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

+ **O.M.P.(I) (COMM.) 87/2018**

M/S B.B CONSTRUCTION & ORS.

..... Petitioners

Through: Mr Manjit Singh Ahluwalia,
Advocate.

versus

**THE GENERAL MANAGER NORTHERN
RAILWAY & ORS.**

..... Respondents

Through: Mr Jagjit Singh, Mr Preet Singh and
Mr Narayan Dev Parashar,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **23.02.2018**

IA No.2642/2018

1. Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 87/2018

2. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia*, praying as under:-

“a) Restraining/injuncting the respondents from encashing all the bank Guarantees/FDR, security deposit, and earnest money, as mentioned above in the petition furnished by the petitioner,

3. The petitioner company was awarded a contract for “*supplying, collecting and stacking of 65 mm gauge machine crushed stone ballast as per Railway standard specification along the cess/yard between Laksar Jn*

(including) and Pathri station (including) from Km 0.000 to Km 14.600 in connection with “LAKSAR-HARIDWAR doubling on LRJ-HW section of Moradabad Division.”

4. Admittedly, the petitioner company has been unable to perform the work as contracted for. The petitioners (the other petitioners being the partners in the petitioner company) claim that the said works could not be completed within the specified time, *inter alia*, due to the ban on mining imposed in the State of Uttarakhand. The petitioners also claim that no land for stacking the material in question was provided by the respondent.

5. The respondents allege that the petitioners have breached the contract and are, accordingly, seeking to forfeit the earnest money and the security deposit. According to the respondents, they are entitled to do so in terms of the contract.

6. This Court is not called upon to examine the disputes between the parties. However, it is clear that no irretrievable injustice would be caused to the petitioners if the interim order as sought for is not granted. The petitioner would be at liberty to claim the said amount along with interest, if the respondents forfeit the security deposit.

7. The law relating to bank guarantees is now well settled. In **Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502**, the Supreme Court had held as under:-

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...”

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...

...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.”

8. In **U.P State Sugar Corporation v. Sumac International Limited:** **(1997) 1 SCC 568**, the Supreme Court had held as under:

“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.”

9. In **Hindustan Construction Co. Ltd. v. State of Bihar and Ors.:** **(1999) 8 SCC 436**, the following observations made by the Supreme Court are also relevant:

“8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, *is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary.* In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to

the Government "Advance", the Guarantee is invoked and the amount is recovered from the Bank.”

[Italics for emphasis]

10. In the present case, none of the conditions for interdicting the encashment of bank guarantee in question are met.

11. In view of the above, this Court does not consider it apposite to pass the interim order as sought for by the petitioners.

12. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

FEBRUARY 23, 2018

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