$~39

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

\+ FAO(OS) (COMM) 2/2018

M/S IL&FS ENGINEERING & CONSTRUCTION COMPANY LTD. ..... Appellant

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Darpan Wadhwa, Mr. Arjun Syal, Mr. Manu Seshadri, Mr. Ishan Bisht, Mr. Aditya Singh & Mr. Samarth Chowdhary, Advocates

versus

PASCHIMANCHAL VIDYUT VITARAN NIGAM LTD. ..... Respondent

Through: Mr.Parag P. Tripathi, Senior Advocate with Mr. Lav Kumar Agarwal & Mr. Srinivasan Ramaswamy, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

O R D E R

% **08.01.2018**

CM Nos. 825-26/2018

Allowed, subject to all just exceptions. The applications are disposed of.

FAO(OS) No.2/2018

1. Learned Senior Counsel for the appellant prays for and is granted permission to place on record copy of the impugned order dated 8.1.2018 passed in OMP(I) (COMM) 356/2017 titled M/s

IL&FS Engineering & Construction Company Ltd. versus Paschimanchal Vidyut Vitaran Nigam Ltd. & Ors..

2. Learned Senior Counsel for the appellant has raised three contentions – (i) invocation of the advance bank guarantee is not in terms of the Guarantee, (ii) the respondent have already adjusted advance payments of Rs.6,53,94,590/- from the payments made during the pendency of the contract. This amount should be reduced and (iii) the respondent has not dealt with and not examined the grounds and reasons given by the appellant contesting the alleged defects or defaults in performance. Our attention is drawn to the order dated 4.9.2017 passed by the Managing Director of the respondent.

3. On the first contention, we are in agreement with the respondent that the advance bank guarantee could be invoked, both in the event of failure to commence the work or on failure to fulfil the obligations in terms of the contract. The contention that the bank guarantee could be invoked, only after demand being raised and failure or default in payment, is far-fetched and unacceptable. Further, Bank guarantees were invoked way back on 4.9.2017. This would show that demand was raised. There was a stay order operating from 12.9.2017 till the impugned order was passed today, i.e. on 8.1.2018. Admittedly, payment has not been made.

4. On the second contention, learned counsel for the respondent has stated that advance of Rs.6,53,94,500/- adjusted from the running payments would not be realized. We take the statement on record and direct and hold that the respondent would be bound by the statement. In other words, the invocation of the bank guarantee would be limited

to the amount mentioned in the said bank guarantee, less Rs. 6,53,94,590/-, adjustment of which has already been made from the running bills.

5. With regard to the third contention, we would record that the dispute raised by the appellant relates to the principal contract and merits. The appellant has already invoked the arbitration clause and the disputes and claims are pending before the Arbitrators.

6. We have been constrained to pass a short order, rather than a detailed one, as the appellant was insisting on stay of bank guarantee in this appeal, which was listed before this Court at 4:00 pm, after being mentioned before the Acting Chief Justice.

7. With the aforesaid observations and directions, the appeal is disposed of, with no order as to costs.

8. *Dasti* under signature of the Court Master.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 08, 2018
tp