

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Appeal Against Order No.62 of 2017

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Sai Wardha Power Generation Limited,
A Company Registered (formerly known
as Wardha Power Company Ltd). Under
the Companies Act, 1956, having its
Registered Office at 8-2-293/82/A/431/A,
Road No.22, Jubilee Hills,
Hyderabad 500 033. ..

APPELLANT
(Orig. Plaintiff)

.. **Versus** ..

1. Western Coalfields Limited,
through it's Chairman cum
Managing Director, with office at
Coal Estate , Civil Lines, Nagpur.
2. Coal India Limited, through
it's Chairman with office at Coal
Bhavan, New Town, Rajarhat,
Kolkata. ..

RESPONDENTS
(Orig. Defendants)

Mr. C.S. Kaptan, Senior Advocate assisted by Mr. Rajeev
Deshpande, Advocate for Appellant.
Mr. Subodh Dharmadhikari, Senior Advocate assisted by
Mr. G.E. Moharil & Mr. K.N. Shukul, Advocates for Respondent
No. 1.
Mr. Subodh Dharmadhikari, Senior Advocate assisted by
Mr. K.N. Shukul, Advocate for Respondent Nos. 2.

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CORAM : MANISH PITALE, J.
RESERVED ON : January 12, 2018.
PRONOUNCED ON : January 25 , 2018.

ORDER

1. By this appeal, the appellant claims that the trial Court has committed an error in refusing to grant temporary injunction claimed by it for restraining encashment of unconditional bank guarantees, despite the fact that it had made out a case for such injunction on the well established twin grounds of fraud committed by respondent no.1 on the appellant and irretrievable damage that the appellant would suffer in the absence of such injunction.

2. The appellant is a company engaged in the business of generation and sale of electricity and for that purpose it had entered into agreements with the respondent no.1- Western Coalfields Ltd. (WCL) for purchase of coal to be utilised in its power plants for generation of electricity. The respondent no.1-WCL is a subsidiary of respondent no.2-Coal India Limited and it is engaged in the business of mining and sale of coal.

The entire coal available in the county is under the control and dispensation of respondent no.2 and as per the policy of the Government of India, supply and sale of coal is done via coal linkages granted in two categories i.e. coal linkages at notified price and coal linkages at cost plus price.

3. Cost plus mines are those mines which are financially not viable at notified price of coal. The respondents offered to supply coal from such cost plus mines at a price called the cost plus price yielding a 12% Internal Rate of Return (IRR) at 85% capacity. The arrangement for supply of coal from a cost plus mine provides certainty of sale of coal to the respondents and at the same time it provides certainty of costing and quantity to the purchase of coal at such cost plus price. It is the case of the appellant that it had entered into three cost plus fuel supply agreements with the respondent No.1 dated 03.04.2012, for supply of coal at cost plus rates by the respondent no.1-W.C.L., from three coal mines called the Bellora Naigaon Deep OC , Ukni Deep OC and Urdhan RCE OC mines. While entering into the said agreements, the respondent no.1-WCL sought security deposit bank guarantees from the appellant to the tune of Rs.19.57 crores. These were

unconditional bank guarantees submitted by the appellant with the respondent no.1-WCL in respect of the aforesaid three cost-plus fuel supply agreements executed between the parties.

4. Upon execution of the aforesaid agreements pertaining to the said mines of the respondent no.1-WCL, supply of coal was undertaken to the appellant for its power plant. But, during this process, the appellant felt aggrieved with the price structure imposed by the respondent no.1-WCL in respect of supply of coal under the said agreements and it filed an application/information under Section 19(1)(a) of the Competition Act, 2002 before the Competition Commission of India, against the respondents alleging contravention of Section 4 of the Competition Act, 2002, on the basis that the respondents had abused their dominant position, being monopoly supplier of coal and that arbitrary methods of fixation of price had been undertaken. The said litigation initiated by the appellant culminated in an order dated 22.07.2014 passed by the Competition Commission of India in Case No.88 of 2013, wherein the respondents were directed to cease and desist from indulging in any conduct that was found

to be in contravention of the provisions of the Competition Act, 2002 and to make necessary modifications in the agreements in the light of findings rendered in the said order.

5. The said order was challenged by the respondents before the Competition Appellate Tribunal (COMPAT). By order dated 09.12.2016, the COMPAT dismissed the appeal of the respondents, holding that the findings and conclusions recorded by the Competition Commission of India, on various facets of abuse of dominant position by the respondents, were based on sound reasons.

6. In the meantime on 19.05.2016 the respondent no.1 – W.C.L. sought to invoke the bank guarantees submitted by the appellant on the ground that in terms of the fuel supply agreement between the parties, the appellant was liable to pay compensation for short lifting of coal. The appellant filed Writ Petition No. 6372 of 2016 before this Court challenging the notice issued by the respondent no.1- WCL to the appellant for payment of compensation on account of short lifting of coal, wherein the appellant sought direction from this Court to restrain the respondent no.1- WCL from taking coercive action

for encashment of bank guarantee. The said writ petition was disposed of on 16.12.2016 by this Court permitting the appellant to withdraw the writ petition and restraining the respondents from invoking the bank guarantees for a period of two months. In the said order, this Court recorded that several disputed questions of facts arose in the matter and that it would not be proper to decide the issues while exercising writ jurisdiction. It is also relevant to mention here that the respondents filed Civil Appeal No. 2845 of 2017, challenging the aforementioned order dated 09.12.2016 passed by the COMPAT. On 03.08.2017, the Hon'ble Supreme Court passed an order directing that coal be supplied to the appellant @ Rs.2100/- from Ukni Deep OC and @ Rs.2000/- from Bellora Naigaon OC, till the appeal was finally heard. Thereafter, when the appeal was listed before the Hon'ble Supreme Court on 06.11.2017, there were further directions issued in respect of the quantity of coal and the manner of its supply by the respondents to the appellant, during the pendency of the appeal. The said appeal is pending for final disposal before the Hon'ble Supreme Court.

7. During the pendency of the aforesaid appeal before

the Hon'ble Supreme Court, appellant filed Special Civil Suit No. 126/2016 in February, 2017, before the Court of District Judge, Nagpur (Judge, Special Commercial Court, Nagpur), against the respondents, for declaration and permanent injunction. In this suit, the appellant has sought declaration in respect of letter dated 25.07.2013 pertaining to the dates of commissioning of the aforesaid mines communicated by the respondent no.1-WCL, as it has a bearing on the manner in which the various clauses of the fuel supply agreements would operate. It is the case of the appellant that the dates of commissioning of the mines, communicated in the said letter, were false and that the respondent no.1-WCL could not be allowed to take benefit of such false information supplied by it. The appellant has sought mandatory injunction to the respondents to supply coal from the aforesaid mines at the correct price and a declaration has been sought that the invocation of bank guarantees by letter dated 19.05.2016 is void as being tainted by fraud. Other reliefs have also been sought in the said suit. The appellant has specifically contended in the said suit that the scope and width of the proceedings initiated by the appellant under the provisions of the Competition Act, 2002, which are now pending before the

Hon'ble Supreme Court, are totally different from the reliefs sought in the suit filed by it. Broadly, it is the case of the appellant in the suit that the respondents have committed a fraud upon it by giving an impression under the fuel supply agreements that coal would be supplied to the appellant from cost-plus mines, while actually the supply of coal was done by the respondents from Scheme area of the mines. It is the case of the appellant that while the agreements were executed for supply of coal from aforesaid three cost-plus mines at cost-plus prices, the coal was never actually supplied from those mines and the supply of coal was done from existing mines under the Scheme.

8. It is the case of the appellant that cost-plus mine would be that deep area of the mine from which extracting and selling of coal at notified price would be unviable and that therefore, such coal was to be sold at a cost-plus price yielding a 12 % Internal Rate Return. But, while taking up actual work, the respondent no.1- WCL found that it could extract coal from area falling within the boundary of the deep side of the mines in question (referred to as the Scheme area) and that without undertaking any substantial capital expenditure, the

coal was extracted and sold to the appellant at cost-plus price, although it could have been profitable at the notified price itself. The appellant also contended that the three cost-plus mines specifically identified and stated so in the schedule of fuel supply agreements, were never utilized by the respondents while supplying coal to the appellant under the aforesaid agreements. By placing reliance on the clauses of the aforesaid agreements, the appellant contended that project report and updates regarding the three mines in question demonstrated that no mining work had effectively started in those mines and that therefore, as per clause 2.7.1 of the said agreements, since the mines were yet to be actually commissioned , the supply of coal by the respondents was during the “Build-up period” and under the said clause no penalty or compensation was payable by the appellant to the respondents for alleged short lifting of coal, during such “Build-up period”. It was contended that the fact that respondents did not actually supply coal from the mines in question and that the supply of coal was made from Scheme area of existing mines, came to the knowledge of the appellant only when relevant documents were finally supplied to the appellant in the year 2016. It is when such documents, including the

relevant project reports, were supplied to the appellant that it became aware of the aforesaid fraud committed by the respondents.

9. It is in this backdrop that the appellant has claimed in the suit that the respondents have committed a fraud while executing the aforesaid agreements and that therefore, the encashment of bank guarantee by the respondent no.1-WCL for alleged short lifting of coal could not be permitted. The appellant also filed an application for grant of temporary injunction under Order 39 Rules 1 and 2 of the Civil Procedure Code. Relying on the averments made in the plaint, the appellant sought temporary injunction to restrain the respondents from acting upon the demand of compensation made against the appellant and, therefore, to restrain the respondent no.1-WCL from encashing the aforesaid bank guarantees. It was also claimed that if such temporary injunction was not granted, the appellant would suffer irretrievable damage and loss and that when a strong *prima facie* case of fraud was made out against the respondents, the temporary injunction was required to be granted.

10. The respondent no.1-WCL filed its written statement in the aforesaid suit and denied the allegations of fraud made against it by the appellant. It was contended that after execution of the said agreements, the appellant was in urgent need of supply of coal for its power plant and that in such a situation the respondent no.1-WCL had supplied coal as per the agreements. There was no question of fraud because coal was supplied from the mines that were notified and that if the appellant had insisted on supply of coal from portions of mines wherein the land was yet to be acquired, there could not have been any supply, resulting in adverse effect on the functioning of the power plant of the appellant. The respondent no.1- WCL placed on record facts to contend that it had become imperative for it to operate the Scheme areas to continue production of coal from the mines to avoid idling of men and machinery, as also to ensure supply of coal, in terms of the aforesaid fuel supply agreements. The allegations of fraud were denied and it was pointed out that when the appellant had failed to lift coal as per the clauses of the said agreements, the consequence of payment of compensation by the appellant was to follow and that therefore, there was no substance in the prayers made in the suit.

11. The application for temporary injunction was taken up by the aforesaid Court and on 15.12.2017 an ad-interim ex parte temporary injunction was granted in favour of the appellant. But, after the respondents put in their appearance and filed their written statement before the Court, by the impugned order, the said Court rejected the application for temporary injunction, holding that the appellant had failed to make out a *prima facie* case for restraining the respondents from encashing the bank guarantees. It was recorded that the appellant could neither make out a case of fraud nor a case of irretrievable damage for an order of temporary injunction to be granted restraining the respondent no.1-W.C.L. from encashing the unconditional bank guarantees. Aggrieved by the said impugned order dated 21.12.2017, the appellant has filed the instant appeal.

12. Mr. C.S. Kaptan, learned senior counsel assisted by Mr. Rajiv Deshpande, Advocate, appeared on behalf of the appellant and contended that the appellant had specifically pleaded fraud against the respondents in the suit, which had not been denied in specific terms by the respondents. The

learned counsel referred to and relied upon various clauses of the fuel supply agreement to contend that in the absence of commissioning of the mines in question, the respondent no.1-WCL could not have invoked clause 4.9 of the agreements to claim compensation for alleged short lifting of coal by the appellant. Emphasis was placed on Clauses 2.7.1 ("Build-up period"), 4.0 (quantity), 4.4 (sources of supply), 4.5 actual commissioning date) and 4.9 (compensation for short delivery/lifting), to contend that on a proper interpretation of the aforesaid clauses of the said agreements and application of the same to the facts of the present case, it would be clear that the respondent no.1-WCL was not entitled to claim compensation for alleged short lifting of coal by the appellant and that consequently the encashment of bank guarantees sought by the respondent no.1-WCL was not justified.

13. It was contended that the respondents had committed a fraud on the appellant while executing aforesaid agreements because while executing the said agreements, reliance was placed on project report of 2009, even though updated project report for the year 2012 was available, wherein data showed that the three mines that were subject

matter of the aforesaid agreements were at initial stage of process of land acquisition and that further activities of actual mining would take substantial period of time. It was contended that the said three cost-plus mines, even as per the estimates of the respondents themselves in the updated project report of 2012, would reach the stage of mining and production of coal only about three to four years after the date of execution of such agreements. Thus, it was contended that if the said facts had been informed by the respondents to the appellant, such information could have been taken into account by the appellant while taking a decision in respect of executing such agreements for supply of coal. By keeping the appellant in dark and executing the agreements for supply of coal from cost-plus mines, while actually supplying coal from Scheme area of existing mines, the respondents had committed a fraud, vitiating the said agreements and the consequent action of the respondent no.1-WCL in claiming compensation for alleged short lifting of coal and in seeking to encash the bank guarantees.

14. It was further contended that even as per the terms of the agreement, under Clause 2.7.1, the respondent no.1-

WCL could not have claimed compensation for short lifting because the cost-plus mines were yet to be actually commissioned when supply of coal had started and such supply of coal under the said clause was clearly under “Build-up period” for which neither party was liable to pay compensation for short supply or short lifting. It was submitted on behalf of the appellant that in such a situation when fraud was committed by respondents, which would result in irreparable damage, the trial Court ought to have granted temporary injunction as prayed by the appellant. It was pointed out that the proceedings initiated by the appellant under the provisions of the Competition Act, 2002, which were now pending before the Hon’ble Supreme Court, were on a specific issue of price structuring and that the relief sought in the suit was of a different nature. It was also pointed out that since the appellant became aware of the said fraud committed by the respondents only when it was supplied copies of the updated project report of 2012, such plea of fraud could not have been raised earlier by the appellant. On this basis, the learned senior counsel appearing for the appellant submitted that the impugned order passed by the trial Court deserved to be set aside and the application for temporary injunction filed

by the appellant deserved to be allowed. The learned senior counsel appearing on behalf of the appellant relied upon judgment of the Hon'ble Supreme Court in the case of **State Trading Corporation of India Ltd. .vs. Jainsons Clothing Corporation and another - (1994) 6 Supreme Court Cases 597, U.P. State Sugar Corporation .vs. Sumac International Ltd. -(1997) 1 Supreme Court Cases 568, and judgment of the Delhi High Court in the case of M/s D.S. Constructions Ltd. .vs. Rites Ltd. and another - AIR 2006 Del 98.**

15. On the other hand, Mr. S.P. Dharmadhikari, learned senior counsel assisted by Mr. G.E. Moharir, appearing on behalf of the respondents, submitted that the pleadings in the suit filed by the appellant were vague and that no case of fraud was made out. It was contended on behalf of the respondents that when the appellant was praying for an injunction against encashment of unconditional bank guarantees, as per settled law, it was required to demonstrate that an egregious fraud had been committed by the respondents and that in the absence of specific pleadings as regards such fraud, no relief could be granted to the appellant.

It was contended that the interpretation of various clauses of agreements on behalf of the appellant and the manner in which the coal was supplied by the respondents, is based on an erroneous approach, since cost-plus mine is included in Scheme area of the mine. It was specifically contended that the sharp distinction sought to be made on behalf of the appellant, between Scheme area and cost-plus area of the mine, was erroneous and that therefore, the entire basis of claiming fraud against the respondents was not justified.

16. It was contended on behalf of the respondents that there was no false statement made by them when dates of commissioning of the mines were communicated to the appellant. It was pointed out that the supply of coal was made from the portions of the mines in question wherein mining activity was already undertaken and that only on this ground it could not be said that the supply was not made from cost-plus mines. According to the respondents, the working of the mines and extraction of coal was a process in which the sharp distinctions sought to be made on behalf of the appellant were not justified. It was further contended that there was no denial on the part of the appellant that there was indeed short lifting

of coal in the present case, as a result, by operation of clause 4.9 of the aforesaid agreements, the appellant was clearly liable to pay compensation or penalty to the respondents. It was submitted that the stands taken by the two sides in the pending suit were such that a resolution was possible only after a full trial and that the pleadings on record did not specify the proof of egregious fraud, which is a *sine qua non* for grant of injunction restraining encashment of an unconditional bank guarantee. The learned senior counsel appearing on behalf of the respondents relied upon judgments of the Hon'ble Supreme Court in the case of **U.P. Cooperative Federation Ltd. .vs. Singh Consultants and Engineers (P) Ltd. - (1998) 1 Supreme Court Cases 174, Federal Bank Ltd. .vs. V.M. Jog Engineering Ltd. and others - (2001) 1 Supreme Court Cases 663, Svenska Handelsbanken .vs. M/s Indian Charge Chrome and others - (1994) 1 Supreme Court Cases 502, Ansal Engineering Projects Ltd. .vs. Tehri Hydro Development Corporation Ltd. and another - (1996) 5 Supreme Court Cases 450, Dwarikesh Sugar Industries Ltd. .vs. Prem Heavy Engineering Works (P) Ltd. - (1997) 6 Supreme Court Cases 450 and Bharat Dharma Syndicate Ltd. .vs. Harish Chandra - AIR 1937**

Privy Council 146.

17. Having considered the rival submissions, the question that arises for consideration is , whether the appellant has made out a case for grant of temporary injunction restraining the respondents from encashing bank guarantees, on the touchstone of settled law that such an injunction ought not to be granted except when the plaintiff is able to make out a *prima facie* case of fraud against the defendants and that it would suffer irretrievable damage if such injunction is not granted. It is also necessary to note that the Bank should have knowledge of such fraud claimed by the plaintiff and that it's obligation to honour the demand of encashment has nothing to do with any dispute between the seller and buyer with regard to any alleged breach of contract between them.

18. In the instant case, the learned senior counsel appearing on behalf of the appellant has read various clauses of the fuel supply agreements between the parties. Since the clauses in all the three agreements pertaining to three cost-plus mines are identical, reference was made to one such agreement pertaining to Bellora Naigon Deep OC Mine. The

emphasis placed on behalf of the appellant was on the following clauses:

"2.7. Build-Up Period

2.7.1 Build-Up Period shall be the period commencing from the First Delivery Date till such time the Cost Plus mine is actually commissioned. During the Build-Up Period any compensation arising on account of short supply or short lifting in this Agreement, during the Build up period shall not be payable by either party.

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3.5. The Purchaser shall ensure that the Security Deposit stands replenished within seven (7) days of drawl of funds by the Seller in accordance with the provisions of this Agreement. Failure to replenish the Security Deposit within such stipulated period shall entitle the Seller to suspend its Coal supplies without absolving the Purchaser of its obligations under this Agreement.

3.6. The Security Deposit shall be forfeited in case the Purchaser fails to comply with any provisions of this Agreement.

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4.0 QUANTITY

4.1.1 The Annual Contract Quantity of coal agreed to be supplied shall be 4.00 lakh tonnes per Operating Year of 12 calendar months provided that where the period of operation of the Mine is less than 12 months following the date of Actual Commissioning, the Annual Contract Quantity shall be prorated accordingly.

4.1.2 However, till such time the actual commissioning of the mine takes place (i.e.85% of the mines capacity is achieved) the quantity of coal produced from the mine and supplied shall be treated as annual contract quantity for the period but no compensation on incentive shall be payable or receivable during the period.

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4.4. Sources of Supply.

4.4.1 The Seller shall endeavour to supply Coal from sources as mentioned in Schedule 1. In case the Seller is not in a position to

supply the Scheduled Quantity (SQ) of Coal from such sources as indicated in Schedule I, the Seller shall have the option to supply the balance quantity of coal from alternate source, including Imported Coal. Further, in case of alternate sources, the Purchaser shall accept Coal directly from such alternate sources through Indian railway system and/or by alternate modes of transport depending upon operational flexibility and at such Delivery Point, as decided by the Seller. Additional cost due to supply through alternate source including the inland logistics cost of Imported Coal shall be borne by the Purchaser.

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4.4.4. The Seller, on the request of the Purchaser shall furnish the necessary information within the reasonable time and accuracy, about the quality of Alternate Supplies proposed to be dispatched from the Alternate Sources(s) to the Delivery Point.

4.5 Actual Commissioning Date - *The mine is said to have achieved Actual Commissioning on a date (the Actual Commissioning date), when it has achieved a*

production of 85% of Annual rated capacity of One Million tonnes during the immediate preceding 12 continuous month period.

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4.9. Compensation for short delivery/lifting .

4.9.1. If for a Year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect to that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting, as the case may be ("Failed Quantity") in terms of the following."

19. On the basis of the aforesaid clauses of the agreement, the learned senior counsel appearing on behalf of the appellant has submitted that the appellant could not be held liable for payment of compensation for short lifting of coal because, as per Clause 2.7.1, the supply of coal made to the appellant by the respondent no.1-WCL was still in the "Build-up Period" as the cost-plus mine in respect of which the said agreement was executed was yet to be commissioned and till such date that the said mine was not commissioned, the supply

of coal was only during the “Build-up period”. It was further submitted that as per the said clause 2.7.1, neither party was liable to pay any compensation to the other on account of short supply or short lifting of coal during such “Build-up period”. It was submitted that Clause 4.9.1 regarding calculation of quantum of compensation for short lifting of coal, would come into operation only after the mine in question had achieved actual commissioning date as per clause 4.6 and the annual contracted quantity was supplied from such mine as per clause 4.1 of the agreement. Till such time as the mine in question was not actually commissioned, the entire supply of coal by respondent No.1 WCL was out of “Build-up period” as per the clause 2.7.1 and that no compensation was payable by the appellant. Consequently the respondent no.1-WCL could not claim that it was entitled to encash the bank guarantees towards such amount of compensation.

20. The aspect of fraud was argued on behalf of the appellant on the basis that the material available on record, particularly updated project report of 2012 regarding the mines in question, demonstrated that the activity of extraction or production of coal from the said mines was yet to commence

when coal was supplied to the appellant and that, therefore, charging cost-plus price of coal by the respondent no.1-WCL was absolutely fraudulent. It was claimed that the respondent no.1-WCL continued to supply coal from Scheme area of existing mine while claiming cost plus price, as if the coal was extracted from specific cost plus mines that were made subject matter of fuel supply agreements. The pleadings in the plaint in respect of fraud are as follows: -

"56. Finally on 23.04.2015, the Defendant No.1 handed over the copies of the DPR of 2012 along with the documents related to Scheme, to the Plaintiff. It is submitted to this Hon'ble Court, that, as per the updated DPR upto Feb 2012 and upto August 2013 for Ukni Deep OC Mine, vide Page 16, Paragraph 13.8 thereof, the "MINING SCHEDULE" published thereunder clearly states that for and the period upto FY 2014-15, the production of coal will be "As per Scheme" planned and from the FY 2015-16 onwards, the production of coal will commence from the Cost Plus Mines as per FSA.

Copy of the letter of Defendant No.1 dated 23.04.2015 providing the DPRs of 2012 is

annexed as ANNEXURE – Q.

Copy of the DPRs of 2009, 2012 of Ukni Deep, Bellora Naigon Deep and Urdhan RCE and 2013 of Ukni Deep, and Bellora Naigon Deep Cost Plus Mines are annexed as ANNEXURE – R (Colly).

Thus, in April 2015, for the first time in 3 years of coal supply under the FSAs, Defendant No.1 provided information to the Plaintiff of Defendant having operated a Scheme, which had its own commercial aspects such as investments, operating costs and sale price etc. There is no letter or correspondence from Defendants side informing the Plaintiff of having worked any Scheme in this period.

57. *It is submitted to this Hon'ble Court that, in the mining industry, Scheme essentially means an approach to extract coal once the existing mine reaches its initially planned boundary. The concept of Scheme can be explained as under:-*

For illustration FSA relating to 'Ukni Deep' can be taken. Ukni mine started its operation long time ago. The coal was being extracted and it was analysed by the technicians and it was

felt that it could be proceeded further by digging deep in the mine contiguous to the existing one that have been mined for a long period, but at a higher cost. The Defendant referred to this place as 'Ukni Deep'. It was assumed by the Defendant that the coal would be supplied from the 'Ukni Deep' as was declared by the Defendant No.1 under the public notice of December 2010. But on the actual working, while transitioning from Ukni mine to Ukni Deep Mine, it came to the knowledge of the Defendant that they could extract coal from area falling within the boundaries of Ukni Deep side which was contiguous to the existing Ukni mine itself (referred to as Scheme Area) without undertaking any substantial capital expenditure so that the coal produced from this area will be profitable at the Notified Price itself and further, they could supply a specified quantity of coal to its consumer. Therefore, as per the Notice of December 2010, this coal production from the Scheme area actually fell within the Cost Plus mine as envisaged at the time of Notice of December 2010, however subsequently removed from the Cost Plus area, without the knowledge of the Plaintiff. The Defendant is burdened with an obligation to pass on such finding to the

Plaintiff as any seller of goods should do with the sale of his goods when such knowledge is exclusively known to the seller only. This is so when more particularly such facts relating to goods are essential to the terms of the contract like price determination. The Defendant chose deliberately to keep the information close to their chest. They let the Plaintiff believe that such coal was to be extracted from the 'Ukni Deep' so that cost of supposed extraction from the 'Ukni Deep' would form the basis of the price while in fact the extraction was from the bordering portion of the existing mine. It is pertinent to state that had the Defendant No.1 not have ulterior motives, they could have supplied coal from the Scheme Area but would have charged the price i.e. the Notified price, as was applicable under the approval of the Scheme. However, the Defendant embarked on a novel device to mislead the Plaintiff and carved out commercially profitable Scheme area from Deep side mine area, thereby adversely affecting the economics of the balance Deep side area. The Defendant in the process unjustifiably enriched themselves and the Defendant concealed the material facts and this constitutes yet another fraud.

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60. It is gathered from these documents that the "Scheme" has been formed to carry out coal production from "Deep Side Property" of the existing Ukni OC Mine and Bellora-Naigaon OC Mine" till the commencement of the Cost Plus Mines. In other words, the reserves that belonged to the Deep side mine at the time of Notice inviting applications in December 2010 was removed under a pretext of a Scheme which had favourable economics, without any intimation to the Plaintiff. As the favourable reserves were removed, the resultant so called Deep Side mine had an adverse impact on the coal prices for the balance uneconomical portion. The fraudulent behaviour of the Defendant No.1 is apparent when the coal production from this Scheme Area was actually supplied by the Defendant No.1 to the Plaintiff during the period from 2012-13 upto 2015-16 and was claimed as being supplied from coal production from Deep Side mine, thereby instead of charging coal price relating to Scheme, Defendant No.1 charged the Prices of the Cost Plus mines, which would have been applicable only in 2016-17.

61. As such, the Defendant did not disclose

this vital piece of information to the Plaintiff, during the course of period from signing of FSAs on 03.04.2012 which the Plaintiff believed was based on the Notice published in December 2010 to April 2015. All the details as regards non-approval of final Project Report of Deep Mines, commencement of working of the Scheme, reduction in reserves of coal mines from the period from Notice till execution of FSAs etc were wrongly, knowingly and deliberately kept away from the Plaintiff as a guarded secret, so as to extract maximum prices of coal and impose the unwarranted penalties like "short supply" and "performance incentive" on the Plaintiff. These facts have been concealed and not been informed to the Plaintiff at any point of time during the entire period as such fact would defeat the very unilateral and fictitious claim of actual commissioning of the cost plus mines by Defendant No.1, wherein the impugned FSAs have been entered into for coal supplies from such mines.

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65. *In other words, production from cost plus mines for which cost plus agreement was signed was scheduled to start after 2015. Till*

that time, entire production that came was from Ukni Scheme, having its own Capital Cost, geographical demarcation and pricing structure , which is markedly different from that of the Ukni Deep Cost Plus mine. Despite this, in a brazen display of fraudulent behaviour of a monopolistic supplier, the Defendant No.1 supplied Coal from the Ukni Scheme and utilised the same to declare commissioning of Ukni Deep Cost Plus mine during 2012-13. The coal supply from Scheme Area continued till March 2016."

21. On the basis of such pleadings, the appellant has contended that there is fraud committed on it, vitiating the entire agreement and that therefore, the respondent no.1-WCL is not entitled to encash the bank guarantees.

22. In this context, the stand of the respondent no.1-WCL is that cost plus area of mine is included in Scheme area and that when the actual working of the mine is undertaken, it is not reasonable to make sharp distinctions between such areas. It is pointed out that the appellant had insisted on supply of coal from the mines in question immediately upon execution of the fuel supply agreements. It was further pointed out that

linkage granted by the Government of India through Ministry of Coal to the appellant was only on cost plus basis and that coal could have been supplied to the appellant only on such basis after execution of the fuel supply agreements. The respondent no.1-WCL agrees that the exploration of cost plus mines was at a preliminary stage and that supply of coal from such mines would have taken a couple of years with the process of land acquisition and other steps being completed. It is the case of respondent no.1 - WCL that since cost plus area of a mine was included in the Scheme area, supply of coal was made to the appellant on cost plus basis under the aforesaid fuel supply agreements. It is contended that in this situation there was no question of any fraud being committed by the respondents upon the appellant and if no supply of coal was made during the relevant period, the power plant of the appellant would have been shut down. Even otherwise, the fact of short lifting of coal was not denied by the appellant and that compensation was payable by the appellant for such short lifting under clause 4.9.1 of the agreement. In this respect, the response of the respondent no.1- WCL to the allegations of fraud made in the plaint, becomes relevant and it reads as follows:-

"42. As to Paras 56 to 71:- With regard to contents of these paras it is to state that at the stage when Ukni and Bellora-Naigon Open Cast Mines were at the verge of getting exhausted and thus their Deep Project Reports were prepared but considering viability at notified price they were not viable. Thus, there was need to comply with the guidelines of Ministry of Coal (MoC) for cost plus coal blocks to identify the customers who were willing to purchase the coal at cost plus price i.e. price to yield more than 12% IRR. As the process of identification of customer as per MoC guidelines was to take some time, it was felt by WCL to be prudent that stopgap arrangement be made for maintaining continuity of production. Therefore, scheme be prepared by considering a small property with fixed quantity or life beyond PR limit of the existing mine, but the same was under the proposed cost plus mine property on which no or minimum capital expenditure was required for commencing mining operation and capable of yielding 12% IRR at notified price. Accordingly, schemes were prepared and approval was given by the competent authority for putting them in operation. Thus, in pursuance to the cost plus project were revised as directed by WCL Board by carving

out the reserves considered in the schemes on execution of cost plus FSA, coal produced from these schemes were supplied to the plaintiff only but on cost plus price as per the scheme properties were part of cost plus project report. Rest of base price is allowable at the time of completion of project. In view of the aforesaid, it was worthless to give stress upon the fact that on achieving 85% of the target capacity from Ukni Deep (scheme) and Belora-Naigaon Deep (scheme) Open Caste Mines the actual commissioning date was declared inasmuch as the said mines were basically cost plus mines. During 2010 to 2013 plaintiff was repeatedly pressing hard for supply of coal to run its power plants, though as of fact, plaintiff would not have received coal supply before April, 2015 (projected time as per FSA to commence production) as per the Fuel Supply Agreements executed between the plaintiff and this defendant, except to get the coal on cost plus price from those mines. In fact, plaintiff was gave consent to WCL by signing letter about waiving the condition proceedings criteria and has thus waives the particular conditions and accepted to receive the coal on cost plus price from the existing mine/ scheme and therefore, supply of coal was stated. However, WCL did

not insist for a written consent from the plaintiff as the waiver of condition precedent was already signed by plaintiff. Even otherwise the said arrangement as per prevailing practice was to run the scheme as a stopgap arrangement until the main project report is approved and the scheme automatically becomes part of the main project report or it gets merged with the project report. Considering the aforesaid submissions, it would be clear that the submissions made by the plaintiff in paras 56 to 71 does not have any weightage and the contents of these paras are of no assistance to the plaintiff to seek the relief prayed in the present proceedings. However, as the submissions are baseless and imaginary and contentions of the plaintiff in these paragraphs are denied."

23. Having considered the pleadings of the rival parties, I find that the question as to whether the supply of coal was made from cost plus area of the mine or whether it can be said to be during "Build-up period", would be a matter of further evidence and trial. The aspect as to whether the dates of commissioning of the mines communicated by the respondent no.1-WCL to the appellant were correct or not, in the face of

the pleadings and material on record, would also be a matter requiring further evidence and trial. The clauses of the agreements, quoted above, that were placed before this Court and relied upon extensively on behalf of the appellant, would also have to be considered and interpreted during the course of trial. In this context, the question is whether the appellant has been able to place on record material to show that egregious fraud was committed by the respondent no.1-WCL to justify restraining the encashment of bank guarantees by way of temporary injunction, during the pendency of the suit.

24. The contentions raised on behalf of the appellant would require further enquiry and trial , but the facts as they emerge from the pleadings and material on record, do not bring out a *prima facie* case of fraud so as to exercise power by this Court to restrain the respondent no.1-WCL from encashing the bank guarantees.

25. In this regard, it would be appropriate to refer to the law laid down by the Hon'ble Supreme Court in this context. In the case of **Federal Bank Ltd. .vs. V.M. Jog Engineering Ltd.** (supra), the Hon'ble Supreme Court held as follows:-

"55. In several judgments of this Court, it has been held that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit. Two exceptions have been mentioned-(i) fraud and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1, CPC can be issued. It has also been held that the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer. This is also clear from Articles 3 and 4 of the UCP (1983 Revision). In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot obtain injunction against the Banker on the ground that there was a breach of the contract by the seller. The Bank is to honour the demand for encashment if the seller prima facie complies with the terms of the Bank Guarantee or Letter of Credit, namely, if the seller produces the documents enumerated in the Bank Guarantee or Letter of Credit. If the Bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for

encashment. While doing so it must take reasonable care. It is not permissible for the Bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the Bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer. As to its knowledge of fraud or forgery, we shall presently deal with it,

Knowledge of fraud :

56. *Decided cases hold that In order to obtain an injunction against the Issuing Bank, it is necessary to prove that the Bank had knowledge of the fraud.*

57. *Kerr, J. said in R.D, Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd., (1978) Q.B, 146 (QB at P.155 that irrevocable Letters of Credit are "the life blood of international commerce". He said :*

"Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.....Otherwise, trust in international

commerce could be irreparably damaged."

Denning M,R, .stated In Edward and Owen Engineering Ltd. v. Barclays Bank International Ltd. (1978) Q.B. 159 that 'the only exception is where there is a clear fraud of which the bank had notice": Browne, LJ. said in the same case : "but it is certainly not enough to allege fraud, it mast be established" and in such circumstances, I should say, very clearly established". In Bolvinter Oil S.A. v. Chase Manhattan Bank, (1984) 1 All E.R, 351 at P. 352, it was said

'where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made, will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer,, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated".

Thus, not only must 'fraud' be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corp. S.A. v. Allied Arab Bank, (1985) 2 Lloyds Rep, 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before

payment. It was also observed that it

"would be sufficient if the corroborated evidence of the plaintiff usually in the form of contemporary documents and the unexplained failure of a beneficiary to respond to the attack, lead to the conclusion that the .only realistic inference to draw was 'fraud'".

In Guarantee Trust Co, of New York v, Hanney, (1918) 2 K.B. 623 , the Banker accepted the documents without any knowledge of fraud or falsification and it was held that the defendants could not counter-claim from the Bank. However, it would be the 'Banker's duty to refuse the documents which on their face bear signs of having been altered (See Salomon and Naudus, [1899]. 81'LT. 325. That was a C.I.F. contract. This Court in [ITC Ltd. v. Depts Recovery Appellate Tribunal](#), [1998] . 2 :SCC 70 (at P 79) also held that knowledge Of the Bank as to the fraud or forgery had to be prima facie established.

26. In fact, the Hon'ble Supreme Court in earlier decisions has laid down the position of law that the fraud claimed by the plaintiff while praying for an injunction for restraintment of encashing of unconditional bank guarantee, should be of an egregious nature so as to vitiate the entire underlying

transaction. In the judgment in the case of **U.P. Cooperative Federation Ltd.** (supra), the Hon'ble Supreme Court has held as follows:-

"53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for

the bank to ask the buyer to approach the Court for an injunction."

27. Thus, the position of law that emerges is that not only should the fraud be of an egregious nature, it should be held to be vitiating the entire underlying transaction and the Bank should have knowledge of such a fraud. In the instant case, on an analysis of the pleadings and documents on record, I find that the allegations levelled by the appellant (plaintiff) against the respondents (defendants) are such that a full dress trial would be required to prove such allegations. The dispute whether the supply of coal was from cost plus mine and whether Scheme area of the mine includes a cost plus area or not, are disputes that would have to be resolved upon further evidence and trial before the Court below. The allegations of fraud made by the appellant in the present case are based on its interpretation about the manner in which the fuel supply agreements should have been operated. I am of the opinion that the material on record does not *prima facie*, make out a case of fraud of egregious nature on the part of the respondents and the said material does not demonstrate that

the entire underlying transaction, i.e. the fuel supply agreements, stood vitiated by fraud on the part of the respondents. Ultimately, at the completion of the trial, the appellant may be able to prove that the interpretation of clauses of the agreement by the respondent no.1- WCL was not correct or that the agreements were not operated in the manner in which they ought to have been operated. But, this alone would not lead to the conclusion that there is enough material on record to show that *prima facie* a fraud of egregious nature has been committed by the respondents in the present case to vitiate the agreements in question. Therefore, the judgment of the Delhi High Court in the case of **M/s D.S. Constructions Ltd. .vs. Rites Ltd.** (supra) can be of no assistance to the appellant, because in that case, on facts, the Court found that fraud was made out.

28. As regards the aspect of irretrievable damage, there is insufficient material on record to show that any exceptional or irretrievable loss will be suffered by the appellant, if the respondent no.1- WCL is not restrained by temporary injunction from encashing the unconditional bank guarantees. In this context, the Hon'ble Supreme Court in the case of **Dwarikesh**

Sugar Industries Ltd. (supra) has held as follows:-

"22. The second exception to the rule of granting injunction, i.e. the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."

29. In the facts of the present case, I do not find that it would be impossible for the appellant whatsoever to recover the amount from the respondent no.1 by way of restitution if the appellant ultimately succeeds in the suit. In fact, in respect of unfair price structure under the fuel supply agreements, the appellant has already succeeded before the authorities under the Competition Act, 2002 and before the Hon'ble Supreme Court an arrangement of price fixation and supply of coal has been worked out, during pendency of the appeal. Therefore, even the case on the aspect of irretrievable damage is not made out by the appellant.

30. In the plaint before the trial Court, the appellant has specifically pleaded that the scope and width of proceedings initiated by it under the provisions of the Competition Act, 2002 and the grievances made in the suit filed before the trial Court are totally different. Therefore, any grievance in respect of alleged unfair price fixation under the said agreements by the respondents abusing their dominant position, cannot be made a factor for considering the contentions raised on behalf of the appellant on the question of irretrievable damage that might be suffered by the appellant on account of refusal to restrain the respondent no.1-WCL from encashing the bank guarantees.

31. It is significant in the present case that the fact of short lifting of coal has not been denied by the appellant and encashment of unconditional bank guarantees is sought by the respondent No.1- W.C.L., towards compensation for such short lifting. Therefore, as per the settled law, since the prayer for temporary injunction restraining a Bank from encashing unconditional bank guarantee can be granted in very narrow set of circumstances wherein fraud and irretrievable damage is proved, I find that the appellant in the present case has failed

to prove that it is entitled for grant of temporary injunction. Hence, I find that there is no error committed by the trial Court in rejecting the application for temporary injunction by the impugned order dated 21.12.2017.

32. In the light of the above, the appeal is dismissed with no order as to costs.

33. Upon pronouncement of judgment, Mr. Rajeev Deshpande, learned counsel appearing on behalf of the appellant, submitted that since the interim order of *status quo* had been operating during the pendency of this appeal in this Court, further extension of the same may be granted as the appellant intends to challenge the order passed by this Court. In the fact and circumstances of the case, I deem it appropriate that the order of *status quo* be extended for a further period of two weeks. It is made clear that no further extension in any circumstances will be granted by this Court.

(Manish Pitale, J.)