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

\+ O.M.P.(I) (COMM.) 53/2024 & I.A. 3407/2024

MS SIMPLEX APEX ENCON RAMMAM BARRAGE CONSORTIUM ..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Rajshekhar Rao, Sr. Advocates with Ms. Hetu Arora Sethi, Ms. Lalit Mohini Bhat, Ms. Kavita, Mr. Nirmal Prasad, Mr. Siddharth Agarwal and Ms. Riya Kumar, Advocates.

versus

NTPC LIMITED ..... Respondent

Through: Mr. Chetan Sharma, ASG, Mr. Adarsh Tripathi, Mr. R.V. Prabhat, Mr. Vikram S. Baid, Mr. Amit Gupta, Mr. Vinay Yadav, Mr. Vikramaditya Singh, Mr. Ajitesh Garg and Mr. Saurabh Tripathi, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE PRATEEK JALAN**

**<u>O R D E R</u>**

% **19.02.2024**

1. This petition, under Section 9 of the Arbitration and Conciliation Act, 1996 ["the Act"], has been filed by the petitioner in anticipation of arbitration proceedings between the parties under an agreement entered into pursuant to a Letter of Award dated 10.09.2014. By virtue of the said Letter of Award, certain work with respect to Barrage Complex of the respondent was entrusted to the petitioner.

2. In the petition, the petitioner has sought an injunction against encashment of five bank guarantees. Three of those bank guarantees had been encashed prior to first listing of the petition on 12.02.2024. The petition was, therefore, pressed in respect of two performance bank guarantees, being Bank Guarantee No.1819214BG1000450 dated 29.04.2014 and Bank Guarantee No. 1819214BG1000451 dated 29.09.2014.

3. When the petition was first listed, Mr. Chetan Sharma, learned Additional Solicitor General appearing for the respondent, sought time to take instructions and stated that *status-quo*, as on 12.02.2024 at 4:20 PM, shall be maintained with regard to the aforesaid two bank guarantees, without prejudice to the rights and contentions of the parties. It is the admitted position that despite this submission, demand drafts made by the banks issued pursuant to the invocation, were deposited into the respondent's bank account after 4:20 PM on 12.02.2024. Mr. Sharma, therefore, undertook on 14.02.2024 that the respondent would restitute the amount so that *status-quo ante* as on 12.02.2024 was restored. It was also recorded that the two bank guarantees in question would have to be revived or replaced with equivalent guarantee. Learned counsel on both sides were granted time to work out the modalities for implementation of these directions.

4. Today, Mr. Sharma states that the amounts credited to the respondent, pursuant to the invocation of the aforesaid two bank guarantees, shall be credited to the account designated by the petitioner within three working days from today. Mr. Sandeep Sethi, learned Senior Counsel for the petitioner, states that the petitioner undertakes to revive

or replace the two bank guarantees in question on exactly the same terms and for the same validity period as the original guarantees. This would be done within three working days after credit of the amount to the petitioner's account.

5. This arrangement is acceptable to both the parties. However, Mr. Sharma states that in the *interregnum*, there has been some correspondence between the respondent and the petitioner's bankers, which gives rise to an apprehension as to whether the petitioner would be in a position to place new bank guarantees in terms of this order. Mr. Sethi states that, there will be no such impediment. However, it is made clear that, in the event the petitioner is unable to furnish replacement bank guarantees or to revive the bank guarantees in terms of this order, it will deposit the said amount with the learned Registrar General of this Court and also file an application for necessary directions in this petition.

6. As the guarantees have already been invoked, Mr. Sharma accepts that the impugned invocation letters dated 09.02.2024 have worked themselves out. The question of any further payment or invocations, on the basis of the said communications, does not arise.

7. Both parties are directed to file affidavits of undertaking within two days from today with regard to compliance of the directions and undertakings recorded hereinabove.

8. Although a suggestion was made by Mr. Sethi that an arbitrator may be appointed in these proceedings to adjudicate the disputes between the parties, Mr. Sharma states that the respondent is not agreeable to the same. The parties are, therefore, at liberty to invoke the arbitration and constitute an Arbitral Tribunal in accordance with the agreement.

9. The parties may apply to the Arbitral Tribunal, once constituted, for such interim measures of protection as they consider necessary including for continuation, variation, vacation or modification of this order.

10. All rights and contentions between the parties, including with regard to any bank guarantee furnished by the petitioner pursuant to this order, are left open.

11. The petition, alongwith pending application, is disposed of in these terms.

**PRATEEK JALAN, J**

**FEBRUARY 19, 2024**

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