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

\+ **W.P.(C) 2998/2017 & CM APPL. 13126/2017 (stay)**

MANJEET HOTELS PVT. LTD. & ANR. ..... Petitioners

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Anuj Malhotra, Advocate.

versus

AIRPORTS AUTHORITY OF INDIA & ANR. ..... Respondents

Through: Mr. Anil Kathuria, ASC with Mr. Neeraj Arora, Advocate for R-1.
Mr. Snehasish Mukherjee, learned counsel for the Respondent No.2

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 13.09.2017

1. The Petitioners seek the release of the Bank Guarantee ('BG') dated 16th February 2008 in the sum of Rs. 70 lakhs issued in favour of the Respondent No. 1 by the Petitioners. Although the petition when it was filed also prayed for the release of two other BGs in favour of Respondent No. 2, Mumbai International Airport Private Limited ('MIAL') for Rs. 16.50 lakhs and Rs. 93.08 lakhs, the said two BGs lapsed and were not renewed.

2. The case of the Petitioners is that, after the decision dated 30th July 2014 of this Court in W.P. (C) No. 4274/2010 (***Airport Retail Private Limited v. Union of India***), no service tax was payable by the Petitioners on the license fee for the period prior to 1st June 2007. It is stated that on the above basis the Petitioners' own Writ Petition No. 545/2007 was disposed of on

2nd May 2016 by the High Court of Bombay. During the pendency of the above writ petition, the Petitioners had furnished the three BGs.

3. The Petitioners after succeeding in the writ petition, asked for return of the BGs by letters dated 12th May 2015 and 15th June 2016. By replies dated 16th June 2016 (by Respondent No.2) and 23rd June 2016 (by Respondent No.1), the Petitioners were asked to approach this Court for return of the BGs.

4. In the present petition, on 22nd May 2017, the Court granted a final opportunity to the Respondents to file replies. Respondent No.1 was restrained from encashing the BG subject to it being kept renewed by the Petitioners during the pendency of the petition.

5. Mr. Dayan Krishnan, learned Senior Advocate, states that the said BG has been kept alive pursuant to the above direction of this Court.

6. In its reply, Respondent No. 1 states that since it has already deposited the service tax with the Central Government, it cannot seek refund and that it is only the service tax provider who can claim the refund. Reference is made to Section 73 A (5) of the Finance Act, 1994.

7. The Court finds that the above submission is based on a misconception of the legal position. The Petitioners took the stand that they are not to liable to pay the service tax for the period prior to 1st June 2007. It is for that reason that instead of paying service tax under protest they furnished a BG

in favour of Respondent No.1. If the AAI, on its own, deposited the service tax with the Central Government, the AAI would be entitled to refund thereof in accordance with law. The AAI would have to satisfy the Central Government that it has not passed on the burden of the service tax liability to the Petitioners, which in fact, it did not.

8. For the above reasons, the Court is of the view that there is no justification for Respondent No.1 to continue retaining the BG issued in its favour. Accordingly Respondent No.1 is directed to forthwith return to the Petitioners BG No. PBG 2007/70029 dated 16th February 2008 issued in its for a sum of Rs.70 lakhs and, in any event, not later than 30th September 2017.

9. Although Respondent No. 2 has not filed a counter affidavit, the fact remains that the two BGs issued in its favour have lapsed thus rendering the reliefs sought in respect thereof infructuous.

10. The writ petition is allowed in the above terms but with no order as to the costs. The application is disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 13, 2017/*dk*