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

% **Reserved on: 21st May, 2021**

Pronounced on: 31st May, 2021

\+ **W.P. (C) 5408/2021**

INDRAJIT POWER PRIVATE LIMITED .....Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Arvind Kumar Gupta, Ms. Purti Gupta, Ms. Henna George and Ms. Shruti Munjal, Advocates

Versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Rakesh Kumar and Mr. Syed Husain Adil Taqvi, Advocates for R-1 to R-4/UOI.
Mr.Brijesh Kumar Tamber and Ms. Deepika Raghav, Advocates for R-5

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

W.P. (C) 5408/2021, CM APPL.16734/2021 (by the petitioner u/S 151 CPC for ad-interim directions)

1. The petitioner/Indrajit Power Private Limited ("IPPL", for short) is an incorporated company formed to generate thermal and green power, and has a 80MW coal based thermal plant at Wardha, Maharashtra. It has

filed the present petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari quashing the Appropriation Notice dated 17th May, 2021 issued by the respondent No.1 and the invocation of Bank Guarantee ("BG", for short) for an amount of Rs.4,92,24,960/- against it.

FACTUAL MATRIX

2. IPPL had registered itself with the MSTC Portal for bidding for coal mines in the manner laid down by the Coal Mines (Special) Provisions Ordinance, for allocation of coal mines. IPPL submitted its tender documents and on 13th March, 2015 was declared the successful bidder for Nerad Malegaon Coal Mine. IPPL and the respondent No.1/UOI entered into a Coal Mine Development and Production Agreement ("CMDPA", for short) on 16th March, 2015. On 30th March, 2015, the Ordinance was replaced by the Coal Mine (Special Provisions) Act, 2015.

3. Under Clause 6 of the CMDPA, IPPL was obligated to furnish a Performance Security. This Clause 6 also provided for appropriation. IPPL deposited with the respondents, a BG dated 13th April, 2015 for a sum of Rs.30,76,56,000/-. IPPL received the Vesting Order for vesting the Nerad Malegaon Coal Mine in its name and also received the approved mining plan, both dated 22nd April, 2015. An amendment was carried out in the CMDPA on 6th May, 2015 elaborating 'Efficiency Parameters' and giving 'weightage percentages' to the achievement of each milestone. A second amendment to the CMDPA was carried out on 26th December, 2016.

4. Anticipating delay in opening the Coal Mine vested in it, IPPL made a representation before the Nominated Authority through letter dated 21st June, 2018 and sought extension by a year for opening the mine. According to IPPL, instead of acceding to the said request, the respondent No.1/UOI issued a Show-Cause Notice dated 24th July, 2018 for non-compliance with the Efficiency Parameters of 17% as well as for delay in commencement of production in terms of the CMDPA. A reply dated 2nd August, 2018 was submitted explaining that delay was on account of non-survey of the lands to be acquired and pointing out that the power-plant was functioning at a huge financial burden on IPPL. The Nominated Authority wrote to IPPL on 18th March, 2019 requiring it to renew the BG as it was to expire on 12th April, 2019. Accordingly, the BG for a sum of Rs.30,76,56,000/- was renewed for a year upto 12th April, 2020.

5. Another request for extension of the period of validity was submitted by IPPL to the Nominated Authority. Once again, the request was not considered and a second Show-Cause Notice was issued to IPPL, which was dated 26th July, 2019, for non-compliance with the 'Efficiency Parameters' of 17% and delay in commencement of production in terms of the CMDPA. Further, the Nominated Authority, instead of extending support to IPPL, chose to refer the matter to the Scrutiny Committee, before whom too, IPPL set out their difficulties and sought assistance to overcome the difficulties being faced by IPPL.

6. The respondent No.1/UOI directed the respondent No.5/Indian Bank vide e-mail dated 4th April, 2020 to appropriate the BG to an amount equal to 17%. W.P.(C) No. 2957/2020 was filed which was

dismissed vide order dated 28th April, 2020 and LPA No.145/2020 was preferred in which, according to IPPL, the Division Bench of this court restrained the Ministry of Coal from invoking the BG for a sum of Rs.5,23,01,520/-. The said appeal is still pending. On the directions of the Court issued in LPA No.145/2020, the BG was split into two, one for 17% and the other for 83%. This order has been complied with and a BG of Rs.25,53,54,480/- was furnished on 18th December, 2020.

7. Another Show-Cause Notice dated 19th November, 2020 was issued to IPPL which was replied to by IPPL on 7th December, 2020, clearly submitting that no action was warranted against it under Clause 10.1 of the CMDPA. The Scrutiny Committee, to which the matter had been referred to by the Nominated Authority, also did not consider the submissions made by IPPL before it during the meetings held on 9th and 10th March, 2021, and passed the impugned order mechanically.

PRAYERS

8. It is pleaded in the petition that the Scrutiny Committee had ignored the vital submissions of IPPL, particularly that IPPL had not been able to acquire land due to Civil Commotion and the pandemic of Covid-19, which situations were covered as '*Force Majeure*' events under Clause 23.1(ii) and (iii) of the CMDPA. IPPL also claimed that other companies had been given differential treatment and the penalty imposed on it was unjust and unfair. Therefore, the following prayers were made:

> *"A. Issue a writ of certiorari for quashing the Appropriation Notice dated 17.05.2021 issued by the Ministry of Coal to the Petitioner Company;*

B. Issue a writ of mandamus and restrain the Respondents No.1 to 4 from invoking, encashing and appropriating the Bank Guarantee dated 18.12.2020 for an amount of Rs. 4,92,24,960/- in terms of Appropriation Notice dated 17.05.2021;

C. Issue a writ of mandamus for direction to the Respondent No.1 to grant extension of time to complete the pending milestones to make the mine operational at Nerad Malegaon Coal Mine, Maharashtra;

D. Restrain the Respondent Nos. 1 to 4 from taking any coercive action against the Petitioner;

E. Restrain the Respondent Nos. 1 to 4 from cancelling the mine allocation."

ARGUMENTS

9. Sh. Sandeep Sethi, learned Senior Counsel appearing on behalf of IPPL, contended that this Court should restrain the respondents from encashing the BG on the basis of the Appropriation Notice as IPPL was entitled to protection on grounds of special equities. He submitted that a perusal of the impugned Appropriation Notice would reveal that none of the submissions of IPPL have been duly considered or dealt with by the respondents. It merely reproduces the Recommendations of the Scrutiny Committee to direct appropriation of a sum of Rs.4,92,24,960/-. Neither any notice was given to IPPL to respond nor was a personal hearing given. Thus, there was a clear violation of the principles of natural justice. Reliance has been placed on ***Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors***. ILR (2010) 5 Del 38.

10. Learned Senior Counsel for IPPL argued that the Appropriation Notice was also against the terms of the agreement between the parties and thus against equity. Attention was drawn to Clause 23 of the CMDPA to contend that the timelines for achieving milestones in performance was to have been extended when there was a pandemic and civil commotion. Learned Senior Counsel submitted that IPPL was unable to acquire land for mining, as a small group of land-owners were creating civil disturbance to prevent sale by interested land holders. IPPL had sought the assistance of the respondents to resolve the local land-holder issues and ease the acquisition of land. Since they did not extend a helping hand, the delay was attributable to Government Agencies and IPPL could not be subjected to any penalty.

11. Finally, it was argued by learned Senior Counsel that the Division Bench of this court had already stayed an earlier Appropriation Notice vide orders dated 30th April, 2020 and 24th June, 2020 and despite that the second Appropriation was directed vide the Notice dated 17th May, 2021. This was like overreaching the court.

12. Relying on the judgement of the Supreme Court in ***Mohinder Singh Gill and Another vs. The Chief Election Commissioner, New Delhi and Others*** (1978) 1 SCC 405, Sh. Sethi contended that the respondents could not seek to explain the Appropriation Notice by reading the Scrutiny Committee recommendations. In any event, those recommendations themselves reveal the discrimination against IPPL as other companies who have not achieved milestones of production on account of delay in acquisition of land have not been subjected to any penalty.

13. It was urged that this was a fit case to restrain invocation of the BG, as granted in ***M/s Tata Sponge Iron Pvt. Vs. Union of India & Ors*** W.P.(C) 261/2016 vide judgement dated 27th May, 2020 as such invocation would cause great financial distress to IPPL as its captive Power Company was already facing insolvency proceedings.

14. Learned counsel for the respondents No.1 to 4, Sh. Rakesh Kumar appearing on advance notice submitted that the law in respect of invocation of BGs was now well-settled and the agreement between the banks and the respondents was a contract that was independent of the contract between the parties and the Bank, i.e. the respondent No.5, was bound to honour its obligations once the respondents No. 1 to 4 invoked the BG. The only recognised exceptions where a court would interfere have also been clearly delineated by various judgements, including ***Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. and Another*** (2007) 6 SCC 470 and ***Standard Chartered Bank vs. Heavy Engineering Corporation Limited and Another*** (2020) 13 SCC 574. It is only when there is a fraud in furnishing of the BG or there were special equities that the Courts would interfere with the encashment of the BGs. According to the learned counsel for the respondents No.1 to 4, neither situation existed in the present case.

15. In respect of the Appropriation Notice dated 17th May, 2021, the learned counsel for the respondents No.1 to 4 submitted that the period under reference was of 2018-19 and 2019-20 when there was no pandemic. There has also been not a shred of evidence to show that there was any civil commotion. Therefore, IPPL can claim no benefit under Clause 23.1 (ii) & (iii) to explain away the non-adherence to the agreed

Efficiency Parameters and achievement of production milestones. It was submitted that the responsibility was of IPPL to acquire the land and the Government had no role in such acquisition. The Scrutiny Committee's recommendations show that in other cases, the Government had to either grant clearances or had to initiate some action and it was on account of the delay on the part of the State machinery for grant of clearances, etc., that penalty was not imposed on other companies where there was some delay in acquisition and achievement of milestones. In the present matter, according to the learned counsel for the respondents No.1 to 4, such a situation does not exist and it was the whole and sole responsibility of IPPL to acquire the land through direct negotiations with the land owners.

16. The learned counsel for the respondents No.1 to 4 also submitted that the reply of IPPL was duly considered and referred to in the Minutes of the Scrutiny Committee at Page 323 of the e-paperbook (Annexure P-9) to point out that all contentions had been duly considered before the recommendations for appropriation of Rs.4,92,24,960/- was made. Thus, there was no violation of principles of natural justice.

17. It was further submitted while relying on Clause 6 of the CMDPA that action had been taken strictly in terms of the agreement between the parties. The learned counsel for the respondents No.1 to 4 submitted that the Performance Security was required to be submitted in terms of Clause 6.2 and the same provisions governed appropriation as and when an Appropriation Event occurred. Under Clause 6.2.1(d), failure to comply with the Efficiency Parameters, as specified in Clause 10, was an Appropriation Event. As provided under Clause 6.3.1, the 'Written Notice' had been issued to IPPL. Under the table provided in Clause

6.3.1- Item No.4, when a successful bidder, like IPPL herein, failed to comply with the Efficiency Parameters, as required under Clause 10, such percentage of Performance Security for each failure to comply with the Efficiency Parameters was liable to be appropriated. The Schedule originally provided under Clause 10.3 was subsequently amended on 6th May, 2015 and 26th December, 2016 and as provided under in the Schedule, for failure to comply with the Efficiency Parameters, 8% of the Performance Security for the year 2018-19 and 8% for 2019-2020 have been claimed. Thus, there was no unlawful invocation of the BG to the extent of Rs.4,92,24,960/-. Hence, it was submitted that the petition was liable to be dismissed.

18. Learned counsel for the respondent No.5/Bank, Ms. Deepika Raghav submitted no relief has been claimed against it and that on receipt of the hard copy of the letter, the Bank would be releasing the amount to the respondents No.1 to 4.

DISCUSSION

19. That an agreement between the bank and the beneficiary in respect of a BG is independent of the contract between the beneficiary and the entity that furnishes the BG and the two are separate and distinct agreements, is no longer *res integra*. In ***Standard Chartered Bank (supra)***, the Supreme Court has observed as under:

> *"**20.** A bank guarantee constitutes an independent contract. In Hindustan Construction Co. Ltd. v. State of Bihar [Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436], a two-Judge Bench of this Court*

formulated the condition upon which the invocation of the bank guarantee depends in the following terms: (SCC p. 442, para 9)

"9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

20. In the instant case, there is no dispute that the BG is unequivocal, unconditional and assures payment without demur and objection irrespective of any dispute that may be between the beneficiary and the person on whose behalf the guarantee was furnished.

21. In ***Hindustan Construction Company Limited vs. National Hydro Electric Power Corporation Ltd***. 2020 SCC OnLine Del 1214, the Division Bench of this court had occasion to consider the law relating to injunction restraining invocation and encashment of unconditional BGs. It was observed as under:

*"**9.** The law relating to grant of injunctions to restrain the invocation/encashment of unconditional BGs is well settled. BGs are distinct agreements between the banks*

and its customers and are independent of the main contract between the customer and the beneficiary and therefore, disputes between the latter two will have no bearing on the obligation of the bank giving such a guarantee to honour its invocation by the beneficiary in terms of the bank guarantee, more so when it is unconditional. The courts are slow to restrain the realization of a BG, but have, however, carved out two exceptions to the rule, one being fraud and the other being special equities in the form of irretrievable harm or injustice being caused if encashment is allowed. [SEE : UP State Sugar Corporation v. Sumac International Ltd. (1997) 1 SCC 568; Standard Chartered Bank v. Heavy Engineering Corporation Ltd. 2019 SCC OnLine SC 1638].

10. *Fraud, calling for the intervention of the court, has to be of an egregious nature. There must be fraud established and mere allegations will not suffice. Fraud in connection with a BG should vitiate its very foundation. It is when the beneficiary seeks to benefit thereby, that the courts will restrain encashment. Fraud must be that of the beneficiary and none else. Injunction can be granted also where the bank itself is proved to have knowledge that the demand for payment of the BG is fraudulent. [SEE: U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Svenska Handelsbanken v. Indian Charge Chrome (1994) 1 SCC 502].”*

22. Fraud has not even been pleaded in the present case as emphasis has been given to the existence of special equity on the basis of which a restraint on the respondents from appropriating the BG has been sought.

Before we proceed to determine whether special equities as claimed exist in the present case, the law in this regard may be considered. In ***Hindustan Construction (Supra),*** it was further discussed as below:

> *"**21.** The law relating to encashment of BGs under the second exception has attained wider dimensions over a period of time. The courts were initially very circumspect and required existence of fraud before it prevented encashment of unconditional BGs. Then it looked into the question of who was in breach of the contract to determine the relief to be granted under special equities. Through various judicial pronouncements the scope of what constitutes special equities was expanded to include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself. In the absence of any straight-jacket formula, the courts are required to examine each case to find out whether it falls within these heads.*
>
> *22 xxx*
>
> *23. xxx*
>
> ***24.** Applying these principles to the facts of that case, the Supreme Court concluded that no injunction could be granted as fraud or the exceptional circumstances which would make it impossible to reimburse the guarantor were not made out as only an apprehension was expressed. We may add that this decision has been followed by the Supreme Court recently in Standard Chartered Bank (supra)."*

23. In ***Standard Chartered Bank (Supra)*** it has been held as under:

*"**22.** Taking note of the exposition of law on the subject in Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , a two-Judge Bench of this Court in Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd. [Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd., (2016) 10 SCC 46 : (2017) 1 SCC (Civ) 458] has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under: (Himadri Chemicals Industries Ltd. case [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110], SCC pp. 117-18, para 14)*

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

***23.** The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee."*

24. The first circumstance claimed under the head of 'special equity' is

the pandemic. But, as rightly pointed out by the learned counsel for the respondents, the Appropriation Notice of 17th May, 2021 relates to the period 2018-19 and 2019-20 as there was zero production against the expected production of 0.017 and 0.15 respectively. At that time, there was no pandemic. Judicial notice can also be taken of the fact that the complete lockdown lasted for at most, for a couple of months (i.e. for 68 days) and therefore, the pandemic and lockdown, post the relevant period under consideration for the appropriation will have no impact on the validity of the Appropriation Notice. The existence of the pandemic does not create any special equities in favour of IPPL.

25. The claim has also been that IPPL has been subjected to differential treatment. The Minutes of the Scrutiny Committee placed on the record by IPPL as Annexure-9, does refer to other companies, as pointed out by the learned Senior Counsel for IPPL, including cases where acquisition has not been completed and production commenced, and in which cases, there was no penalty imposed. However, it is clear from these Minutes that penalty has not been imposed on such companies where clearances, like the environment clearance, forest clearance and mining lease, had not been granted by the respective State Governments. On the other hand, in the present case, IPPL admits that all clearances have been given to it, including the vesting of the mines. All that remained was the acquisition of land to commence production. This was clearly the obligation of IPPL and not of the Government. Therefore, if some latitude has been shown in cases where companies have not been able to move forward with the mining lease on account of governmental clearances, the same cannot be extended to IPPL. Special equities are not

made out on this ground also.

26. The case relied upon by the learned Senior Counsel for IPPL, ***M/s. Tata Sponge (supra)*** is distinguishable precisely on this ground. In that case, the company had not been able to obtain the mining plans due to the delay caused by Central Mine Planning and Design Institute Limited, a subsidiary of the Coal India Limited and was not on account of some failure on the part of M/s. Tata Sponge Iron Pvt. Ltd. In the present case, the delay was on account of the non-acquisition of land by IPPL itself. There is no parity in these two cases.

27. As regards the argument that the Appropriation Notice could have been issued by the Nominated Authority only after granting hearing to IPPL, suffice it to note that the Nominated Authority had issued a Show-Cause Notice dated 19th November, 2020 and IPPL had submitted a detailed reply thereto on 7th December, 2020. A personal hearing was also granted following which the Nominated Authority had referred the matter to the Scrutiny Committee, which also had granted hearing to IPPL before recommending action of imposition of penalty on IPPL. At no stage, does it appear, therefore, that there has been any violation of the principles of natural justice. No special equities on this ground also are made out.

28. The argument that since the Division Bench of this court was seized of a previous proceedings between the parties in reference to another Appropriation Notice, permission of that court had to be taken by the respondents before issuing the Appropriation Notice dated 17th May, 2021, appears to be merely rhetorical and nothing more is required to be said.

29. In any case, the original BG for Rs.30,76,56,000/- had been split into two BGs, one for Rs.5,23,01,520/- relating to the previous Appropriation Notice against which the matter is pending before the Division Bench of this Court in LPA No. 145/2020 and the other BG for Rs.25,53,54,480/-. It is out of that latter amount that the fresh appropriation is being sought and the two BGs for the distinct amounts having been provided by IPPL, the present invocation is not subject to the outcome of the other case.

30. Mere financial burden is insufficient to disclose equities in favour of IPPL. Rather, this very case set up by IPPL would justify the invocation of the BG to the extent of the Appropriation Notice dated 17th May, 2021 for a sum of Rs.4,92,24,960/-.

31. There is no merit in the present petition, which is accordingly dismissed along with the pending application.

32. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

MAY 31, 2021
s/ak/ck