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

+ **FAO(OS) 358/2016**

**M/S PATNA WATER SUPPLY DISTRIBUTION
NETWORKS PVT LTD**

..... Appellant

Through : Mr S. D. Singh with Mr Rahul Kumar
Singh, Ms Surabhi Shukla and
Ms Shweta Sinha

versus

UNITED BANK OF INDIA & ANR

..... Respondents

Through : None

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

ORDER

% **14.12.2016**

CM Nos. 46003-46004/2016

Allowed subject to all just exceptions.

FAO(OS) 358/2016 & CM 46002/2016(stay)

This appeal is directed against the order dated 06.12.2016 passed by a learned Single Judge of this Court in the appellant's petition under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP (I) 416/2015. The appellant had sought the injunction of encashment of a bank guarantee dated 15.09.2012 for a sum of Rs 2,48,00,950/- issued in favour of the respondent No.2.

This is the second round of litigation. In the earlier round, there was an invocation letter by the respondent No.2 dated 23.07.2014. The appellant had approached this Court seeking an injunction against the encashment of the said bank guarantee pursuant to the invocation letter dated 23.07.2014. The learned Single Judge had not acceded to the request made by the appellant and an appeal, being FAO(OS) 102/2015, had been filed. The said appeal was disposed of by the Division Bench on 07.08.2015. The plea taken by the appellant at that stage was

that there was a specific condition of the bank guarantee that a written demand had to be made clearly stating that there was a contractor's default. It was contended that no such statement was contained in the invocation letter and consequently, the bank guarantee was not liable to be encashed on the invocation letter dated 23.07.2014.

On 07.08.2015, when the Division Bench disposed of the said appeal, instructions had been taken by the learned counsel for the respondent No.2 to the effect that the letter of invocation dated 23.07.2014 would be withdrawn in view of the technical objection raised by the appellant and which had been noticed by the Division Bench in its earlier order dated 03.03.2015 to the effect that the invocation was not in terms of the bank guarantee. Consequently, the appeal was disposed of and the parties were free to act under the bank guarantee in accordance with law. The interim order was also vacated on the condition that the invocation letter shall be withdrawn.

It so happened that on the same day, that is, on 07.08.2015, the invocation letter was withdrawn. As noted in paragraph 28 of the impugned order, immediately and/or simultaneously, another invocation letter of the same date was issued by the respondent No.2 to the bank. In this invocation letter, it was specifically stated that the performance bank guarantee was for timely performance of contractual obligations by the contractor (the appellant herein) and as the appellant had grossly failed to perform its duty under the contract, a request for encashment of the performance bank guarantee was made. Hence, the technical objection, which had been raised in the earlier round with regard to the invocation not being in terms of the bank guarantee, was done away with and the invocation, this time, was in terms of the bank guarantee.

Apart from the point of invocation not being in terms of the bank guarantee, the learned counsel for the appellant raised several issues before the learned Single Judge and cited several decisions, including the recent decision of the Supreme Court in the case of **M/s Gangotri Enterprises Limited v. Union of India and**

Others: 2016(4) SCALE 664. The learned Single Judge considered the decision in ***Gangotri Enterprises Limited (supra)*** in detail and came to the conclusion that the bank guarantee in the present case was furnished in the contract in question, whereas in ***Gangotri Enterprises Limited (supra)***, this was not the position. Furthermore, it was observed that the purpose of invocation of the bank guarantee was breach of the contract and that the claim was not restricted to one of damages. We agree with the view taken by the learned Single Judge that the decisions cited by the learned counsel for the appellant, including the decision in ***Gangotri Enterprises Limited (supra)***, were all clearly distinguishable.

We are also not persuaded by the arguments raised by the appellant that any special equities had arisen in favour of the appellant to injunct the bank guarantee. It is well settled that the bank guarantee is a distinct and separate contract from the underlying contract and the disputes between the employer and the contractor under the underlying contract do not come in the way of the operation of the bank guarantee which is a contract between the contractor and the bank. This is not a case of fraud of an egregious nature and/or of special equities and, therefore, no interference is called for with the decision of the learned Single Judge. The appeal is dismissed. There shall be no order as to costs.

Dasti under the signature of the Court Master.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

**DECEMBER 14, 2016
SR**