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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGMENT NO. 68 OF 2015
IN
SUMMARY SUIT NO. 376 OF 2015**

The Fertilisers & Chemicals Travancore Ltd. ...Plaintiff
VS
ICICI Bank Ltd. ...Defendant

.....
Mr Ashok Singh & Ginny Jetley Rautray for the Plaintiff
Mr Vishnu S. i/b Phoenix Legal for the Defendant.
.....

**CORAM : S.C. GUPTE, J.
FEBRUARY 08, 2016**

P.C. :

The Summons for Judgment is taken out in a Summary Suit for a decree of Rs.15,12,41,828/-. The claim arises out of five bank guarantees issued by the Defendant in favour of the Plaintiff. The bank guarantees were issued by the Defendant at the instance of one M/s ABC & Sons, Mumbai ("ABCL") against a mobilization advance in a contract between the Plaintiff and ABCL.

2 This contract was for transportation of liquid ammonia gas from the Plaintiff's ammonia storage tank at Willington Island to its production divisions. The Plaintiff claims to have paid 24 crores towards the mobilization advance to ABCL on the strength of the suit bank guarantees. ABCL took out an application under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") and sought interim injunction against enforcement of these bank guarantees. The Division Bench of Kerala High Court by its order dated 23 January 2012 confirmed ad-interim injunction granted earlier against enforcement of the bank guarantees and continued the interim injunction during pendency of the reference between the Plaintiff and ABCL. ABCL succeeded in the reference. By an award dated 1 January 2014, the Arbitral Tribunal came to the conclusion that the bank guarantees issued by the Defendant at the instance of ABCL had become unenforceable and that the Plaintiff was not entitled to encash the same. This

award has been challenged by the Plaintiff before the Court in an application under Section 34 of the Act filed before the District Court at Ernakulam in Kerala. This Arbitration Petition is pending before the District Court, Ernakulam. The Plaintiff has now sued the Defendant on the basis of the suit bank guarantees.

3 On these facts there are clearly triable issues arising between the Plaintiff and the Defendant as to the enforceability of bank guarantees, though the subject matter is also pending adjudication before the District Court, Ernakulam in an application of the Plaintiff under Section 34 of the Act. Learned counsel for the Plaintiff relies on Section 36 of the Act and also cites judgment of the Supreme Court in **National Aluminium Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd.**¹ She submits that an award, which is challenged within the time stipulated under Section 34 before a competent Court, is un-executable. Whilst this may be so, the question before this Court is about enforceability of the bank guarantees, which are the subject matter of the present suit. The question of enforceability is already decided by an arbitral forum against the Plaintiff herein. Whether or not the award passed by the Arbitrator in this case is executable, is besides the point. But surely, the least that the Defendant can say on the basis thereof is that whether or not the Plaintiff can enforce the bank guarantees is a triable matter, to be decided at the hearing of the suit and no decree or conditional order should follow upon a Summons for Judgment. In the premises, the Defendant is entitled to unconditional leave to defend the suit.

4 In the premises, the Defendant is granted leave to defend the suit unconditionally. The suit is transferred to the list of commercial causes. Written statement to be filed within a period of six weeks from today. The suit to come up on board for directions after six weeks. The Summons for Judgment is disposed of accordingly.

(S.C.GUPTE J.)

1 (2004) 1 Supreme Court Cases 540