Fraud is One of the Exceptions for Grant of Injunction in Respect of Bank Guarantees: High Court of New Delhi

The Court have explained the concept of fraud to be of ‘an egregious nature as to vitiate the underlying transaction’, that fraud has to be of a very high degree, one which would vitiate the very foundation of the bank guarantee.This honorable judgement was passed by High Court of New Delhi in the case of AMR-BBB Consortium Thro’Lead Partner, AMR India Ltd. v. Bharat Coking Coal Ltd. & Anr. [FAO(OS) (COMM) 20/2021, CMs No.4009/2021] by Hon’ble Mr. Justice Rajiv Sahai Endlaw and Hon’ble Mr. Justice Sanjeev Narula

The present appeal was filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 is directed against the final judgment/order dated 27th January, wherein the petition filed 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 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.

A Notice Inviting Tender along with Geological Reports furnished, was issued by Bharat Coking Coal Ltd., for “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”. A letter of acceptance was issued by BCCL to the Appellant contractor. The Appellant in line of the Contract, furnished a performance bank guarantee in favour of BCCL for an amount of Rs. 12,78,49,970. 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. 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 the Contract furnished three bank guarantees for release of 5%-part payment of deliverable plant. On 15th January, 2018, BCCL informed the Appellant that the Internal Rate of Return (IRR) of the total investment in the Project was unfavourable, it was found that the amount of coal extraction is likely to be greatly reduced.

The court opinioned that, “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 present appeal is dismissed stating that, “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.”