that requires to be allotted to a fresh contractor should be for the balance amount that was alleged to have been left undone.

Accordingly, we direct the parties to have joint measurement of the works executed by the appellant and upon such exercise being carried out by the parties thereafter the respondents, subject to any order that may be passed by the arbitral tribunal in this regard, may re-tender for the balance work. In other words, the Union of India shall be entitled to apply for a fresh tender

after joint measurement upon prior notice to the appellant so as to enable the appellant to take appropriate steps in this regard.

Learned Additional Solicitor General has submitted that the contractor has not been debarred from any future tender. In our view, the contractor shall not be debarred to participate any future tender as the issue with regard to the alleged failure on the part of the appellant to complete the work is required to be adjudicated upon deciding the arbitration proceeding.

The parties are ad idem that the dispute is arbitrable and covered by the arbitration clause.

Accordingly, by consent of the parties we appoint Mr. R.K. Bag (Retired) a former judge of this court, to act as sole arbitrator for adjudication of the dispute between the parties without insisting for the appointment procedure prescribed in the contract document to be followed in this regard.

Learned Arbitrator shall fix his remuneration at the first sitting of the arbitration proceeding.

The parties are directed to bear all charges, expenses and remuneration of the arbitrator in equal measure.

We make it clear that the observations made in this order are only for the purpose of deciding the appeal and application and the learned arbitrator shall not be influenced by this order in disposing of the reference on merit.

In view of the aforesaid, nothing remains to be decided in the application filed by the appellant before the trial court under Section 9 of the Arbitration and Conciliation Act 1996 in Misc. Case No. 3618 of 2022. The said

application stands accordingly disposed of.

Since no affidavit-in-opposition is called for, all allegations are deemed to have been denied.

The appeal being FMAT 392 of 2022 is thus disposed of along with CAN 1 of 2022.

(Uday Kumar,J.)

(Soumen Sen, J.)