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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 13.04.2020

Pronounced on: 28.04.2020

+ W.P.(C) 2957/2020 & CM Nos.10268-70/2020 (URGENT)

INDRAJIT POWER PRIVATE LIMITED Petitioner

Represented by: Mr. Sandeep Sethi, Sr. Adv.
with Ms.Purti Marwaha, Adv.

versus

UNION OF INDIA & ORS. Respondents

Represented by: Ms.Maninder Acharya, ASG
with Mr.Jasmeet Singh, CGSC
for R-1 to 4.

**CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

J U D G M E N T

Crl. M.A.10268-69/2020

1. Allowed, subject to all just exceptions.
2. Applications are disposed of.

W.P.(C) No.2957/2020 & Crl.M.A.10270/2020

3. The instant writ petition under Article 226/227 of the Constitution of India has been filed praying for issuance of a writ of Certiorari for quashing the email dated 04.04.2020 received by the petitioner company on

06.04.2020 whereby the respondent no.1 has passed a decision to appropriate the Bank Guarantee No. 0018215IPG000019 dated 13.04.2015. Consequently, a writ of Mandamus for direction to the respondent no.1 to refrain from appropriating the Bank Guarantee dated 13.04.2015. Further, a writ of Mandamus directing the respondent no.5 to renew the Bank Guarantee dated 13.04.2015 which is due to expire on 12.04.2020 and a writ of Mandamus for direction to the respondent no.1 to grant extension to time to complete the pending 17% milestones to make the mine operational at Nerad Malegaon Coal Mine, Maharashtra.

4. Hearing of the present petition has been conducted through video conferencing.

5. Notice issued and accepted by the respective counsel of the respondents. With the consent of counsel for the parties, the present petition is being taken up for final disposal.

6. Petitioner is a company incorporated on 20.09.1994 which was formed to generate thermal and green power. At present, petitioner has a 80 MW coal based thermal power plant based at Wardha, Maharashtra.

7. Respondent no.1 is the Union of India. The respondent no.2 is the nominated authority, Ministry of Coal, represented through Secretary, that

regulates and deals with availability of coal to meet the demand of various sectors of the economy in an eco-friendly, sustainable and cost effective manner. Respondent no.1 also regulates the Coal Mines in the territory of India. The respondent no.3 is the Scrutiny Committee set up by the Ministry of Coal. The respondent no.4 is the office of the Coal Controller i.e. subordinate office of the respondent no.1. The respondent no.5 is Allahabad Bank which issued the Bank Guarantee on behalf of the petitioner company.

8. On 21.10.2014, respondent no.1 introduced the Coal Mines (Special) Provisions Ordinance, which provided for allocation of Coal Mines and vesting right, title and interest in and over the land mine infrastructure together with mining leases to successful bidders and allottees with a view of ensure continuity in coal mining operations and production of coal, and for promoting optimum utilisation of coal resources consistent with the requirement of the country in national interest and for matters connected therewith or incidental thereto. It was vide this Ordinance, permission for commercial mining had been permitted in India and therefore, the bids were to be invited for re allotment of the mines, after the cancellation of coal blocks by the Hon'ble Supreme Court of India vide its judgment dated

25.08.2014 in *Manohar Lal Sharma vs. Principal Secretary: (2014) 9 SCC 516*.

9. On 02.03.2015, the petitioner became the technically qualified bidder, alongwith 4 other bidders, and on 13.03.2015, the petitioner was declared as a successful bidder of the electronic auction conducted by the respondent no. 1 for Nerad Malegaon Coal Mine. Thereafter, a Coal Mine Development and Production Agreement (“*CMDPA*”) dated 16.03.2015 was entered into by the petitioner and respondent no.1.

10. On 03.03.2015, the Coal Mine (Special Provisions) Act, 2015 was notified. The *CMDPA*, laid down the post vesting obligations under Clause 5, which is being reproduced as under:-

“5. POST VESTING OBLIGATIONS

5.1 Commencement Plan

5.1.1 Within 30 Business days of the date of the Vesting Order, the Successful Bidder shall be required to submit a detailed plan (the “Commencement Plan”) towards commencement of mining operations of the Coal Mine. The Commencement Plan shall include all actions that the Successful Bidder may be required to perform to commence mining operations at the Coal Mine and shall include such information as may be required by the Nominated Authority, including without limitation, information regarding the following:

(a) *The Government Approvals, including Mining Lease which shall be required for commencement of mining operations at the Coal Mine and the time within which the Successful Bidder would make applications for such Governmental Approvals; and*

(b) *Revision to the Mine Plan, if any, as may be proposed by the Successful Bidder.*

5.1.2 The Commencement Plan shall be prepared by the Successful Bidder to ensure strict compliance with the Efficiency Parameters. (page 15)

5.2 Payment of the Upfront Amount

5.2.1 First Instalment of fifty per cent

The first instalment of fifty per cent of the Upfront Amount being an amount equal to INR 2,19,26,204 (Indian Rupees Two Crores Nineteen Lakh Twenty Six Thousand Two Hundred and Four), shall be deposited by the Successful Bidder in the Designated Bank Account in the manner provided in Clause 3.1(b) as a Vesting Condition.

5.2.2. Second Instalment of Twenty Five Per cent

The second instalment of twenty five per cent of the Upfront Amount being an amount equal to INR 1,09,63,102 (Indian Rupees One Crore Nine Lakh Sixty Three Thousand One Hundred and Two), shall be deposited by the Successful Bidder in the Designated Bank Account, on or prior to expiry of 15 Business Days from the date of execution of the Mining Lease by the relevant State Government.

5.2.3 Third Instalment of Twenty Five Per Cent

The third instalment of twenty five per cent of the Upfront Amount being an amount equal to INR 1,09,63,102 (Indian Rupees One Crore Nine Lakh Sixty Three Thousand One Hundred and Two), shall be deposited by the Successful Bidder in the Designated Bank Account, on

or prior to expiry of 15 Business Days from the date of grant of mine opening permission from the state pollution control board of the relevant State where the Coal Mine is located.

5.2.4 Failure to pay the Upfront Amount

In the event the Successful Bidder fails to pay the second instalment or the third instalment of the upfront Amount within the time specified in Clause 5.02.2 or Clause 5.2.3, respectively, then the Nominated Authority shall be entitled to appropriate the Performance Security in the manner stipulated in Clause 6 (PERFORMANCE SECURITY) and such failure may also result in termination of this Agreement as provided in Clause 24 (EFFECTIVE DATE, TERM AND TERMINATION) .

5.3 The Mining Lease

5.3.1 Pursuant to Section 8(4)(b) read with Section 8(8) of the Ordinance, the Successful Bidder shall become entitled to the mining lease with respect to the Coal Mine (the "Mining Lease") to be granted by the State Government upon issuance of the Vesting Order.

5.3.2 the Successful Bidder shall promptly upon issuance of the Vesting Order make an application to the State Government for grant of a Mining Lease in the name of the Successful Bidder."

11. The CMDPA, laid down the details of the petitioners obligation to submit a Performance Security under Clause 6, which is being reproduced as under:-

"6. PERFORMANCE SECURITY AND APPROPRIATION

6.1. Performance Security

6.1.1. The Successful Bidder shall provide an irrevocable and unconditional revolving guarantee from an Acceptable Bank payable at Delhi for an amount equal to INR 30,76,56,000 (Indian Rupees Thirty Crores Seventy

Six Lakh and Fifty Six Thousand) (the “Performance Security”) in substantially the same form as provided in SCHEDULE F for the performance of its obligations within such time as specified in Clause 3.2.2.

6.1.2. The Performance Security shall be an amount which is equal to aggregate of (a) one year royalty, to the computed on the basis of peak rated capacity of the Coal Mine as per the approved Mine Plan payable to the relevant State Government with respect to the Coal Mine; and (b) the annual approved Mine Plan multiplied by the Final Price Offer.

6.1.3. In case of any revision in the Mine Plan in accordance with Clause 14, the amount of Performance Security shall be revised accordingly.

6.1.4. In such case, bank guarantee constituting the Performance Security shall be substituted with another bank guarantee of the enhanced value issued in accordance with this Clause 6, within a period of 15 Business Days of receipt of approval for revision to the Mine Plan.”

12. Accordingly, the petitioner deposited with the respondents a bank guarantee dated 13.04.2015 for an amount of Rs.30,76,56,000/- (Rupees Thirty Crores Seventy Six Lacs Fifty Six Thousand Only) made in favour of The President of India, acting through the Central Government represented by the Nominated Authority, under the Schedule F of the Coal Mine Development and Production Agreement for Nerad Malegaon Coal Mine. On 14.04.02015, the petitioner also paid the first upfront instalment to the respondent no.1, and the petitioner received the Vesting order dated 22.04.2015 in its name with regards to Nerad Malegaon Coal Mine and in

view thereof, the petitioner received the approved mining plan dated 22.04.2015 no.104/25/2015/NA.

13. The CMDPA, further laid down the details of the events and the manner in which the petitioners Performance Security would be appropriated by the respondents under Clause 6.2 and 6.3, which are being reproduced as under:-

“6.2. Events for appropriation of the Performance Security

6.2.1 The Performance Security may be appropriated by the Nominated Authority upon occurrence of any of the following events (the “Appropriation Event”), to be determined by the Nominated Authority in its sole discretion:

(a) Failure of the Successful Bidder to provide the duly acknowledged duplicate copy of the Vesting Order as required under Clause 4.6;

(b) Failure of the Successful Bidder to make payment of the first instalment second instalment or the third instalment of the Upfront Amount within the time specified in Clause 3.1(b), Clause 5.2.2 or Clause 5.2.3, respectively;

(c) Failure of submission of Commencement Plan within the time specified in Clause 5.1.1.

(d) Failure of the Successful Bidder to comply with the Efficiency Parameters as required under Clause 10;

(e) Any change in Control or transfer of right, title or interest in the Coal Mine which is not in conformity with Clause 13;

(f) Failure to make payment of the Monthly Payment in accordance with this Agreement;

(g) Any utilization of coal which is not in conformity with Clause 8; or

(h) Any other breach or non-compliance of any of the provisions of this Agreement including in case of the Warranties being untrue or misleading or incorrect in any manner whatsoever.

6.2.2 Provided however that in the event an Appropriation Event has occurred solely on account of an Event of Force Majeure which could not have been mitigated by the Successful Bidder through Good Industry Practice as provided in Clause 23, then the Performance Security shall not be appropriated for such specific Appropriation Event.

6.3. Manner of appropriation of the Performance Security

6.3.1. Upon occurrence of an Appropriation Event, to be determined by the Nominated Authority, the Nominated Authority shall have the unconditional right to appropriate the Performance Security by providing a written notice to the Successful Bidder in the following proportion:

<i>#</i>	<i>Appropriation Event</i>	<i>Amount</i>
<i>1.</i>	<i>Failure of the Successful Bidder to provide the duly acknowledged duplicate copy of</i>	<i>Entire Performance Security</i>

	the Vesting order as required under clause 4.6	
2.	Failure of the Successful bidder to make payment of the first instalment second instalment or the third instalment of the Upfront Amount within the time specified in Clause 3.1(b), clause 5.2.2 or Clause 5.2.3, respectively.	An amount equal to the first instalment, and/or second instalment and/or third instalment of the Upfront Amount together with 12% per annum simple interest on such amount starting from the date on which such amount was due and until the date of appropriation of the Performance Security.
3.	Failure of submission of Commencement Plan within the time specified in Clause 5.1.1	An amount equal to 10% of the Performance Security
4.	Failure of the Successful Bidder to comply with the Efficiency Parameters as required under Clause 10;	Such percent of the Performance Security for each failure to comply with the Efficiency Parameters as specified in SCHEDULE E.
5.	Any change in Control or transfer of right, title or interest in the Coal Mine which is not in conformity with Clause 13	Entire Performance Security
6.	Any utilization of coal which is not in conformity with clauses	Entire Performance Security.
7.	Failure of the Successful Bidder to make payment of the Monthly Payment	The amount of Monthly Payment due and payable, along with a simple interest of twelve per cent per annum starting from the date on which such amount was due

		and until the date of appropriation of the Performance Security.
8.	Any other breach or non-compliance of the provisions of this Agreement including in case of the Warranties being untrue or misleading or incorrect in any manner whatsoever	Such proportion as may be determined by the Nominated Authority in its sole discretion.

6.3.2. Any Appropriation Event resulting in appropriation of the entire Performance Security shall be o Termination Event for the purposes of Clause 24 (EFFECTIVE DATE, TERM AND TERMINATION).

6.3.3. In the event of a port appropriation of the Performance Security, the Successful Bidder shall be required to: (i) rectify the Appropriation Event; and, (ii) top-up the bank guarantee constituting the Performance Security within fifteen, Business Days of receipt of a notice under Clause 6.3.1, failure to do so shall be a Termination Event for the purposes Clause 24 (EFFECTIVE DATE, TERM AND TERMINATION). Appropriation Event except as mentioned in 6.2.1 (d) shall be rectified within seven Business Days of receipt of a notice under Clause 6.3.1. Appropriation Event mentioned in Clause 6.2.1 (d) shall be rectified within the time specified in SCHEDULE E."

14. Subsequently on 24.04.2015, the Petitioner submitted an application to the MPCM, regarding the transfer of consent to establish and on 02.05.2015 an application to the MoEF and CC for transfer of

Environmental clearance to the Petitioner. However, an amendment was carried out in the CMDPA on 06.05.2015 and in the said amendment Efficiency Parameters were further elaborated and weightage percentages were given to each Milestone:

a) The percentage for appropriation of performance security shall be calculated in proportion to the failure/delay in compliance with the timeline mentioned for achievement of efficiency parameters which shall be broadly based on abovementioned weightages.

b) In Case of Non Compliances with the efficiency parameters mentioned above the successful bidder shall be required to rectify the same within such time as may be prescribed by the competent authority after examination on a case to case basis.

15. Thereafter, the Petitioner submitted the Mining Lease in Form-I before the Director of Geology and Mines (DGM) Maharashtra on 16.05.2015 and immediately thereafter, on 16.05.2015, the Petitioner submitted the Mining Lease Application.

16. Since the State of Maharashtra is governed by the Mumbai Tenancy and Agriculture Land Act (Vidharbha) 1958, the petitioner submitted an application dated 02.06.2015 to Development Commissioner (Industries), Government of Maharashtra, Mumbai regarding purchase of Land i.e.

Bombay Tenancy and Agriculture Land, the petitioner was thereafter granted the Environment Clearance Transfer completed vide letter no. J-11015/292/2008-1A-II (M) on 06.07.2015. The Petitioner was successfully granted the Mining Lease order, vide order MMN-0615/C.R. S9/IND-9 from Industries, Energy and Labour Department of Government of Maharashtra.

17. Accordingly, petitioner began the Process of Execution of Mining Lease Deed and the District Mining Officer (DMO) Yavatmal issued a letter dated 26.08.2015 to the DYSLR Wani/Zari Jamni Taluka to execute the measurement and demarcation of the 450 Hactare lease area of the Nerad Malegaon Coal Mine. However, vide corrigendum dated 02.09.2015, Government of the State of Maharashtra, amended the errors apparent in the Mining Lease dated 16.07.2015 alongwith the coordinates of the Coal Mine.

18. The petitioner was granted permission by the Development Commissioner (Industries), for purchase of agriculture land vide letter no. DI/Land/Permission/205(2015)2015/C/6989 dated 04.09.2015 to the extent of 563.25 Hectares at Villages — Malegaon, Nerad, Hivadhara, Tal. Wani and Village —Sindhivadhona, Tal. Zari Jamni, District Yavatmal and the Petitioner had undertaken to comply With the provisions Section 49(A) of

Mumbai Tenancy and Agriculture Land Act (Vidharbha), 1958 and Section 44A of the Maharashtra Land Revenue Code, 1966.

19. Thereafter, the Director of Geology and Mines, Maharashtra recommended that the Mining Leased Deed be executed by the petitioner with stipulated conditions on 19.09.2015 and on the same date the petitioner was also granted the transfer of consent to establish vide consent No. BO/JD(APC)TB1/R/CC-372 from Maharashtra pollution Control Board.

20. The petitioner received permission from GSDA vide letter No.734/2015 dated 29.09.2015 to install 5 numbers of bore well and to start withdrawing 0.15 MLD of water to initiate the preliminary work required for making the Coal Mine operational. The Sub Divisional Officer issued an order dated 30.10.2015, whereby mutation of 61.92 hectares of land was done in favour of the Petitioner and the Petitioner got completed the DGPS and topographic Survey for the Coal Mine Operation at Nerad Malegaon Coal Mine from an empanelled agency which was approved by the Directorate of Geology and Mining in January 2016.

21. Thereafter, the petitioner was directed to pay a revised stamp duty amount of Rs. 2,44,80,000/- (Rupees Two Crore Forty Four Lakh Eighty

Thousand only), which the Petitioner duly paid to the Department of Registration and Stamps, Government of Maharashtra on 13.01.2016.

22. In pursuance of the Petitioner achieving its milestones to be able to execute the Mining Lease, Petitioner vide letter dated 25.01.2016, submitted the map along with the vesting order, and requested the Deputy Superintendent, Land Record, Wani and Zari Jamani to conduct a survey of the mauzani area under the Villages, Malegaon, near, Hiwardhara and Sindhiwadhona to enable the petitioner to start acquiring the said lands from the rightful owners.

23. Accordingly, the petitioner sought a three month extension for execution of Mining Lease vide its letter dated 10.02.2016, the Petitioner also received notice dated 03.03.2016 issued by the Talathi Kayar regarding the payment of Non-Agriculture tax for the Financial year 2015-2016, which was thereafter paid on 14.03.2016 for the already acquired land of 61.92 Hectare by the Petitioner.

24. Thereafter, the Petitioner made the payment of the Second instalment of twenty five percent [25%] of the Upfront payment being an amount equal to INR 1,09,63,102/- (Rupees One Crore Nine Lakh Sixty Three Thousand One Hundred and Two only) which amount was deposited with the Pay and

Accounts Officer, of the respondent no.1 vide Bank Transaction ref no. PMCBR92016042800004634, dated 28.04.2016, which was intimated to the above respondent vide a letter dated 30.04.2016, issued by the petitioner.

25. On 05.04.2016, the petitioner executed the Mining Lease at the DMO Office, Yavatmal, which was further registered with the office of the Sub-Registrar, Wani vide registration Number 1109/2016 and thereafter, the Petitioner's Mine Closure Plan was also approved by Respondent no. 1 vide letter No. 34011/16/2015/CPAM on 06.04.2016.

26. Thereafter, the DMO issued a letter dated 13.04.2016 to the Petitioner, regarding the execution of the Mining Lease Deed and registration of the Nerad Malegaon Coal Mine. On 26.04.2016, the Central Mine Planning & Design Institute Limited vide its letter dated 26.04.2016 provided the Petitioner the Certification on the Geological Coordinates used in the preparation of the Mining Plan of the Coal Mine and therefore on 18.05.2016, the Petitioner Submitted necessary payment with DYSLR WANI/ZARI JAMNI vide Challan MTR Form Number-6 for Malegaon, Nerad & Hiwardhara respectively. The petitioner again deposited new re-validated cheque of Rs.1,34,000/- (Cheque no 137528 Dated 29.08.2016) drawn in favour of Bank of India payable to DYSLR Zari Jamni, since the

earlier cheque deposited issued by the Petitioner for the same on 24.05,2016 was misplaced due to lapses of bank officials of Bank Of India.

27. Thereafter, petitioner received an e-mail dated 09.09.2016 from respondent no.1 regarding payment of incremental amount towards compensation of land equivalent to an amount of Rs.52,72,310.86/-. Subsequently, on 27.09.2016, petitioner was also intimated by the DYSLR Wani that there is an upward revision in fees which need to be paid towards Village Nerad, Malegaon and Hiwardhara and in view thereof, the Petitioner received letters dated 13.10.2016 from office of DYSLR informed vide letter no 941, 942 & 943 that as per online measurement fee for Hiwardhara, Malegaon & Nerad Village have been revised and instructed to deposit the difference amount of revised fees of Rs.19,000/-, Rs.60,000/- & Rs.1,76,000/-. Accordingly, petitioner on 28.10.2016 deposited necessary incremental amount towards Taluka Inspector of Land Record Survey of Nerad, Malegaon and Hiwardhara villages vide cheque nos. 164213, 164314 & 164315 drawn in favour of Union Bank of India WARDHA Branch.

28. The DYSLR issued Notice for commencement of Taluka Inspector Of Land Record survey of Sindhiwadona Village of Zari Jamni Taluka from 18.11.2016, which survey was successfully completed on 01.12.2016 and

further Notices were issued by DYSL Wani on 02.12.2016 for commencement of Taluka Inspector of Land Record survey of Malegaon Village vide notice Number 1486-1558, which Survey field work started for Malegaon Village on 06.12.2016 and successfully completed on 20.12.2016. After completion of Talukâ Inspector of Land Record survey of Sindhwadona and Malegaon Taluka Inspector of Land Record the office of the DYSLR started Survey Plan Preparation Of the said Villages on 21.12.2016.

29. A Second Amendment to the Coal Mine Development and Production Agreement was carried out between the petitioner and the respondent no.1 on 26.12.2016. Thereafter, a notice dated 25.01.2017 was issued by the Talathi Malegaon regarding Land Revenue Tax for the financial year 2016-2017 for already acquired land of 61.92 in Malegaon Village, which demand was cleared by the Petitioner on 21.03.2017 by depositing the yearly Non-Agricultural Revenue tax of Rs.8,35,920.00/- for the acquired land.

30. The DYSLR Wani issued notice dated 05.04.2017 for commencement of Taluka Inspector of Land Record Survey of Hiwardhara Village from 24.04.2017 and the petitioner submitted letter to DYSLR office (Wani & Zari Jamni) marking copies to SLR (Yavatmat) requesting to provide duly

approved signed copies of Taluka Inspector Of Land Record survey plans Of village Malegaon and Sindhiwadona vide letter number IPPL/Coal/NM-DYSLR/2017-18/001 & 002 respectively and on 12.04.2017 petitioner received the duly approved and signed copy Of Taluka Inspector Of Land Record survey plans for Sindhiwadona village from DYSLR Zari Zamni Office vide letter no Bhumapan/Mauzani/Sindhivadona/2017 and the same was also sent to DMO office Vavatmal by DSLR Zari Jamni office and further on 18.04.2017 the petitioner received duly approved and signed copy of Taluka Inspector of Land Record survey plans for Malegaon Village on 18.04.2017 from DYSLR office Wani and Yavatmal. The Taluka Inspector of Land Record survey field work for Hiwardhara commenced on 24.04.2017 and was successfully completed on 29.04.2017. The Petitioner submitted letter dated 21.08.2017 to DYSLR to request for expediting the process of plan preparation work of Hiwardhara village and also to start the work of Nerad Village Taluka Inspector of Land Record Survey, marking a copy to the Superintendent of Land Record Yavatmal for information and records and therefore DYSLR Wani issued Notice for commencement of TALUKA INSPECTOR OF LAND RECORD survey of Nerad Village from 15.11.2017 till its completion.

31. The Petitioner submitted the land schedule for Nerad village as per approved mining lease deed agreement to DSLR Wani vide letter dated 06.11.2017, as required by DYSLR office Wani and further requested to expedite Taluka Inspector Of Land Record Survey at Nerad Village.

32. The Petitioner on 07.11.2017 deposited the incremental fee towards lands for Nerad Malegaon Coal Block equivalent to an amount of Rs.52,72,311/- (Fifty Two Lakh Seventy Two Thousand and Three Hundred Eleven Only) through RTGS and intimated the Nominated, Authority accordingly.

33. The Taluka Inspector of Land Record had conducted survey for Nerad Village commenced from 15.11.2017, however after the field visit, the surveyor of DVSLR Wani office had declined to carry out the survey on grounds of obstructions on the sites due to the field being fully covered with Cotton & Tur, which were hindering the normal target visibility for survey at Nerad Village and hence, the survey was temporarily stopped. Thereafter, on 20.11.2017, the petitioner again requested the DYSLR Wani and Yavatmal, to re-commence the Taluka Inspector of Land Record Survey of Nerad Village in the month of December 2017. However, the Petitioner on 24.11.2017 received a notice issued by Talathi Malegaon regarding Land

Revenue Tax for the financial year 2017-2018 for already acquired land of 61.92 Hactare in Malegaon Village and the Petitioner on 22.01.2018 deposited a part payment of the Land Revenue Tax and balance of the Land Revenue Tax was deposited by the Petitioner on 14.03.2018. In the meanwhile, the petitioner received notice regarding the commencement of the Taluka Inspector Of Land Record Survey on 06.03.2018, however, thereafter received intimation, that the Survey was stopped for want of a Surveyor and therefore on 08.03.2018, the Petitioner vide its letter dated 08.03.2018 requested that the Survey be completed by arranging an alternative surveyor.

34. Vide letters dated 27.03,2018, the petitioner submitted a monthly pre-commencement report to the Director of Geology and Mining, Government of Maharashtra as well as the status of the Taluka Inspector of Land Record Survey of Nerad Malegaon Coal Mines to the Deputy Secretary, Industries & Labour Department, Government of Maharashtra.

35. The Petitioner submitted a letter dated 16.05.2018 before the DYSLR Wani, for making available the ETS instrument and also requested for an expedited survey at the Nerad Village. The petitioner also submitted an update report to the Nominated Authority vide its letter dated 22.06.2018.

36. Mr. Sandeep Sethi, learned Senior Advocate appearing on behalf of the petitioner submitted that the petitioner runs a captive power plant for the company called Uttam Value Steels Limited (UVSL), which has been closed down because of lockdown in the country due to spread of COVID-19 pandemic. In these circumstances, the petitioner has no immediate source of revenue and has only limited funds in its bank account to pay the salaries of around 500 employees for 1-2 months. However, if the amount is appropriated in the instant case, the Company will have to pay Rs.5,23,01,520/- to the Bank and the same would be from the working capital account of the petitioner company and shall lead to non-payment of salaries of the employees. The company shall be pushed into default and effectively towards being declared as NPA.

37. Further submitted that a series of interim orders have been passed restraining the invocation of bank guarantees in coal mine matters, which were issued prior to the spread of pandemic Covid-19, which is evident from the order dated 24.08.2015 in W.P.(C) No. 8087/2015 titled as ***M/s Arcelor Mittal India Private Limited vs. Union of India & Ors.*** Therefore, on the ground of parity, similar interim order may be passed in favour of the petitioner herein.

38. Ld. Senior counsel further submitted that the order dated 17.07.2018 passed by this Court in W.P. No. 7268/2018 being ***Rajasthan Rajya Vidyut Utpadan Nigam Limited Vs. Union of India, Ministry of Coal & Anr.***, relied upon by the Ld. ASJ is not applicable to the present case since relief of representation was given in the said matter. Further, the said representation might have been accepted or the matter might not have been pursued. Accordingly, the reliance placed on the said matter is misplaced. In the instant case, it is evident from the Minutes of the Review Committee Meeting held on 03.01.2020 that the matter had to be examined by the Scrutiny Committee. However, the Scrutiny Committee examined the matter but passed a non-speaking order. Thus, the invocation of the Bank Guarantee is unfair and inequitable. The decision invoking the Bank Guarantee is unreasoned and it does not consider the submissions made by the petitioner in the reply to show cause notice and the said decision is in gross violation of principles of natural justice. Accordingly, submitted that an unreasoned administrative order affecting the right of the parties, is contrary to law lay down in case of ***Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors.: (2010) 9 SCC 496.***

39. Ld. senior counsel submitted that the said committee examined the matters of 12 other companies, which have not taken the basic steps and are in much more delay than the petitioner company, however, no action has been taken against them. The names of these parties are mentioned in the Minutes of Scrutiny Committee Meeting dated 05.02.2020/06.02.2020.

40. It is further submitted, since the issue of invocation of Bank Guarantee is involved and only the petitioner company is being penalized, giving reasons for rejection of submission is all the more essential. Accordingly, relied upon the case of *Mekaster Trading Corporation vs. Union of India & Ors.: 2003 (71) DRJ 376* and *Prakash Atlanta JV & Ors. vs. National Highways Authority of India & Ors.: 2010 (5) ILR (Del) 38*.

41. Mr. Sethi, learned senior advocate argued that the government cannot allege non-seriousness on the part of the petitioner company as admittedly, the petitioner has completed 83% of the steps required to be taken by it and the balance steps could not be taken timely because of civil commotion at the acquisition site, which is also a force majeure exemption under clause 23.1(iii) in the Agreement dated 16.03.2015. Therefore, no action has been taken against the other 12 parties and only petitioner has been penalized, thus conduct of the Government is inequitable and violative of Right of

Equality. Moreover, no written notice was received by the petitioner regarding the invocation of bank guarantee as stipulated under Clause 6.3.1 read with 1.2.11 of the Coal Mine Development and Production Agreement dated 16.03.2015 and the invocation is being done behind the back of the petitioner company.

42. Further, it is submitted that in the present matter, the invocation of Bank Guarantee is barred in view of the prevailing situation of spread of Covid-19, which has been declared as pandemic by World Health Organization on 11.03.2020. The pandemic is covered under Force Majeure at clause 23.1 (ii) of the agreement dated 16.03.2015. However, as per para 15 on invocation of Bank Guarantee, the petitioner will have to pay the Bank and also replenish itself, but as aforesaid, the Company does not have adequate amounts to do the same and the company shall not be able to revive even after the situation becomes normal.

43. Learned senior counsel submitted that the ground of COVID-19 is independent of the merits of the matter because various businesses and banking activities are under severe stress. Therefore, at this stage, the Bank Guarantee ought not to have been invoked and interim order passed by this

Court in various other similar matters, be passed in present case also on the principle of parity.

44. Lastly, learned senior counsel submitted that it may be noted that the Courts have been inclined to grant relief regarding payment of instalments to the bank and declaration of NPA during this period of lockdown as evident from the order dated 06.04.2020 passed by this Court in W.P. (C) Urgent No.5/2020 being *Anant Raj Limited Vs. Yes bank* and order dated 03.04.2020 in W.P. (C) Urgent No. 7/2020 being *India Bulls Housing Finance Ltd. Vs. Securities Exchange Board of India & Ors.* Therefore, on the principle of pari materia treatment, in the instant case, the encashment and appropriation of Bank Guarantee may be stayed and the petitioner may be permitted to renew the Bank Guarantee from 12.04.2020 within two weeks from the lifting of lockdown.

45. On the other hand, Ms. Maninder Acharya, Senior Advocate and Ld. Additional Solicitor appearing on behalf of UOI submitted that the petitioner failed to comply with the Efficiency Parameters, therefore, the Nominated Authority was constrained to issue 1st Show Cause Notice 24.07.2018 for non-compliance with the timelines of various Milestones listed in Schedule E of CMDPA in respect of Nerad Malegaon Coal mine, as detailed below:

Sl No	Milestones	Time Limit from Zero Date (in months)	Due date of Completion	Date of Completion (only in Date format)	Weightage assigned for the appropriation of Performance Security
1	Land Acquisition (to reach rated capacity)	36	22.04.2018	Still Pending	5%
2	Opening of Escrow Account	37	22.05.2018	Still Pending	8%
3	Application of Opening Permission	37	22.05.2018	Still Pending	2%
4	Grant of Opening Permission	38	22.06.2018	Still Pending	2%

46. The petitioner replied to the abovesaid show cause vide reply dated 02.08.2016 stating that the delay in meeting parameters was beyond its control and requested to withdraw the show cause and grant an extension of 12 months w.e.f. 21.06.2018 to commence the Mine Operation. However, petitioner's said request was accepted. As the petitioner continued to be in the breach of Efficiency Parameters despite lapse of more than a year, the Nominated Authority issued 2nd Show cause dt. 26.07.2019. The petitioner replied to the show cause vide letter dated 05.08.2019 and again sought an

extension of 12 months. Accordingly, a Scrutiny Committee under the Chairmanship of Ex- Chairman, Coal India Limited comprising of Officers from the Nominated Authority/Ministry of Coal has been constituted to consider/examine the submissions/replies made by the Successful Bidders/Parameter as mentioned in the Coal Mine Development and Production Agreement. The reply to the said Show Cause Notice(s) submitted by the various Allocates including the petitioner were placed before the Scrutiny Committee Meeting held on 05.02.2020 & 06.02.2020. The petitioner was also given the opportunity to present its case before the Committee and was represented through its E.D., V.P. & Manager on 06.02.2020. After due deliberations of the submissions in respect of the said coal mine, the observation of the Committee for non compliance with the Milestones in respect of Nerad Malegaon is as follows:-

S.No	Show Cause Reason	Observation of the Committee
1.	Land Acquisition (to reach rated capacity)	Allocattee stated that partial acquisition of land has been done and 75 Hectare land is yet to be acquired and mine working is to start from this left out land. Allocattee also mentioned that one of its partner company having 36% shareholding is under NCLT. Committee member are not satisfied with the reply given by the Allocattee and find lack of
2.	Opening of Escrow Account	

		seriousness of effort of Allocatee and observes that due penalty should be imposed on them.
3.	Application for grant of opening permission	Committee members are not satisfied with the reply given by the Allocatee and is of the view that serious effort has not been done by the Allocatee and observes that due penalty should be imposed on them.

47. Ld. Additional Solicitor submitted that the recommendation of the Scrutiny Committee has been deliberated by the Competent Authority and it has been decided to impose a penalty of an amount equal to 17% of Performance Security amounting to Rs.5,23,01,520/- INR for deviation from the timelines of Milestones as stated above. Thus, it is manifest that email dt. 04.04.2020 intimating the Concerned Bank to invoke the Performance Security, was issued after due compliance of natural justice and provisions of CMDPA. The petitioner who is in noncompliance of Milestones since April-June 2018 (approx. 2 years) was issued 2 show cause notices and was also represented before the Scrutiny Committee on 06.02.2020, thus the petition is devoid of merits and unfounded and liable to be rejected by this Hon'ble Court. Further, a bare perusal of the email dated 04.04.2020 reveals that it contains reasons for invocation of the performance security.

48. Further submitted, pertinently, Cl. 25 provides Governing Law & Dispute Resolution and Cl. 25.3- provides for dispute resolution as per S. 27 and Cl. 25.4 provides that existence of dispute doesn't affect right of Nominated Authority to appropriate Performance Security or terminate the agreement.

49. Ms. Acharya, Ld. Additional Solicitor General also submitted that in a similar case being W.P.(C) 7268/ 2018 (*Rajasthan Rajya Vidyut Utpadan Nigam Ltd. vs. UOI & Ors.*) on the first day of hearing on 16.07.2018 the Hon'ble Court granted time to Respondent to take instructions whether the order/recommendations of the Scrutiny Committee were communicated to the petitioner and further confirm whether any of the representatives of the petitioner had participated in the oral hearing before the Scrutiny Committee. The Court, in the meanwhile, ordered to maintain status quo in respect of the bank guarantee. On the next date of hearing on 17.07.2018, after hearing the parties the Hon'ble Single Judge disposed of the petition while declining to interdict with the invocation of Bank Guarantee. The court granted liberty to the petitioner to make representation to the Respondents or to file appropriate application before the Tribunal under section 27 of the Coal Mines (Special Provisions) Act, 2015. The order dt.

17.07.2018 was taken in appeal being LPA 382/2018 which was dismissed as withdrawn and thus the order dt. 17.07.2018 attained finality. In another similar case being W.P.(C) 7277/ 2018 (*Damodar Valley Corporation vs. UoI & Ors.*) the Hon'ble Court vide order 16.07.2018 issued notice and granted time to file reply to the Respondent. However, did not restrict the invocation of bank guarantee and only directed that amount of bank guarantee deducted shall be subject to outcome of the case.

50. Accordingly, learned Additional Solicitor General submitted that the subject Bank Guarantee is unconditional and irrevocable and there can be no fetters upon encashment of the same and is liable to be invoked on demand by the Respondents. It is settled law that Court in writ jurisdiction do not interfere or interdict in the cases of invocation of bank guarantee unless in exceptional cases of (i) irretrievable injustice, or (ii) fraud. Irretrievable injustice should be of a kind arising in irretrievable situation. The irreparable harm should not be speculative. It should be genuine and immediate as well as irreversible. It should be a case where the party seeking restraint on invocation of bank guarantee has no adequate remedy in law at all and the harm to him would be irreparable. Thus, present petition deserves to be dismissed.

51. I have heard learned counsel for the parties and perused the material available on record.

52. Mr. Sandeep Sethi, learned senior counsel appearing for petitioner has relied upon the following judgments:-

Sl. No.	Particulars		Date of order
	Title	W.P. No.	
1.	<i>Jindal Steel and Power Limited and Anr. Vs. Union of India & Anr.</i>	<i>W.P.(C) 7818/2015</i>	<i>18.08.2015</i>
2.	<i>JSW Steel Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 7863/2015</i>	<i>18.08.2015</i>
3.	<i>Ambuja Cements Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 7987/2015</i>	<i>21.08.2015</i>
4.	<i>Maharashtra Seamless Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 7988/2015</i>	<i>21.08.2015</i>
5.	<i>Jindal Steel & Power Limited & Anr. Vs. Union of India & Ors.</i>	<i>W.P.(C) 7990/2015</i>	<i>21.08.2015</i>
6.	<i>M/s. Lafarge India Private Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 7991/2015</i>	<i>21.08.2015</i>
7.	<i>Jindal Stainless Ltd. Vs. UOI & Ors.</i>	<i>W.P.(C) 7992/2015</i>	<i>21.08.2015</i>
8.	<i>M/s. DB Power Limited Vs.</i>	<i>W.P.(C) 7998/2015</i>	<i>21.08.2015</i>

	<i>Union of India & Anr.</i>		
9.	<i>Bhushan Steel Ltd. & Ors. Vs. UOI & Ors.</i>	<i>W.P.(C) 8000/2015</i>	<i>21.08.2015</i>
10.	<i>JSW Energy Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 8002/2015</i>	<i>21.08.2015</i>
11.	<i>M/S. Arcelor Mittal India Private Limited & Anr. Vs. Union of India & Anr.</i>	<i>W.P.(C) 8087/2015</i>	<i>24.08.2015</i>
12.	<i>IST Steel and Power Ltd. Vs. Union of India & Ors.</i>	<i>W.P.(C) 8111/2015</i>	<i>24.08.2015</i>
13.	<i>M/s. Kesoram Industries Limited Vs. Union of India & Ors.</i>	<i>W.P.(C) 8163/2015</i>	<i>28.08.2015</i>
14.	<i>Steel Authority of India Ltd. Vs. Union of India & Ors.</i>	<i>W.P.(C) 8432/2015</i>	<i>02.09.2015</i>
15.	<i>Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. And Ors. Vs. Union of India & Ors.</i>	<i>W.P.(C) 8529/2015</i>	<i>04.09.2015</i>
16.	<i>SKS Ispat And Power Limited & Anr Vs. Union of India & Ors.</i>	<i>W.P.(C) 8144/2015</i>	<i>22.09.2015</i>
17.	<i>Rohne Coal Co. Ltd. Vs. Union of India & Ors.</i>	<i>W.P.(C) 11551/2015 & CM No. 30596/2015</i>	<i>11.12.2015</i>
18.	<i>Rajasthan Rajya Vidyut Utpadan Nigam Limited Vs. Union of India & Anr.</i>	<i>W.P.(C) 4040/2016</i>	<i>06.05.2016</i>

19.	<i>Sunflag Iron And Steel Company Ltd. Vs. The Union of India & Ors.</i>	<i>W.P.(C) 5174/2016</i>	<i>30.05.2016</i>
20	<i>Electrosteel Castings Limited and Anr. Vs. Union of India & Anr.</i>	<i>W.P.(C) 6727/2016</i>	<i>03.08.2016</i>

53. It is pertinent to mention here that all the judgments/orders referred above are of the year 2015 and 2016. However, thereafter this Court and Hon'ble the Supreme Court of India have taken different view, which will be discussed hereinafter.

54. Mr.Sethi, further relied upon the orders passed during Lockdown due to COVID-19 regarding payment of installments to Banks and declaration of NPA, in W.P.(C) Urgent No. 5/2020 being *Anant Raj Limited Vs. Yes Bank*, order dated 06.04.2020 and order dated 03.04.2020 in W.P. (C) Urgent No. 7/2020 being *India Bulls Housing Finance Ltd. Vs. Securities Exchange Board of India & Ors.*

55. However, fact remains that petitioner company is in non-compliance of Milestones since April-June, 2018 and further despite extension of 12 months, its position remained the same. Thus, the orders passed mentioned above during Lockdown are not applicable in the present case for the simple reason that Lockdown came into force in India w.e.f. 24.03.2020, however,

the petitioner despite the extension of 12 months, could not fulfil its obligation.

56. Admitted case of the petitioner is that the Taluka Inspector of Land Record had conducted survey for the land in question i.e. Nerad village and commenced the same from 15.11.2017, however, after the field visit, Surveyor of DYSLR Wani Office had declined to carry out the survey on grounds of obstructions on the sites due to the field being fully occupied with Cotton and Tur, which were hindering the normal target visibility for survey and hence, the survey was stopped. Accordingly, on 20.11.2017 the petitioner again requested to re-commence the survey in the month of December, 2017. However, on 24.11.2017 the petitioner received a notice issued by Talathi Malegaon regarding Land Revenue Tax for the financial year 2017-2018 for already acquired land of 61.92 hectares in Malegaon village. Accordingly, petitioner deposited part payment on 22.01.2018 and balance tax was deposited on 14.03.2018. Thereafter, on 16.05.2018, petitioner submitted a letter before DYSLR Wani, for making available the ETS instrument and also requested for an expedited survey at Nerad village.

57. Whereas, the CMDPA laid down the details of the events and the manner in which the petitioner's Performance Security would be

appropriated by the respondents under clause 6.2 and 6.3 mentioned above. It is not in dispute that on 30.03.2015, the Coal Mine (Special Provisions) Act, 2015 was notified and the CMDPA, laid down the post vesting obligations under Clause 5 as mentioned above.

58. It is pertinent to mention here that petitioner failed to comply with the Efficiency Parameters, therefore, the Nominated Authority had issued 1st Show Cause notice dated 24.07.2018 for non-compliance with the timelines of various Milestones listed in Schedule E of CMDPA in respect of Nerad Malegaon Coal mine, as detailed below:

Sl No	Milestones	Time Limit from Zero Date (in months)	Due date of Completion	Date of Completion (only in Date format)	Weightage assigned for the appropriation of Performance Security
1	Land Acquisition (to reach rated capacity)	36	22.04.2018	Still Pending	5 %
2	Opening of Escrow Account	37	22.05.2018	Still Pending	8%
3	Application of Opening Permission	37	22.05.2018	Still Pending	2%
4	Grant of Opening Permission	38	22.06.2018	Still Pending	2%

59. Accordingly, petitioner replied to the abovesaid Show Cause Notice vide reply dated 02.08.2016 and requested to withdraw the Show Cause Notice by granting an extension of 12 months w.e.f. 21.06.2018 to commence the Mine Operation. Accordingly, on this request, 12 month time was extended. Despite this, petitioner continued to be in breach of Efficiency Parameters. Therefore, after lapse of more than one year, the Nominated Authority issued 2nd Show Case Notice dated 26.07.2019. On receipt of the same, in its reply dated 05.08.2019, petitioner again sought an extension of 12 months. Accordingly, a Scrutiny Committee under the Chairmanship of Ex. Chairman, Coal India Ltd comprising of Officers from the Nominated Authority/Ministry of Coal was constituted to consider/examine the submissions/replies made by the Successful Bidders/Parameter as mentioned in the Coal Mine Development and Production Agreement. The Scrutiny Committee Meeting was held on 05.02.2020 and 06.02.2020 wherein the petitioner was also given the opportunity to present its case before the Committee, accordingly, petitioner was represented through its E.D., V.P. and Manager on 06.02.2020. After due deliberations of the submissions in respect of the Coal Mine in question, the observations of the Committee for non-compliance with the Milestones

in respect of Nerad Malegaon were made inter-alia that the Allottee stated that partial acquisition has been done and 75 Hectare land is yet to be acquired and Mine working is to start from its left out land. The Allottee also has mentioned that one of its partner companies having 36% shareholding is under NCLT.

60. In view of above submissions in reply to 2nd show cause notice, it is not possible for the petitioner to commence the Mine Operation in near future. Therefore, request of the petitioner for further extension of 12 months has rightly been rejected and it was decided to impose a penalty of an amount equal to 17 % of Performance Security amounting to Rs.5,23,01,250/- INR for deviation from the timelines of Milestones as stated above.

61. It is pertinent to mention here that clause 25 provides Governing Law & dispute Resolution and Clause 25.3 provides for dispute resolution as per 5.27 and Clause 25.4 provides that existence of dispute does not affect right of Nominated Authority to appropriate Performance Security or terminate the agreement.

62. In similar case of *Rajasthan Rajya Vidyut Utpadan (Supra)*, this Court has already taken view in para-5 which is reproduced as under :-

“Insofar as the interdiction of the subject bank guarantee furnished by the petitioner is concerned, this Court is not persuaded to accede to the said prayer. The law relating to the bank guarantee is well settled and the same cannot be interdicted on account of any contractual disputes. It is an admitted case that the petitioner has not achieved the efficiency norms. The only question to be examined is whether the petitioner’s failure to do so is for justifiable reasons beyond the control of the petitioner.”

63. Above order was challenged in LPA 382/2018, however, same was dismissed as withdrawn on 24.07.2018. Thus, order dated 17.07.2018 passed in W.P. (C) 7268/2018 attained finality.

64. In addition, similar issue came before Hon’ble the Supreme Court of India in ***Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. And Another: (1997) 6 SCC 450***, whereby held as under:-

“21.Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the Courts must apply which considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken Vs. Indian Charge Chrome, Larsen & Toubro Ltd. Vs. Maharashtra SEB, Hindustan Steel Works Construction Ltd. Vs. G.S. Atwal & Co. (Engineers) (P) Ltd. and U.P. State Sugar Corporation

Vs. Sumac International Ltd. The general principle which has been laid down by this court has been summarised in the case of U.P. State Sugar Corporation's as follows:

"The law relating to invocation of such bank guarantees in by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observation of Sir John Donaldson, M.R. in Bolivinter Oil SA V. Chase Manhattan Bank (1984) 1 All ER 351, CA

are apposite:

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."

(emphasis supplied)

The aforesaid passage was approved and followed by this court in U.P. Coop. Federation Ltd. Vs. Singh consultants and Engineers (P) Ltd. (1988) 1 SCC 174.

22. The secondly exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of due Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary. by way of restitution."

65. Further, this Court in case of **NHPC Ltd. Vs. HCC Ltd.:** 2018 SCC

Online Del 11469, observed as under:-

"17. The law in relation to the Bank Guarantee is no longer res integra and infact has been reiterated by the Supreme Court in a number of decisions. In Dwarikesh Sugar Industries Ltd. (supra), the Supreme Court has

held as under:-

"21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are [Svenska Handelsbanken v. Indian Charge Chrome, Larsen & Toubro Ltd. v. Maharashtra SEB](#), [Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. \(Engineers\) \(P\) Ltd.](#) and [U.P. State Sugar Corpn. v. Sumac International Ltd.](#) The general principle which has been laid down by this Court has been summarised in the case of [U.P. State Sugar Corpn.](#) as follows:

"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the

bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank are apposite:

"... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged." (emphasis supplied)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."

18. The Supreme Court further held that the principle of unjust enrichment would have no application in case of encashment of the Bank Guarantee.

19. In *BSES Ltd. (supra)*, the Supreme Court held that the ground of irretrievable injustice cannot be said to have been made out only because the arbitral proceedings were pending.

20. In *Vinitec Electronics Private Ltd v HCL Infosystems Ltd. (2008) 1 SCC 544* it was reiterated that:-

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes."

21. On pendency of arbitration proceedings it was held that:-

"29. There is no dispute that arbitral proceedings are pending. The appellant can always get the relief provided he makes his case before the Arbitral Tribunal. There is no allegation that it would be difficult to realize the amounts from the respondent in case the appellant succeeds before the Arbitral Tribunal."

22. In *Rail Vikas Nigam Ltd. (supra)*, this Court has held that merely because the Arbitral Tribunal considers that it would be able to adjudicate on the disputes pending before it expeditiously, is no ground for injuncting the invocation/encashment of the Bank Guarantee. It was held that the harm or injustice contemplated under the head of irretrievable injury or injustice must be of such an exceptional and irretrievable nature as would override the terms of the guarantee."

66. Also this Court in *Umaxe Projects Pvt. Ltd. Vs. Air Force Naval Housing Board & Anr.: 2019 SCC Online Del 9126*, while relying upon another judgment of this Court in *Classic KSM Bashir JV Vs. Rites Ltd. & Ors.: 2018 SCC Online Del 8888* wherein law related to invocation of Bank Guarantee has been analyzed in detail and concluded that merely because invocation will cause financial distress is not a ground of stay, however, exception of irrevocable injury should be invoked.

67. Regarding the issue of parity, why the respondents have granted extension to other 12 allottees, the details of those cases are not before this Court, therefore, this Court has not given any opinion on this issue. Undisputedly, one extension for 12 months has already been granted to petitioner and after proper hearing, the respondents have passed impugned order which is neither illegal nor perverse or discriminatory.

68. In view of above discussion and settled position of law, this Court is of the view that there is no merit in the present petition.

69. Accordingly, the writ petition is dismissed with no order as to costs.

70. Pending application also stands disposed of.

(SURESH KUMAR KAIT)
JUDGE

APRIL 28, 2020/ms/ab