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

+ **FAO(OS) (COMM) 2/2017**

Date of Decision: 04th January 2017

TEYMA INDIA PRIVATE LIMITED

..... Appellant

Through **Mr. Rakesh Sinha and Mr. Pawan Kr.
Bansal, Advocates.**

versus

JITF WATER INFRASTRUCTURE PRIVATE LIMITED & ANR

..... Respondents

Through **Mr. Manoj K. Singh and Ms. Nilam
Bandyopadhyay, Advocates for
respondent no. 1.
Ms. Jagriti Ahuja and Mr. Gowtham,
Advocates for respondent no. 2.**

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

J U D G E M E N T

INDIRA BANERJEE, J. (ORAL)

Caveat Pet. No. 4/2017

Since the caveator has put in appearance through counsel, the caveat stands discharged.

CM No. 117/2017

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CM No. 115/2017 (delay)

This is an application seeking condonation of delay of 7 days in filing the appeal. For the reasons stated in the application, the delay of about 7 days in filing the appeal is condoned.

The application stands disposed of.

FAO(OS) (COMM) 2/2017 and CM Nos. 116/2017 (stay) and 118/2017 (for permission to file additional documents)

1. This appeal filed under Section 37(1) of the Arbitration and Conciliation Act, 1996, is against a judgment and order dated 09.11.2016 passed by the learned Single Bench dismissing the application of the appellant for interim relief.
2. By the judgment and order impugned, the learned Single Bench rejected the prayer of the appellant for orders restraining the respondent from encashing a bank guarantee furnished by the appellant in favour of the respondent-JITF Water Infrastructure Private Limited.
3. On or about 10.12.2014, Uttarakhand Urban Sector Development Agency (“UUSDA”) entered into a contract with the respondent no.1, M/s JITF Water Infrastructure Private Limited, for engineering, procurement, construction, supplying, laying, testing and commissioning of water supply distribution system for 19 geographic zones in Dehradun.

4. The contract, hereinafter referred to as the main contract, provided for sub-contract of the contractual work. On or about 28.06.2015, the respondent no.1 entered into a contract dated 28.06.2015 with the appellant whereby the respondent no.1 sub-contracted the contract job to the appellant on back to back basis.

5. In terms of the agreement between the respondent and the appellant, the appellant was required to furnish a bank guarantee which the appellant duly furnished for an amount of Rs.3,76,25,000/-. The bank guarantee is referred to as the first bank guarantee. The appellant issued a second bank guarantee for an amount of Rs.6,09,88,271.30 which is referred to as the second bank guarantee, as required in terms of the sub-contract.

6. It appears that several disputes arose between the respondent no.1 and the appellant with regard to the execution of the sub-contract, with which we are not concerned at this stage.

7. It is well settled that the bank guarantee constitutes an independent contract between the bank which issues the bank guarantee and the beneficiary of the bank guarantee. A bank guarantee, and more particularly an unconditional bank guarantee, is in no way concerned with the underlying disputes between the party at whose instance the bank guarantee

has been furnished and the beneficiary of the bank guarantee.

8. It is well settled that an order restraining the invocation of a bank guarantee can only be passed in rare cases of fraud in relation to the bank guarantee, in cases of irretrievable injustice, or where special equity exists in favour of the person at whose instance the bank guarantee has been furnished. Fraud must be in connection with the invocation of the bank guarantee.

9. If the invocation of a bank guarantee is not in terms of the bank guarantee, invocation may be restrained. However, this is not a case where it can be said that invocation is not in accordance with terms of the bank guarantee. In fact, it is not even the case of the appellant, that the invocation is not in accordance with the bank guarantee. Particulars of alleged fraud allegedly committed by the respondent no. 1 have been pleaded in paragraph 7.1 of the petition filed before the learned Single Bench under Section 9 (1) of the Arbitration and Conciliation Act, 1996. The pleadings in paragraph 7.1 do not disclose any act of fraud in the matter of invocation of the bank guarantee.

10. It has strenuously been argued on behalf of the appellant that the respondent no. 1 acted wrongfully in invoking the bank guarantees when the

Uttarakhand Urban Sector Development Agency had not invoked the bank guarantees furnished by the respondent to Uttarakhand Urban Sector Development Agency. Unfortunately, however, it was not a condition of the bank guarantees that invocation thereof would be subject to invocation by Uttarakhand Urban Sector Development Agency of the bank guarantees furnished to them.

11. Principles of irretrievable injustice and special equity can be invoked only in case of apparent illegality coupled with a situation where the party furnishing a bank guarantee would never be able to recover the proceeds of the bank guarantee. At least, there are no pleadings to the effect that in the event the bank guarantee is invoked and if ultimately, the invocation is held to be wrongful, the appellant would never be able to recover the proceeds from the respondent.

12. The learned Single Bench has rightly held:

“The law relating to interdiction of bank guarantees is now well settled; the same cannot be interdicted unless the party seeking interdiction is able to establish a prima facie case of egregious fraud and irretrievable injustice. (See: Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502 and U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.: 1988 (1) SCC 174).”

13. It may also be pertinent to refer to the following observation of the

learned Single Bench.

“The reliance placed by the petitioner on the letter dated 30.06.2016 sent by respondent no. 1 to the principal employer is also not determinative of the dispute between the parties. It is relevant to note that the said response clearly stated that it was “without prejudice”. Further, the said response was issued by the respondent no. 1 to dissuade the principal employer from taking action that the principal employer proposed to take against respondent no. 1. While respondent no. 1 was defending the issue regarding delays and poor work with the principal employer, it also informed the petitioner as to the said controversy, which directly related to the subject contract between respondent no. 1 and the petitioner.

It is also not in dispute that the principal employer has terminated the contract with respondent no. 1, inter alia, alleging poor performance.”

14. The learned counsel appearing on behalf of the appellant submitted that orders may be passed directing the respondent who has already invoked the bank guarantee to deposit the proceeds in the registry of this Court. It is, however, well settled that what cannot be done directly cannot be done indirectly. If the Court cannot restrain the invocation of the bank guarantee, the Court cannot indirectly restrain the beneficiary of the bank guarantee from enjoying the proceeds of the bank guarantee. We find no grounds to interfere with the order under appeal. The appeal is dismissed.

15. It is made clear that any observations in this order are prima facie observations which will not sway the arbitration proceedings in any manner.

Since the appeal is dismissed, the applications mentioned herein have become infructuous, and shall stand disposed of.

16. *Dasti.*

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

JANUARY 04, 2017

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