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

+ **FAO 110/2018**

R D NON TOXIC PRODUCTS Appellant

Through: Mr. Rakesh Kumar and Mr. Anupam
Sharma, Advocates.

versus

**SENIOR DIVISIONAL MECHANICAL ENGINEERING
(COACHING) NORTHAN RAILWAYS**

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **04.04.2018**

CM APPL. 12683/2018 (by appellant for early hearing)

This is an application for early hearing. For the reasons mentioned in the application, it is allowed.

The application stands disposed off.

FAO 110/2018

This is an appeal against an order dated 12.03.2018 passed by the learned Additional District Judge, Delhi declining the interim relief to the appellant under section 9 of the Arbitration and Conciliation Act, 1996.

It is the appellant's case that it had never sought any extension of time for performance of the contract which was to come to an end on 07.12.2017; that the Railways have, on their own, extended the time and now seek to encash the appellant's Bank Guarantee on the ground that there has been failure in performance of the contract by the appellant.

The impugned order notes that initially the Court had granted interim protection against the encashment of the Bank Guarantee on the basis of the aforesaid submissions of the appellant. However, upon examination of the record, it was found that the appellant itself had sought extension of time for completion of the contractual obligation. The impugned order refers to a document filed by the appellant showing that one Mr. Sujeet Kumar had been authorized by it to sign documents on its behalf. This authority letter dated 01.10.2015 reads *inter alia*:-

“To
Sr. CDO
NDLS Station
Northern Railway

Sub: Authorisation for Signing Authority

Ref. No.: Agreement No.197-S/92/M-CLG /NDLS/14/MC-IV
Dated 04/02/2015
Contract for Mechanized cleaning of coaches, depot
premises at coach care centre New Delhi including DLT
Complex for Three Years

Dear Sir

With reference to the above mentioned subject, we authorise to Mr. Sujeet Kumar for signing the documents and bill on behalf of our organization M/s R.D Non -toxic Products, 2/15, West Patel Nagar, New Delhi-110008.

As per signature of Mr. Sujeet Kumar attested below.

Thanking you

For R. D. Non-Toxic Products
Ashish Ahuja
(Proprietor)

(Mr. Sujeet Kumar)
For R. D NON-TOXIC PROPRIETOR”

On the basis of this authority, Mr. Sujeet Kumar sought extension of time for performance of the contract by a letter dated 11.10.2017. His letter reads *inter alia*:-

“ This is to request you to please enhance the dp of the contract. We are working on New Delhi Depot. As some quantities have been finished or to be finished soon so please do it on urgent basis”.

The request was granted, by letter dated 29.11.2017, the Railways communicated to the appellant that the Competent Authority had extended the DP (date of completion of period) of the subject contract upto 07.04.2018, on the same terms and conditions. Thereafter, the appellant sought cancellation of the enhancement of time in view of their understanding that the contract stood completed. However, the issue whether the contract stood completed is yet to be determined. In the interim, the appellant sought stay of the encashment of the Bank Guarantee. The impugned declined to grant the relief. It reasoned and concluded as under:-

“10 The claim of the petitioner that respondent unilaterally extended the contract between the parties, which had expired by efflux of time is found to be incorrect and contrary to record. Prima facie it seems that petitioner deliberately concealed certain facts from the court, so as to make the court believe that the respondent unilaterally and fraudulently extended the contract.

11. In the opinion of the court, as the contract was extended on the request of the petitioner, therefore, the petitioner has failed to make out prima facie case and the petitioner is not entitled to relief claimed and more so, as the petitioner deliberately concealed true facts from the court in order to obtain ex-parte order. In the opinion of the

court in view of judgment titled **U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Limited (1988) 1SCC 174, Svenska Handelsbanken Vs. M/s Indian Charge Chrome (1994) 1SCC 502, U.P. State Sugar Corporation Vs. Sumac International Ltd. (1997) 1 Swcc 567, Himadri Chemicals industries Ltd. Vs. Coal Tar Refining Company (2007) 8 SCC 110, General Electric Technical Services Company Inc. Vs. Punj Sons (P) Ltd. (1991) 4 SCC 230, Centax (India) Ltd. Vs. Vinmar Impex Inc. (1986) 4 SCC 136 and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dun lop India Ltd. (1985) 1 SCC 26** in absence of any fraud, it would not be appropriate for the court to interfere in invocation/ encashment of the bank guarantee and the remedy, if any against wrongful invocation/encashment of the bank guarantee by the respondent, is to claim refund/damages from the respondent, that too in arbitration proceedings. Accordingly, petition is dismissed”.

The stay of invocation of the Bank Guarantee would have to be premised on *ex-facie* fraud being played against the furnisher of the Bank Guarantee by its beneficiary. The Supreme Court in **Svenska Handelsbanken vs Indian Charge Chrome, 1994 AIR 626**, held that:-

“58. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also the well-settled principle of law in India. No fraud and no question of irretrievable injustice was involved in the case.” (emphasis supplied)

The teamed (sic) Judge at pages 1141 and 1142 held as under: (SCR headnote) “In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of

credit or of bank guarantee, there should be a serious dispute and a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties; otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operation would be jeopardized. The commitments of the banks must be honoured free from interference by the courts; otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases, that is, in cases of fraud or in cases of irretrievable injustice that the court should interfere. This is not a case where irretrievable injustice would be done by enforcement of the bank guarantee. This is also not a case where a strong prima facie case of fraud in entering into a transaction was made out. The High Court should not have interfered with the bank guarantee. The judgment and order of the High Court set aside. The order of the Civil Judge restored."

(emphasis in original)

At this stage the appellant has not been able to make out a case of fraud having been played upon it. Therefore, there could be no occasion to stay the encashment of the Bank Guarantee.

In view of the above, the Court finds no reason to interfere with the impugned order. Accordingly, the appeal is dismissed.

NAJMI WAZIRI, J

APRIL 04, 2018/RW