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SL-1&2

27-02-2025

sg

Ct. 37

In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side
Commercial Division

FMA 269 of 2025
CAN 1 of 2025

OFB Tech Private Limited
Versus
Rean Watertech Private Limited & Ors.

With

FMAT (Arbaward) 12 of 2025

OFB Tech Private Limited
Versus
Rean Watertech Private Limited & Ors.

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Ratnanko Banerji, Sr. Adv.
Mr. Rohit Das
Mr. Nitesh Goyal
Ms. Kishwar Rohman
Mr. Preetam Majumdar
Ms. Sristi Roy
…for the appellants
Mr. Anindya Mitra, Sr. Adv.
Mr. Anirban Ray, Sr. Adv.
Mr. Siddhartha Sharma
Mr. Rishav Dutt
Mr. Pathik Choudhury
…for the respondent No.1
Mr. Avishek Guha
Mr. Shilpa Das
Mr. Arunika Dutta
…for the respondent no.2

1. FMAT (Arbaward) 12 of 2025 was supposed to be listed today. The department is directed to list FMAT (Arbaward) 12 of 2025 in the supplementary cause list today to avoid any future complication.
2. By consent of the parties, the appeal being FMAT

(Arbaward) 12 of 2025 is treated as on day's list and heard along with the present appeal and disposed of by this common order. All the appeals are connected with the enforcement of bank guarantee.

3. It appears that on 29th November, 2024, an *ex parte ad interim* order was passed by the learned Judge, Commercial Court, Rajarhat whereby the present appellant was restrained from invoking bank guarantee aggregating to a sum of Rs.8 crore (approximately) till 5th December, 2024. The said order was, however, extended from time to time and as it appears from the record that the said application for injunction along with the application filed under Order 39 Rule 4 of the Code of Civil Procedure is fixed for hearing on 27th March, 2025.

4. In the first matter, the appellant has challenged the order dated 29th November, 2024 read with the order dated 5th December, 2024 by which the interim order was extended till 1st February, 2025. On 5th December, 2024, the appellant was not represented.

5. On 1st February, 2025, when this matter was taken up for consideration, the appellant appeared and filed an application under Order 39 Rule 4 of the Code of Civil Procedure. Objections being raised on behalf of the respondent no.1. Directions were given for filing of the affidavits and the matter was listed for hearing on 27th March, 2025.

6. Mr. Abhrajit Mitra, learned Senior Counsel along with Mr. Ratnanko Banerji, learned Senior Counsel, appearing

on behalf of the appellant has submitted that this is an unconditional bank guarantee and in any event, having regard to the tenor of the four bank guarantees issued by the ICICI Bank, the learned Judge, Commercial Court could have passed any *ex parte ad interim* order. Mr. Mitra submits that the said bank guarantees being unconditional in nature and at the stage of deciding the application for invoking the bank guarantee, even at the ex parte stage, the Court shall be extremely careful in restraining the beneficiary of the bank guarantee to invoke the bank guarantee, having regard to the fact that any such order is likely to cause irreparable damage to the beneficiary. The bank guarantees are live blood of commerce and unless there is a clear allegation of fraud and irretrievable injury in the form of special equity, the Court ought not to have injuncted the beneficiary from realizing the proceeds of the bank guarantee.

7. Mr. Aninda Mitra, learned Counsel appearing on behalf of the respondent no.1 has submitted that in view of the subsequent development, namely the order dated 1st February, 2025, by which the appellant had elected to file an application for vacating of the interim order on the grounds contemplated under Order 39 Rule 4 of the Code of Civil Procedure, the learned Judge, Commercial Court should be given an opportunity to decide the matter on merits. Moreover the learned Judge Commercial Court was of the view that the respondent no.1 was able to make out a prima facie case for which an ad interim ex

parte order with limited duration was passed.

8. We agree with Mr. Abhrajit Mitra, Senior Counsel that in matters of unconditional bank guarantee injunction can be passed only in exceptional circumstances. The existence of any dispute between the parties to the contract is not a ground to injunct enforcement of a bank guarantee. In an interlocutory proceeding invocation of bank guarantee can be restrained if it is a fraud going to the root of the agreement of which the beneficiary is trying to take advantage. Injunctions can be granted only on the ground of fraud and where the bank has notice of the fraud. The demand for payment must be fraudulent. Mr. Anindya Mitra, however, has fairly suggested that the amounts covered by the bank guarantees issued by the ICICI Bank may be released in favour of the appellant.

9. Upon hearing the learned Counsel for the parties and considering the nature of the bank guarantees, insofar as the ICICI Bank is concerned and the amounts to which, prima facie, the appellant would be entitled on invocation of such bank guarantee we permit the appellant to invoke the bank guarantees issued by the ICICI Bank. The ICICI Bank shall release the amount covered by the bank guarantees issued by the ICICI Bank within 48 hours.

10. This order however, does not decide on the merits of the rival claim and confined to the propriety of invocation of bank guarantee. The bank guarantees also considered to be a separate contract.

11. The learned Counsel for the ICICI Bank is present and has assured that this order shall be complied with.
12. The learned Counsel for the parties have agreed to appoint an Arbitrator to adjudicate the disputes between the parties without going through the process of filing an application for appointment of a sole Arbitrator. The choice of sole Arbitrator is left open to the Court.
13. Accordingly, we appoint Hon'ble Justice Subrata Talukdar (Retd.) as Sole Arbitrator.
14. The learned Arbitrator shall fix his remuneration commensurate with his position in consultation with the parties at the first sitting.
15. It is needless to mention that all costs, charges and expenses in connection with arbitration proceeding shall be borne by the parties in equal measure.
16. The learned Arbitrator shall be entitled to appoint a personal staff and a stenographer, whose expenses are also to be borne by the parties in equal measure.
17. The learned Arbitrator shall make a declaration in terms of Section 12(5) read with VII Schedule of the Arbitration and Conciliation Act, 1996 before commencement of the arbitration proceeding.
18. The application under Section 9 of the Arbitration and Conciliation Act shall be treated as an application under Section 17 of the Arbitration and Conciliation Act.
19. All pleadings in respect of the said application shall be completed within three weeks from date.
20. The parties are directed to serve copies of the pleadings

upon the learned Arbitrator. After the pleadings are completed, we request the learned Arbitrator to decide the said application for interim measure as expeditiously as possible.

21. The parties shall be at liberty to file their claims and counter-claims, if any, in the said proceeding in terms of the directions that may be passed by the learned Arbitrator.

22. The remaining bank guarantees, however, shall be kept alive till the interim application is decided by the learned Arbitrator.

23. We make it clear that any observation made in this order shall not influence the learned Arbitrator in deciding the application for interim measure.

24. Since no affidavit-in-opposition is filed, all allegations are deemed to have been denied and disputed.

25. In view thereof, both appeal and the application are accordingly, disposed of with the above directions.

26. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)