$~02

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

% Judgment delivered on: 09th May, 2017

\+ **<u>FAO(OS) (COMM) 65/2016 & CM No.31110/2016</u>**

M/S SIMPLEX INFRASTRUCTURES LIMITED
(FORMERLY KNOWN AS SIMPLEX
CONCRETE PILES (INDIA) LIMITED) ..... Appellant

Through : Mr.Sanjeev Sen, Sr Advocate with Mr.Rakesh Sinha, Mr.Samrat Sengupta, Mr.Dev Roy, & Ms.Soumyajit Nath, Advocates.

versus

NATIONAL HIGHWAYS
AUTHORITY OF INDIA & ANR ..... Respondents

Through : Ms.Bhavana Dahoon, Advocate for NHAI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

<u>S.RAVINDRA BHAT, J. (Oral)</u>

1. The appellant's grievance is that the order of the learned Single Judge dismissing its application for injunction in the circumstances was not justified.

2. The appellant submitted a bid, in response to the tender enquiry by the respondent i.e. National Highways Authority of India (NHAI). The bid was rejected and the amount deposited as pre-bid security (₹8.14 Crore) was forfeited. In doing so, NHAI resorted to a

condition in the tender. The deposit was made through bank guarantee. Being aggrieved, the appellant sought a declaration that NHAI could not have invoked the bank guarantee (after first filing a writ petition which was disposed of), that the invocation of the bank guarantee by way of forfeiture was illegal and it also sought for permanent injunction.

3. Initially, learned Single Judge granted an *ex parte* injunction interdicting NHAI from encashing the bank guarantee. The NHAI proceeded to encash the guarantee nevertheless which led to the initiation of contempt proceedings. Thereupon, NHAI was constrained to deposit the amount, on 02.02.2016 under orders of this Court with the Registry of this Court.

4. Learned Single Judge declined the grant of injunction based upon the following reasoning:-

> *"16. The senior counsel for the plaintiff argues i) that though this Court in the order dated 7th October, 2015 had directed defendant no.1 NHAI to communicate the reasons for persisting with the demand but in the letter dated 17th November, 2015 no such reasons were stated; ii) that though the bank guarantee given was an unconditional and unequivocal one but because of the order dated 7th October, 2015 became a conditional bank guarantee; iii) that though the judgment dated 7th October, 2015 (of the undersigned) could not have changed the well settled law relating to bank guarantee but since it is binding inter se parties, the plaintiff is entitled in this peculiar situation to an order injuncting the encashment of the bank guarantee.*

17. I am unable to agree.

18. Fraud of an egregious nature, which is the only exception to the law of, no interference of court in encashment of bank guarantee, has to be in obtaining the bank guarantee and not subsequent to the bank guarantee, as is contended.

19. As far as the contention, of the bank guarantee having become conditional owing to the order dated 7th October, 2015, I may state that the purport of the order is not so. There is no intention reflected therein or any discussion therein on the matter of encashment of bank guarantee. Rather, the order expressly provides that if the plaintiff is unable to obtain stay on encashment of bank guarantee, the defendant no.1 NHAI shall be entitled to invoke the same.

20. The well settled law is that if the encashment of the bank guarantee is wrongful, the person on hose instance the bank guarantee is furnished is entitled to make a claim for refund of the monies wrongfully realized under the bank guarantee. That right exists in favour of the plaintiff also and particularly in terms of the judgment in ***GVR Infra Projects Ltd. Vs. NHAI*** *2015 SCC Online Del 11924 and order dated 18th March, 2015 of the Supreme Court in Civil Appeal No.3053/2015 titled as* ***NHAI Vs. MEILEDB LLJ (JV)****."*

5. Learned senior counsel for the appellant argued that the learned Single Judge fell into error seriously in treating the present dispute as one concerning the encashment of the bank guarantee. He emphasised that the real issue was whether the forfeiture clause would enable the NHAI to appropriate the entire amount through encashment of the bank guarantee in the manner that it was done. He

relied upon two decisions of this Court rendered in writ proceedings and highlighted that the Court had in no uncertain terms stated that the forfeiture clause could not have been resorted to by the NHAI under similar circumstances. It was submitted that in any event the NHAI may be directed to maintain the amount lying deposited with the Court as it would not cause any prejudice to it.

6. It is quite apparent from the above discussion that the relief claimed by the appellant was in respect of the bank guarantee. Though the bank guarantee sought to secure the bid amount, but the fact nevertheless is that in such circumstances, the jurisdiction of the Courts to injunct the beneficiaries from doing so is extremely narrow and limited.

7. Learned Single Judge has pointed out that fraud of an egregious nature i.e. in respect of form of the underlining contract or something akin to that (termed as 'special equity' in the decisions of the Supreme Court) only, can persuade the Courts to exercise this limited jurisdiction. With such injunction order in the case of a bid amount, (earnest money deposit) by way of bank guarantee, does not in any manner relieve the Courts of their obligation to apply the law constantly declared by the Supreme Court in *UCO Bank vs. Bank of India* AIR 1981 SC 1426 onwards. Constantly, the Courts have stated that it is only where fraud of an egregious nature apparent from the record or where special equity of similar kind are pleaded and demonstrably shown that such narrow jurisdiction can be sparingly exercised. Evidently, the appellant was unable to establish these

elements.

8. In these circumstances, the decision of the learned Single Judge impugned in the present appeal cannot be faulted with.

9. This Court is also un-persuaded by the submissions that the amounts can be retained in deposit with the Registry of this Court. No such direction is apparently borne out from the order of the learned Single Judge that the appellant is in possession of such funds. Furthermore, it is nobody's case that NHAI is a loss making concern or would not be able to return the amount of such depository, if any such order is made eventually.

10. The appeal and pending miscellaneous applications are therefore dismissed.

S. RAVINDRA BHAT, J

YOGESH KHANNA, J

MAY 09, 2017

M