$~29, 30 & 31 (*Common Orders*)

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

% **Date of Decision: 17th January, 2018**

\+ FAO(OS) 8/2018

MULANUR RENEWABLE ENERGY PRIVATE LIMITED ..... Appellant

Through: Mr. Sankh Sengupta with Ms. Tine Abraham and Ms. Vatsala Kumar, Advs.

versus

REGEN POWERTECH PRIVATE LTD & ANR ..... Respondent

Through: Mr. Jayant K. Mehta with Mr. Neevanandham Rajagopal, Mr. Anush Raajan, Mr. S. Aravindan and Mr. Rahul Kukreja, Advs.

\+ FAO(OS) 9/2018

GREEN INFRA WIND SOLUTIONS LIMITED ..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Sankh Sengupta with Ms. Tine Abraham and Ms. Vatsala Kumar, Advs.

versus

REGEN POWERTECH PRIVATE LTD & ANR ..... Respondent

Through: Mr. Jayant K. Mehta with Mr. Neevanandham Rajagopal, Mr. Anush Raajan, Mr. S. Aravindan and Mr. Rahul Kukreja, Advs.

\+ FAO(OS) 10/2018

MULANUR RENEWABLE ENERGY PRIVATE LIMITED ..... Appellant

Through: Mr. Sankh Sengupta with Ms. Tine Abraham and Ms. Vatsala Kumar, Advs.

versus

REGEN POWERTECH PRIVATE LTD & ANR ..... Respondent

Through: Mr. Jayant K. Mehta with Mr. Neevanandham Rajagopal, Mr. Anush Raajan, Mr. S. Aravindan and Mr. Rahul Kukreja, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

Cav. No.27/2018 in FAO(OS) No.8/2018

Since the ld. counsel for the respondents entered appearance, caveat stands discharged.

CM Nos.1600-01/2018 in FAO(OS) No.8/2018
CM Nos.1717-18/2018 in FAO (OS) No.9/2018
CM Nos.1847-48/2018 in FAO(OS) No.10/2018

Allowed, subject to all just exceptions.

CMs stand disposed of.

CM No.1602/2018 in FAO(OS) No.8/2018
CM No.1719/2018 in FAO (OS) No.9/2018
CM No.1849/2018 in FAO(OS) No.10/2018

1. Notice.

2. Mr. Jayant K. Mehta, ld. counsel accepts notice for the respondents in all these appeals.

3. Having regard to the nature of the applications, we have orally heard the ld. counsel for the parties and delay in filing the appeals is condoned.

CMs stand disposed of.

FAO (OS) No.8/2018 & CM No.1599/2018 *(for stay)*
FAO (OS) No.9/2018 & CM No.1716/2018 *(for stay)*
FAO (OS) No.10/2018 & CM No.1846/2018 *(for stay)*

4. We have heard Mr. Sandeep Sethi, ld. Senior Counsel appearing for the appellant and Mr. Jayant K. Mehta, ld. counsel who appeared on behalf of the respondents, as caveater, on advance notice.

5. The appellant assails the orders passed by the ld. Single Judge in O.M.P. (I) 24/2017 & O.M.P.(I) 25/2017 dated 29th November, 2017 and O.M.P. (I) 37/2017 dated 8th December, 2017 granting the protection of notice of five workings days to the respondents herein on invocation by the appellants of bank guarantee furnished to it by the respondents.

6. It appears that with regard to contract of setting up and developing Wind Power Project, the appellants had placed a purchase order on the respondents for supply of Wind Turbine Generators (WTGs). For this purpose, the parties had *inter alia* entered into a Wrap Agreement. In terms of the agreement, the respondents had submitted irrevocable and unconditional bank

guarantees for securing performance of the agreement.

7. Apprehending encashment of the bank guarantees, the respondents invoked the jurisdiction of the ld. Single Judge by way of the three petitions under Section 9 of the Arbitration and Conciliation Act, 1996 seeking orders restraining the appellants from invoking or receiving money under the performance bank guarantees. These petitions were considered and disposed of by the ld. Single Judge in terms of the impugned orders dated 29th November, 2017 (*in OMP(I) No.24/2017 & OMP(I) No.25/2017*) and impugned order dated 8th December, 2017 (*in OMP(I) No.37/2017*). Reasons for the same stand recorded in the order dated 29th November, 2017 passed in OMP(I) No.25/2017. The orders dated 29th November, 2017 in OMP(I) No.24/2017 and order dated 8th December, 2017 issue the same direction for the reasons recorded in the order dated 29th November, 2017 in OMP(I) No.25/2017.

8. A perusal of the impugned order in OMP(I) No.25/2017 would show that the ld. Single Judge has clearly recorded that as on date, there were no notices of default issued by the appellant herein to the respondent herein in all three petitions. It is also noted that there was no material to support the apprehension expressed by the respondents that the appellants intended to invoke the bank guarantees in near future.

9. However, influenced by the fact that the appellants, in similar situation, had earlier not only invoked the other bank guarantees issued by the respondents between the parties, as well

as that it had encashed the same before the respondents could have approached the Court to seek protection, the ld. Single Judge took a view that the respondents had a valid apprehension that the appellant may, only to defeat the entitlement of a legal remedy to the respondents, invoke the bank guarantees behind its back so as to leave the respondents remediless.

10. Premised on this conclusion, the ld. Single Judge was of the view that equity deserves to be balanced between the parties and consequently, directed the appellant herein to give a "*notice of five working days*" to the respondents before invoking the bank guarantees in question.

11. OMP(I) No.24/2017 and OMP(I) No.37/2017 have thus been decided by the ld. Single Judge on the force of this order.

12. In our view, given the admitted position that no action for invocation of the bank guarantee has been commenced by the appellants, the requirement of issuing "*notice of five working days*" to the respondents before its invocation would tantamount to the grant of prayers made in the petition under Section 9 of the Arbitration and Conciliation Act, 1996, inasmuch as the appellants would stand interdicted from invoking the bank guarantee without issuing a notice of five working days, all before invocation.

13. In the given facts and circumstances of the case, the direction for issuance of notice of five working days to the respondent before invocation of bank guarantee is neither in terms of the contract nor in terms of the bank guarantee which has to abide by well-settled principles of law. In view thereof, the

impugned orders dated 29th November, 2017 in OMP (I) No.24 & OMP (I) No.25/2017 and order dated 8th December, 2017 in OMP(I) No.37/2017 are not sustainable and hereby set aside.

These appeals are disposed of in the above terms.

In view of the order passed in the appeals, pending applications do not survive for adjudication and the same are accordingly disposed of.

14. We make it clear that we have not expressed any opinion on the merits of the case.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

JANUARY 17, 2018/pmc