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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 133/2018, CM Nos. 34114-35115/2018**
M/S EAST INDIA TECHNOLOGIES PVT LTD

..... Appellant

Through: Mr. D.D. Dayani, Adv. with
Ms. Mahima Dayani, Adv.

versus

DEPARTMENT OF POST

..... Respondent

Through: Mr. Anuj Aggarwal, ASC

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **29.08.2018**

CM No. 35115/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 133/2018

1. The present appeal has been filed by the appellant M/s East India Technologies Pvt. Ltd under Section 37 of the Arbitration & Conciliation Act, 1996 against the order dated August 06, 2018 passed by the learned Single Judge in OMP 876/2011 (under Section 9 of the Arbitration & Conciliation Act) by which the interim order passed on November 25, 2011

was vacated and the bank was directed to remit the amount to the respondent.

2. The facts as noted from the record are, respondent issued an Expression of Interest ('EOI' for short) for selection of hardware for Supply, Installation and Maintenance services of Hardware, Peripheral Devices, Operating System and Connectivity for Rural Solution dated 19th November, 2010. The appellant who expressed its interest was shortlisted for the next stage of Request For Proposal ('RFP' for short). In response to the RFP, the appellant submitted all the documents but failed to give a further Bank Guarantee of Rs.11 crores which was required as per the RFP. The respondent then invoked the Bank Guarantee and sought encashment of the same.

3. The Section 9 petition was filed on November 24, 2011. On November 25, 2011, the Court directed that, subject to the appellant keeping the Bank Guarantee alive for a period of six months, the same could not be encashed. On August 06, 2012, the OMP was disposed of. The review petition against the order was dismissed. The respondent filed an appeal before the Division bench, which set aside the impugned order of the learned Single Judge and remitted the matter back to the learned Single Judge for a

decision in the main OMP.

4. The submission of the appellant before the learned Single Judge was that the condition relating to the Bank Guarantee of Rs.11 Crores was not part of the EOI and therefore the said condition could not have been incorporated in the RFP without notice to the petitioner.

5. On the other hand, it was the case of the respondent that the clause in the EOI is clear that in case any shortlisted bidder who moves the stage of the RFP is found to be unresponsive, the amount given as Earnest Bank Deposit in the form of a Bank Guarantee is liable to be forfeited.

6. The learned Single Judge on a perusal of the documents concluded that if a shortlisted vendor does not respond the RFP, the respondent had the right to forfeit. In fact, it is also held by the learned Single Judge that the appellant in response to the RFP agreed to be unconditionally bound by all the terms and conditions set out in the RFP documents. The learned Single Judge also decided the issue of arbitration clause forming part of the RFP. She also by noting the position of law with regard to invocation of Bank Guarantee that the same cannot be stayed unless exceptional case of fraud or irretrievable injustice is made out vacated the interim order, whereby the appellant was granted protection and directed the bank to remit the amount

to the respondent.

7. It may be stated here, the learned Single Judge has clearly stated that the observations in the impugned order are only at the interim stage and shall not bind the learned Arbitrator.

8. The learned counsel for the appellant has reiterated the plea that there is no stipulation in the RFP for the appellant to furnish a Bank Guarantee. We are unable to accept this plea of the learned counsel for the appellant in view of the clause III as relied upon by the learned Single Judge. It appears, the plea of the appellant before the learned Single Judge was that the said stipulation was not part of the EOI and therefore the said condition could not have been incorporated into the RFP without notice to the appellant. The plea itself suggest the appellant does not deny the existence of clause III, which has been relied upon by the learned Single Judge. We may state the conclusion of the learned Single Judge is not perverse.

9. That apart, the learned Single Judge was justified by referring to the position of law with regard to the invocation of Bank Guarantee to vacate the interim order. Further, the learned Single Judge has relegated the parties to the Delhi International Arbitration Centre for appointment of a Sole Arbitrator to adjudicate upon the dispute between them and also stated that

the observations in the impugned order are at the interim stage and shall not bind the learned Arbitrator. The said observation secures the interest of the appellant in the Arbitration.

10. We do not see any merit in the appeal. The same is dismissed.

CM No. 34114/2018 (for stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

AUGUST 29, 2018/ak