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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 3022/2019 and CM Nos. 13936-13937/2019**

HINDALCO INDUSTRIES LIMITED Petitioner
Through: Mr Abhishek Manu Singhvi,
Senior Advocate with Mr Parag
P. Tripathi, Senior Advocate,
MsMuleta Dutta and Sanyam
Saxena, Advocates.

versus

UNION OF INDIA & ORS Respondents
Through: Ms Maninder Acharya, ASG
with Mr Ripu Daman
Bhardwaj, CGSC and Mr T.P.
Singh, MrViplav Acharya,
Advocates and MrSambhav
Jain, Ministry of Coal for UOI.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

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ORDER
26.03.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning a demand letter dated 25.03.2019 issued by respondent nos.1 and 2 calling upon respondent no.4 (Kotak Mahindra Bank Ltd.) to transfer an amount of ₹64,29,31,200/- to the respondents by partly invoking the performance bank guarantee furnished by respondent no.4 at the instance of the petitioner. The said bank guarantee has been invoked by respondent no.2 as the concerned Committee had concluded that there was delay on the part of the petitioner in meeting

the milestone in respect of Kathautia Coal Mines.

2. The respondents have stipulated efficiency parameters as listed in Schedule E of the Coal Mine Development and Production Agreement (hereafter 'the Agreement') which stipulate the milestones to be achieved by the petitioner and the period within which the same are to be met. There is no dispute that there has been a delay in the achieving the milestones as stipulated in Schedule E to the Agreement. The only controversy is whether the delay is attributable to the petitioner or is for the reasons attributable to the respondents or is for the reasons beyond the control of either parties.

3. It is apparent from the impugned order that the delay in execution of the mining lease was on account of the land in question being classified as *jungle jhari* (deemed forest). In view of the said classification, the mining lease in respect of the land could not be executed. This was also the principal explanation provided by the petitioner for the delay in meeting the milestones.

4. The respondents had issued a show cause notice dated 05.07.2018 calling upon the petitioner to show cause as to why action should not be taken towards appropriation of the bank guarantee (constituting the performance security) furnished by the petitioner.

5. It appears from the impugned order that the petitioner's explanation was considered and the concerned Committee accepted that there was a delay in execution of the mining lease on account of the land being declared as *jungle jhari*. Consequently, the Committee

observed that the zero date for production may be advanced to 04.07.2016 instead of 01.07.2015 (as originally contemplated). Despite extending the milestones by the aforesaid period, the Committee found that there was a delay of three months – that is, till 07.10.2016 – in execution of the mining lease, which had consequently led to delay in grant of “Mine Opening Permission” and “Consent to Operate”.

6. In the aforesaid view, the Committee ordered that 24% of the performance security (8% for each of the milestone) be appropriated.

7. Mr Singhvi, learned Senior Counsel appearing for the petitioner had assailed the impugned order on three fronts. First, he submitted that the concerned committee had accepted all contentions of the petitioner but had conjured up an artificial date of 04.07.2016 for being considered as a zero date for production. He stated that the impugned order was effectively in the petitioner’s favour as its explanation was accepted, yet the bank guarantee was directed to be invoked. In this view, he submitted that the impugned order was arbitrary and unreasonable and is liable to be rejected.

8. Second, he submitted that the delay in meeting the milestones was on account of cascading effect of the mining lease being executed belatedly, which in turn was on account of the land being notified as *jungle jhari* and, therefore, the invocation of bank guarantee was palpably erroneous.

9. Third, he submitted that there was a past precedent where this

Court had relegated the petitioner to take recourse to the alternative remedy while passing an *ad interim* order. He drew the attention of this Court to an order dated 02.05.2018 passed in *W.P.(C) 4655 of 2018* captioned *Hindalco Industries Ltd. v. Union of India and Ors.*, whereby this Court had granted liberty to the petitioner to approach the tribunal and in the meanwhile, stayed the operation of the communication dated 25.04.2018 impugned therein. By the said communication, the petitioner was called upon to top up the bank guarantee already encashed failing which the petitioner was put to notice that the contract itself may be terminated. He contended that a similar order ought to be passed in the present petition as well and it is incumbent upon this Court to follow the past precedent.

10. Mr Tripathi, learned Senior Counsel supplemented the aforesaid submissions. He referred to the decision of the Division Bench of this Court to *M/s Bottle Glass Pvt. Ltd. v. Union of India and Ors.: AIR 1984 Delhi 400* and contended that the law relating to bank guarantee, as is applicable in the commercial transactions, would not apply in cases where the bank guarantee was furnished pursuant to the exercise of the statutory or the executive power of the State.

Reasoning and Conclusion

11. The contention, that the impugned order had, in fact, accepted all contentions of the petitioner with regard to delay in execution of the mining lease but had arbitrarily fixed 04.07.2016 as a zero date, is unpersuasive. Although it was contended that there was no indication

why that date was fixed, a plain reading of the impugned order indicates that the said date was fixed as being a date of notification of the revised survey records. It indicates that as on that date, the lands in question were no longer notified as *jungle jharis*, and thus the said reason for delay in execution of mining lease did not survive. The contention that the delay in grant of Mine Opening Permission and Consent to Operate are only consequential delay may be merited. However, this Court is not inclined to examine as to what proportion of the bank guarantees was required to be invoked. Admittedly, the three milestones have not been met and the concerned Committee had taken an informed decision in this regard.

12. Third, the contention that this Court is compelled to follow the past precedent, as referred to by Mr Singhvi, is bereft of any merit. Although there can be no dispute that the past precedent are to be followed, however, the precedent must be relevant. In the present case, it is seen that the order dated 02.05.2018 passed in W.P.(C) 4655/2018 did not interdict the invocation of a bank guarantee. There is clearly no precedent which is brought to notice of this Court which would compel this Court to interdict a bank guarantee given that the law relating to the same is now well settled.

13. In *Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502*, the Supreme Court has 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.””

14. A similar view has also been expressed in several decisions (See: *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*: (1988) 1 SCC 174 and *Larsen & Turbo Limited v. Maharashtra State Electricity Board and Others*: (1995) 6 SCC 68).

15. The grounds on which the bank guarantee is interdicted are extremely restricted. In the facts of the present case, this Court is not persuaded to accept that any of the aforesaid grounds are established. Clearly, no case of fraud and special equities has been established.

16. The contention that the invocation of the bank guarantee in this case ought to be viewed differently from any commercial transaction, is unpersuasive. Indisputably, the mining lease executed in favour of the petitioner is a commercial transaction as far as petitioner is concerned. The mining lease has also been granted on commercial principles.

17. Even if it is accepted that the bank guarantee furnished by the

petitioner is received in exercise of executive powers, no interference with invocation of the bank guarantee would be called for. This is so because the substratal principle to provide for an unconditional bank guarantee is to ensure that the recovery of the amount is not obstructed in any manner.

18. In view of the above, this Court is unable to accept that the invocation of the bank guarantee is required to be interdicted.

19. Having stated the above, it must be clarified that the petitioner would be at liberty to avail all remedies available for recovering any amount recovered by invocation of the bank guarantee if the petitioner is otherwise able to establish that the said invocation was unjustified.

20. It is also pointed out that the petitioner has also been directed to top up the performance security and failure to do so would invite action for termination of the agreement. In this regard, the petitioner is liberty to avail of the alternate remedy of an appeal before the Tribunal. However, this Court also considers it apposite to restrain the respondents from terminating the Agreement (Coal Mine Development and Production Agreement) till the petitioner has had an opportunity to agitate its grievance before the Tribunal under Section 27 of the Coal Mines (Special Provisions) Act, 2015, and its application for interim relief is decided. It is so directed. This is subject to the petitioner preferring the appeal under the said provision within a period of two weeks from today.

21. In view of the above, the present petition is dismissed leaving it

open for the petitioner to avail of its remedies.

22. It is clarified that nothing stated herein should be construed as an expression of opinion (*prima facie* or otherwise) as to the merits of the dispute. All rights and contentions of the parties are reserved. This order is confined to deciding the petitioner's relief of restraining the respondents from recovering any amount by invocation of the bank guarantee.

23. All pending applications are disposed of.

MARCH 26, 2019
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VIBHU BAKHRU, J



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