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

\+ O.M.P.(I) (COMM.) 138/2017 & IA No.3864/2017

MANISH SACHDEVA, PROPRIETOR, AANAV CONSTRUCTION CO ..... Petitioner

Through Mr Viplav Sharma, Advocate.

versus

NATIONAL SMALL INDUSTRIES CORPORATION LTD. ..... Respondent

Through Mr Sanjay K Sharma, Advocate.

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**O R D E R**

**% 28.04.2017**

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia,* praying as under:-

> "a. allow the present application and as an interim measure, pass urgent suitable injunctive orders against respondent No. 1 and restrain the said Respondent No. 1 its employees, agents and all persons acting for and on its behalf from invoking/encashing subject bank guarantees (Annexure P5 Colly) and thereby, preserve the same under the authority of this Hon'ble Court pending final outcome of the arbitration proceedings which the Petitioner hereby, undertakes to commence by issuing the Notice of the Arbitration."

2. The petitioner is engaged in civil construction activities which require procurement of raw materials such as Cement, TMT Reinforcement, Iron

Sheets and Diesel etc. The petitioner has availed of a financing facility from respondent no.1 (NSIC), which has been established for facilitating growth of Small Enterprises and assisting Small Scale Industrial Units.

3. NSIC has provided a financial facility to the petitioner, which is stated to be essentially in the nature of a bill disclosing limit. Currently, the petitioner enjoys a limit to the extent of ₹2.25 crores which is secured by bank guarantees (six in number) furnished by the petitioner. The petitioner has filed the present petition as NSIC has sought to invoke the said bank guarantees.

4. The case set up by the petitioner is that he has not defaulted in payment of any interest and, therefore, in terms of the agreement dated 02.06.2014 entered into between the parties, the bank guarantees cannot be invoked.

5. Mr Viplav Sharma, learned counsel appearing for the petitioner had also referred to the NSIC's letter dated 16.03.2017 which indicates that NSIC had decided to invoke the bank guarantees to discourage the petitioner from paying the penal interest. He also referred to clause 4 of the agreement which reads as under:-

> "4. That the amount(s) advanced, paid or incurred by the Corporation towards remittances for payment of material to the canalised / Government Agencies and others and for storage, insurance charges freight for movement of material, clearance charges, charges for transporting the material, postal expenses and all other charges and expenses incurred by the Corporation in connection with the procurement of the material will be

> debited to the account of the Borrower and it agrees and undertakes to repay or reimburse the amount(s) so debited to its accounts with interest at the rate of 12.95 percent per annum or at such other rates as the Corporation may charge in its discretion depending upon the variation in its lending rates, within a maximum period of 90 days from the date of debited such amount(s). In case the payment is not received within the stipulated period of 90 days from the date of debited such amount(s). In case the payment is not received within the stipulated period of 90 days, the Borrower shall be liable to pay additional interest @ 0.75 to 1 percent for delays beyond 90 days or at such other rates as the Corporation may charge at its discretion on the amount(s) of the said advance and processing and administrative charges to the Corporation. The Borrower agrees that such repayment of the amount debited to its accounts will be made on or before the expiry of 90 days from the date of delivery of the material to the borrower or date of payment by Corporation whichever is earlier."

6. He submitted that in terms of the aforesaid clause, if the payments against the supplies are not received within a period of 90 days, the petitioner would be liable to pay additional interest at the rate of 0.75% to 1% for the delays beyond 90 days. He submitted that since the agreement between the parties provided for additional interest, the term of the agreement which required the amounts advanced to be paid within a period of 90 days, was not sacrosanct and time was not the essence of the agreement. He contended that the petitioner was willing to pay the additional interest and, therefore, it was not open for the NSIC to invoke the bank guarantees solely for the reason that the payments had not been received within the stipulated period of 90 days. He earnestly contended that

the terms of the bank guarantees must be read in conjunction with the agreement between the parties. The only consequence for delay in payment was levy of additional interest and not invocation of the bank guarantees.

7. The learned counsel for NSIC countered the aforesaid submissions and stated that in terms of the facility provided to the petitioner, he is obliged to deposit the amounts financed within a period of 90 days. He submitted that merely because the petitioner was willing to suffer additional interest, did not imply that NSIC could not recover the principal amount financed by it. He further stated that as on 26.03.2017 (at the time of invocation of the bank guarantees) a sum of ₹2,25,13,983/- was due and payable by the petitioner and NSIC was within its right to recover the same.

8. I have heard the learned counsel for the parties.

9. At the outset, it is necessary to observe that the law in relation to invocation of the bank guarantees is now well settled. The bank guarantees cannot be interdicted except where the petitioner is able to establish *prima facie* case of egregious fraud, special equities and irretrievable injury. (See: ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Others*****: (1994) 1 SCC 502,** ***Larsen & Toubro Limited v Maharashtra State Electricity Board and Others*****: (1995) 6 SCC 68**, ***U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.*****: 1988 (1) SCC 174** and ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.*****: AIR 1996 SC 2268**).

10. In the present case, there is no allegation that invocation of bank guarantees is fraudulent and there are any special equities that would

warrant interdiction of the invocation of the bank guarantees.

11. Mr Sharma has sought to place the petitioner’s case within the exception of the invocation of the bank guarantees not being in terms thereof.

12. A bare perusal of the bank guarantees indicate that the same are unconditional and the Corporation Bank Ltd. has undertaken to pay on written demand, the amounts as specified against any loss or damage to or suffered by NSIC by reason of any breach by the petitioner. All the said bank guarantees are similarly worded. Clause 2 of the bank guarantees is relevant and reads as under:-

> "2. The bank do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a written demand from the Corporation should reach on or before expiry date i.e. stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Corporation by reason of breach by the said Borrower of any of the terms and conditions contained in the said Agreement or by reason of the Borrower's failure to perform the said Agreement, including any default /delay in timely payment of Corporation dues, other charges, expenses or payment demanded by Corporation in terms of the said agreement, any loss caused to Corporation by way of loss of raw material/items or refusal to take delivery of raw material/items acquired by Corporation at the behest of the Borrower for utilisation of Borrower's business. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this Guarantee. However, Bank's liability under this

> guarantee shall be restricted to an amount not exceeding Rs. 50 lacs (Rupees Fifty Lacs only).

13. In the present case, it is admitted that NSIC has not received payments which were due to be received within a period of 90 days and thus, indisputably, there has been a breach of the terms of the agreement between the parties. It is also not disputed that the petitioner is liable to pay the amounts due to NSIC. NSIC had issued a letter dated 17.03.2017 demanding that the outstanding overdue payments be made as it had found that there were several transactions, which were pending for more than 500 days. NSIC called upon the petitioner to deposit the outstanding dues of ₹22,50,000/- (sic) [*recte* ₹2,25,00,000/-] within eight working days.

14. Since the petitioner had not cleared the overdue amounts, NSIC by its letter dated 27.03.2017 has invoked the bank guarantees.

15. The contention that since the petitioner was willing to pay penal charges, no action for recovery of the outstanding payments could be made, is clearly unsustainable.

16. In view of the above, the present petition and application are dismissed. No order as to costs.

17. Order *dasti* under signature of Court Master.

**VIBHU BAKHRU, J**

**APRIL 28, 2017**
**RK**