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

+ **FAO(OS)(COMM) 27/2020**

INDRAPRASTHA POWER GENERATION CO. LTD.

..... Appellant

Through: Mr. Sanjay Poddar, Senior Advocate
with Mr. Yashish Chandra, Advocate and
Mr. Sunil Kumar, AGM, IPGCL and Mr. Kamal
Singh.

versus

MUKTI CREDITS PVT LTD

.....Respondent

Through: Mr. Prashant Mehta and Ms. Divita
Vyas, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% **01.06.2020**

HEARD THROUGH VIDEO CONFERENCING

CM APPL. 11638/2020 (by the respondent for urgent release of the Bank Guarantee)

1. The present application has been moved by the respondent praying *inter alia* for release of a Bank Guarantee for a sum of Rs.4 Crores, offered to the appellant during the course of the arbitration proceedings, in terms of an order passed by the Arbitral Tribunal, so as to secure the interest of the appellant herein, who had also filed counter claims before the Arbitral Tribunal. Under the Arbitral Award dated 17.11.2018, all the counter claims of the appellant were rejected, except for counter claim No.4 relating to the amount payable by the respondent herein

towards Sales Tax/VAT alongwith interest. Similarly, all the claims of the respondent were also rejected except for Claim No.D, raised towards extra penalties imposed by the appellant on it.

2. Aggrieved by the Arbitral Award dated 17.11.2018, both, the appellant and the respondent have filed separate petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'A&C Act'), registered as OMP(COMM) 147/2019 and OMP(COMM) 318/2019 that are pending hearing on the Original Side of this Court and are listed on 16.06.2020.

3. In the meantime, the respondent moved a petition under Section 9 of the A&C Act [OMP(I)(COMM) 113/2019] praying *inter alia* that the respondent (appellant herein) be restrained from encashing Bank Guarantee No.2579IGFIN000713 for a sum of Rs.4 Crores, tendered by the respondent. Under the impugned judgment, the learned Single Judge has allowed the Section 9 petition filed by the respondent/petitioner and directed the appellant/respondent to return the captioned Bank Guarantee within a period of two weeks from the date of the said order, while making it clear that whichever party succeeds in the pending Section 34 petitions, would be entitled to take legal remedies as may be available to it for recovery of the amount held as due and payable by the other side.

4. Mr. Prashant Mohan Mehta, learned counsel for the applicant/respondent states that on the very first date of hearing in this appeal, on 06.02.2020, he had pointed out to this Court that the present appeal has been rendered infructuous as the Bank Guarantee in question offered by Bank of Baroda on behalf of the respondent, had expired on 11.10.2019 and an intimation to the said effect was duly addressed by the Bank to the Director of the appellant/company.

5. When confronted with the aforesaid position, Mr. Sanjay Poddar, learned Senior Advocate appearing for the appellant had stated that the Department had not apprised the briefing counsel of the said development and he would have to seek instructions. At the request of the counsel for the appellant, the matter was adjourned to 20.03.2020. However, before that date, the appellant moved an application for early hearing on the ground that the respondent had filed a contempt petition against it [CM APPL. 9901/2020]. The said application was turned down and the date already fixed in the appeal was maintained. However, the respondent was restrained from taking any coercive steps in the contempt petition filed against the appellant.

6. Today, Mr. Mehta, learned counsel for the applicant/respondent states that besides the Bank Guarantee of Rs.4 crores offered by his client, subject matter of the present appeal, during the proceedings that took place before the Delhi International Arbitration Centre (DIAC), on the direction of the learned Single Judge, the respondent had deposited a sum of Rs.85 lacs (approx.), which has been placed in a FDR and is still in the custody of DIAC. He submits that if the appellant/IGPL succeeds in the Section 34 petition, there are sufficient funds to secure its interest.

7. The aforesaid submission is however disputed by Mr. Sanjay Poddar, Senior Advocate appearing for the appellant, who states that if the appellant succeeds in the pending Section 34 petition, then amounts over Rs.85 lacs would be recoverable from the respondent. He also disputes the submission made by the other side that Bank of Baroda had written any letter to the appellant in relation to the expiry of the Bank Guarantee.

8. Admittedly, the Section 34 petitions filed by both sides are pending and have yet to be adjudicated upon. Therefore, we do not propose to go into the merits or demerits of the pleas taken by both sides in the said petitions, as it would amount to pre-judging the issues raised.

9. We have enquired from learned counsel for the parties if they would be agreeable to the DIAC retaining the FDR of Rs.85 lacs till the Section 34 petitions are decided and the Bank Guarantee of Rs.4 Crores that was offered by the respondent during the arbitration proceedings having already expired on 11.10.2019, be discharged by the Bank particularly in view of the fact that without any specific order passed in its favour, the appellant had unilaterally written a letter to Bank of Baroda on 07.02.2020, i.e., one day after the present appeal was listed before this Bench on 06.02.2020, calling upon it to keep the Bank Guarantee in question alive and threatening the Bank with legal consequences if it failed to do so.

10. Learned counsel for the parties state on instructions from their respective clients that they are agreeable to the present appeal being disposed of and the Bank Guarantee of Rs.4 Crores being released by Bank of Baroda in favour of the respondent while the sum of Rs.85 lacs deposited by the respondent with the DIAC be retained by it till the Section 34 petitions filed by both sides [OMP(COMM) 147/2019 and OMP(COMM) 318/2019], are finally decided.

11. In view of the submission made hereinabove, the appeal is disposed of on the above lines as agreed upon, alongwith all the pending applications including the present one, while granting liberty to the parties to pursue their Section 34 petitions pending on the Original Side of this Court. If both the parties give their joint consent to get the

aforesaid petitions listed before the learned Single Judge for final arguments in terms of the recent directions of the High Court, an application can be moved by them in this regard.

12. The date already in the appeal, i.e., 29.06.2020 stands cancelled.

HIMA KOHLI, J.

SUBRAMONIUM PRASAD, J.

JUNE 01, 2020

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