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

\+ W.P.(C) 1/2018 & CM No.13/2018

B S ISPAT LIMITED ..... Petitioner

Through: Mr Siddharth Aggarwal, Mr Nakul Sachdeva, Mr Dheeraj P. Deo and Mr Zeeshan Diwan, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr Ripu Daman Bhardwaj, CGSC for R-1 and R-2/UOI.
Mr Sidharth Aggarwal, Advocate for R-3/Andhra Bank.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **16.01.2018**

1. The petitioner has filed the present petition, *inter alia,* praying as under:-

> "a) Issue a Writ of Certiorari or any other appropriate Writ or direction in the nature of Certiorari thereby quashing Clause 10.3 of the Agreement titled the Coal Mine Development and Production Agreement with respect to "Marki Mangli-III" Coal Mine and the time line as prescribed under Sr.No.2 of Schedule "D" as appended to the said Agreement;
>
> b) Issue a Writ of Certiorari or any other appropriate Writ or direction in the nature of Certiorari thereby quashing the Letter dated 26.12.2017 issued by Respondent No.2;
>
> c) Issue a direction to the Respondent no.2 to restrain from invoking/Encashing the Performance Security provided

by the Petitioner in form of Bank Guarantee bearing no.00841516PER0005 dated 30.03.2015 for noncompliance the Agreement titled the Coal Mine Development and Production Agreement executed between the Petitioner and the Respondent with respect to "Marki Mangli-III" Coal Mine;

d) Issue a direction to the Respondent No.3 to restrain from taking any steps in furtherance to/of the email dated 28.12.2017 and invoking the Bank Guarantee bearing no.00841516PER0005 dated 30.03.2015."

2. Insofar as the first prayer - that is to quash clause 10.3 of the Agreement dated 28.02.2015 titled "the Coal Mine Development and Production Agreement" (hereafter 'the Agreement') - is concerned, this Court is not persuaded to accept that any such prayer can be granted.

3. Clause 10.3 of the Agreement reads as under:-

> "10.3 Any non compliance with the Efficiency Parameters would result in appropriation of the Performance Security in the manner stipulated in Clause 6 (PERFORMANCE SECURITY) and in case where such non-compliance exceeds for more than five instances, such non-compliances may also result in termination of this Agreement as provided in Clause 24 (EFFECTIVE DATE, TERM AND TERMINATION)."

4. As it is apparent from the plain reading of the aforesaid clause, failure on the part of the petitioner to comply with the Efficiency Parameters would result in appropriation of Performance Security. And, in case non compliance exceeds for more than 5 instances, such non compliances may also result in termination of the Agreement.

5. The learned counsel for the petitioner contends that a plain reading of

the Efficiency Parameters indicates that there may be situations where the said parameters are not met on account of defaults by other government departments and not on account of any reasons attributable to the petitioner. He states that in such cases, the termination of the Agreement would not only be arbitrary but also harsh and onerous, therefore, the said clause ought to be quashed.

6. In the first instance, this Court is not convinced that a clause in the Agreement, which has been voluntarily entered into by the parties can be set aside on the ground that it provides one party an arbitrary power to appropriate Performance Security or terminate the Agreement. However, even if it is accepted that such a prayer can be entertained, clause 10.3 of the Agreement clearly indicates that non compliance of Efficiency Parameters *may* result in termination and it is not necessary that the concerned authority (nominated authority) would terminate the Agreement in all cases where Efficiency Parameters have not been met in more than 5 instances.

7. Insofar as the challenge to the notice dated 26.12.2017 is concerned, it is seen that the petitioner's bank guarantee to the extent of ₹1,91,15,040/- has been appropriated and in terms of clause 6.3.3 of the Agreement, the petitioner is obliged to top up the bank guarantee.

8. Insofar as the petitioner's prayer to restrain the invocation of the bank guarantee is concerned, the same is unmerited The law relating to bank guarantees is well settled. Unless the petitioner is able to establish a fraud of egregious nature, the encashment of bank guarantees cannot be interdicted (See: ***U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.: (1988) 1 SCC 174***, ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Ors: (1994) 1 SCC 502*** and ***Larsen & Toubro Limited v.***

Maharashtra State Electricity Board & Ors: (1995) 6 SCC 68).

9. Thus, no order restraining respondent no.2 from invoking or encashing the performance bank guarantee can be issued at this stage.

10. Insofar as the dispute between the parties relating to petitioner's appropriation of Performance Security is concerned, the petitioner would be at liberty to avail of the remedies as provided under the Agreement, that is, approach the Tribunal under Section 27 of the Coal Mines (Special Provisions) Act, 2015. The petitioner would also be at liberty to seek certain interim orders from the said Tribunal. Needless to state that if such prayers are made, the same would be considered in accordance with law.

11. At this stage, the learned counsel for the petitioner requests that the petitioner be provided further ten days time to top up the performance security as demanded by the impugned notice dated 26.12.2017. He assures this Court that the same would be done within the said period. In view of the above request, the respondents are directed to accept the same as due compliance of the impugned notice dated 26.12.2017.

12. The petition and the pending application are disposed of with the aforesaid directions.

13. Order *dasti* under signatures of the Court Master.

VIBHU BAKHRU, J

JANUARY 16, 2018
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