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

\+ O.M.P (I) (COMM) 91/2020

SKYLINE ENGINEERING CONTRACTS (INDIA) PVT LTD .....Petitioner

Through: Mr. Rupesh Gupta, Advocate.

versus

THE CANARA BANK LIMITED & ANR ..... Respondents

Through: Mr. Deepak Kumar, Advocate for R-1.
Mr. Gaurav Mitra, Senior Advocate with
Ms. Manmeet Kaur, Advocate for R-2.

**CORAM:**
**HON'BLE MR. JUSTICE NAJMI WAZIRI**

**O R D E R**

% **08.05.2020**

1. The hearing was conducted through video conferencing.
2. This petition seeks stay on encashment of Bank Guarantee Nos. 081068 and 081069 totalling to an amount of Rs.1,16,10,000/- furnished by respondent no. 1 on behalf of the petitioner to respondent no. 2- M/s Raheja Developers Pvt. Ltd. In the year 2008, the latter respondent had issued a contract to the petitioner to carry out some work at its residential project called 'Vedaanta', Sector 108, Gurgaon, Haryana. The project was to be completed in 2010, but it got delayed. Despite extension of time it could not be completed till end of 2013. The petitioner left the premises on 09.10.2013. Raheja had to engage another contractor to complete the project.
3. Albeit the Bank Guarantee is titled as guarantee for mobilisation of advance payment, in its last page it has a clause which in essence,

makes it more than what its title purports to limit it to. It is not merely a guarantee or security against mobilisation advance. The said clause reads as under:

> "....
> *Notwithstanding anything contained hereinabove.*
> a. *our liability under this Guarantee is restricted to Rs. 66,10,000/- [Rupees sixty six lakh ten thousand only] provided further that our liability under this guarantee shall automatically stand reduced in amount corresponding to the liability of the Contractors, discharged by way of repayment of the aforesaid Mobilisation Advance by adjustment from the running bills or the interim bills proportionately by the Contractors as specified in the Work Contract and / or actual performance of work as provided in the Work Contract such reduction shall be effected based on the certificate of the Architects to that effect and the same shall be binding on the Company......."*

4. In substance, the guarantee was not only for adjustment against mobilisation advance but also against actual performance of the work as provided in the work contract. It was clearly in the nature of a composite security furnished to M/s Raheja Developers Pvt. Ltd. The Bank Guarantee was kept alive despite the remaining work having been contracted to another contractor for completion of the project.

5. The learned Senior Advocate for respondent no. 2, relies upon the dicta of the Supreme Court in *BSES Ltd. (Now Reliance energy Ltd.) v. Fenner India Ltd. & Anr.,* (2006) 2 SCC 728 and a judgment of this Court in *Topline Build Tech Pvt. Ltd* Vs. *Raheja Developers Pvt. Ltd. & Anr.* in O.M.P. No. 50/2014 dated 24.04.2015, the latter has relied upon *Fenner (supra)*, to content that when in substance a document is a composite bank guarantee, the same cannot be limited to or limited

to merely a Bank Guarantee against mobilisation advance. In *Topline* supra, stay against encashment of Bank Guarantees was refused. It is the case of respondent no. 2 that it has suffered as a consequence of project not being completed in time; it has suffered subsequent cost escalation and damages because of the delay and for having to engage another contractor, etc., and it has suffered loss of reputation and other damages, due to poor quality of work carried out at the project.

6. Mr. Rupesh Gupta, the learned counsel for the petitioner, submits that the period for rectification of errors was only one year from the date when they handed back the project to M/s Raheja Developers Pvt. Ltd. No defects were not found either at that stage or for a year thereafter, therefore, the rectification of poor workmanship cannot be a cause for encashment of the Bank Guarantees. However, the R-2 contends that its loss and claims against the petitioner is not limited to poor quality of construction or what has been stated in the preceding paragraph but on many other counts; that it is the composite loss which is to be looked into under the clause 'actual performance of work' as provided in the work contract. According to R-2 its claim would exceed over Rs. 12 crores,. It contends that therefore, the petitioner's request for provision of any security or surety against encashment of the Bank Guarantee would not be warranted at this stage.

7. Lastly, the learned counsel for the petitioner submits that guarantee amount had to be correspondingly reduced from the work carried out by them. Therefore, the liability, if any, under the Bank Guarantee is of a lesser amount, the petitioner would be able to encash its fixed

deposit correspondingly. He refers to a summary of payments furnished by respondent no. 2 at page 207 of the documents. However, R-2 submits that the petitioner had submitted its final bill on 31.03.2014, which R-2 has consistently disputed and refers to chain of correspondence through e-email and otherwise. It is contended that because of this dispute that the Bank Guarantee was kept alive

8. The issue relates to encashment of Bank Guarantees worth Rs. 1,16,10,000/-. Since the terms of the guarantee make it a composite security against the petitioner, the same can be encashed by respondent no. 2. Accordingly, the interim order stands vacated. The *lis* between the parties is almost more than six years old and they would like an early resolution of the same, therefore, at their request, Hon'ble Mr. Justice Badar Durrez Ahmad (Mobile No.7042205786), a former Judge of this court and former Chief Justice of High Court of Jammu and Kashmir, is appointed as the Arbitrator. The parties shall appear before the learned Arbitrator on 15$^{th}$ May 2020. The fees of the arbitration shall be determined by the Arbitrator himself.

9. The learned counsels for the parties submit that their claims would not be limited to what has been discussed in this order.

10. The petition is disposed-off, in terms of the above.

11. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the counsel through email.

**NAJMI WAZIRI, J**

**MAY 08, 2020**/AB