$~18 (original side)

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

\+ O.M.P.(I) (COMM.) 257/2020 & I.A. 7592/2020, I.A. 7593/2020

HILD ENERGY PRIVATE LIMITED ..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Jayesh Dolia, Mr. R.V. Prabhat, Mr. Jaspal Singh, and Mr. Saurabh Seth, Advs.

versus

ENERGY EFFICIENCY SERVICES LIMITED & ANR. ..... Respondents

Through: Mr. Samdarshi Sanjay, Adv. for R-1
Mr. Sharat Tyagi and Ms.Yukti Makan, Advs. for R-2

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

<u>O R D E R (O R A L)</u>

% **12.10.2020**

(Video-Conferencing)

1. The prayer clause, in this petition reads thus:

"In view of the aforementioned facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to :

(A) Restrain Respondent No. 1 from invoking the Bank Guarantee No. 11650100016476, dated 28.08.2019, for an amount of Rs. 4,16,00,000/- (Rupees Four Crore Sixteen Lakh Only), issued by Respondent No. 2, on behalf of the Petitioner, to Respondent No. 1 and from receiving any payment under such invocation;

(B) Restrain Respondent No. 2 from releasing the amount under the Bank Guarantee No. 11650100016476, dated 28.08.2019, for an amount of Rs. 4,16,00,000/- (Rupees Four Crore Sixteen Lakh Only), issued by Respondent No. 2, on behalf of the Petitioner, to Respondent No. 1;

(C) Restrain Respondent No. 1 from awarding the fresh Letter of Award to any third party for undertaking the work which was earlier awarded to the Petitioner vide the Letter of Award dated 20.12.2019;

(D) Secure the Bank Guarantee No. 11650100016476, dated 28.08.2019, for an amount of Rs. 4,16,00,000/- (Rupees Four Crore Sixteen Lakh Only), issued by Respondent No. 2, on behalf of the Petitioner, to Respondent No. 1, from invocation till the time of completion of arbitration proceedings; and

(E) Pass any other order which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. This petition, therefore, deals with Bank Guarantee No. 11650100016476 dated 28th August, 2019.

3. On 4th September, 2020, this Court noted the submission, on which learned Counsel for the petitioner and Respondent No. 1 were *ad idem*, that Respondent No.2 (hereinafter referred to as the "Bank") had rejected the request, of Respondent No. 1, for invocation and encashment of the aforesaid Bank Guarantee No. 11650100016476 dated 28th August, 2019, for an amount of ₹ 4,16,00,000/-. Mr. Rajiv Nayar, learned Senior Counsel had submitted that, in view of this fact, he would pray for return of the bank guarantee by the Bank.

4. This Court had deemed it appropriate to confirm the above fact from the Bank, for which purpose the Bank was directed to file an affidavit.

5. The Bank has, subsequently, filed an affidavit, paras 7 to 10 of which read thus:

> "7. That as per the letter dated August 28, 2019, addressed by the Respondent No. 2 to the Respondent No. 1, it is categorically stated that the liability of the Respondent No. 2 was only restricted to the amount as mentioned in the Bank Guarantee and its obligations to pay under the said Bank Guarantee shall remain valid only till March 21, 2020 (i.e. claim expiry date). The relevant para of the aforesaid letter dated August 28, 2019, has been reproduced herein below for ease of reference:
>
> > *"2. The above Guarantee is issued subject to the condition that the Bank's liability is restricted to the amount mentioned above and in the said Guarantee. Our Guarantee shall remain in force till the expiry date. Unless a demand or claim under the guarantee is made on the Bank in writing and delivered to the bank on or before the Expiry date/Claim Expiry Date, the Bank shall be discharged from all the liability under the said guarantee thereafter."*
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> The said Bank Guarantee was also issued subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458. The relevant para stating the same is reproduced below for ease of reference:
>
> > *"This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458."*

8. That the said Bank Guarantee was expired on March 21, 2020. The Respondent No. 2 vide its e-mail dated August 28,2020, and the invocation letter dated August 25, 2020 and asked the Respondent No. 2 to honour the said Bank Guarantee and remit the funds in the accounts of the Respondent No. 1. The copy of the e-mail dated August 28, 2020, and the invocation letter dated August 25, 2020 are attached herewith as Annexure - 2 (Colly.).

9. As the said Bank Guarantee has already been expired, the Respondent No. 2 vide its e-mail and letter dated September 1, 2020, informed Respondent No. 1 that the said Bank Guarantee was invoked by the Respondent No. 1 after the claim expiry date (i.e. March 21, 2020). Hence, the Respondent No. 2 is unable to proceed with the claim of Bank Guarantee. The relevant text is reproduced below for ease of reference:

> *"We draw your attention to the URDG 458 Article No. 22, which states that:*
>
> *Expiry of the time specified in a Guarantee for the presentation of demands shall be upon a specified calendar date ("Expiry Date") or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry (Expiry Date"). If both an Expiry Date and an Expiry Event are specified in a Guarantee, the Guarantee shall expire on whichever of the Expiry Date or Expiry Event occurs first, whether or not the Guarantee and any amendment(s) thereto are returned."*

The copy of the reply e-mail and letter dated September 1, 2020, by the Respondent No. 2 are attached herewith as Annexure – 3 (Colly.).

10. As per the terms agreed, the Respondent No. 2 stands discharged after the claim expiry date specified in the said bank guarantee."

6. Mr. Nayar submits that, in view of the above stand by the Bank, there can be no question of invocation or encashment of the Bank Guarantee No. 11650100016476 dated 28th August, 2019 and prays that Respondent No. 1 may be directed to return the bank guarantee to the petitioner. Needless to say, the bank also would be discharged in all its liability under the aforesaid Bank Guarantee No. 11650100016476 dated 28th August, 2019.

7. The Respondent No.1 is, accordingly, directed to return the bank guarantee to the petitioner.

8. Mr. Samdarshi Sanjay, learned Counsel for Respondent No. 1 submits that liberty may be reserved, with Respondent No. 1 to initiate appropriate action against the petitioner, if permissible in law, and that this order should not stand in the way of initiation of any such action.

9. Needless to say, the prayer in the petition is only *qua* Bank Guarantee No. 11650100016476 dated 28th August, 2019 and this order has also been passed only *qua* the said bank guarantee.

10. In view of the above facts, nothing survives for adjudication in the present petition which stand disposed of as such, with the above directions.

11. This order shall not, however, inhibit Respondent No.1 from taking any other action, as it may deem fit to initiate, which, if initiated would be decided in accordance with law.

12. Pending applications also stand disposed of.

C. HARI SHANKAR, J.

OCTOBER 12, 2020/*kr*