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

+ W.P.(C) 10797/2015 & CM No.27732/2015 (for stay) & 27734/2015
(for condonation of 7 days delay in re-filing the petition)

M/S ASHOKA PAPER PRODUCTS Petitioner

Through: Mr. Iqbal Ashraf Rahmani, Adv.

Versus

GOVERNMENT OF INDIA & ORS Respondents

Through: Mr. Nawal Kishore Jha, Adv. for UOI
with Mr. Subir and Mr. Sudhir
Mukherjee COS.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **27.11.2015**

1. The petition seeks to prohibit the respondent No.2, Controller of Stationary, Govt. of India Stationary Office from encashing the Bank Guarantee (BG) of Rs.5,56,350/- furnished by the respondent No.3 Union Bank of India, Asaf Ali Road, New Delhi at the instance of the petitioner in favour of the respondent No.2.

2. It is the case of the petitioner that the respondent No.2 had placed an order on the petitioner for supply of stationary items and the petitioner had got furnished the BG aforesaid as required under the terms of the said order / contract. The petitioner admits that it could not supply the contracted goods within the time prescribed therefor and not even within the extension granted by the respondent No.2 subject to levy of 1% penalty and not even within the further extensions granted by the respondent No.2 and owing whereto the respondent No.2 has now cancelled the contract and invoked

the BG.

3. It is the case of the petitioner that he could not supply the goods in spite of his best efforts and is now ready and willing to supply the same. It is further stated that inspection notes were issued by the respondent no.2 only two days prior to the last date for delivery and during which two days the petitioner could not supply the goods. It is thus contended that the default is not of the petitioner alone and the respondent No.2 is not entitled to invoke the BG.

4. The counsel for the respondents, appearing on advance notice, under instructions from the officials present in Court states that though the BG has been invoked and money thereunder demanded from the respondent No.3 Bank but the money has not been received as yet.

5. Not only is the writ jurisdiction of this Court invoked in a purely contractual matter having no colour of public law and the writ remedy is thus not maintainable, as recently held in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728, but even otherwise law with respect to interference by the Courts in encashment of bank guarantee has been sufficiently well settled. The BG in the present case also is unconditional and unequivocal making the respondent No.2 the sole judge, whether the petitioner has committed the breach or not and requiring the respondent No.3 Bank to, under the BG, make payment to the respondent No.2, without any demur or protest. Reference may be made to ***U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Limited*** (1988) 1 SCC 174, ***Svenska Handelsbanken Vs. M/s. Indian Charge Chrome*** (1994) 1 SCC 502, ***U.P. State Sugar Corporation Vs. Sumac*** W.P.(C) 10797/2015

International Ltd. (1997) 1 SCC 567, *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company* (2007) 8 SCC 110, *General Electric Technical Services Company Inc. Vs. Punj Sons (P) Ltd.* (1991) 4 SCC 230, *Centax (India) Ltd. Vs. Vinmar Impex Inc.* (1986) 4 SCC 136 and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd.* (1985) 1 SCC 260, all laying down that there can be no interference by the Courts in invocation / encashment of such BGs and the remedy if any against wrongful invocation / encashment is to claim refund / damages.

6. Supreme Court, in *National Highway Authority of India Vs. Ganga Enterprises* (2003) 7 SCC 410, also concerned with the relief of refund of the bid security forfeited by NHAI, held that it is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India; the dispute regarding forfeiture of bid security is regarding the term of offer and thus contractual in respect of which a writ Court is not the proper forum; invoking Bank Guarantee and / or enforcing the bid security is not in exercise of any statutory right; forfeiture of earnest / security in no way affects any statutory rights; such earnest / security is given and taken to ensure that a contract is performed; the law regarding enforcement of an on demand Bank Guarantee is very clear; if the enforcement is in terms of the guarantee then Courts must not interfere with the enforcement of Bank Guarantee; the Court can interfere if the invocation is against terms of the guarantee or if there is any fraud; if the guarantee is rightly invoked, there is no question of directing refund. Accordingly, the writ petition was dismissed. Supreme Court in *Jagdish Mandal Vs. State of Orissa* (2007) 14 W.P.(C) 10797/2015

SCC 517 held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides* but cautioned that a Court, before interfering in a tender or contractual matter in exercise of power of judicial review, should pose to itself the questions whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no reasonable authority acting reasonably and in accordance with relevant law could have reached and whether public interest is affected. It was further held that if the answers to the said questions are in the negative then there should be no interference under Article 226. This view has been reiterated in ***Michigan Rubber (India) Ltd. Vs. State of Karnataka*** (2012) 8 SCC 216 and in ***Maa Binda Express Carrier Vs. North-East Frontier Railway*** (2014) 3 SCC 760.

7. Similarly, the Supreme Court in order dated 18th March, 2015 in Civil Appeal No.3053/2015 titled ***National Highway Authority of India Vs. MEIL-EDB LLC (JV)*** set aside the judgment of the Division Bench of this Court holding forfeiture of security deposit by the NHAI to be bad and the Supreme Court held that such question can be adjudicated only in a suit or in arbitration.

8. No case for entertaining the writ petition is thus made out.
Dismissed. No costs.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 27, 2015

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