$~102 to 104

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

% *Date of decision: 05.05.2022*

\+ **FAO(OS) (COMM) 107/2022**
FAO(OS) (COMM) 108/2022
FAO(OS) (COMM) 109/2022

M/S GARG BUILDERS ..... Appellant

Through: Mr. Rajshekhar Rao, Learned Sr.Adv. along with Mr. Rahul Malhotra, Mr. Anshul Gupta, Advs.

versus

HINDUSTAN PREFAB LIMITED & ANR. ..... Respondents

Through: Mr. Varun Nischal, Mr. Vaibhav Mishra, Advs. for R-1 along with Mr. Mukesh Kumar, Legal Officer (HPL) Mr. Ateev Mathur and Mr. Amol Sharma, Advs. for R-2.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE POONAM A. BAMBA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 21579/2022 in FAO(OS) (COMM) 107/2022
CM APPL. 21581/2022 in FAO(OS) (COMM) 108/2022
CM APPL. 21585/2022 in FAO(OS) (COMM) 109/2022

1. Allowed, subject to just exceptions.

FAO(OS) (COMM) 107/2022 & CM APPL. 21578/2022 ***[Application filed on behalf of the appellant for interim relief]***
FAO(OS) (COMM) 108/2022 & CM APPL. 21580/2022 ***[Application filed on behalf of the appellant for interim relief]***
FAO(OS) (COMM) 109/2022 & CM APPL. 21584/2022***[Application filed***

on behalf of the appellant for interim relief]

2. The above-captioned appeals assail a common judgment dated 02.05.2022, rendered by the learned single judge.

3. Mr Rajshekhar Rao, learned senior counsel, who appears for the appellant, says that the learned single judge has not taken into account the financial state of respondent no. 1.

3.1. In sum, according to Mr Rao, this was a case wherein stay against encashment of the subject bank guarantees ought to have been granted, as they fell into the category of the third exception, which is, irretrievable harm and special equities.

4. Mr Varun Nischal, who appears on behalf of respondent no.1, contends to the contrary.

4.1. Mr Nischal says that the latest financials would show that respondent no.1 has, in fact, won several new projects and that the position, which obtained in the financial years [in short "FYs"] 2018-2019 and 2019-2020, does not subsist any longer.

5. According to Mr. Nischal, respondent no. 1 has earned profits in the FY 2020-2021.

5.1. To be noted, the financials and profit/loss account for FY 2021-2022 are not on record, as the petitions under Section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"] were filed by the appellant in July 2021.

6. Be that as it may, after having heard the matter for some time, we put to the learned counsel for the appellant and respondent no.1, as to whether the following *pro tem* arrangement would work in the present matter.

6.1. The learned counsels for the appellant and respondent no.1 have obtained instructions and have agreed to the directions set forth below, for the purpose of disposal of the above-captioned appeals:

(i) The appellant will permit respondent no. 2/bank to remit the monies concerning the following 09 bank guarantees, the details of which are extracted hereafter:

BG No.	Dated	Amount(₹)	Purpose
003GT0216 3520012	17.12.16	3243000/-	Security Deposit
003GT0219 2540009	11.09.19	2974000/-	Security Deposit
003GT0218 2790007	06.10.18	7500000/-	Security Deposit
003GT0217 3030030	30.10.17	3243000/-	Security Deposit
003GT0218 2190021	07.08.18	28773504/-	Performance
003GT0216 0760022	16.03.16	15172278/-	--
003GT0217 1670016	16.06.17	2000000/-	--
003GT0219 2590021	16.09.19	3500000/-	--
003GT0218 2810026	08.10.18	2500000/-	--
Total amount		6,89,05,782/-	

(ii) Insofar as the 10th bank guarantee is concerned i.e., BG No. 003GT02170190002 amounting to Rs.2,19,59,310/-, the same will be returned by respondent no. 2/bank to the appellant as, concededly, the validity period of the same has expired.

(iii) Since the appellant's petition under Section 11 of the Act is pending adjudication before the learned single judge, which is resisted by respondent no. 1; and therefore at this juncture, one cannot hazard a guess as to the adjudicatory forum before which, ultimately, the disputes obtaining between the parties will be placed and dealt with. Given this position, the money that respondent no.1 will obtain against the aforementioned 09 bank guarantees [as referred in paragraph 6.1(i) above] will be kept aside by respondent no.1

(iv) Furthermore, the parties will abide by the decision of the concerned adjudicatory forum to which the parties may take recourse to i.e., either an arbitral tribunal or this court.

(v) The money, which will be obtained by respondent no. 1, against the aforementioned bank guarantees, will earn interest at the rate of 6 % p.a.

(vi) The principal amount, as reflected by the aforementioned bank guarantees, and the interest component, as indicated in paragraph 6.1(v) above, will enure to the benefit of the party, which succeeds in the adjudication.

(vii) Insofar as the claims lodged herein by the parties are concerned, the parties would be free to press for a higher rate of interest, *vis-à-vis* claims other than the amounts reflected in the aforementioned bank guarantees.

(viii) The parties will also be at liberty to approach the concerned adjudicatory forum for modification, variation or even for vacating the *pro tem* measure put in place by us.

6.2. The impugned judgement is modified, to the aforesaid extent.

7. Needless to add, the aforementioned directions will not prejudice the stand of either party, with regard to the merits of the disputes.

8. The above-captioned appeals are disposed of in the aforesaid terms.

9. Consequently, pending applications shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(POONAM A. BAMBA)
JUDGE

MAY 5, 2022
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Click here to check corrigendum, if any