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

Date of Decision: August 08, 2016

\+ **<u>RFA 10/2008</u>**

THE STATE TRADING CORPORATION OF INDIA LTD.

..... Appellant

Through: Ms. Ekta Kalra Sikri, Mr Vaibhav Kalra & Mr. Jasbir Bidhuri, Advocates

versus

L'ENTERPRISE NATIONALE D'APPROVISIONMENT EN PRODUITS PHARMACEUTICALS D'ALGER AND OTHERS

..... Respondent

Through: Mr. Sanjeev Kakra & Mr. Bheem Jain, Advocates for respondent No.3

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

<u>JUDGMENT</u>
ORAL

1. Impugned judgment of 10th September, 2007 dismisses appellant's suit for injuncting the respondent from invoking or encashing performance bank guarantee of 4th November, 1988 for USD 4,74,907.86 and to restrain respondents No. 1 & 2 from invoking the bank guarantee.

2. In this appeal, despite service none had appeared on behalf of respondents No. 1 & 2 and they were set *ex parte*. Respondent No.3-bank is a proforma respondent in this appeal. While entertaining this appeal, the operation of the impugned order was stayed. The context in

which the performance bank guarantee was given by appellant-plaintiff is spelt out by trial court in the opening paragraphs of the impugned judgment and it needs no reiteration. It is a matter of record, respondents No.1,2 & 3 were *ex parte* even before the trial court. However, in the impugned judgment, appellant's suit has been dismissed while observing that nothing has been placed on record by appellant-plaintiff to show that any final receipt was issued in respect of contract in question or that the supplies were made by the appellant to first respondent to its satisfaction or that appellant had performed its obligation under the bank guarantee in question to the satisfaction of respondents No. 1 & 2.

3. Regarding the delay of eleven years in invocation of the bank guarantee, trial court in the impugned order has brushed it aside by simply observing that delay of eleven years in invocation of bank guarantee cannot be termed as an exceptional case of hardship and irretrievable injustice.

4. At the hearing, learned counsel for appellant had drawn attention of this Court to various clauses of contract, Clause-15 thereof and the bank guarantee to submit that the contract was fully performed and in terms of the contract, appellant had received the payments and after inordinate delay of eleven years, the bank guarantee is belatedly sought to be invoked by a mere swift message, which does not disclose that there was any breach in terms of the contract. It is submitted that the stand taken by the appellant of respondent-defendant reopening the previous contract of 1986, against which performance bank guarantee was already released, was totally unjustified and evidence to this effect was led by the appellant, which remains unrebutted. It is further submitted that it has

been the categoric stand of appellant-plaintiff that the final receipt was not issued by the first respondent because of some complaints pertaining to a previous contract, which could not have been made.

5. In the *ex parte* evidence, it is asserted by appellant-plaintiff that the supplies relating to the contract in question were effected in December, 1988 and June, 1989 and they had received the payment qua those supplies. So, it is submitted that invocation of the bank guarantee after a lapse of eleven years is wholly unjustified and trial court has gravely erred in holding that the belated invocation of bank guarantee does not cause any irretrievable injustice to appellant-plaintiff. Reliance is placed by learned counsel for appellant upon a Division Bench decision in *Nitin Verma Vs. State* 2013 (138) DRJ 435 [DB] to submit that rebutted testimony ought to be accepted unless any infirmity is found in it. Reliance is also placed upon Supreme Court decision in *Hindustan Construction Co. ltd. Vs. State of Bihar & ors.* (1999) 8 SCC 136 to submit that even if the bank guarantee is irrevocable, still the terms of bank guarantee are material and are required to be looked into.

6. Upon hearing and on perusal of the impugned judgment, the trial court record and the decisions cited, I find that very basis of invoking the bank guarantee lacks substance to justify the invocation. Pertinently, it is not the case of the first respondent in the swift message that invocation of bank guarantee is on account of non-fulfillment of any term or obligation of the main contract in question. In such a situation, the first respondent was not justified in invoking the bank guarantee. Trial court has erred in ignoring the delay aspect by simply observing that no irretrievable injustice is caused to appellant-plaintiff. Merely because the final receipt

has not been placed on record, would not justify invocation of the bank guarantee for the reason that unrebutted stand of appellant-plaintiff is that the final bill was not deliberately issued by the first respondent because they had sought to raise some disputes about previous contract. In the face of the unrebutted evidence, impugned judgment cannot be sustained and is accordingly set aside. The suit of appellant for injunction is decreed as prayed for and the bank guarantee furnished by appellant stands discharged.

7. This appeal is accordingly disposed of.

(SUNIL GAUR)
JUDGE

AUGUST 08, 2016
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