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

% *Date of Order: 12.11.2018*

\+ **<u>FAO 498/2018</u>**

M/S S N ELECTRICALS ..... Appellant
Through: Mr. Sharique Hussain, Adv.

versus

NBCC SERVICE LTD & ORS ..... Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (Oral)

<u>CM No.44604-44605/2018 (Exemption)</u>

1. Allowed, subject to all just exceptions.

2. The applications are disposed of.

<u>FAO 498/2018 & CM No.44603/2018 (stay)</u>

3. The impugned order dated 06.10.2018 passed by the Court of Additional District Judge-07, South-East District, Saket Courts, New Delhi in Civil Suit No.21493/2016, is the subject matter of challenge in this appeal.

4. The respondent/defendant floated the tender in which the appellant was one of the bidders. The bid submitted by the appellant was accepted by the respondent/defendant on 29.06.2015. As per the terms and conditions of the contract, the appellant/plaintiff had furnished a Performance Bank Guarantee dated 07.10.2015 for Rs.12,22,898/-, being 5% of the total value of the contract. The bank guarantee furnished by the appellant/plaintiff was unconditional and irrevocable providing *"We, the Bank, The Naintal Bank Ltd. (hereinafter called "Bank")* ***do hereby unconditionally and irrevocably undertake to pay to NBCC immediately on demand in writing and without protest/or demur all monies payable by the contractor/supplier to NBCC*** *in connection with the execution/supply of and performance of the work/equipments, inclusive of any loss, damages, charges, expenses and cost caused to or suffered by or which would be caused to or suffered by NBCC by reason of any breach by the contractor/supplier of any of the terms and conditions contained in the contract* ***as specified in the notice of demand made by NBCC on the Bank shall be conclusive evidence of the amount due and payable by the bank under this guarantee."***

5. A bare perusal of the above said Bank Guarantee makes it amply clear as crystal that it is unconditional and irrevocable and the Bank had undertaken to pay to the respondent/defendant immediately on demand in writing and without protest or demur all the money payable by the contractor/supplier to the respondent. It is also made clear that the notice of demand made by the respondent to the bank is

the conclusive evidence of the amount due and payable by the bank under the guarantee.

6. By a letter dated 10.08.2016, the respondent/defendant sought the encashment of the bank guarantee from The National Bank Limited, which led the appellant to file the suit before the learned ADJ.

7. When the Bank Guarantee furnished by the contractor is unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amount under the guarantee. In **Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. & Anr., (2007) 6 SCC 470,** the Hon'ble Supreme Court has held that *"The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."*

8. Similarly, the Apex Court in **U.P. State Sugar Corpn. Vs. Sumac International Ltd., (1997) 1 SCC 568,** laid down the principle as to the enforcement of the Bank Guarantee as under: -

> *"12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings* ***an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee.*** *The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned."*

9. When the appellant has furnished the unconditional and irrevocable Bank Guarantee of M/s. The Nainital Bank Limited to pay the amount to the extent of Rs.12,22,898/- to the respondent on demand in writing, the encashment of such Bank Guarantee cannot be prevented by way of an injunction in enforcing the guarantee for any reason that they have completed the work or there was no breach of any term and condition of the contract on their behalf. In these circumstances, the learned ADJ has rightly dismissed the application

of the appellant under Order XXXIX Rules 1 & 2 CPC for restraining the respondent from encashing the Bank Guarantee.

10. I do not find any merit in the appeal. The appeal along with CM No.44603/2018 is dismissed with no order as to costs.

(VINOD GOEL)
JUDGE

NOVEMBER 12, 2018
"shailendra/sandeep"