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

\+ ARB.APPEAL Nos. 18/2009 & 19/2009

30th October, 2009

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through : Mr. Chetan Sharma, Sr. Advocate with Mr. Vikas Goel and Mr. Ramaiya N. Sharma, Advocate for the appellant.

versus

M/S UEM-ESSAR (JV) .....Respondent

Through : None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

% **JUDGMENT (ORAL)**

VALMIKI J. MEHTA, J.

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1. These appeals have been filed under Section 37 of the Arbitration and Conciliation Act,1996 against the order dated 14.8.2009 passed by the Arbitral Tribunal dismissing the appellant's application under Section 17 of the Act. The application was filed by the appellant seeking to restrain the respondent from taking over the machinery which belonged to the respondent and which was used by the respondent in performance of its work till the cancellation of the contract by the petitioner. The exact prayer clauses of the application filed before the Arbitration Tribunal are as under:-

> "a. Permanent injunction restraining the defendants, their respective officials, agents, servants or any other person or persons claiming on behalf of the defendants from filing the equipments, material

and temporary works from the sites as prescribed in the schedule.

b. Permanent injunction restraining the defendants, their respective officials, agents, servants or any other person or persons claiming on behalf of the defendants from creating any hindrance in usage of the equipments, material and temporary work as prescribed in the schedule, for execution of balance work by NHAI, its officials, agents, contractors or any other person or persons appointed by NHAI."

2. The appellant claims his right in terms of clause 63.1 of the Contract and which is reproduced below :

"

Remedies

Default of Contractor

63.1 "If the Contractor is deemed by law unable to pay his debts as they fall due, or enters into voluntary or involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction with the prior permission of the Employer), or becomes insolvent, or makes an arrangement with, or assignment in favour of, his creditors or agrees to carry out the Contract under a committee of inspection of his creditors, or if a receiver administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to the contractor of his assets which, under any applicable law has a substantially

similar effect to any of the foregoing acts or events, or if the Contractor has contravened Sub Clause 3.1, or has an execution levied on his goods, or if the Engineer certifies to the Employer, with a copy of the Contractor, that, in his opinion, the Contractor:

(a) has repudiated the Contract,

(b) without reasonable excuse has failed

(i) to commence the Works 28 days of the Date of Commencement in accordance with Sub-Clause 41.1, or

(ii) to proceed with the Works, or any Section thereof, within 28 days after receiving notice pursuant to Sub-Clause 46.1

(c) has failed to comply with a notice issued pursuant to Sub-Clause 37.4 or instruction issued pursuant to Sub-Clause 39.1 within 28 days after having received it.

(d) despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligation under the Contract, or

(e) has contravened Sub-Clause 4.1

(f) has substantially suspended the Works for a period of fourteen days without authority from the Engineer and has failed to proceed with the Works within 28 days of receipt of a Notice from the Engineer; or

(g) has failed to supply sufficient or suitable constructional plant temporary works, key personnel, labour materials as proposed in the programme for the execution of

Work furnished under Sub-Clause 14.1; or

(h) has failed to comply with the requirements applicable to Joint Ventures as per the Contract.

then the Employer may, after giving fourteen days notice to the Contractor, enter upon the Site and expel the Contractor therefrom without thereby voiding the Contract, or releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and powers conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to compete the Works. The Employer or such other contractor may use for such completion so much of the Contractor's Equipment, Plant, Temporary Works and materials which have been deemed to be reserved exclusively for the execution of the Works, under the provisions of the Contract, as he or they may think proper, and the Employer may, at any time, sell any of the said Contractor's Equipment, temporary Works and unused Plant and materials and apply the proceeds of sale in or towards the satisfactory of any sums due or which may become due to him from the Contractor under the Contract."

(Emphasis added)

3. On the basis of the aforesaid clause, it is contended by the learned senior counsel for the appellant that the machinery in question becomes of the appellant and which it is in fact not only entitled to use but also sell at any point of time.

4. The impugned order which has been passed by the Tribunal, (and which could have been worded better) in fact says that by deciding on the application the arbitrators will effectively be deciding on the merits of the controversy, by interpreting the vexed clause 63.1 of the contract and for proceedings which are presently pending before it and final arguments are going on. Since the issue would indeed be a highly contentious one amounting to deciding highly disputed issues by an interim application, the arbitrators in effect have said that the pronouncement in one way or the other would be to effectively pronounce on the merits of the case and which are pending before the Arbitral Tribunal and which the Arbitral Tribunal would seek/prefer not to do. I do not think that this is such an unreasonable finding for which this Court need interfere under Section 37.

5. At this stage, it would be appropriate to refer to the second last para of the impugned order which reads as under:-

> "We reiterate what we had stated in the concluding part of our order dated 19.2.2009 while dismissing the application filed by the claimants under Section 23(3) of the Act and once again advise the parties to concentrate on merits of the case rather than filing one application after another, which consumes a lot of time of the arbitral tribunal as well as the parties. The parties would be well advised to conclude their arguments on the merits in an expeditious and speedy manner."
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> (Emphasis added)

It is quite clear that the arbitrators have emphasized to the parties that instead of filing interim applications, it would be better if the parties

concentrate on their arguments and complete the final arguments which are presently going on.

6. Considering that an interim application is for an urgent relief which is asked for as necessary to preserve the final relief is prayed in particular/specific type of cases, I may note that the notice under Clause 63.1 which has been issued in this case for cancellation of the contract is way back on 11.12.2006. The suit before the Civil Judge in Karnataka was filed in March, 2008 and which suit was on the application of the respondent herein under Section 8 of the Arbitration and Conciliation Act, 1996 was referred to arbitration because the contract in question had an arbitration clause. Consequently, this application which has been decided by the impugned order was filed before the Arbitrators on 29.5.2009. Obviously, therefore, considerable time has elapsed since the cancellation of the contract, issuing of the cancellation notice, filing of the suit in Karnataka and any issue of interim relief, therefore, would not arise more so because the final arguments are going on before the Arbitral Tribunal and the Tribunal has expressed its annoyance that the parties are concentrating more on filing of interim applications and not on the final arguments.

7. Though the appellant has failed to answer the query of this court it is quite clear that claims of the respondent in the present case, would obviously be in the regime of crores of rupees in as much as the original contract is of Rs.250 crores approximately. In these arbitration proceedings there are no claims of the appellant, though I am informed that it has claims for which other arbitration proceedings are going on. On query from the

court, the counsel for the appellant states that he does not have and has not filed the copies of the claims of the respondent no.1. The court is, therefore, handicapped in not being able to state the exact amount of the claims of the respondent no.1. I may, however, note that the total value of the contract in question was more than Rs 250 crores as per the statement of the counsel for the appellant. I have already noted that there are no counter-claims of the appellant in the present arbitration proceedings. In a case where there are monetary claims of the appellant, the effect of taking over the machinery in terms of the agreed contractual clause in such a case is in fact a relief not only of attachment before judgment but the same would amount to execution of a future decree for money claims which the present appellant may have (of course it is not that it is bound to succeed in getting a money decree/award) and for which it seeks to appropriate the value of the machinery towards such claims in terms of the last para of clause 63.1 reproduced above. I may again note that the appellant claims to have not only the right to use the machinery but it claims under clause 63.1 the right to sell plant and machinery towards satisfaction of sums which it claims would be held to be due to it in other arbitration proceedings. Obviously, if therefore, the plant and machinery is sold, the present appellant would have to account for the monies which are received by it with respect to the sale of the plant and machinery since the machinery does not belong to the appellant and in fact which belongs to the respondent. Even if, there were in a case final monetary claims, any interim appropriation would effectively amount to execution of the final money claims through an interim measure amounting to interim execution of an expected money decree/award and

which is not known to law. Further and more so, because the validity of a claim itself under the subject contractual clause in question is very much in issue and has yet to be pronounced and adjudicated upon by the arbitrators. Therefore, prima facie, I find at this stage, in view of the facts of the present case and the law as applicable that appellant is not entitled to appropriate the machinery, prayed for at the present stage. At the cost of repetition, it may be said that this would in fact amount to appropriation towards final money claims by an interim order when there are vexed issues and strenuous contest before the arbitrators.

8. To the observations already made above I would seek to add herein the aspect that a reference to the appeal filed before this court as also the application for interim relief which was filed before the Tribunal shows that there are no required and necessary averments therein which are called for in an application under Order 38 Rule 5 of the CPC viz of the respondent/claimant is seeking to dispose of its properties to defraud its creditors or is running away from the jurisdiction of the arbitration Tribunal. Therefore, even if, the subject application of the appellant be treated as under Order 38 Rule 5 CPC for attachment of the machinery admittedly belonging to the respondent, the same is/was liable to fail as even the necessary averments for claiming the drastic relief of attachment before judgment are not found in the application which has been dismissed by the Arbitral Tribunal.

9. Therefore, at the time of dismissal of the appeals, I may reiterate what the Tribunal has observed that the parties are well advised to concentrate

on final arguments and not on the filing of interim applications at the time of final arguments. With these observations, these appeals are dismissed with costs quantified at Rs.50,000/- in each of the appeals, to be deposited with the Delhi High Court Legal Services Authority since the respondent has not appeared. The costs be deposited within two weeks from today and failing which it will carry further interest of 18% per annum. The appeals are accordingly disposed of.

OCTOBER 30, 2009 **VALMIKI J. MEHTA, J**
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