

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

Reserved Date: 11th February, 2021

Pronounced on: 26th March, 2021

+ **FAO(OS) (COMM) 20/2021, CMs No.4009/2021 (for stay),
4010/2021 (for permission to file lengthy synopsis and list of dates)**

AMR-BBB CONSORTIUM

THRO' LEAD PARTNER, AMR INDIA LTD.

... Appellant

Through: **Mr. Sandeep Sethi, Senior Advocate
with Mr. Brijesh Kumar Goel and
Mr. Rajeev Kumar, Advocates.**

versus

BHARAT COKING COAL LTD. & ANR.

...Respondents

Through: **Mr. Amit Sharma and Mr. Dipesh
Sinha, Advocates for R-1.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J.

1. The present appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] is directed against the final judgment/order dated 27th January, 2021 [*hereinafter referred to as 'Impugned Order'*] passed by the learned Single Judge in OMP (I) (COMM) 31/2021, wherein the petition filed by the Appellant

herein under Section 9 of the Act, seeking orders restraining the Respondent from encashing bank guarantees, has been decided by directing the Respondents No. 2 to 5 [*hereinafter referred to as the ‘Banks’*] to encash the four bank guarantees and transfer the encashed amount into the account of the learned Registrar General of this Court, to be put in a fixed deposit subject to the outcome of the arbitration proceedings.

Facts

2. The bare essential facts leading to the establishment of the bank guarantees in question are that a Notice Inviting Tender [*hereinafter referred to as ‘NIT’*] along with Geological Reports furnished therein [*hereinafter referred to as ‘GRs’*], was issued by Respondent No. 1 [Bharat Coking Coal Ltd., *hereinafter referred to as ‘BCCL’*] for, *inter alia*, “Development of Kapuria Block and extraction of coal by mass production technology package for a minimum guaranteed production of 2.0 million ton per year on turnkey basis” [*hereinafter referred to as the ‘Project’*]. Pursuant thereto, on 10th September, 2011, a letter of acceptance was issued by BCCL to the Appellant/Consortium contractor. This was followed by the execution of a Contract Agreement between the Appellant and BCCL on 18th April, 2012 [*hereinafter referred to as the ‘Contract’*]. On 8th November, 2012, the Appellant after undertaking exploration works, submitted a comprehensive Detailed Project Report to BCCL, for approval [*hereinafter referred to as ‘DPR’*]. On 11th July, 2013, BCCL communicated its approval to the Appellant and gave directions to start work as per the approved DPR, after obtaining the required environmental clearance and statutory approvals. Based on the approval of the aforesaid

DPR, on 29th July, 2013, the Appellant in line with Clause 4.1.4 of the Contract, furnished a performance bank guarantee in favour of BCCL for an amount of Rs. 12,78,49,970/-. The Appellant also prepared a mining plan for extraction of coal reserves and submitted the same to BCCL, which was approved on 30th December, 2014. In line with the same, the Appellant conducted Environmental Impact Assessment and Environmental Management Plan, and submitted these reports to BCCL, based whereupon, environmental clearance for the Project was accorded on 19th December, 2014 by the Ministry of Environment and Forest, Government of India.

3. Based on the approved DPR, the Appellant tied up the supply of indigenous and imported plant and machinery/equipment for the Project and in terms of Clause 4.1.49.3 of the Contract furnished three bank guarantees for release of 5% part payment of deliverable plant and machinery to BCCL, for Rs. 6,40,75,203/-, 20,00,00,000/- and 14,79,00,000/- respectively.

4. On 15th January, 2018, BCCL informed the Appellant that the Internal Rate of Return (IRR) of the total investment in the Project was unfavourable, as, upon a re-examination of the layout of the proposed panels, it was found that the amount of coal extraction is likely to be greatly reduced. Resultantly, subsidence studies were done afresh through the Central Institute of Mining and Fuel Research and its report was submitted in June, 2018. On 26th November, 2018, BCCL informed the Appellant that the reports furnished by the Appellant have been provided to the Design Consultant (Central Mine Planning and Design Institute Limited) to re-work the integrated economics of this Project. Thereafter, on 20th May, 2019,

BCCL furnished a fresh GR to prepare revised DPR.

5. According to the Appellant, the fresh GRs were at great variance to the earlier GRs and called for entire fresh planning of work execution; its associated cost changes/variations; approval of a fresh mining plan; obtaining fresh environmental clearance; change in locations of ventilation shaft and inclined drivages and other key issues. In these circumstances, pursuant to various rounds of high-level meetings on this subject, it was agreed that the cost of proposal for preparing fresh DPR be submitted by the Appellant to the Committee specifically constituted by BCCL for examining the issues concerning implementation of this Project and for suggesting the way forward. Accordingly, the cost and timely proposal for preparing fresh DPR was submitted by the Appellant on 24th July, 2019 and in response thereto, on 28th December, 2019 it was informed by BCCL that the Committee has submitted its report and the final decision would be communicated soon.

6. The Appellant contends that for a long period of twelve months, they did not hear from BCCL on the aforesaid cost and timeline proposal. Instead, to its dismay, a show cause notice dated 10th July, 2020 was issued by BCCL titled as *“15 days’ notice for cancellation of the contract”*. Aggrieved with the aforesaid, the Appellant preferred a petition under Section 9 of the Act before this court,¹ praying for grant of interim measures of protection and injunction from invocation of the bank guarantees. This

¹ Bearing OMP(I)(COMM) No. 200/2020.

Court *vide* order dated 23rd July, 2020, observed that the petition was premature, as there was neither a final order pursuant to the show cause notice dated 10th July, 2020 nor was there any invocation of the bank guarantees. In these circumstances, the Appellant withdrew the said petition, and the same was accordingly dismissed as withdrawn.

7. Thereafter, the Appellant furnished a reply to the show cause notice dated 10th July, 2020 and called upon BCCL to withdraw the cancellation notice and have a high-level meeting to amicably resolve the issues and suggest the way forward to implement the Project, failing which BCCL could take steps to foreclose the Contract under Clause 4.1.20.8. Pursuant thereto, a CMD level meeting was held on 27th July, 2020, wherein the Appellant again requested BCCL to find an amicable way forward to implement the Project or to amicably foreclose the Contract and start conciliation. The Appellant also addressed further communications to BCCL, impressing upon them to go in for conciliation. Ultimately, the Appellant, *vide* letter dated 10th November, 2020 invoked the arbitration clause contained in the Contract. In consonance thereto, the Appellant has filed its request for arbitration and supporting claim statement before the International Chamber of Commerce, Paris [*hereinafter referred to as the 'ICC'*] which has been registered on 21st December, 2020. The ICC has notified the said request to BCCL, calling upon them to file their response within a period of thirty days.

8. In the background noted above, BCCL issued a letter for cancellation of Contract dated 21st January, 2021, and also sent letters dated 22nd January,

2021 to the banks (impleaded as Respondent No. 2 to 5 in the present appeal), for encashment of the bank guarantees. Aggrieved with the aforesaid action, the Appellant filed a petition² under Section 9 of the Act seeking interim measures for protection, which was disposed of *vide* the Impugned Order dated 27th January, 2021, though not letting the monies under the bank guarantee go to BCCL but nevertheless letting bank guarantees be encashed and amounts thereof to be retained in this Court, subject to outcome of arbitration proceedings. Aggrieved by the same, the present appeal has been preferred by the Appellant.

CONTENTIONS OF THE PARTIES

9. Mr. Sandeep Sethi, learned Senior Counsel for the Appellant, made the following submissions:

- (i) At the outset, the learned Single Judge has erred in passing the Impugned Order, in as much as, the prayers sought in the Section 9 petition were for injunction against encashment of the bank guarantees and stay of operation of the effect of the letters of cancellation of the Contract. The said reliefs were not considered and instead the learned Single Judge directed the banks to encash the bank guarantees and deposit the amount in the Court. Emphasis was laid on the prayer clause to argue that direction to the bank to deposit the amount of the bank guarantees in the Court was sought as an alternate relief, in the event that the bank

² Being OMP(I)(COMM) 31/2021.

guarantees had been encashed prior to consideration of interim relief. However, the learned Single Judge, instead of restraining the banks, has directed the encashment of the bank guarantees.

- (ii) *Status quo* as existing prior to 21st January, 2021 should be restored and the amount encashed under the two bank guarantees be forthwith returned to the respective banks for issuance of fresh bank guarantees in favour of BCCL and then all the four bank guarantees can be directed to be kept alive till the outcome of the arbitration proceedings which are underway before the ICC, Paris.
- (iii) During the course of the arguments, having regard to the law on encashment to bank guarantees, we enquired from Mr. Sethi how the Appellant is entitled to a relief of injunction against encashment. Mr. Sethi responded by contending that the facts of the case clearly fall in the well-known exceptions recognized by the Courts for granting restraining orders in relation to bank guarantees. Elaborating on this contention, Mr. Sethi argued that encashment of the bank guarantees is fraudulent, and that BCCL was making an attempt to take advantage of its own defaults; that the notice inviting tender in 2010 was based on certain GRs, pursuant to which, the Appellant had undertaken an extensive examination and exploration, and then submitted the DPR to BCCL, which was accepted, and therefore the stand of BCCL that Appellant did not do any exploration work is untrue and untenable. BCCL thereafter did not complete the land acquisition and did not handover the Project land or take other steps to enable the Appellant to undertake the operations and perform its

obligations, which is its own failure to meet its obligations and were pre-conditions for the Appellant to perform its part.

- (iv) Thus, BCCL, having concluded that the present Contract is no longer viable, cannot take advantage of its own default, and then claim entitlement to cancellation of Contract and invoke the bank guarantees, as the same is a manifest fraud of such egregious nature that it vitiates the very foundation which underlay the Contract. He submits that this conduct of BCCL in seeking to terminate the Contract and invoking the bank guarantees is *ex-facie* fraudulent and the learned Single Judge had failed to take notice of the aforesaid facts. Several case laws have been cited in support of the above contentions.³
- (v) In 2019, BCCL obtained fresh GRs (which formed the basis of the NIT) and concluded that the terms agreed upon were unviable for executing this Contract. In such circumstances, having accepted that the GRs were incorrect, the entire NIT and the underlying Contract was rendered *void ab initio* in the eyes of the law.
- (vi) Elaborating further, Mr. Sethi submitted that if the fresh GRs in 2019 (submitted by BCCL's own investigation/survey agency which carried out the geological investigation work in 2010), are incorrect, the conduct of BCCL to cancel the Contract and invoke the bank guarantees is fraudulent. Mr Sethi further argued that on 27th January, 2021, when the learned Single Judge heard the matter, the bank guarantees had not been encashed, and therefore

³ *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, 1988 (1) SCC 174 and *U.P State Sugar Corporation v. M/s Sumac International Ltd.*, 1997 (1) SCC 568.

there was no justification for the learned Single Judge to have granted the relief under prayer (v) of the petition by directing the banks to encash the bank guarantees and deposit the encashed amount before the Registry of this Court. In these circumstances, the amount of the bank guarantees would get locked in till the outcome of the arbitration proceedings, which would cripple the financial cash flow of the Appellant that is crucially required to execute the ongoing Project. Several correspondence exchanged between the parties were relied upon, to support the aforesaid contentions.

10. Mr. Amit Sharma, learned counsel for BCCL, on the other hand, defended the order, contending the following:

- (i) There is no fraudulent encashment of the bank guarantees. Some of the bank guarantees in question were given as a security for the advance given towards mobilisation of the equipment. There is nothing on record to suggest that the Appellant had made any payment for the said equipment.
- (ii) The arbitration has since been invoked and the parties are before the ICC, Paris, and therefore, no interim orders are warranted from this court. He further submitted that the Project in question was awarded on a turnkey basis, in terms of the NIT, and within the scope of work.
- (iii) All the obligations and preparation of DPR was the responsibility of the Appellant including additional exploration. The DPR submitted by the Appellant was not found to be viable. It had adverse effect on the economics of the Project rendering the Internal Rate Return (IRR) of

the total investment in the Project unfavourable to the economic exploitation of the seams as suggested in the DPR and accordingly, it was suggested that a comprehensive DPR be prepared.

- (iv) Coal is a natural resource and cannot be allowed to be wasted.
- (v) Appellant was in breach of the terms and conditions of the Contract by not discharging its obligations and failing to take remedial steps.

ANALYSIS AND FINDING

11. We have given our due consideration to the contentions of both the counsels. The bank guarantees are unconditional in nature. In terms thereof, the bank has undertaken to pay to the beneficiary immediately on demand all monies payable by the contractor to the extent of the amounts specified therein, without any demur, reservation, recourse, contest or protest and/or without any reference to the appellant contractor. It has further been stipulated that any such demand made by BCCL on the bank shall be conclusive and binding, notwithstanding any difference between the employer and the contractor or any dispute before any Court, Tribunal, Arbitrator or any other authority. Thus, the terms and conditions stipulated therein give an absolute right to BCCL to encash the bank guarantees in accordance with the terms captured above.

12. The contentions urged by Mr. Sethi, to our mind do not bring out a case of egregious fraud that has been recognised by the Court to be a ground for to stay the invocation of the bank guarantees. The law relating to invocation of such bank guarantees is by now well settled. There are

numerous judgments of the Apex Court and as well as of this Court on this issue, and we need not burden this judgment by extracting the views expressed in the said decisions.⁴

13. For the present appeal it would suffice to note that the Courts have acknowledged fraud as one of the exceptions for grant of injunction in respect of bank guarantees. That fraud has to be of a very high degree, one which would vitiate the very foundation of the bank guarantee. The Courts have explained the concept of fraud to be of '*an egregious nature as to vitiate the underlying transaction*'. However, the entire appeal is abysmally silent on this aspect. The allegations of fraud, as levelled, are founded on a different premise. Appellant's contention is that BCCL orchestrated grounds for termination and cancellation and that amounts to egregious fraud vitiating the very foundation of the Contract. In our view, the Appellant's contention is vague and does not meet the requirement of law on the concept of fraud as a ground for restraining encashment of bank guarantees, as laid down in a plethora of judgments on the subject. The case laws cited by the Appellant in support of its contentions, we are afraid, do not lend any support to the Appellant's case, and on the contrary, are entirely against the case set-up before us.

14. Further, we are of the view that the other reliefs as sought in the present appeal, to the effect that the Court should hold and declare the cancellation of the Contract to be *void ab initio*, cannot be granted while

⁴ *Umaxe Projects Private Limited v. Air Force Naval Housing Board*, 265 (2019) DLT 599, *Atul Gupta and Ors. v. S. Chand and Company Limited and Ors.*, 2019 (175) DRJ 694

entertaining a petition under Section 9 of the Act. The parties are already before the Arbitral Tribunal and in case BCCL has wrongly breached its obligations under the Contract, the remedy shall lie before the Arbitral Tribunal.

15. In so far as the encashment of the bank guarantees is concerned, the facts leading to the invocation only demonstrates a contractual dispute between the parties where allegations and counter-allegations are being levelled against each other for such breaches. Even if we assume Mr. Sethi's contentions to be the correct factual position, and even if we were to form a *prima facie* opinion that BCCL was at fault for failing to fulfil its obligations under the Contract, yet, we cannot conclude that the encashment of the bank guarantees is fraudulent. The existence of disputes between the parties to the Contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees. In the course of commercial dealings, the Appellant has issued an unconditional bank guarantee, the beneficiary is therefore entitled to realize such a bank guarantee in terms thereof, irrespective of any pending disputes. The fraud, which has been recognised by the Courts to be an exception, is a fraud of egregious nature, underlying the Contract, as discussed above.

16. In view of the foregoing, we find no ground to interfere with the finding of the learned Single Judge. Having said that, we would like to observe that we do find merit in the contention of Mr. Sethi that, as the bank guarantees had not been encashed at the point when the matter was heard, the learned Single Judge should not have granted the alternate prayer and

directed the banks to encash the same. In fact the Impugned Order does not record any reason for declining the main relief of injunction, and thus, to this extent the learned Single Judge fell in error. It is for this precise reason that we have given our anxious consideration to the Appellant's contentions to examine if indeed there is a case for the grant restraining orders. However, on consideration of the entire factual narrative and the grounds urged, we are unable to find any ground compelling enough to order restitution. Even otherwise, we may only note that the amount of the bank guarantees in question has been ordered to be deposited before this Court and the same is subject to the outcome of the arbitration proceedings. BCCL has not assailed the Impugned Order. Thus, although the Appellant is prejudiced by the encashment, but the amount is still secured. In the event the Appellant succeeds in the arbitration proceedings, the necessary orders pertaining to the amount of the bank guarantees will necessarily follow.

17. Accordingly, the present appeal is dismissed in the afore-noted terms. Pending applications, stand disposed of.

SANJEEV NARULA, J

RAJIV SAHAI ENDLAW, J

MARCH 26, 2021

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