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

Date of decision: 14.05.2018

+ **FAO(OS) (COMM) 102/2018**

M/S CLASSIC KSM BASHIR JV Appellant
Through: Mr. Sudhir K. Makkar, Senior
Advocate with Mr. Parijat Kishore,
Mr. K. Datta, Mr. Prakash,
Ms. Saumya Gupta and Ms. Ridhi
Munjhal, Advocates.

versus

MITES LTD & ORS Respondents
Through: Mr. G.S. Chaturvedi, Adv. for R-1 to
R-3.
Ms. Priyanka Tomar for HDFC Bank.
Mr. Pranjal Saran and Mr. Puneet
Juneja, Advocates for R-5.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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CM APPL. 19888/2018 *(for exemption)*

Allowed, subject to all just exceptions.

**FAO(OS) (COMM) 102/2018 & CM APPL. 19886/2018 &
19887/2018**

1. The present appeal challenges the order of the learned Single Judge which has declined the grant of interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act').

2. The grievance of the appellant was threefold i.e. the invocation of performance guarantee, mobilisation of advance bank guarantee and the alleged unlawful termination of the contract by the respondent No.1-Rail India Technical and Economic Service (hereafter 'RITES').

3. The contract, out of which dispute arose, was awarded to the appellant on account of his emergence as a successful bidder pursuant to a public tendering process on 03.12.2012 for the "Earthwork in formation, construction of ROB, RUB and Culverts and other related works for a total agreed consideration of over ₹69 crores in terms of the contract which was entered into through a formal agreement on 18.01.2013; the period for execution of the work was 15 months. It was agreed that the principal i.e. the RITES could extend the performance of the contract depending on the exigencies of the circumstances.

4. The appellant was aggrieved by the termination of the contract on 20.09.2017. This termination was a sequel to "to cure notices" which, *inter alia*, allegedly listed out the defects and deficiencies discerned during the performance of the contract by RITES. The RITES also had immediately before issuing the termination letter asked the appellant to apply for extension, which it did, only to be followed with a termination letter. The RITES also invoked the three bank guarantees (two performance bank guarantees and one mobilisation bank guarantee). The appellant's grievance before the learned Single Judge was that neither the determination could be sustained nor the bank guarantee could be invoked in the final

judgment, which was done. The learned Single Judge broadly disagreed with the appellant's arguments and held that the issue of termination could be conveniently gone into in the arbitration proceedings and consequently, the suspension of the termination notice was unfeasible in law. So far as the relief with respect to the stay of invocation was concerned, the learned Single Judge recorded findings to the effect that such invocation of the performance guarantee could not be interdicted in view of the settled principles of law. The learned Single Judge however granted limited relief to the appellant with respect to the invocation of the mobilisation advance, holding that the invocation was not in terms and in any event did not preclude RITES from issuing a fresh invocation letter.

5. During the course of the appeal learned senior counsel, after obtaining instructions, stated that the findings with respect to the wrongful termination, so far as it relates to matters of Section 9 of the Arbitration Act, these issues may be kept open and that were to be agitated on their merits before the Arbitral Tribunal. Accordingly, this order is confined to the other issue i.e. the legality of invocation.

6. Strong reliance was placed by learned senior counsel for the appellant upon the judgment of the Supreme Court in the case of '*Gangotri Enterprises Limited vs. Union of India and others*', (2016) 11 SCC 720. It was submitted that the decision in the case of '*Gangotri Enterprises Limited*' (supra) was not properly appreciated. Learned senior counsel highlighted that the Supreme Court had held that the invocation of a guarantee in relation to a different contract

was not sustainable and more importantly rested its findings with respect to the necessity of staying the invocation on other judgments such as '*Union of India vs. Raman Iron Foundry*', (1974) 2 SCC 231. It was highlighted in this regard that the reasoning of the Court that in case of inchoate or undetermined sums claimed as damages, invocation of guarantees is not justified.

7. The observations relied upon by the appellant in the case of '*Gangotri Enterprises Limited*' (supra) to the extent it is relevant, are as follows:-

“40. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22-8-2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the bank guarantee had been furnished but it relates to another contract dated 22-8-2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable in other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any court of law in any judicial proceedings but it is a disputed sum, and lastly, the bank guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14-7-2006 (Anand Vihar works and the work having been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee.

41. *We have, therefore, no hesitation in holding that both the courts below erred in dismissing the appellant's application for grant of injunction. We are indeed constrained to observe that both the courts committed jurisdictional error when they failed to take note of the law and down by this Court in Raman Iron Foundry case which governed the controversy and instead placed reliance on Himadri chemicals Industries Ltd. v. Coal Tar Refining Co. and U.P. State Sugar Corpn. V Sumac International ltd., which laid down general principle."*

8. In the present case, the relevant conditions of the bank guarantee read as follows:-

"3. We Allahabad Bank, Circular Road, Ranchi, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from RITES Ltd. for and on behalf of the BRBCL as an agent and Power of Attorney Holder stating that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor. Any such demand on the bank shall be conclusive as regards the amount due and payable by the bank Under this guarantee. However our liability under this guarantee shall be restricted to an amount not exceeding Rs.3,45,31,281/- (Rupees Three Crore Forty Five Lacs Thirty One Thousand Two Hundred Eighty One Only).

4. We the said Bank further undertake to pay RITES Ltd. for and on behalf of BRBCL as an agent and Power of Attorney Holder any money so demanded not withstanding any dispute or disputes raised by the contractor in any suit or proceeding pending before any court or Tribunal relating there to our liabilities under this present being absolute and

Unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and the Contractor(s) shall have no claim against us for making such payment.”

9. The reliance placed upon the case ‘*Gangotri Enterprises Limited*’ (supra), in this Court’s opinion, is not justified. The Court was largely persuaded to hold that the invocation was wrongful on account of the fact that the bank guarantee, which was invoked, in fact, related to a third contract between the same parties. Clearly, that revealed utter non-application of mind on the face of the record. The point emphasised by the learned senior counsel that in the case of undetermined or inchoate sums claimed by the principal on account of damages, performance guarantee cannot be invoked at all, is too broad a proposition to be accepted. The performance guarantee mandates the bank to honour without demur any demand by the principal, who is the real beneficiary of any sums, claimed by it as due under the contract. In other words, the bank cannot adjudicate as to whether the claim by the beneficiary was in fact determined by it in accordance with the underlying contract between it and a third party. To allow a wide application of such proposition is fraught and would ultimately undermine the basis on which the bank guarantees are in fact issued. It has been repeatedly emphasised that the guarantee is an independent contract and has only a referential connection to the contract between the two parties, who agree upon the execution of performance of a particular contract for which the bank guarantee is issued. A

contract of guarantee and divorced from the obligations of the parties towards each other, in their bilateral enforcement. If one keeps these principles in mind, the fact that some amount of guess work at the stage of invocation by way of estimation as to the ultimate damages is entered into, is the basis for the claim from the bank under the guarantee which might be justified either in full or in part in arbitral proceedings ought not, in the opinion of the Court, be the basis for interdicting the invocation of the guarantee, which is otherwise lawful.

10. For the above reasons, the Court is of the opinion that there is no merit in the appeal. The appeal is accordingly dismissed along with the pending applications.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 14, 2018

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