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

Judgment reserved on: 19.09.2025
Judgment pronounced on: 17.12.2025

\+ **O.M.P. (I) (COMM) 78/2025, I.A. 6098/2025, I.A. 6099/2025, I.A. 7017/2025, I.A. 8914/2025, I.A. 12236/2025**

BLACK GOLD RESOUCES PRIVATE LIMITADA

……Petitioner

Through:Mr. Rajiv Nayar, Sr. Adv. with Mr. Saurav Agrawal, Mr. Mayank Jain, Mr. Madhur Jain, Mr. Saurabh Seth, Mr. Arpit Goel, Mr. Deepak Jain, Ms. Allaka M, Mr. Raghav Thareja, Ms. Raadhika Chawla, Mr. Mehak Joshi, and Mr. Abhiroop Rathore Advs.

versus

INTERNATIONAL COAL VENTURES PVT. LTD. & ANR.

……Respondents

Through: Mr. Shaiwal Srivastava, Adv. for R2

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 ("***1996 Act***") seeking the following reliefs against the respondents:-

"a) Stay the operation of a letter dated 03.03.2025 bearing No.16/MBL/DC/03/2025 issued by Respondents terminating the contract dated 02.11.2017 awarded to the Petitioner;

b) Restrain the Respondents from acting upon/in furtherance to the letter dated 03.03.2025 terminating the contract dated 02.11.2017 awarded to the Petitioner;

c) Stay the operation of letter dated 03.03.2025 bearing No. 15/MBL/DC/03/2025 issued by Respondents to the First Capital Bank seeking invocation/encashment of Bank Guarantee No. 178760690005 amounting to USD 10,535,000/- of First Capital Bank furnished by the petitioner;

d) Restrain the Respondents, its officers, employees, assignees or any person acting under instructions or on behalf of the Respondents from invoking and/or encashing of Bank Guarantee No. 178760690005 amounting to USD 10,535,000/- of First Capital Bank furnished by the petitioner;

e) Stay the operation of letter dated 03.03.2025 issued by Respondents rejecting the bid submitted for Global Open Tender for coal mining operation services No. MBL/TM/2024-25/01 dated 15.07.2024 and/or stay the consequent debarment of the petitioners done by the Respondents;

f) Restrain the Respondents from subsequent coercive actions against thePetitioner;

g) In the event that the Bank Guarantees mentioned in Prayer (a)above are encashed, direct the Respondents to deposit the encashed amount before this Hon'ble Court in the form of an interest-bearing fixed deposit till the outcome of the arbitral proceedings and subject to such outcome;"

FACTUAL BACKGROUND

2. The petitioner i.e., Black Gold Resources Private, Limitada, a special purpose vehicle, was incorporated for undertaking coal mining operations at Benga Coal Mine in Mozambique.

3. The respondent No. 1 i.e., International Coal Ventures Private Limited, has been promoted as a Special Purpose Vehicle by Steel Authority of India Limited (SAIL), Rashtriya Ispat Nigam Limited (RINL), National Mineral Development Corporation (NMDC), Coal India Limited (CIL) and National Thermal Power Corporation (NTPC) for acquiring coal mines and assets overseas.

4. The respondent No. 2 i.e., Minas De Benga Limitada, is a company entrusted with the functions of handling operation of Benga Coal Mine in Mozambique. It is stated that respondent No. 1 and the respondent No. 2 are part of the same group of companies.

5. The petitioner and the respondent No.2 entered into a Contract dated 02.11.2017 ("***the Contract***") for the project of "Coal Mining Operation Services at Benga Mine", which primarily included extraction of 4.5 million tonnes per annum (+/-20%) i.e., 3,75,000 tonnes per month (+/-20%) of Run of Mine ("***ROM***") coal alongwith associated activities ("***project***"). The Completion Date as per the Contract was 16.02.2023. As per the Contract, the average stripping

ratio was about 4.65 Billion Cubic Meters ("***BCM***")/tonne of ROM, meaning that for extraction of 1 BCM/ tonne of coal, 4.65 BCM/tonne of overburden i.e., sand, rocks, waste, etc. had to be removed.

6. The General Conditions of the Contract contains an arbitration clause being Clause No. 13.4, which reads as under: -

> *"13.4 Arbitration*
>
> *(a) If the Company and the Contractor are unable to resolve the Dispute within 20 Working Days after the senior executive officers first conferring, or within such other period as the Parties may agree in writing, such Dispute shall be finally settled by arbitration in accordance with the following Sub-clauses.*
>
> *(b) Where the value of the arbitration claim is less than two million United States Dollars (USD 2,000,000), the Dispute shall be submitted to arbitration under the UNCITRAL Arbitration Rules by a sole neutral arbitrator appointed in accordance with the procedure established in the UNCITRAL Arbitration Rules. If the Parties are unable to agree on the appointment of a sole arbitrator within 30 Days of the appointment proposal made in accordance with this procedure, the appointing entity shall be the International Chamber of Commerce (ICC) in accordance with the ICC Rules as the Appointing Authority in CDUDMI and other Ad Hoc Arbitrations. The seat of the arbitration shall be Maputo, or as otherwise determined by agreement*

between the Parties. The language for the arbitration shall be English.

(c) Where the value of the arbitration claim is greater than two million United States Dollars (USD 2,000,000), the Dispute shall be submitted to arbitration under the ICC Arbitration Rules (save that no requirements of the ICC Arbitration Rules as to the nationality of the arbitrator shall apply) by three arbitrators, one appointed by each Party and the chairman chosen by the two Party appointed arbitrators. The seat of the arbitration shall be New Delhi, India but the arbitral tribunal shall have discretion to hold hearings in any location it sees fit, or as otherwise determined by agreement between the Parties. The language for the arbitration shall be English.

(d) The value of the arbitration claim, for the purposes of determining the jurisdiction of the arbitral tribunal to settle the Dispute, is the monetary amount, value or damage which is sought to be recovered by the claimant in the arbitration, or which is otherwise the subject matter of the Dispute. Any interest included in the claim shall be disregarded in the calculation. The value of the arbitration claim shall be determined by the arbitral tribunal:

(i) In the case of arbitration under the UNCITRAL Arbitration Rules, as soon as the arbitral tribunal has been constituted or upon communication of the statement of claim to each of the arbitrators, if this is later; and

(ii) In the case of arbitration under the ICC Arbitration Rules, as soon as the Request for arbitration (as defined in the ICC Arbitration Rules) has been transmitted to the arbitral tribunal.

(e) If any Party enters a plea concerning the jurisdiction of the arbitral tribunal on the basis of the value of the claim, the arbitral tribunal must rule on such a plea as a preliminary question."

7. The petitioner started implementing the project. However, on expiry of the contract period, the Contract was revised and the time stipulated for completion of the project was extended by two years till 22.08.2025 *vide* Addendum No. 2 to the Services Contract dated 18.08.2023 ("***Addendum***"). As per the Addendum, approximately 64 BCM of overburden and 9 tonnes of coal had to be extracted during the extension period. The petitioner was also required to issue a Performance Bank Guarantee ("***PBG***") and the same was issued by the petitioner.

8. Subsequently, the petitioner continued with the project and since inception of the project till August 2024, removed total overburden of about 100,879,342 BCM and extracted 23,846,339 tonnes of coal. These figures are borne out from the joint survey conducted by the petitioner and the respondents.

9. However, the respondent No. 2 withheld payments for the invoices raised for the period of August to October 2024 on account of inadequate removal of overburden by the petitioner. The respondent No. 2 issued a Default Notice dated 08.11.2024 ("***Default Notice***")

under Clause No. 12.1(a)(i) of General Conditions of the Contract alleging incorrect computation of overburdened volumes by the petitioner and demanded approximately USD 30.08 million for the alleged defaults.

10. The petitioner replied to the said Default Notice *vide* letter dated 05.12.2024 denying all the allegations and stated that since the work certificates had already been issued for the period of August 2023 to July 2024, referral to any other self-serving measurements was unjustified. It was further emphasised that the respondents being satisfied with the work had also made payment for the work undertaken.

11. The respondent No. 2 issued another letter dated 09.12.2024, wherein while reiterating its contention, appointed Mr. Sandip Achanta as its representative to settle dispute in terms of Clause No. 13.3(a) of General Conditions of the Contract and also furnished the survey report of Bureau Veritas. The petitioner replied to the said letter *vide* letter dated 11.12.2024, in which it asked the respondent No. 2 to reconcile the figures of overburden and also appointed its representative to settle the dispute.

12. The respondent No. 2 issued another letter dated 13.12.2024 reiterating the earlier issues and in response to the said letter, the petitioner replied through a letter dated 19.12.2024, refuting all the allegations and called upon the respondent No. 2 to clear all the outstanding dues. Thereafter, the petitioner through several letters and emails requested the respondents to release the outstanding payments.

13. Subsequently, the respondent No. 2 *vide* letter dated 06.01.2025 called

upon the petitioner to submit an irrevocable Bank Guarantee to the tune of USD 30.08 million, to which the petitioner replied *vide* letter dated 09.01.2025 reiterating its request to release outstanding payments and fix an appropriate meeting for settlement of the dispute.

14. In due course, on 14.02.2025 a meeting was held between the parties, however, no consensus could be reached.

15. Consequently, the respondent No. 2 issued a letter dated 18.02.2025 proposing name of senior executive officer for resolution of disputes. The petitioner suggested a proposal to the respondent No. 2 *vide* letter dated 18.02.2025 that the respondents may withhold USD 1.5 million from the future bills, till the time the alleged claim of USD 30.08 million is pooled and in the meanwhile, the outstanding amount be paid to the petitioner. The same was rejected by the respondent No. 2 *vide* letter dated 24.02.2025. Thereafter, the petitioner also appointed a senior executive officer for settlement of dispute *vide* letter dated 28.02.2025.

16. Pertinently, during operation of the project, the respondents issued another tender bearing No. MBL/TM/2024-25/01 dated 15.07.2024 for undertaking coal mining works in Benga Coal Mine in Mozambique and the petitioner also submitted its bid.

17. Subsequently, while the dispute resolution process was underway, the respondents terminated the Contract under Clause No. 12.1(b)(i) and (iv) of General Condition of the Contract *vide* impugned letter dated 03.03.2025 and *vide* another impugned letter dated 03.03.2025, the respondent No. 2 asked First Capital Bank to enforce the PBG furnished by the petitioner. Lastly, *vide* another impugned letter dated

03.03.2025 the respondent also rejected the bid submitted by the petitioner to the tender No.MBL/TM/2024-25/01.

18. Hence, the petitioner has filed the present petition seeking the above-mentioned reliefs.

SUBMISSIONS OF BEHALF OF THE PETITIONER (including rejoinder arguments)

19. Mr. Nayar and Mr. Kirpal, learned senior counsels for the petitioner make the following submissions.

A. Illegality of termination of the Contract and invocation of PBG

20. It is submitted that the respondent's actions of terminating the Contract was arbitrary and in direct contravention of Clause No. 12 of General Conditions of the Contract and Clause No. 9 of the Addendum.

21. Clause No. 12.1 of General Conditions of the Contract requires a default notice to be issued first and if the default is not remedied, then the respondents can terminate the Contract. However, no such notice was issued under Clause No. 12.1(b)(iii) of General Conditions of the Contract before terminating the Contract. Further the termination of the Contract and the invocation of the PBG were in violation of Clause No. 9 of the Addendum, which explicitly requires that in the event the petitioner defaults, a default notice of 90 days must be issued to allow rectification. Since, the same was not done termination of the Contract is wrong.

22. Further, the Default Notice issued by the respondent required the petitioner to remedy the alleged default within a period of 14 days, contrary to the mandatory 90-day period stipulated in Clause No. 9 of

the Addendum. It was upon expiry of the 90-day period that the respondent could issue a termination notice under Clause No. 12.1(b)(iii) of the General Conditions of the Contract. No such notice was issued and the petitioner was deprived of any opportunity to be heard before the termination of the Contract. Additionally, the respondent never expressed any intention to terminate the Contract. The Default Notice only stated that in the event the default is not remedied, the respondent may withhold payments and expressly provided that prior notice would be given before terminating the Contract.

23. Further, it is contended that as per Clause No. 12.9 of General Conditions of the Contract, the invocation of the PBG is contingent upon the validity of the termination. Since the termination itself is *void ab initio*, the invocation of the PBG was also illegal and unsustainable. Additionally, the impugned letter invoking the PBG also does not indicate any breach on account of the petitioner, justifying its invocation.

B. Invocation of the PBG is contrary to its express terms

24. It is submitted that the PBG contains mechanism and terms and conditions for its invocation, which mandate that the respondents' demand for payment must be based on a decision that the petitioner has committed a breach of its contractual obligations. Additionally, the PBG was furnished to secure obligation of the petitioner for the performance of the Contract and, the Bank was required to be informed of the decision of the respondents regarding breach of terms and conditions of the Contract.

25. It is argued that in the present case the impugned invocation letter dated 03.03.2025 is contrary to the terms of the PBG. There is no decision of the respondents regarding breach by the petitioner, instead, it was a generic demand letter. In support of the said contention reliance is placed on ***Hindustan Construction Co. Ltd. v. State of Bihar***[1].

C. <u>Termination of the Contract and invocation of the PBG cannot be on the ground of shortfall of overburden volumes</u>

26. It is submitted that the respondents had no reason to terminate the Contract and invoke the PBG. The Contract was for extraction of coal from Benga Coal Mine in Mozambique along with associated activities. The removal of the overburden was just an ancillary exercise and not part of the objective of the Contract. Further, as the respondents did not provide the mining plan to the petitioner, the exact quantity of overburden to be removed was always contingent.

27. Clause No. 1.21 of Contract Specification of the Contract defines the total contract price/ total contract value to mean the total target quantity of ROM coal to be produced during commercial production period multiplied by the price offered by the contractor. Therefore, evidently the payment under the Contract is solely linked to coal production, with no bearing on the overburden extraction volume.

28. Additionally, the targets of coal extraction were achieved and did not form the basis for termination of the Contract. The Contract stipulated that the petitioner had to extract 4.5 million tonnes per annum (+-20%) of coal and as per the latest report of August 2024 the petitioner

[1] (1999) 8 SCC 436.

had already extracted 23,846,339 tonnes of coal. Neither the Default Notice nor the impugned termination letter refer to the shortfall in coal extracted or in the quantity of coal, rather the respondent has referred to an incorrect computation of overburden volume.

29. It is further stated that the alleged issue of incorrect computation of overburden volumes could have been addressed by imposing penalties, under Clause No. 12 of Contract Specification of the Contract. Thus, it is contended that the termination of the Contract and invocation of the PBG could not have been undertaken on the mere pretext of incorrect computation of overburden volumes, as the said computation has no bearing on the coal extracted by the petitioner, which is admittedly not in dispute. Termination of the Contract on such irrelevant ground is completely arbitrary and disproportionate.

30. Further, in response to respondent's contention that it discovered the shortfall in the overburden volume after a survey conducted by another employee from August 2024 onwards, it is asserted that the said employee was already an integral part of the survey team and had signed the survey reports for the previous months. Furthermore, the respondent's reliance upon a report of October 2024 conducted by a drone survey to substantiate the claim of incorrect computation of overburden volume, is entirely misplaced and untenable, as the drone survey conducted in September and October 2024 could not estimate the overburden volume for the period from July 2023 to August 2024.

D. <u>Unlawful withholding of invoices by the respondents</u>

31. It is submitted that in the impugned termination letter dated 03.03.2025, the respondent No. 2 decided to adjust its claims of

amount USD 30.07 million from the pending invoices and the PBG. This unilateral adjustment cannot be done unless it is adjudicated that the respondent No. 2 is entitled to this amount.

32. It is undisputed that the respondents have withheld USD 25 million in the pending invoices. Under the Contract, the payment could have been only suspended under Clause No. 12.1(b)(vi) of General Conditions of the Contract, which has neither been invoked nor satisfied. In the Default Notice, the respondent No. 2 has resorted to "*exceptio non adimpleti contractus*" (which means "exception of non-performance" allowing a party in a reciprocal contract to withhold their own performance, if the other party fails to perform their part) to withhold the payment, however, the said doctrine applies in a case of reciprocal obligations. In the present case, the return of penalty for overburden removal was not reciprocal to the invoices for sale of coal, instead, they were separate and different obligations.

E. Bar on termination of the Contract during dispute resolution

33. It is submitted that the termination of the Contract, while the process of conciliation was undergoing between the parties, was illegal. Clause No. 13.2 of General Conditions of the Contract categorically stated that the parties are under an unequivocal obligation to continue performing their contractual obligations without prejudice to their respective positions regarding the dispute.

34. Following the Default Notice, both parties initiated a dispute resolution process under Clause No. 13 of General Conditions of the Contract and the dispute was referred to Senior Executive Officers. The senior executives first conferred on 10.03.2025 and the next date

for the resolution process is yet to be notified. As per Clause No.13.3(c) of General Conditions of the Contract after the conclusion of the resolution process under Clause No. 13.3(b) of General Conditions of the Contract, if the parties fail to reach an agreement, the dispute is to be referred to conciliation. Since the conciliation stage has not yet been reached, any termination at this stage is legally untenable. Reliance is placed on ***Innovative Facility Solutions (P) Ltd. v. Affordable Infrastructure & Housing Projects (P) Ltd***.[2]

F. <u>Special equities warrant restraint against invocation - Gross disproportionality and absence of any breach</u>

35. It is submitted that the invocation of the PBG on account of failure to return USD 30 million due to alleged incorrect computation of overburden volumes, is grossly disproportionate. USD 25 million is already withheld by the respondents from pending invoices, of which USD 20 million pertains to undisputed ROM coal quantities.The amounts of USD 11.5 million and USD 8.25 million refunded to the petitioner on account of overburden backlog targets cannot be the subject matter of invocation of the PBG, as this would an issue in the Arbitration.

36. It is submitted that unilateral recovery of the said amounts through invocation of the PBGwould be grossly disproportionate. Reliance has been placed on ***Chennai Metro Rail Ltd. v. Transtonnelstroy - Afcons (JV)***[3] and ***National Federation of Farmers, Procurement***

[2] 2024 SCC OnLine Del 7542.
[3] 2021 SCC OnLine Mad 5637.

Processing & Retailing Coop. of India Ltd. v. NLC India Ltd.[4] to assert that doctrine of proportionality constitutes an exception against invocation of bank guarantee.

37. Further, Clause No. 6 of the Addendum, records that the respondents acknowledges and agrees refund of USD 11.5 million for removal of overburden backlog to the petitioner. However, even the overburden backlog removed for the said period has been disputed by the respondents in the Default Notice and termination.

G. <u>Irreparable injury to the petitioner and Balance of Convenience in favour of the petitioner</u>

38. It is submitted that the issuance of the impugned termination letter and invocation of the PBG amounting to USD 10.5 million will cause severe financial hardships and irreparable injury to the petitioner.The petitioner has made substantial investments over a period of seven years in the Contract and termination of a Contract worth USD 525 million would lead to significant economic distress and the loss of employment for over 2000 workers who have been engaged in the project for more than seven years.

39. Additionally, illegal withholding of payments has led to severe financial distress to the petitioner. The petitioner is at risk of insolvency and the net worth of the company is already wiped out. Encashment of the PBG would irreparably impair the petitioner's ability to continue operations, respond to vendor claims and pursue legitimate remedies in arbitration, reliance is placed on ***BGR Energy***

[4] 2023 SCC OnLine Mad 8139.

***Systems Ltd. v. Chhattisgarh State Power Generation Co. Ltd.*[5].**

40. Lastly, it is contended that the balance of convenience lies in favour of the petitioner. The Contract is set to conclude in August 2025 and the respondent never disputed the volume of coal extracted by the petitioner since 2017, therefore, the petitioner should be allowed to project during the pendency of legal proceedings.

41. The respondent has already withheld the alleged shortfall in overburden volumes through penalties, therefore, granting of the interim relief sought by the petitioner would not prejudice the respondent's rights.

SUBMISSIONS OF BEHALF OF THE RESPONDENT NO. 2

42. Though the learned counsel for the respondent No. 2 has briefly mentioned that the Mozambican law will be applicable under the Contract, the said argument was subsequently abandoned.

A. The Contract is a determinable contract

43. It is submitted that it is settled law that any contract which provides for the termination at the instance of either party at the occurrence or non-occurrence of a certain event is determinable in nature. Clause No. 12 of General Conditions of the Contract provides termination rights to either parties, hence, the Contract is a determinable contract.

44. Additionally, under Section 9 of the 1996 Act a contract which has already been terminated cannot be restored. Hence, prayer for injunction on a terminated Contract cannot be permitted. Even otherwise, the Contract read with Addendum is to expire on 22.08.2025 and therefore, the Contract will automatically come to an

[5] 2024 SCC OnLine Chh 6740.

end.

B. <u>No ground has been established for seeking an injunction on invocation of the PBG</u>

45. It is submitted that in the present case the PBG is unconditional, and the same is evident from the recitals read with other clauses of the subject PBG. It is stated that the bank guarantees which provide that they are payable by the guarantor on "mere demand" are unconditional bank guarantees and the ground of financial hardship as urged by the petitioner to support its case for restraining the encashment of the PBG, cannot insulate an unconditional bank guarantee from encashment as the threshold of irretrievable harm or injury or special equities is much higher in cases of invocation of unconditional bank guarantee.

46. It is further submitted that the petitioner's rejoinder argument that the PBG was conditional on account of Clause No. 2 of the PBG, in as much as the respondent ought to have informed about its decision regarding petitioner breach of the Contract is incorrect. Firstly, the petitioner has not pleaded that the PBG is a conditional bank guarantee. Secondly, as per Clause No. 2 of the PBG there was no mandatory condition imposed upon the respondent to communicate/ inform breach of the Contract by the petitioner to the Bank. In case such communication was required, the wordings of Clause No. 2 of the PBG ought to have specifically mandated the same. If anything, Clause No. 3 of the PBG mandates the Bank to honour the bank guarantee *dehors* pending any dispute.

47. It is further submitted that the law is well settled that with respect to

an unconditional bank guarantee an injunction can be granted only in case of (i) egregious fraud and/or (ii) irretrievable injury special equity. In the present petition, there is no allegation that the respondent defrauded the petitioner into entering the Contract, only to obtain the PBG and to profiteer from the same. Hence, the first case of "egregious fraud" is not present.

48. The only ground raised by the petitioner is that of "irreparable injury" due to "severe financial hardship" and as per the settled law severe financial hardship is not a ground for seeking any restraining order upon the invocation of encashment of a bank guarantee. Reliance has been placed on ***U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.***[6].

49. Further,the petitioner has failed to establish any special equities in its favour. Except pleading "irretrievable injury" and delving upon the disputes between the parties, the petitioner has failed to establish existence of special equities, reliance has been placed on ***Hitachi Energy India Ltd. v. Sterlite Power Transmission Ltd***.[7].

C. <u>Termination of the Contract/ Invocation of the PBG is not barred under Clause No. 13.2 of General Conditions of the Contract</u>

50. It is submitted that the Clause No. 13.2 of General Conditions of the Contract does not restrict the respondent's right to terminate the Contract under Clause No. 12 of General Conditions of the Contract. Admittedly, the parties followed the contractual mechanism stipulated under Clause No. 13 of General Conditions of the Contract, however,

[6] (1988) 1 SCC 174.
[7] 2023 SCC Online Del 1176.

the said clause does not have any negative covenant which could have prevented the respondent from terminating the Contract or invoking the PBG.

51. Further, the respondent issued the Default Notice, wherein a claim of USD 30 million was raised upon the petitioner and the same was disputed by the petitioner *vide* letter dated 05.12.2024. However, the petitioner stopped performing any of its obligations under the Contract since then. The respondent *vide* its letter dated 13.12.2024 insisted the petitioner to continue the project, however the petitioner *vide* letter dated 19.12.2024 refused to perform. It was then the respondent No. 2 exercised its right to terminate the Contract *vide* the impugned letter dated 03.03.2025. It is asserted that when the petitioner itself has gone against Clause No. 13.2 of General Conditions of the Contract and abandoned the works, it cannot later assert that the respondent ought not to have terminated the Contract or ought to have permitted continuing with the Contract.

D. <u>Doctrine of Proportionality is in favour of the Respondent</u>

52. It is submitted that the learned senior counsels for the petitioner in rejoinder submissions relied upon the 'Doctrine of Proportionality' to assert that since the respondent has withheld more money than its preliminary claim of USD 30 million, it should be restrained from encashing the PBG, while relying on a table of invoices, petitioner's request for arbitration and answer to its request for arbitration by the respondent before International Chamber of Commerce (ICC).

53. Firstly, a perusal of the table of invoices by the petitioner show that the amount asserted in the request for arbitration i.e., USD 25 million

is higher than the amount shown in the said table of invoices i.e., USD 22.6 million. Even if the figures of the petitioner are taken to be correct, the table of invoices show that the respondent is still yet to recover about USD 7.4 million against its claim of USD 30 million.

54. Secondly, without prejudice to respondent's case that it is entitled to encash full amount of the PBG, it is submitted that perusal of the four invoices (dated 26.09.2024, 18.10.2024, 18.11.2024 and 01.12.2024) accompanying the petitioner's table of invoices shows that in none of the months, the petitioner was able to achieve the guaranteed excavation of coal. Thus, despite applicability of penalty Clauses No. 12.2 and 12.3 of Contract Specification of the Contract, the petitioner has failed to consider the applicable penalty so as to show an inflated amount to justify its new case made during rejoinder arguments. In so far as fifth Invoice is concerned, which purportedly had been raised in terms of Clause No. 7(4) of the Addendum for overburden purportedly removed from 23.05.2024 to 22.07.2024, the same is also not payable as upon re-computation it was clear that no backlog overburden had been removed.

55. Instead, an amount of about USD 13.25 million only has been withheld and set off as against the respondent No. 2's preliminary claims of USD 30 million. Thus, there is an amount of USD 16.75 million which is still recoverable and the amount of PBG i.e., USD 10 million is not even sufficient to recover the same. In view of the same, the 'Doctrine of Proportionality' is in favour of the respondent.

E. Refund sought is a performance issue and contractually recoverable

56. It is submitted that one of the petitioner's contention during rejoinder submissions was that invocation of the PBG could not be for seeking "refund" which stood paid by respondent under the Addendum against work done since August 2023 until July 2024. It is submitted that the said amounts paid to the petitioner were not payable in the first instance and were wrongly paid to the petitioner due to collusion and fraud committed by the petitioner along with the official of the respondent No. 2.

57. It is stated that the petitioner received payment based on Survey Measurement Certificates prepared jointly by the petitioner and the respondent No. 2's employees, which reflected the quantity of both coal and the overburden volumes. After departure of one of the respondent No. 2's employee, who was instrumental in preparing the Survey Measurement Sheets, the ground survey and computations for the month of August 2024 was done by another employee of the respondent No. 2. It was only then that it was revealed that the excavation of overburden volume was much less than the average of previous twelve months. On verification, it was revealed that for the period of August 2023 to July 2024, the petitioner in collusion with respondent No. 2's employee(s) had fraudulently received amounts towards excess quantity of overburden of about 17.69 BCM (invoices quantity of 29.96 BCM as against re-computed quantity of 12.27 BCM). It was pursuant to such discovery, the Default Notice was issued to the petitioner. Hence, the respondent has the right to claim back the amounts fraudulently received by the petitioner.

58. Further, Clauses No. 10.4 and 10.5 of General Conditions of the

Contract provides for recovery of such amounts. The overburden excavation was part of the Contract, and the refund sought is in respect of wrongly billed and paid overburden volumes and is directly pertaining to the performance of the Contract. Therefore, the respondent is entitled to encash the PBG and has all the rights under Clause No. 10.4 read with Clause No. 10.5 of General Conditions of the Contract, to recover the amounts.

59. Another plea raised by the petitioner was that CEO of the respondent No. 1 had not issued any prior notice of default in performance and therefore, the termination is invalid. The same is erroneous and misconceived in light of Clause No. 9 of the Addendum read with Clause No. 12.1 of General Conditions of the Contract.

ANALYSIS AND FINDINGS

60. I have heard learned senior counsels/learned counsel for the parties and perused the material available on record, including the case laws cited.

61. The law with regard to the scope and jurisdiction under Section 9 of the 1996 Act is no longer *res integra*. In ***Arcelormittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.***[8], the Hon'ble Supreme Court elucidated upon the sameas under:-

> *"88. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration*

[8] (2022) 1 SCC 712.

proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value.

89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief.

90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17.

91. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case, an application for urgent

interim relief may have to be entertained by the Court under Section 9(1).”

(Emphasis added)

62. On perusal, the three-prong test that is to be satisfied before granting interim relief under Section 9 of the 1996 Act: (i) *prima facie* case, (ii) balance of convenience, and (iii) risk of irreparable injury/ loss, which cannot be compensated for in terms of money. The Court, under Section 9 of the 1996 Act, is to only preserve/protect the subject matter of the arbitral dispute and ensure that the Arbitral Award does not become a paper Award.

63. With said principles in mind, I shall proceed to deal with the rival contentions raised by learned senior counsels/ learned counsels for the parties.

64. There are primary two issues before this Court namely, (i) Whether injunction should be granted against termination of the Contract by the respondents? and (ii) Whether injunction should be granted against the invocation/encashment of the subject PBG?

65. As for the issue of injunction against termination of the Contract is concerned, the Contract has been terminated on 03.03.2025. The petitioner approached this Court in March 2025 itself. The Court while issuing notice did not consider fit to grant interim relief of stay on the effect and operation of the impugned termination letter dated 03.03.2025. As per the paragraph No. 10 of the rejoinder affidavit on behalf of the petitioner, it is an admitted fact that the respondents after terminating the Contract have already selected a Chinese Company to conduct the mining operations over the same mine. Hence, the subject

matter of the arbitral dispute namely rights of mining coal in the coal mines in question have already been granted to a Chinese Company.

66. Further, the learned senior counsels for the petitioner while contending that the termination of the Contract is in violation of Clause No. 13 of General Conditions of the Contract, as the Contract could not have been terminated while parties were in the process of dispute resolution and were under an obligation to continue performing their contractual obligations, have placed reliance on ***Innovative Facility Solutions (supra)*****.** In my view, the said judgement and other judgments relied upon the learned senior counsels for the petitioner to buttress the contention for injunction against termination of the Contract has no relevance, as the termination of the Contract has already taken effect and the respondents have already given a Chinese Company rights to conduct the mining operations over the same mine.

67. Further, it will be relevant to point out that the petitioner itself stated that it will be unable to fulfil its obligation on account of delay payments by the respondent. The same is apparent from the paragraph No. 3 of the letter dated 05.12.2024 of the petitioner, which reads as under:-

> *"3. At the outset, BGR expresses its commitment towards continuing its performance under the Contract. However, ICVL/MBL is fully aware of the fact that BGR is unable to carry out its obligations, if ICVL/MBL refuses to make timely payments. ICVL/MBL's conduct is causing huge economic hardships upon BGR, which is unable to make any*

further payments to its subcontractors and vendors. Once ICVL/MBL makes payment of the entire outstanding amount due and payable to BGR for its invoices raised for the months of August 2024 to October 2024, it will be able to continue performance of the work under the Contract."

68. The petitioner again reiterated its stand in paragraph No. 8 of the letter dated 19.12.2024, which reads as under:-

"8. ICVL/MBL is fully aware that BGR's performance under the present Contract is contingent upon timely payments required to be made by ICVL/MBL to BGR. BGR will be unable to fulfill its obligations if ICVL/MBL continues to delay payments. This conduct is causing severe economic hardship to BGR for which ICVL/MBL will be held fully responsible."

69. In this view of the matter, no injunction can now be granted against termination of the Contract. The issue whether the termination of the Contract is in accordance with the law and terms and conditions of the Contract and the Addendum shall be adjudicated by the Arbitral Tribunal, as and when raised.

70. Additionally, as held by a Division Bench of this Court in ***National Highways Authority of India v. Bhubaneswar Expressway Private Limited***[9] the 1996 Act does not sanction two trials/adjudication that is one *vide* by the Court under Section 9 of the 1996 Act and another final adjudication by the Arbitral Tribunal. The intention of the legislature is clear that under Section 9 of the 1996 Act the merits of

[9] 2021 SCC OnLine Del 2421.

the matter are not be adjudicated upon and if the three-prong test is satisfied, then the Court must "preserve" the subject matter of the arbitral dispute and it will be for the Arbitral Tribunal to decide the disputes on merits. This Court is not to deliver findings on issues which require extensive evidence and pleadings, as the same exclusively lies within in the domain of the Arbitral Tribunal.

71. For the said reasons, the issue one i.e., whether injunction should be granted against termination of the Contract is denied.

72. The only surviving question that remains before me is the issue pertaining to injunction against the invocation/encashment of the subject PBG.

73. The law with respect to grant of an injunction restraining encashment/invocation of a bank guarantee is well settled. In the foundational case of ***U.P. Coop. Federation (supra),*** the Hon'ble Supreme Court, after extensively referring to English and Indian cases on the subject, held that bank guarantees are independent contracts and must be honoured in accordance with their terms and conditions. The Bank which gives the guarantee is not to be concerned with the disputes between the parties and just must pay according to the tenor of its guarantee on demand without proof or condition. The Court carved out two exceptions to this rule i.e., (i) fraud of an egregious nature and, (ii) special equities in form of preventing irretrievable injustice. The relevant paragraphs from the said judgment is extracted below:-

> *"28. I am, however, of the opinion that these observations must be strictly considered in the light of the principle*

enunciated. It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised."

(Emphasis added)

74. The principles as laid down by the Hon'ble Supreme Court in ***U.P. Coop. Federation (supra)*** are being followed till date and reiterated in catena of judgments. In ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.***[10], while referring to ***U.P. Coop. Federation (supra),*** the Hon'ble Supreme Court elaborated the law on grant of injunction against a bank guarantee as following: -

"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

[10] (2007) 8 SCC 110.

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."

(Emphasis added)

75. Having laid down the law on the subject, the PBG in question reads as

under: -

Av. 25 de Setembro, Aterro do Maxaquene
Edifício Maryah, 7 Andar, Maputo, Moçambique.
Tel: +258 21 320751/3 / +258 21 320760

suporte.cliente@firstcapitalbank.co.mz
www.firstcapitalbank.co.mz

SÉRIE Nº MP 004011

First Capital BANK

PERFORMANCE BANK GUARANTEE No. 178760690005

We **FIRST CAPITAL BANK, S.A.** do hereby expressly on first demand, irrevocably and unreservedly undertake to unconditionally pay to you, merely on your written demand and without referring to **Black Gold Resources Private, Limitada** and the Contract, and without referring to the merits of the request and without protest and demur, an amount not exceeding **USD 10.535.000.00 (ten million five hundred and thirty-five thousand United States dollars).**

1. Any such demand made on us shall be conclusive as regards the amount due and payable by us under this guärantee.
2. Notwithstanding anything to the contrary we agree that your decision as to whether the Contractor has committed a breach of any terms and conditions of the Contract shall be final and binding on us and we shall not be entitled to ask you to establish your claim or claims under this Guarantee but shall pay the same forthwith without any objection or excuse.
3. We undertake to pay to you any monies up to the Guaranteed Amount so demanded notwithstanding any dispute or disputes raised by the Contractor in any suit or proceeding pending before any court or Tribunal or arbitration relating thereto, our liability under these presents being absolute and unequivocal.
4. The payment so made by us under this Guarantee shall be a valid discharge of our liability for payment thereunder.
5. This guarantee shall come into force from the date of issuance of this guarantee and shall remain fully, irrevocably and unconditionally valid and in force up to either six (6) months after 6 September 2025 or up to six (6) months after the Works/Services completion, whichever is later, as notified to us in writing by yourselves.
6. This guarantee shall not in any way be affected by you taking any securities from the Contractor or by the winding up, dissolution, insolvency as the case may be of the Contractor. The Bank shall not be entitled to proceed against the assets of the Contractor at your site.
7. In order to give full effect to the guarantee herein contained, you shall be entitled to act as if we were your principal debtors in respect of all your claims against the Contractor hereby guaranteed by us as aforesaid and we hereby expressly waive all our surety ship and other rights, if any, which are in any way inconsistent with the above or any other provisions of this guarantee.
8. This guarantee is in addition to any other guarantee or guarantees given to you by us.

Av. 25 de Setembro, Aterro do Maxaquene
Edifício Maryah, 7 Andar, Maputo, Moçambique.
Tel: +258 21 320751/3 / +258 21 320760

suporte.cliente@firstcapitalbank.co.mz
www.firstcapitalbank.co.mz

SÉRIE Nº MP 004012

First Capital BANK

PERFORMANCE BANK GUARANTEE No. 178760690005

9. This guarantee shall not be discharged by any change in the constitution of the Contractor or us, nor shall it be affected by any change in your constitution or by any amalgamation or absorption thereof or therewith but will ensure for and be available to and effaceable by the absorbing or amalgamated company or concern.
10. Notwithstanding anything contained herein before, our liability under this guarantee is restricted up to a sum of **USD 10.535.000.00 (ten million five hundred and thirty-five thousand United States dollars)** and shall expire on either six (6) months after 6 September 2025 or six (6) months after the Works/Services completion, whichever is later, as notified to us in writing by the Company. We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only if you serve upon us a written claim or demand within the expiry date of this guarantee, otherwise all your rights shall be forfeited and we shall stand relieved and discharged from our liabilities hereunder.

11. We have full power to sign this guarantee under the delegations of powers and notification made under general regulation and resolutions in this regard.

Yours faithfully

Dated 06 day of September Two Thousand and Twenty Three

For and on behalf of **FIRST CAPITAL BANK, S.A.**

The Head of Operations
(Joana Marçal)

The Deputy Head of Legal
(Idelson Jossefa)

76. The reliance of the petitioner is on paragraph No. 2 of the PBG, as extracted above, which reads that *"your decision as to whether the Contractor has committed a breach of any terms and conditions of the Contract shall be final and binding on us".* According to the learned senior counsels for the petitioner, the PBG could be invoked only when there is a breach committed by the petitioner and have heavily relied upon the impugned invocation letter dated 03.03.2025, to assert that there is no mention of the breach of the Contract by the petitioner while invoking the PBG. Consequently, it is asserted that the invocation of the PBG by the respondent is contrary to the terms of the PBG. The impugned letter invoking the subject PBG in extracted below:-

Av. 24 de Julho, nº 1123, 4º Piso
Maputo - Moçambique
T +258 21 343600
F +258 21 320649

First Capital Bank, S.A.
COMERCIAL
RECEBIDO/RECEIVED
DATA 03/03/25
ASSINATURA

To

First Capital Bank, S.A.

Av. 25 de Setembro, Aterro do Maxaquene

Edificio Maryah, 7 Andar

Maputo

Moçambique

Maputo, 3rd March 2025
RE: 15/MBL/DC/03/2025

RE: EXECUTION / ENFORCEMENT OF PERFORMANCE BANK GUARANTEE NO. 178760690005 OF USD 10,535,000.00 DATED 6TH SEPTEMBER 2023

Dear Sir,

We refer to the Contract No. MBL/BProj/TE089-2016/17/2017 and Addendums thereto between Minas de Benga, Limitada and Black Gold Resources Private, Limitada for Mining Services at Tete, Mozambique.

We, **Minas de Benga, Lda.**, the beneficiaries of the Performance Bank Guarantee No. 178760690005, in the amount of USD 10,535,000.00 (ten million five hundred and thirty five thousand United States dollars), dated 6th September 2023, issued by FIRST CAPITAL BANK, S.A., in our favour, under the provisions of the Contract for Coal Mining Operation Services (Contract no. MBL/BPROJ/TE089-2016/17/2017#2), of the Laws of Mozambique, and of the Performance Bank Guarantee No. 178760690005, hereby demand the payment forthwith, of the full amount of USD 10,535,000.00 (ten million five hundred and thirty five thousand United States dollars), to our following bank account:

Bank: **First Capital Bank**

Address: **Av. 25 de Setembro, Aterro do Maxaquene, Edificio Maryah, 7 Andar, Maputo**

Account currency: **USD**

Av. 24 de Julho, nº 1123, 4º Piso
Maputo - Moçambique
T +258 21 343600
F +258 21 320649

Account number: **177 855 911 001**

NIB: **001 000 000 177 855 911 127**

IBAN: **MZ59 001 000 000 177 855 911 127**

Swift code: **FRCGMZMA**

We expect that payment is made by First Capital Bank, S.A. without referring to the merits of the request, without protest and demur, and without any objection or excuse, as per the terms of the Performance Bank Guarantee No. 178760690005.

This letter of execution/enforcement of the Performance Bank Guarantee No. 178760690005 is issued and delivered to First Capital Bank, S.A., only and solely for the purposes of execution/enforcement of the Performance Bank Guarantee No. 178760690005, which original is attached herewith.

Thanking you.

Yours truly,

Name: Vikas Shounak
Designation: CFO and Board Member

77. I am unable to agree with the said contention raised by the learned senior counsels for the petitioner that the terms of the PBG requires respondent's demand for payment based on and conveying a decision

that the petitioner has committed a breach of contractual obligations. A bare perusal of the recitals and terms of the PBG, as extracted above, show that it is an unconditional and irrevocable PBG. The recitals of the PBG itself states that it's the bank's duty to "irrevocably" and "unconditionally" pay the respondent on demand, without any requirement to establish breach by the petitioner. The PBG in unequivocal words states that any demand made by the respondent shall be conclusive, irrespective of any dispute pending between the parties before any court or tribunal or arbitration.

78. Further, even the reliance of the petitioner on paragraph No. 2 of the PBG is misplaced. The same only says that the respondents' "*decision as to whether the Contractor has committed a breach"* shall be final. Nowhere does it mention that the respondent has to disclose its decision that the petitioner has committed a breach of its contractual obligations to the Bank. It is only the decision which has to be formed by the respondent that there has been breach of the terms and conditions of the Contract. Further, the said decision is duly contained in the impugned termination letter dated 03.03.2025 (as extracted below). However, whether or not such decision is correct, is not for this Court to adjudicate upon in this petition.

79. The petitioner has also placed reliance on the impugned termination letter dated 03.03.2025 and it is emphasised that the termination of the Contract is not on account of any default but due to miscalculation of the overburden volumes, which the respondents had already paid and the petitioner had received. The said letter is extracted below:-

Av. 24 de Julho, nº 1123, 4º Piso
Maputo - Moçambique
T +258 21 343600
F +258 21 320649

To

Black Gold Resources Private, Limitada ("BGR")

Av. Guerra Popular, nº 1028, 1º Andar

Maputo

Att. Messrs.

Charan Mangalapuru

Venkata Krishna A. P. Marty

Tete, 3rd March 2025
Ref. 16/MBL/DC/03/2025

RE: TERMINATION NOTICE FOR UNDUE APPROPRIATION OF MBL`S FUNDS BASED ON SUBSTANTIAL INCORRECT COMPUTATION OF OVER BURDEN VOLUMES

Dear Sirs,

We refer to the Services Contract no. MBL/BProj/TE089-2016/17/2017, entered into between Minas de Benga, Lda. (hereinafter "MBL") and Black Gold Resources Private, Limitada (hereinafter "BGR") on 2 November 2017 (hereinafter "Contract") and Addendums thereto.

We also refer to MBL's letter dated 8 November 2024, Ref. 95/MBL/DC/11/2024, addressed to BGR regarding *"Default notice for undue appropriation of MBL`s funds based on substantial incorrect computation of Over Burden volumes"*, as well as subsequent letters dated 9 December 2024 (Ref. 95/MBL/DC/12/2024), 13 December 2024 (Ref. 104/MBL/DC/12/2024) and 6 January 2025 (Ref. 108/MBL/DC/01/2025).

By the above referred letter dated 8 November 2024, MBL gave a Default Notice to BGR (*under the terms of Clause 12.1 (a) (i) of the General Conditions of Contract*), and expressed its intention to exercise its rights under the Contract provisions if BGR failed to remedy the default by returning to MBL the total amount of USD 30,079,100.83 unduly received by BGR from MBL due to substantial incorrect computation of Over Burden volumes.

Furthermore, through the letter dated 8 November 2024, MBL stressed that if BGR failed to remedy the default by returning to MBL the total amount of USD 30,079,100.83 until 22nd November 2024, then MBL may exercise its rights (*under the terms of Clause 12.1 (b) of the General Conditions of Contract*).

MBL also explained in detail, in the mentioned letter dated 8 November 2024, what BGR's default consists of.

BGR may also take note that the issue of non-performance of BGR in achieving Over Burden target volumes has been discussed amongst representatives of both BGR and MBL for several times. In terms of Clause 13.3(a) of the General Conditions of Contract, since 19th December 2024, meetings between teams of both parties have taken place with no solutions being reached.

BGR failed to remedy the default by returning to MBL the total amount of USD 30,079,100.83 and made no efforts to solve the issue.

Given that BGR has failed to remedy the default, in terms of Clause 12.1 (b) (i) & (iv), **MBL forthwith terminates the whole Contract** (Termination Notice) due to breach of Contract and reserves its right to engage a third party to carry out or complete the performance of the Contract (i.e., achieve the Over Burden figures, which BGR failed to achieve) and the cost of such action so taken by MBL being recoverable from BGR as a debt due to MBL by BGR.

As consequence of termination of the Contract, MBL shall recover the amount due by BGR by:

1. deduction of such amounts from invoices received from BGR, which invoices are pending payment; and
2. using any other contractual and legal means at MBL's disposal, including but not limited to encashment of BG No. 178760690005 dated 6th Sep 2023.

We emphasize that, the termination of the Contract has, besides the above and amongst others, the consequences stated under Clause 30.1 of the General Conditions of Contract and, therefore, the parties obligations under the Contract immediately ceases and BGR must complete the demobilization of its mining equipment, its personnel, its facilities and all other items supplied or provided by BGR, by no later than 3rd April 2025, as per the terms of Clause 1.5.2 of the Scope of Works, other applicable provisions of the Contract and the terms and conditions of the letter dated 22 December 2017, Ref. 945/MBL/DC/12/2017 (specifically points 9., 10., 18., 19. and 20.). We emphasize that, should BGR not demobilize the mining equipment until 3rd April 2025, BGR shall pay MBL the amount of USD 1,000.00 (one thousand United States dollars) per day, as a rental and penalty fee for usage of the Site belonging to MBL, until the date of full and complete demobilization and removal of the mining equipment from the mine site. If the mining equipment to be demobilized still remains at the mine site after 2nd July 2025, the ownership to all the mining equipment shall revert to MBL at zero cost, and no demand, claim, compensation, indemnification or any other action on the basis of unjustified enrichment or any other basis or cause shall be applicable.

Considering that the Contract is terminated, the dispute conversations still taking place by video conference as from 10 March 2025 (as proposed in point 14 of BGR's letter dated 28 February 2025) for 10 working days, the said 10 working days' time should not be, in any

manner whatsoever, construed as any extension of time under Clause 12.1(b)(i) of the General Conditions of Contract.

This Notice is being issued on a without prejudice basis and all rights and remedies available to MBL are being hereby expressly reserved.

Regards.

MINAS DE BENGA, LDA.

Anil Bhatnagar
Head of Mining Operations

80. It is the submission of the petitioner that the said allegation of the respondent has also been mentioned in the Default Notice. Hence, it is the submission of the petitioner that the respondent have paid about USD 30 million towards overburden volumes after due verification based on survey reports of mined areas and work completion/experience certificates (which included reports on volume of waste removed) and subsequently, the respondent cannot unilaterally come to a finding that the same was paid in excess and seek to recover the same from the petitioner by invoking the PBG. The respondents' claim of about USD 30 million comprises of three components: (i) about USD 10.329 million on account of penalty on shortfall of current overburden (ii) USD 11.5 million on account of refund given for overburden removed during February 2023 to July 2023 and (iii) USD 8.25 million for quarterly refund given for allegedly meeting overburden target, which were wrongly certified and claimed. It is the argument of the learned senior counsels for the petitioner that the PBG was issued for due performance of the

Contract and not for recovery of alleged over payment made by the respondent for the overburden volumes.

81. To my mind, the issue whether the respondent paid excess for overburden volumes or paid them legally and legitimately or whether the respondent No. 2 has rightly or wrongly withheld payments are questions which require evidence and an adjudication of whether there was a fraud and collusion between the petitioner and the respondent No. 2's employee(s), as claimed by the respondent No. 2 and denied by the petitioner. This Court today in a Section 9 petition cannot adjudicate whether the termination of the Contract was right or wrong or whether the respondent No. 2 was entitled to recover the overburden charges already paid, as such issues touch the merit of the matter and are for the Arbitral Tribunal to decide.

82. The subject PBG is an unconditional bank guarantee and needs to be honoured in its entirety. The respondents have already terminated the Contract for breach. I am of the view that once the Contract had been terminated for breach (without commenting rightly or wrongly), the respondent No. 2 in terms of the PBG, in entitled to encash the PBG.

83. The learned senior counsels for the petitioner while relying on ***Hindustan Construction (supra)*** states that therein it was held that where the terms of a bank guarantee require a breach of contract, invocation must be in accordance with such terms.The said judgement is differentiable as the terms of the bank guarantee in ***Hindustan Construction (supra)*** were different from the subject PBG. The present PBG is unconditional and is encash able on mere decision of the respondent regarding breach of the Contract. The bank guarantee

involved in ***Hindustan Construction (supra)*** had a condition that *"... in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract"*. The Hon'ble Supreme Court in ***Hindustan Construction (supra),*** relied upon the said wordings in the bank guarantee to restrain invocation of the bank guarantee.

84. In cases of unconditional and irrevocable bank guarantees, the Court may stay invocation only when there is egregious fraud, irretrievable injustice, or special equities. In the present case, the petitioner has pleaded special equities and irreparable injury. It is submitted that the invocation of the subject PBG on account of failure to return USD 30 million due to alleged incorrect computation of overburden volumes, is grossly disproportionate, as the respondents have already withheld USD 25 million from pending invoices. Further, it is also argued that the invocation of the PBG amounting to USD 10.5 million will cause severe financial hardship and irreparable injury to the petitioner.

85. As far as the issue of injunction on the invocation of the PBG is concerned, any reference to the dispute between the parties relating to the performance of the Contract, is completely irrelevant, as held in ***Himadri Chemicals Industries (supra),*** among many other judgements. The argument that the respondent has withheld USD 25 million from pending invoices is also a question which will be decided by the Arbitral Tribunal. Such dispute is to be adjudicated in the arbitral proceedings and I, in the present interim proceedings, am

confined to deliberating on whether a case of special equities in form of preventing irretrievable injustice has been made out by the petitioner.

86. In ***Svenska Handelsbanken v. Indian Charge Chrome***[11], the Hon'ble Supreme Court observed that special equities partake the character of irretrievable injustice. The Court further noted that irrevocable Bank Guarantee should not be interfered with unless there is established irretrievable injustice involved in the case and the irretrievable injury has to be of the nature noticed in the case of ***Itek Corporation v. First National Bank of Boston***[12]**.**The relevant paragraphs from the said judgment are extracted below:-

> *"72. Again in this very judgment Shetty, J. referred to the observations of Mukharji, J. that there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.*
>
> ***xxxxxxxx***
>
> *88. The High Court was also in error in considering the question of balance of convenience. In law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima facie case of established fraud and an irretrievable injury.*

[11] (1994) 1 SCC 502.
[12] 566 Fed Supp.1210, 1217.

Irretrievable injury is of the nature as noticed in the case of Itek Corpn. [566 Fed Supp 1210, 1217] Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers or suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for effecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed by the Indian Courts could not be executable in Sweden."

(Emphasis added)

87. From the entire arguments of the learned counsels for the petitioner, no case of special equities and irreparable injury is made out. All that emerges is that there are disputes pertaining to calculation of overburden volumes removed by the petitioner, due to alleged collusion between the petitioner and respondent No. 2's employee(s) and in lieu of the same the respondent withheld payments and sought to invoke the subject PBG.

88. Irretrievable injustice, as an exception to the rule of non-interference with invocation/encashment of unconditional bank guarantee, is not fulfilled by mere pleading of loss or financial hardship. Any party who furnishes a PBG is at the risk of suffering its encashment, however, such a party also always has the legal remedy to sue for recovery due to wrongful encashment. Therefore, what the petitioner needed to prove was that it would be impossible for it to recover the PBG amount, if later the Arbitral Tribunal found the issue in its favour, as also observed by the Hon'ble Supreme Court in ***Dwarikesh Sugar***

Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.[13], especially in paragraph No.22, which reads as under:-

> *"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."*

89. The petitioner has pleaded that the issuance of the impugned termination letter and the invocation of the PBG will cause severe financial hardships and that the petitioner is at risk of insolvency, in which case encashment of the subject PBG would irreparably impair its ability to continue operations.To my mind the said contentions, neither meets the high threshold of irretrievable injustice or that of special equities, as to justify restraining the respondents from invocation of the subject PBG.

90. There is no pleading on record that the respondents are trying to evade the Jurisdiction of the Court or are alienating their assets, or any other ground which could adversely affect the recovery of the petitioner, if so ordered by the Arbitral Tribunal. Disputes pertaining to withholding of invoices and overburden measurement, fall within the exclusive jurisdiction of the Arbitral Tribunal and cannot override the PBG's unconditional wordings.

[13] (1997) 6 SCC 450.

91. Further, the learned senior counsels for the petitioner has relied upon ***Chennai Metro Rail (supra)*** and ***National Federation of Farmers (supra)*** to assert that an injunction can be granted against invocation of bank guarantee by applying the Doctrine of Proportionality. In the case of ***Chennai Metro Rail (supra)***, the Hon'ble High Court of Madras granted injunction against invocation of bank guarantee as the party sough encashment of the whole amount of bank guarantee without crystallising its claims. Similarly, in ***National Federation of Farmers (supra)*** the Hon'ble High Court of Madras granted injunction against invocation of bank guarantee as the first respondent sought invocation of the bank guarantee without any claim of loss suffered on account of cancellation of the tender and before the contract could be awarded by the first respondent in favour of the petitioner. Both these judgements are differentiable from the present case, as in the present case the respondent No. 2 has clearly crystallised its claims.

92. As for the contention raised by the both parties as to how the 'doctrine of proportionality' lies in their favour by relying on invoices and showing calculations, the same is entirely arbitrable in nature and shall be decided by the Arbitral Tribunal.

93. Further, the learned senior counsel for the petitioner has relied upon ***BGR Energy Systems (supra)*** to contend that invocation of the PBG should be restrained as it would wipe out the net worth of the petitioner and cause irretrievable injury. However, the same does not persuade me as in ***BGR Energy Systems (supra)*** the appellant had completed the contracted work and completion certificate was also

issued. In the present case, the petitioner itself through letters dated 05.12.2024and 19.12.2024 expressed its inability to continue with the Contract.

CONCLUSION

94. To conclude, the invocation of the subject PBG is as per the text and recitals of the PBG and the petitioner has failed to establish that it will suffer irretrievable harm if invocation of the PBG is not restrained. The contentions raised bythe learned senior counsels for the petitioner for injunction against invocation of the PBG essentially revolved around interpretation and performance/ non-performance of the conditions stipulated in the Contract and Addendum and the same are entirely arbitrable in nature and not for this Court to adjudicate upon in a Section 9 petition.

95. In view of the aforesaid, I am not inclined to grant injunction against the impugned letter for execution/enforcement of the subject PBG or against the impugned letter for termination of the Contract.

96. The present petition is dismissed and the Interim Order dated 06.03.2025 stands vacated.

97. Consequently, the pending applications are disposed of.

JASMEET SINGH, J

DECEMBER 17th, 2025 / (HG)