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

*Reserved on: 17<sup>th</sup> September, 2021*

*Pronounced on: 2<sup>nd</sup> May, 2022*

+ O.M.P.(I) (COMM.) 200/2021 & I.As. 7653-55/2021

M/S GARG BUILDERS THROUGH SHRI MOHINDER PAL  
GARG ..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv.  
assisted by Mr. Rahul Malhotra, Adv.

versus

HINDUSTAN PREFAB LTD. AND ANR ..... Respondents

Through: Mr. Ankit Jain, Mr. Varun  
Nischal, Mr. Vaibhav Mishra, Advs. for R-1  
with Mr. Mukesh Kumar (Law Officer-  
HPL)

Mr. Amol Sharma, Adv. for R-2

+ O.M.P.(I) (COMM.) 201/2021 & I.As. 7656-58/2021

M/S GARG BUILDERS THROUGH SHRI MOHINDER PAL  
GARG ..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv.  
assisted by Mr. Rahul Malhotra, Adv.

versus

HINDUSTAN PREFAB LTD. AND ANR .... Respondents

Through: Mr. Ankit Jain, Mr. Varun  
Nischal, Mr. Vaibhav Mishra, Advs. for R-1  
with Mr. Mukesh Kumar (Law Officer-  
HPL)

Mr. Amol Sharma, Adv. for R-2

+ O.M.P.(I) (COMM.) 202/2021 & I.As. 7659-61/2021

GARG BUILDERS ..... Petitioner  
Through: Mr. Rajshekhar Rao, Sr. Adv.  
assisted by Mr. Rahul Malhotra, Adv.  
versus

HINDUSTAN PREFAB LIMITED & ANR. .... Respondents  
Through: Mr. Ankit Jain, Mr. Varun  
Nischal, Mr. Vaibhav Mishra, Adv. for R-1  
with Mr. Mukesh Kumar (Law Officer-  
HPL)  
Mr. Amol Sharma, Adv. for R-2

**CORAM:**  
**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E N T**

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**02.05.2022**

1. Hindustan Prefab Limited (HPL) invited tenders from interested bidders for construction activities to be carried out at various locations in the country. With respect to three of the tenders thus floated, the petitioner Garg Builders was the successful bidder.

2. Tenders were awarded to the petitioner, by HPL, for carrying out of construction activities at Ghaziabad, Uttar Pradesh, Raipur, Chhattisgarh and Asansol, West Bengal *vide* Letters of Award dated 3<sup>rd</sup> March, 2016, 9<sup>th</sup> January, 2017 and 4<sup>th</sup> August, 2018, followed by agreements dated 21<sup>st</sup> March, 2016, 25<sup>th</sup> January, 2017 and 25<sup>th</sup> September, 2018 respectively.

3. Each of these Agreements required the petitioner to provide Bank Guarantees towards security deposit as well as Performance

Bank Guarantee (PBGs). Bank Guarantees, as so required, were undisputedly furnished by the petitioner to HPL. All the Bank Guarantees were issued by HDFC Bank Ltd. (“the Bank”) which is, accordingly, Respondent 2 in these three petitions.

4. Disputes arose between the petitioner and HPL in respect of all these three contracts. The contracts provided for reference of the disputes to arbitration. Accordingly, after following the pre-arbitral regimen stipulated in that regard in the individual agreements, the petitioner moved this Court by way of Arb. P 518 of 2021, Arb. P 473 of 2021 and Arb. P P47 of 2020, respectively.

5. Prior to filing Arb. P 518 of 2021, Arb. P 473 of 2021 and Arb. P 47 of 2020, however, the petitioner moved the captioned three OMPs, under Section 9 of the Arbitration and Conciliation Act, 1996 (“the 1996 Act”), seeking pre-arbitral interim reliefs.

6. The relief sought in these three cases is identical. In each of these cases, the petitioner has averred that HPL had written to the Bank on 1<sup>st</sup> July, 2021, invoking the Bank Guarantees furnished by the petitioner, and calling upon the Bank to credit the amount secured by the Bank Guarantees into HPL’s account. The petitioner has sought a restraint against such invocation, pending resolution of the disputes between the petitioner and HPL by arbitration.

7. The petitioner was represented, initially, by Mr. Jayant Mehta, learned Senior Counsel, and later, by Mr. Raj Shekhar Rao, learned

Senior Counsel, in these matters, whereas Mr. Ankit Jain appeared on behalf of the contesting respondent HPL. They were heard at length. The Bank was represented by Mr. Amol Sharma, who did not choose to advance any argument, as the Bank has no stake in the matter.

8. I proceed to dispose of the captioned OMPs by the present judgment. The relevant facts, and prevailing considerations, being the same in all the three OMPs, they are dealt with together.

### **Facts**

9. The details of the contracts in these three OMPs may be tabulated as under:

<b>OMP No.</b>	<b>Date of Contract</b>	<b>Location of work</b>
<b>200 of 2021</b>	25 <sup>th</sup> January, 2017	Raipur
<b>201 of 2021</b>	25 <sup>th</sup> September, 2018	Asansol
<b>202 of 2021</b>	21 <sup>st</sup> March, 2016	Ghaziabad

Other specifics of the contracts are of no particular relevance to the determination of the issue in controversy; ergo, reference thereto is eschewed.

10. Nine Bank Guarantees, provided by the petitioner as required by the aforementioned three contracts, form subject matter of these three petitions. The petitioner also provided four Bank Guarantees towards security deposit, the details of which may be tabulated thus:

BG No.	Dated	Amount (₹)	Purpose
<b>OMP (I) (Comm) 200/2021</b>			
003GT0216 3520012	17.12.16	3243000/-	Security Deposit
003GT0219 2540009	11.09.19	2974000/-	Security Deposit
003GT0218 2790007	06.10.18	7500000/-	Security Deposit
003GT0217 3030030	30.10.17	3243000/-	Security Deposit
<b>OMP (I) (Comm) 201/2021</b>			
003GT0218 2190021	07.08.18	28773504/-	Performance
<b>OMP (I) (Comm) 202/2021</b>			
003GT0216 0760022	16.03.16	15172278/-	-
003GT0217 1670016	16.06.17	2000000/-	-
003GT0219 2590021	16.09.19	3500000/-	-
003GT0218 2810026	08.10.18	2500000/-	-

**11. The operative terms of the aforesaid Bank Guarantees read thus:**

Bank Guarantee No. 003GT02163520012 dated 17<sup>th</sup> December, 2016

“In consideration of Hindustan Prefab Limited having its Head Office at Jangpura, New Delhi : 110 014 (hereinafter called the “Employer” which expression shall unless repugnant to the subject or context include its successors and assigns) having issued Notice inviting Tender No.HPL/DGM(C)/TC/ESIC/Raipur/2016-17/92 dated 06.12.2016 M/s Garg Builders having its Registered/Head Office at 110, NDM-1, Netaji Subhash Place, Pitampura, New Delhi-110034 (hereinafter called the “Tenderer” who wishes to participate in the said tender for Construction of 100 bedded ESIC Hospital at Raipur, Chhattisgarh and you, have agreed to accept an irrevocable and unconditional Bank Bid

Guarantee for and amount of Rs.32,43,000.00 [Rupees Thirty Two Lakh Forty Three Thousand Only] valid up to 20-JUN-2017 on behalf of the tenderer in lieu of cash Deposit required to be made by the tenderer, as a condition precedent for participation in said tender.

We, the HDFC Bank LTD, a body corporate constituted under the Companies Act 1956 having its Registered Office at HDFC Bank House ,C.S.No.6/242, Senapati Bapat Marg, Lower Parel (West), Mumbai 400013 and other places, a Branch at E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as the Bank) do hereby unconditionally and irrevocable guarantee and undertake to pay to the “Employer” on demand without any demur reservation, protest, contest, and recourse to be extent of the said sum of Rs. 32,43,000.00 (Rupees Thirty Two Lakh Forty Three Thousand Only).

Any such claim/demand made by the said “Employer” on us shall be conclusive and binding on us irrespective of any dispute or difference raised by the tenderer. This guarantee shall be irrevocable and shall remain valid up to 20-JUN-2017. If any further extension of this guarantee is required, the same may be granted to such required period on receiving instructions from M/s Garg Builders on whose behalf this guarantee is issued.”

Bank Guarantee No. 003GT02192540009 dated 11<sup>th</sup> September, 2019

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called “The Employer”) having offered to accept the terms and conditions of the proposed agreement between **Hindustan Prefab Ltd** and **M/s Garg Builders** (hereinafter called “the said Contractor(s)”) for the work **Construction of 100 bedded ESIC Hospital at Raipur, Chattisgarh** (hereinafter called “the said agreement”) having agreed to production of an irrevocable Bank Guarantee for ₹2,974,000.00 as a security/guarantee from the contractor(s) for compliance of

his obligations in accordance with the terms and conditions in the said agreement.

1. We, **HDFC Bank Limited**, E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as “**the Bank**”) hereby undertake to pay to the Employer an amount not exceeding **₹2,974,000.00** on demand by the Employer.

2. We **HDFC Bank Limited** do hereby undertake to pay the amounts due and payable under this Guarantee without any demure, merely on a demand from the Employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding **₹2,974,000.00**.

3. We, the said bank further undertake to pay the Employer any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this guarantee shall be a valid discharge of our liability for payment there under and the Contractor(s) shall have no claim against us for making such payment.”

Bank Guarantee No. 003GT02182790007 dated 6<sup>th</sup> October, 2018

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called “The Employer”) having offered to accept the terms and conditions of the proposed agreement between **Hindustan Prefab Ltd** and **M/s Garg Builders** (hereinafter called “the said contractor(s)”) for the work **Construction of 100 bedded ESIC Hospital at Raipur, Chattisgarh** (hereinafter called “the said agreement”) having agreed to production of an

irrevocable Bank Guarantee for ₹7,500,000.00 (**Rupees. SEVENTY FIVE LAKHS ONLY**) as security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We, **HDFC Bank Limited**, E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as “**the Bank**”) hereby undertake to pay to the Employer an amount not exceeding **₹7,500,000.00 (Rupees SEVENTY FIVE LAKHS ONLY)** on a written demand by Employer.

2. We **HDFC Bank Limited** (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this Guarantee without any demure, merely on a demand from the Employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding **₹7,500,000.00 (Rupees. SEVENTY FIVE LAKHS ONLY)**.

3. We, the said bank further undertake to pay the Employer any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be valid discharge of our liability for payment there under and the Contractor(s) shall have no claim against us for making such payment.”

Bank Guarantee No. 003GT02173030030 dated 30<sup>th</sup> October, 2017

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called the employer) having offered to accept the terms and conditions

of the proposed agreement between Hindustan Prefab Ltd and M/s Garg Builders (hereinafter called “the said contractor(s)”) for the work Construction of 100 bedded ESIC Hospital at Raipur, Chattisgarh (hereinafter called “The said agreement”) having agreed to production of an irrevocable Bank Guarantee for ₹3,243,000.00 (Rupees Thirty Two Lack Forty Three Thousand only) as security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We HDFC Bank Limited, incorporated under the Companies Act, 1956 and carrying on the business of banking under the Banking Regulation Act having its registered office at HDFC Bank House, C.S. No. 6/242, Senapati Bapat Marg, Lower Parel (West), Mumbai 400013 and one of its branch office at HDFC Bank Limited, E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as “the Bank) hereby undertake to pay to the Government an amount not exceeding ₹3,243,000.00 (Rupees Thirty Two Lakh Forty Three Thousand only) on a written demand by employer.

2. We HDFC Bank Limited do hereby undertake to pay the amount due and payable under this Guarantee without any demure, merely on a written demand from employer stating that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding ₹3,243,000.00 (Rupees Thirty Two Lakh Forty Three Thousand only).

3. We, the said bank further undertake to pay to employer the guaranteed money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal.

The payment so made by us under this bank guarantee shall be valid discharge of our liability for payment there under and the contractor(s) shall have no claim against us for making such payment.”

Bank Guarantee No. 003GT02182190021 dated 7<sup>th</sup> August, 2018

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called the employer) having offered to accept the terms and conditions of the proposed agreement between Hindustan Prefab Ltd. and **M/s Garg Builders** (hereinafter called “the said contractor(s)”) for the work Upgradation from 100 to **150 bedded ESIC Hospital at Asansol, West Bengal** (hereinafter called “The said agreement”) having agreed to production of a irrevocable Bank Guarantee for **Rs. 28773504/-** (rupees **TWO CRORE EIGHTY SEVEN LAKHS SEVENTY THREE THOUSAND FIVE HUNDRED AND FOUR RUPEES ONLY.**) as security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We HDFC Bank Limited We HDFC Bank Limited, incorporated under the Companies Act 1956 and carrying on the business of banking under the Banking Regulation Act having its registered office at HDFC Bank House, C.S. No.6/242, Senapati Bapat Marg, Lower Parel (West), Mumbai 400013 and one of its branch office at Hdfc Bank Limited, 1<sup>st</sup> Floor, Kailash Building, 26, K.g.Marg, New Delhi-110001 (hereinafter referred to as “the Bank) hereby undertake to pay to the government an amount not exceeding **Rs.28773504/- (Rupees TWO CRORE EIGHTLY SEVEN LAKHS SEVENTY THREE THOUSAND FIVE HUNDRED AND FOUR RUPEES ONLY)** on a written demand by employer.

2. We HDFC Bank Limited do hereby undertake to pay the amount due and payable under the Guarantee without any demure, merely on a written demand from employer stating

that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding **Rs. 28773504/- (Rupees TWO CRORE EIGHTY SEVEN LAKHS SEVENTY THREE THOUSAND FIVE HUNDRED AND FOUR RUPEES ONLY)**

3. We, the said bank further undertake to pay to employer the guaranteed money so demanded not exceeding **Rs. 28773504/- (Rupees TWO CRORE EIGHTY SEVEN LAKHS SEVENTY THREE THOUSAND FIVE HUNDRED AND FOUR RUPEES ONLY)** notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal.”

Bank Guarantee No. 003GT02171670016 dated 16<sup>th</sup> June, 2017

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called “The Employer”) having offered to accept the terms and conditions of the proposed agreement between Hindustan Prefab Ltd. And M/s Garg Builders (hereinafter called “the said contractor(s)”) for the work C/o. of Proposed Infrastructure for 08 Battalion of National Disaster Response Force (NDRF), Ghaziabad (U.P.) (hereinafter called “the said agreement”) having agreed to production of an irrevocable Bank Guarantee for Rs. 20,00,000.00 (Rupees Twenty lakh Only) as a security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We HDFC Bank LTD, a body corporate constituted under the Companies Act 1956 having its Registered Office at HDFC Bank House, C.S.No.6/242, Sengapati Bapat Marg, Lower Parel (West), Mumbai 400013 and other places, Branch at E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle circle,

Connaught Place, New Delhi 110001 (hereinafter referred to as the Bank) hereby undertake to pay to the Hindustan Prefab Ltd. acting for and on behalf of the Employer as an Agent/Power of Attorney Holder, an amount not exceeding Rs.20,00,000.00/- (Rupees Twenty Lakh Only) on demand by Hindustan Prefab Ltd. for and on behalf of Employer as an Agent/Power of Attorney Holder.

2. We HDFC Bank Limited do hereby undertake to pay the amount due and Payable und this Guarantee without any demur, merely on a demand form by Hindustan Prefab Ltd. for and on behalf of the Employer as an Agent/Power of Attorney Holder stating that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs.20,00,000.00/- (Rupees Twenty Lakh Only).

3. We the Said Bank further under take to pay to the Employer represented by Hindustan Prefab Ltd. for and on behalf of the employer as an Agent/Power of Attorney Holder any Money up to the guaranteed amount so demanded not withstanding any dispute or disputes raised by the Contractor in any suit or proceeding pending before any court or Tribunal relating there to, our liabilities under this present being absolute and unequivocal. The payment so made by us under this Guarantee shall be a valid discharge of our liability for payment there under and the Contractor shall have no claim against us for making such payment.”

Bank Guarantee No. 003GT02192590021 dated 16<sup>th</sup> September, 2019

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called “The Employer”) having offered to accept the terms and conditions of the proposed agreement between Hindustan Prefab Ltd. and M/s Garg Builders (hereinafter called “the said Contractor(s)”) for the work **C/o of Proposed Infrastructure for 08 Battalion of National Disaster Response Force**

(NDRF), Ghaziabad (U.P) (hereinafter called “the said agreement”) having agreed to production of an irrevocable Bank Guarantee for **Rs.3,50,000.00** as a security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We, **HDFC Bank Limited**, E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as “the Bank”) hereby undertake to pay to the Employer an amount not exceeding **Rs. 3,500,000.00**.

2. We, **HDFC Bank Limited** (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this guarantee without any demure, merely on a demand from the Employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding ₹3,500,000.00

3. We, the said bank further undertake to pay the Employer any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this guarantee shall be a valid discharge of our liability for payment there under and Contractor(s) shall have no claim against us for making such payment.”

Bank Guarantee No. 003GT02182810026 dated 8<sup>th</sup> October, 2018

“In consideration of the Hindustan Prefab Ltd. having its Head Office at Jangpura, New Delhi (hereinafter called “The Employer”) having offered to accept the terms and conditions of the proposed agreement between **Hindustan Prefab Ltd** and **M/s Garg Builders** (hereinafter called “the said

Contractor(s)”) for the work **C/o. of Proposed Infrastructure for 08 Battalion of National Disaster Response Force (NDRF), Ghaziabad (U.P)** (hereinafter called “the said agreement”) having agreed to production of an irrevocable Bank Guarantee for **₹2,500,000.00 (Rupees.TWENTY FIVE LAKHS ONLY)** as security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement.

1. We, **HDFC Bank Limited**, E-13/29, 2<sup>nd</sup> Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as “**the Bank**”) hereby undertake to pay to the Employer an amount not exceeding **₹2,500,000.00 (Rupees. TWENTY FIVE LAKHS ONLY)** on demand by the Employer.

2. We **HDFC Bank Limited** (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this Guarantee without any demure, merely on a demand from the Employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding **₹2,500,000.00 (Rupees.TWENTY FIVE LAKHS ONLY)**.

3. We, the said bank further undertake to pay the Employer any money so demanded not exceeding **₹2,500,000.00 (Rupees.TWENTY FIVE LAKHS ONLY)** notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this Guarantee shall be a valid discharge of our liability for payment there under and the Contractor(s) shall have no claim against us for making such payment.”

12. On 14<sup>th</sup> June, 2021, HPL wrote the following letter to the Bank, seeking to invoke the aforesaid nine bank guarantees:

“HPL/BG/ENCASHMENT/26

June 14, 2021

The Chief Manager  
HDFC Bank  
E-13/29, 2<sup>nd</sup> Floor  
Harsha Bhawan  
Cont. Circus  
New Delhi-110001

Sub: Invocation of Bank Guarantee

Dear Sir,

Please refer to your following mentioned Bank Guarantees

Sl. No.	BG. No.	Dated	Project	Amount	Claim date
1.	003GT02160 760022	16.03.2016	NDRF Gzd	1,51,72,278.00	15-06- 2021
2.	003GT02171 670016	16.06.2017	NDRF Gzd	20,00,000.00	15-06- 2021
3.	003GT02163 529912	17.12.2016	ESIC Raipur	32,43,000.00	20-07- 2021
4.	003GT02192 540009	11.09.2019	ESIC Raipur	29,74,000.00	10-09- 2021
5.	003GT02192 590021	16.09.2019	NDRF Gzd	35,00,000.00	15-09- 2021
6.	003GT02182 810026	08.10.2018	NDRF Gzd	25,00,000.00	07-10- 2021
7.	003GT02182 790007	06.10.2018	ESIC Raipur	75,00,000.00	05-04- 2022
8.	003GT02182 190021	07.08.2018	ESIC Asansol	2,87,73,594.00	06-04- 2022
9	003GT02173 030030	30.10.2017	ESIC Raipur	32,43,000.00	29-04- 2022

The validity period of the captioned bank guarantees is expired and are under claim period on the date mentioned

above. We have requested to extend the validity of BGs. As bank guarantees have not been extended further and not received by us as per request.

Now competent authority has decided to invoke the above mentioned bank guarantees, accordingly you are requested to remit the guarantee amount in terms of the guarantee in its letter and spirit by means of Demand Draft in favour of M/s Hindustan Prefab Limited, payable at New Delhi OR remit the amount to the undersigned mentioned a/c (a copy of cancelled cheque is also enclosed).

Name of the Party	HINDUSTAN PREFAB LIMITED
Banker	Punjab National Bank
Branch	Jangpura, Bhogal, New Delhi-110014
Account No.	0147002100025853
RTGS CODE	PUNB0014700

Thanking you

Yours faithfully,

For Hindustan Prefab Limited

Sd/-  
V.K.Gupta,  
FA& CAO”

**13.** Challenging the proposed action, the petitioner approached this Court by way of OMP (I) (Comm) 185-187/2021.

**14.** By order dated 7, 2021, a coordinate Single Bench of this Court disposed of the said three OMPs, noting the fact that the letters dated 14<sup>th</sup> June, 2021 *supra*, whereby HPL was seeking to invoke the Bank Guarantees furnished by the petitioner, was not in accordance with the terms of the Bank Guarantees. Expressing this *prima facie* view, this Court stayed the operation of the letter of invocation dated 14<sup>th</sup> June,

2021, subject to the petitioner renewing the Bank Guarantees. Paras 8 to 10 of the order dated 16<sup>th</sup> June, 2010, passed by the coordinate bench in OMPs (I) (Comm) 185-187/2021, may be reproduced thus:

“8. As far as the invocation in question by the letter dated 14.06.2021 is concerned, the same *prima facie* does not appear to be in terms of the bank guarantees which requires the respondent to also state that '*the amount claimed is required to meet the recoveries dues or likely to be due from the contractor*'.

9. In view of the above, the invocation based on the letter dated 14.06.2021 of the respondent shall not be given effect to if not already given effect as on 8.10 p.m. today when this order is being passed, till the next date of hearing, subject to the condition that the petitioner renews the bank guarantees in question within a week from today without prejudice to the rights and contentions of the parties.

10. It is made clear that this Court has only considered and passed the order on the basis of the invocation letter dated 14.06.2021.”

**15.** Shortly and on the eve of the above order of this Court, HPL proceeded, on 1<sup>st</sup> July, 2021, to address, to the Bank, the communications with which the petitioner is, in these petitions, principally aggrieved. The operative paragraphs of the said letters were identical, except for the specifics of the Bank Guarantees with respect to which they were issued. By way of example, the letter dated 1<sup>st</sup> July, 2021, issued in respect of the four Bank Guarantees forming subject matter of OMP (I) (Comm) 200/2021, and impugned therein, read thus:

“Ref. HPL/BG-ENCASHMENT/2021      Dated: 01.07.2021

The Chief Manager  
HDFC Bank  
E-13/29, 2<sup>nd</sup> Floor, Harsha Bhawan

Connaught Circus  
New Delhi-110001

Dear Sir,

Please refer to the Bank Guarantees issued by your bank as per details given below:-

S.No	BG. No.	Dated	Amount
1	003GT02163520012	17.12.2016	32,43,000.00
2	003GT02192540009	11.09.2019	29,74,000.00
3	003GT02182790007	06.10.2018	75,00,000.00
4	003GT02173030030	30.10.2017	25,00,000.00
5	003GT02170190002	19.01.2017	2,19,59,310.00
		Total	3,89,19,310.00

Hindustan Prefab Limited hereby demands to invoke the above said BGs in terms of Clause 2 & 3 as stipulated in each Bank Guarantee. It is stated here that the amount claimed is required to meet the recoveries due or likely to be due from the Contractors (M/s Garg Builders). Accordingly, this written demand to pay of ₹ 2,36,72,278.00 is made to HDFC Bank, by invocation of BGs and to either remit the amount by means of Demand Draft in favour of M/s Hindustan Prefab Limited, payable at New Delhi or by transferring the amount to the under mentioned Bank Account details:-

Name of the Party HINDUSTAN PREFAB LIMITED  
Banker Punjab National Bank  
Branch Jangpura, Bhogal, New Delhi-110014  
Account No. 0147002100025853  
RTGS CODE PUNB0014700

Thanking you

Yours faithfully,

For Hindustan Prefab Limited

Sd/-  
1.07.2021

CA V.K.Gupta,  
Financial Advisor & Chief Accounts Officer”

**16.** The petitioner, in these OMPs, seeks stay of operation of the aforesaid letters dated 1<sup>st</sup> July, 2021.

**Rival contentions**

**17.** Learned Senior Counsel for the petitioner contend that, apart from the aforesaid nine Bank Guarantees, Performance Bank Guarantee No. 003GT02170190002 for ₹ 2,19,59,310/-, having already expired before its invocation was attempted by HPL, the Bank itself wrote, to HPL, on 14<sup>th</sup> June, 2021, that the letter of invocation was null and void, as the Bank Guarantee had already expired. Insofar as the remaining nine Bank Guarantees were concerned, learned Senior Counsel contend that, in view of order dated 16<sup>th</sup> June, 2021, and the extending, by the petitioner, of the Bank Guarantees, as directed by this Court, the act of HPL in seeking to invoke the Bank Guarantees cannot sustain in law. That apart, invocation of the Bank Guarantees furnished by the petitioner towards security deposit could, it is submitted, be justified only once, consequent on determination of the contract, security deposit was forfeited. HPL having neither terminated the contracts nor forfeited the security deposit provided by the petitioner, the invocation of the security Bank Guarantees is, it is submitted, completely unjustified, factually as well as legally. It is pointed out, in this regard, that the respondent never addressed any communication to the petitioner, demanding any amount from it and that, therefore, the assertion, in the impugned letter dated 1<sup>st</sup> July,

2021, that the “amount claimed (was) required to meet the recoveries due or likely to be due from the contactors” was a mere recitation of the covenants in the Bank Guarantees and was unjustified on facts. Learned Senior Counsel submits that, far from any amount being due from the petitioner to HPL, HPL was in arrears towards the petitioner, for which the petitioner had already proceeded towards invocation of the remedy of arbitration contractually available to it.

**18.** At this point, one may advert to the individual OMPs, though the legal issues involved are the same.

**OMP (I) (Comm) 200/2021**

**19.** Learned Senior Counsel for the petitioner invited my attention to a communication dated 17<sup>th</sup> August, 2021, from HPL to the petitioner, the opening paragraph of which recorded the approval, of the competent authority, for withholding of an amount of ₹ 25 lakhs from the bills raised by the petitioner towards liquidated damages for alleged delay, on the part of the petitioner, in carrying out its obligation under the agreement. HPL having, thus, already effected recovery from the petitioner, learned Counsel submits that there was no justification for HPL seeking, all over again, to effect further recovery by way of invocation of the Bank Guarantees, without even prior notice to the petitioner, claiming any amount. While acknowledging the fact that, on 16<sup>th</sup> April, 2021, HPL did address a legal notice to the petitioner, para 10 of which quantified the demands

of HPL against the petitioner, learned Counsel submits that such a notice could not substitute the requirement of a formal demand.

**20.** In any event, as the Bank Guarantees had been renewed, as directed by this Court, learned Counsel submits that no prejudice would result to the petitioner if, till the resolution of the dispute by arbitration, *status quo* were directed to be maintained with respect to the Bank Guarantees.

**21.** Responding to the submissions of learned Senior Counsel for the petitioner, Mr. Ankit Jain, appearing for HPL, draws my attention to the fact that, in the legal notice dated 16<sup>th</sup> April, 2021, HPL had clearly set out the basis for its contention that it had valid claims against the petitioner. The following passages, from the said legal notice, were especially pressed into service in this regard:

“10. That even without submitting Tax invoice and lodging proper claim, you the addressee have indulged in raising alleged 'Dispute' unethically to drag my client in unwanted litigation and usurp undue money under the guise of framing a 'Dispute'. My client informs that previously payments were made against interim RA Bills and amount was released at your request subject to scrutiny and verification to expedite the project. However, on detailed scrutiny of the bills submitted by you and assessment of your defaults and violation of agreed terms of the said contract, my client has ascertained the following amount which are due from you:-

a. Clause no.44 of SCC - You have not completed the project within specified completion period which was to be completed on 15.07.2018. My client has imposed Liquidity Damages (LD) for an amount Rs.153.71 Lacs. You are therefore called upon to deposit the said amount within 07 days failing which, the same will be recovered/adjusted from your pending

dues if any/Bank Guarantees or other security including dues payable to you if any.

b. As per Clause no.13 of SCC, you have failed to provide labour record i.e. wages sheet, attendance sheet, monthly / annual returns / challans for verification of ESI & PF amount of employees / labour who were engaged by you at site, thus there is clear breach of contract on your part. You have failed to deposit PF / ESI dues of workers, the cost of which was the part of your quoted rates. As per the assessment of my client Labour cost estimated to be 25% of total work done, comes to amount of Rs.12,94,17,891.00, therefore recovery of 24% contribution of employer & employees amounting to Rs.3,10,60,294.00 is to be made from you. You are therefore called upon to deposit the said amount within 07 days. You are further informed that my client reserves its rights to take steps and inform the concerned authorities to investigate and take action against you for the violation of statutory provisions at your end.

c. In terms of Clause no.17 of SCC, you were responsible to control noise and air pollution at site as per norms of Pollution Control Board / Local Authority. You have failed to comply with the same, thus there is another breach of contract on your part.

d. As per clause no.21 of SCC, you were required to build and complete a mock-up room within the limits of area of the building under construction before progressing for further finishing/works. You have failed to comply with this requirement, thus there is a breach of contract at your part hence my client is entitled to a recovery of Rs. 10 Lacs against you.

e. As per clause no.23 of SCC, you had to provide a suitable area approx. 600 sq.ft. equipped with basic facilities such as tables, chairs, record keeping almirah, two number Air Conditioner, telephone, fax, internet, photocopier, computer and HP printer & scanner alongwith operator, regular electricity & filtered drinking water supply and staff carrying vehicle one

number like INDIGO (AC) or equivalent approved by Engineer In-Charge with fuel, driver, toll tax, parking charges and maintenance for average running upto 3000 KM/month etc. complete within 15 days of the award of work. Charges of the above facilities are also included in the rates quoted by the contractor and nothing extra shall be payable on this account. The maintenance charges were also to be borne by you. You have failed to provide the same, thus there is a breach of contract term at your part and thus you are called upon to pay to my client Rs.30 Lacs (30 months@ Rs.1,00,000/- per month).

f. As per clause no.24, you were required to make arrangements for ground breaking ceremony / inaugural function etc. for the projects as required and the cost towards it, is included in your quoted rates / offer. You have failed to comply with the same, thus on account of breach of this term at your part, hence you are liable to pay sum of Rs.5 Lacs on this account.

g. As per clause no.35 of SCC, you had to obtain the labour license within one month of the award of the work but you have failed to comply this requirement, thus there is clear breach of contract at your part and a sum of Rs.5 Lacs is due and payable by you. You are further informed that my client is taking steps to inform the concerned authorities to take action against you for the violation of statutory provisions at your end.

h. Clause no.19 b (v) of GCC, you have to comply with the provisions of the Payment of Wages Act 1936, Minimum Wages Act, 1948, Employees Liability Act 1938, Workmen's Compensation Act 1923, Industrial Disputes Act 1947, Maternity Benefit Act 1967 and the Contractor's Labour (Regulation and Abolition) act 1970 or the modifications therefore or any other laws relating thereto and the rules made thereunder from time to time. You have not submitted any record as above for compliance, thus there is clear breach of contract at your part and a sum of Rs.10 Lacs is due and payable by you. You are further informed that my client is taking steps to inform the concerned

authorities to take action against you for the violation of statutory provisions at your end.

i. As per clause no.36 of GCC, you have to intimate in writing to Engineer In-charge, HPL about deployment of. principal & technical representative's name, qualification, experience, age, address & other particulars alongwith certificates. You have failed to comply with the same, thus there is clear breach of contract at your part and a sum of Rs.10 Lacs is due and payable by you.

j. As per clause no.37 of GCC, you have to deposit the royalty and obtain necessary permit of supply of red bajri, stone, kankar etc. from local authority. You have not submitted the deposit challan of the same, thus a breach of contract on your part, hence a sum of Rs.50 Lacs is due and payable by you.

k. As per clause no.44 of GCC, you have not complied with the provision of Apprentice Act 1961 and the rule & order issued thereunder from time to-time which is a breach of contract on your part therefore, a sum of Rs.5 Lacs is due and payable by you.

l. In compliance with the clause of Safety Code of GCC, you have failed to comply the safety code definrd under the rule, thus a breach of contract on your part, hence a sum of Rs.10 Lacs is due and-payable by you.

m. In compliance with the clause of GCC "**model rules for protection of health & sanitary arrangements for workers**", you have failed to provide the facility under above model rule, thus a breach of contract on your part, hence a sum of Rs.50 Lacs is due and payable by you.

n. As per Labour Regulations of GCC, you have not obtained certificate under the signature of Engineer In-charge at the end of the entries in the register of wages or the Wages cum Muster Roll, thus a breach of

contract at your part hence, a sum of Rs.10 Lacs is due and payable by you.

o. As per GCC's Labour Regulation Rule -7, you have not provided register of person employed, Muster Roll register, wages register under the Central Rule, 1971, thus a breach of contract at your part hence, a sum of Rs.10 Lacs is due and payable by you.”

**22.** Mr. Jain further invokes Clauses 1A and 2 of the Agreement, as entitling HPL to invoke the bank guarantees furnished by the petitioner. These Clauses read thus:

**“CLAUSE 1 A**

The person/persons whose tender(s) may be accepted (hereinafter called the contractor) shall permit Government at the time of making any payment to him for work done under the contract to deduct a sum at the rate of 2.5% of the gross amount of each running and final bill till the sum deducted will amount to security deposit of 2.5% of the tendered value of the work. Such deductions will be made and held by Government by way of Security Deposit unless he/they has/have deposited the amount of Security at the rate mentioned above in cash or in the form of Government Securities or fixed deposit receipts. In case a fixed deposit receipt of any Bank is furnished by the contractor to the Government as part of the security deposit and the Bank is unable to make payment against the said fixed deposit receipt, the loss caused thereby shall fall on the contractor and the contractor shall forthwith on demand furnish additional security to the Government to make good the deficit.

All compensations or the other sums of money payable by the contractor under the terms of this contract may be deducted from, or paid by the sale of a sufficient part of his security deposit or from the interest arising therefrom, or from any sums which may be due to or may become due to the contractor by Government on any account whatsoever and in the event of his Security Deposit being reduced by any such deductions or sale as aforesaid, the contractor shall within 10

days make good in cash or fixed deposit receipt tendered by the State Bank of India or by Scheduled Banks or Government Securities (it deposited for more than 12 months) endorsed in favour of the Engineer-in-Charge, any sum or sums which may have been deducted from, or raised by sale of his security deposit or any part thereof. The security deposit shall be collected from the running bills and the final bill of the contractor at the rates mentioned above.

The security deposit as deducted above can be released against bank guarantee issued by a scheduled bank, on its accumulations to a minimum of Rs. 5 lac subject to the condition that amount of such bank guarantee, except last one, shall not be less than Rs. 5 lac. Provided further that the validity of bank guarantee including the one given against the earnest money shall be in conformity with provisions contained in clause 17 which shall be extended from time to time depending upon extension of contract granted under provisions of clause 2 and clause 5.

In case of contracts involving maintenance of building and services/any other work after construction of same building and services/other work, then 50% of Performance Guarantee shall be retained as Security Deposit. The same shall be returned yearwise proportionately.

**Note-1:** Government papers tendered as security will be taken at 5% (five per cent) below its market price or at its face value, whichever is less. The market price of Government paper would be ascertained by the Divisional Officer at the time of collection of interest and the amount of interest to the extent of deficiency in value of the Government paper will be withheld if necessary.

**Note-2:** Government Securities will include all forms of Securities mentioned in Rule No. 274 of the G. F. Rules except fidelity bond. This will be subject to the observance of the condition mentioned under the rule against each form of security.

**Note-3:** Note 1 & 2 above shall be applicable for both clause 1 and 1A.

## **CLAUSE 2**

If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as a weed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete.

This will also apply to items or group of items for which a separate period of completion has been specified.

(i) Compensation @ 1.5 % per month of delay for delay of work to be computed on per day basis Provided always that the total amount or compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s) in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. With-holding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s). the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However. no interest. whatsoever, shall be payable on such withheld amount.”

**23.** Adverting to the bank guarantees themselves, Mr. Jain submits that the covenants of the individual bank guarantees are clear and categorical. They require the bank to pay, to HPL, on demand, without demur, reservation or protest, the amount covered by the bank guarantees. While the bank guarantee dated 17<sup>th</sup> December, 2016 for ₹ 32,43,000/- did not even specify the contents of the letter of invocation, to be issued by HPL to the bank, the remaining three bank guarantees dated 30<sup>th</sup> October, 2017, 6<sup>th</sup> October, 2018 and 11<sup>th</sup> September, 2019 required HPL to state that the amount claimed was required to meet the recoveries due or likely to be due from the contractor. For want of such a recital, in the earlier letter of invocation issued by HPL on 14<sup>th</sup> June, 2021, this Court, *vide* its order dated 16<sup>th</sup> June, 2021 had stayed the operation of the letter of invocation. That lacuna now stood remedied by the letter dated 1<sup>st</sup> July, 2021 which contained a recital in the terms as required by the bank guarantees. That being so, the invocation of the bank guarantees was in accordance with the terms of the bank guarantees, and, absent egregious fraud, special equities and irretrievable injustice, Mr. Jain submits that a Court could not injunct invocation of the bank guarantees.

**24.** He submits that the petitioner has not pleaded, much less established, the existence of any egregious fraud, irretrievable injustice or special equities, which are the only circumstances in which invocation of an otherwise unconditional bank guarantee can be interdicted by a Court. The particulars of the dispute between the parties, he submits, are irrelevant in this regard. In any event, even if

the bank guarantees were to be invoked, it would always be open to the petitioner to seek restitution in the arbitral proceedings so that, even on the test of irreparable prejudice, no case for grant of any interim protection under Section 9 of the 1996 Act can be said to exist.

**25.** In rejoinder, Mr. Mehta submits that it was not his case that the invocation of the bank guarantees was vitiated by fraud. There is, however, in his submission, a clear case justifying stay of invocation on the principle of irretrievable injustice, as the financial position of HPL is so precarious that, were HPL to be permitted to realise the amounts covered by the bank guarantees furnished by the petitioner, a situation could well arise in which its restitution to the petitioner would become impossible, even were it to succeed in the arbitral proceedings. Mr. Mehta has invited my attention, in this context, to the audited statement of accounts and balance sheets of HPL. He has drawn my attention to the following recitals in the auditor's report:

**“Emphasis of Matter**

We draw attention to Note No. 23.5 and 23.7 of the financial statements: Accumulated losses have resulted in erosion of substantial net worth of the Company and also the outcome of the decision of Government of India on closure of the Company could affect the continuity of the Company. However, the financial statements have been prepared on a going concern basis on the grounds as disclosed in the said notes. Our opinion is not modified in respect of above matter.”

26. Further, in the notes to the financial statements of HPL for the year ending 31<sup>st</sup> March, 2019, Mr. Mehta has invited attention to para 23.5 which reads as under:

“23.5 There is erosion of substantial net worth of the Company due to accumulated losses. However, the financial statements have been prepared on a going concern basis as the Company is a profit making concern since last many years with no borrowings and on the basis of improved business operations.”

27. He points out from para 23.5 of the same notes to the financial statement, that the contingent liabilities of HPL were as provided for in the said note to the financial statement. He also drew my attention to Clause 23.6 of the notes on financial statements, which dealt with handing over of various land and properties of HPL to the land and development office (L&DO) on 20<sup>th</sup> March, 2018, and read thus:

**“23.6 Hand-over of various Land and Properties to Land & Office Development (L&DO) on 20.03.2018**

a) As per the order dated 22.02.2018 of Ministry of Housing & Urban Affairs (MoHUA), Government of India, being the administrative ministry, HPL was directed to hand-over various Land and properties, as mentioned in PIM to L&DO, without any express compensation, on 20.03.2018. The said decision has been approved and ratified in the Board meeting held on 23.03.2018. Accordingly, the net block of Land of ₹ 9.07 lakhs and Roads of ₹ 0.37 lakh as at 20.03.2018 were written off during the year 2017-18. The Company on 07.01.2019, requested MoHUA to provide suitable compensation for the acquired land and properties, which were valued at ₹ 1427.89 crores as per the valuation done by MoHUA appointed valuer as part of the disinvestment process.

b) As per the said order of MoHUA and the directions received from L&DO, the built up portion of existing properties and other immovable assets i.e. registered office of HPL, residential quarters, presently being used by staffs and families of HPL will remain with HPL, till further decision is taken on the matter. Accordingly, Office Buildings and Residential Buildings, the net block of which is ₹ 225.66 lakhs (Previous Year: ₹ 251.72 lakhs) and ₹ 6.85 lakhs (Previous Year: ₹ 7.41 lakhs) respectively as at 31.03.2019, have continued to be shown under Property, Plant & Equipments in note no. 9. In case, the decision is taken by L&DO to take over these buildings from HPL in future, corresponding effect will be given in the accounts in that year.

c) Property (Housing) at Jangpura, let out to Hudco was also handed over to L&DO on 20.03.2018. Since L&DO is yet to initiate the steps for transfer of legal title of said property hence it has been shown under the Residential Buildings as at 31.03.2019 in (b) above.

Pending transfer of legal title of above property, rent has not been provided for in the accounts.

d) Municipal taxes of ₹ 8.57 lakhs due to SDMC for the year 2018-19 i.e. subsequent to the date of handing over of Land and Properties is payable by L&DO. Accordingly, no provision towards the said amount has been provided for in the accounts.

e) Office Buildings includes office at Scope Minar, Laxmi Nagar with Original Cost of ₹ 1,16,45,125/- (Previous Year : ₹ 1,16,45,125/-) of which the title deed in favour of Company is yet to be executed by SCOPE. However, land allotted to SCOPE by DDA is leasehold land. Further, the said office has since been handed over to the Land and Development Office (L&DO) on 20.03.2018. The said office, let out to EPFO was vacated w.e.f 27.06.2018. Since L&DO is still to initiate the steps for transfer of legal title of said property with SCOPE hence it has been shown under Office Buildings as at 31.03.2019 in (b) above.

The rent received from EPFO for the period 21.03.2018 to 27.06.2018 i.e. subsequent to the date of its handing over to L&DO has been shown as payable in note no. 7. Accordingly, demand of ₹ 22.72 lakhs raised during the year by SCOPE towards property tax, maintenance charges and electricity for the year 2018-19 is payable by L&DO. Management intends to take up this matter with SCOPE to raise these demands directly to L&DO and considering the same, no provision towards such charges has been made as the same will be paid either directly by L&DO or recovered from them if paid by the Company.”

**28.** Mr. Mehta thereafter drew my attention to the balance sheet of HPL as on 31<sup>st</sup> March, 2019, to point out that, as against the cash in hand available with HPL, of ₹ 153.9624 crores, ₹ 103.4204 grade payables were figuring in the current liabilities of HPL for the said financial year.

**29.** The audited financial statements of HPL, therefore, submits Mr. Mehta, indicate that the financial condition of HPL is not such as could inspire confidence that HPL would continue to possess the financial wherewithal to restore, to the petitioner, the *status quo ante*, were HPL to be permitted to invoke the bank guarantees and the petitioner, thereafter, to succeed in arbitration.

**30.** Mr. Jain has seriously contested the submission, of Mr. Mehta, regarding the allegedly precarious financial condition of HPL. He submits that 100% shareholding of HPL was with the Hon’ble President of India. Apropos the financial position of HPL as reflected from its balance sheet, Mr. Jain points out that, against the total

liabilities of HPL of ₹ 176.37 crores, its current assets were to the tune of ₹ 249.90 crores. Referring to the paragraph titled “Emphasis of Matters” cited by Mr. Mehta, Mr. Jain points out that, while noting the fact that substantial net worth of HPL had been eroded by accumulated losses, it was, nonetheless, a going concern as was reflected in the very same passage, and its financial statements had also been prepared on a going concern basis. In this context, Mr. Jain has also invited my attention to Clause 23.5 of the notes on financial statements of HPL, which record the fact that HPL was “a profit making concern since last many years with no borrowings and on the basis of improved business operations”. Mr. Jain points out that HPL had earned profits both in 2017-18 and 2018-19. Adverting to the handing over of land and properties of HPL to L&DO, Mr. Jain points out that Clause 23.6(a) of the notes on financial statements (which had earlier been reproduced) records the request, of HPL, to the Ministry of Housing and Urban Affairs (MoHUA), on 7<sup>th</sup> January, 2019, for suitable compensation against the acquired land and properties, which were valued at ₹ 1427.89 crores as per the valuation done by the valuer approved and appointed by the MoHUA. It was not, therefore, submits Mr. Jain as though the land of the company was thrown away for a song.

**31.** Mr. Jain has pressed into service the judgments of the Supreme Court in *UP State Sugar Corporation v. Sumac International Ltd.*<sup>1</sup> and *Svenska Handelsbanken v. Indian Charge Chrome*<sup>2</sup>, to contend that the requirement of the existence of the element of egregious fraud

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<sup>1</sup> (1997) 1 SCC 568

<sup>2</sup> (1994) 1 SCC 502

actually permeates all three considerations, i.e. of irretrievable injustice, special equities and egregious fraud itself, on which alone invocation of an unconditional and irrevocable bank guarantee could be interdicted by a Court. Irretrievable injury, he submits, must partake of the character of impossibility of execution. Mere financial hardship being faced by the beneficiary of the bank guarantee, submits Mr. Jain, even if it were shown to exist, could not justify interdiction of invocation.

### **Analysis**

**32.** This is yet another a case in which valuable time of this Court has been expended in dealing with a prayer for a restraint against invocation of “unconditional” and irrevocable bank guarantees. In its decision in *CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of India Ltd*<sup>3</sup>, a Division Bench of this Court, while upholding the judgment of this Bench in *CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of India Ltd*<sup>4</sup>, lamented the fact that, despite the law in that regard being practically fossilized, Courts were being inundated with repeated requests for stay of unconditional bank guarantees. Apparently, with a view to discourage such litigation in future, the appellant before the Division Bench was burdened with costs of ₹ 5 lacs.

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<sup>3</sup> (2020) SCC Online (Del.) 1526

<sup>4</sup> MANU/1803/2020

**33.** The following passages from the report of the judgment of the Division Bench in *CRSC Research and Design Institute*<sup>3</sup> speak for themselves:

“7. The settled law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is (a) 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; (b) the Bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer; (c) the very purpose of giving such a bank guarantee would otherwise be defeated; (d) the Courts should therefore be slow in granting an injunction to restrain the realization of such a bank guarantee; (e) the Courts have carved out only two exceptions i.e. (i) a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee - if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so; fraud has to be an established fraud which the bank knows of and the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge; and, (ii) 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 effect the bank and its customers 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; 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.

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15. We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to

interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs. If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs. *In the said proceedings, no question of taking a prima facie view arises and the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice. Needless to state that from the entire arguments of the senior counsel for the appellant, no case of fraud of egregious nature in the matter of making/obtaining of the BGs is made out. All that emerges is that there are disputes between the appellant and the respondent No. 1 and it is not even whispered that the respondent No. 1 built the entire charade of entering into the contract, only to obtain BGs and to profiteer from the appellant. With respect to the ground urged by the senior counsel for the appellant, of special equities, the Solicitor General has stated that the appellant is a Chinese entity and if ultimately in arbitration, which has already commenced between the parties, the monies are found due to the respondent No. 1 from the appellant, the respondent No. 1 would have no means or ways available to it for recovering the same from the appellant and/or to enforce the arbitral award in China. On the contrary, it is contended that the respondent No. 1 is a Public Sector Undertaking and the monies, if ultimately found due to the appellant from the respondent No. 1, can always be recovered by the appellant from the respondent No. 1.*

16. *Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the appellant, we are afraid, fails to qualify so. The Single*

*Judge has written at length on the subject and save for as aforesaid, we need not say more.*

*17. Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof. It is always open to such person to sue for recovery of the amount wrongfully recovered. What has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. There is not even a whisper to this effect, neither in the pleadings nor in the arguments.”*

(Emphasis supplied)

**34.** Despite the clear enunciation of the law as above, and at least till I sat in that roster, petition after petition continued to be filed, seeking stay of invocation of unconditional irrevocable bank guarantees. In nearly every such case – including the present petitions – reliance was placed, by the petitioners, on the disputes between the parties relating to the performance/non-performance of the original contract. The fact that the petitioner, seeking stay of invocation of the bank guarantees, had a subsisting claim against the respondent beneficiary of the bank guarantees is also inevitably taken as a ground for seeking stay of invocation.

**35.** In view of the well crystallized law on the subject, any reference to the original dispute between the parties, relating to the performance of the contract, is completely irrelevant, insofar as the issue of stay of invocation of the bank guarantees is concerned. That dispute has necessarily to form substratum of an entirely different proceeding, to be resolved either by arbitration or by adjudication by a

Court. While I have recorded the submissions of learned Senior Counsel for the petitioner regarding the petitioner's substantive grievances against HPL, I do not, in view of the law that stands settled in that regard, propose to deal with the said contentions here.

**36.** With these prefatory observations, I deem it appropriate, before applying the law to the facts of the present case, to itemize the basic principles relating to bank guarantees, their invocation and the interdiction of such invocation, thus:

(i) Commercial contracts often contain clauses requiring the contractor to furnish bank guarantees.

(ii) These bank guarantees are, principally, either bank guarantees provided towards security, for having been awarded the contract, or performance bank guarantees, to guarantee performance of the contract, though, on occasion, other bank guarantees such as bank guarantees towards mobilization advance etc. may also be required to be provided.

(iii) The contract, in such cases, also provides for the circumstances in which the bank guarantees could be invoked, as well as the purpose for requiring the bank guarantees to be provided in the first place.

(iv) No bank guarantees payment to anyone gratis. Every bank guarantee is of necessity issued by a bank on instructions.

In case of a commercial contract, such as the contract in the

present petition, the instruction to the bank, to provide a bank guarantee, is given by the person to whom the contract is awarded; in the present case, the petitioner. The party to whom the contract is awarded, in other words, instructs the bank, in lieu of having been awarded the contract, to issue a bank guarantee in favour of the person awarding the contract. In the present case, as required by the agreements between the petitioner and the HPL, and that the petitioner's instance, bank guarantees were issued by the bank in favour of HPL which, therefore, is the beneficiary of the bank guarantee.

(v) These bank guarantees are, however, bilateral contracts between the bank and the beneficiary, i.e. HPL, even if they were issued at the instance of the petitioner. The petitioner is not a party to the bank guarantees. It is, therefore, legally a stranger to the contract, insofar as the bank guarantees are concerned.

(vi) Like all independent commercial contracts, every bank guarantee has to abide strictly by its terms. Honour and compliance of a bank guarantee, as per its terms, is, therefore, mandatory. In the case of bank guarantees, especially, the Supreme Court has stressed this aspect, as there is an overwhelming element of public interest involved in requiring banks to honor their commitments towards customers and clients. If a bank is to be interdicted, at the instance of a third party, who is a stranger to the bank guarantee between the bank

and the beneficiary, from honouring the bank guarantee, the Supreme Court has held in *United Commercial Bank v. Bank of India*<sup>5</sup> and *Hindustan Steelworks Construction Ltd. v. Tarapore & Co*<sup>6</sup>, that it would erode the public faith in the banking institution of the country.

(vii) The bank is, therefore, concerned only with the terms of the bank guarantee. The elements of any dispute between the contractor and the beneficiary of the bank guarantee, or the conditions existing in the contract between the contract awardee and the beneficiary of the bank guarantee, i.e. in the present case between the petitioner and HPL, are, therefore, generally irrelevant to the aspect of invocation of the bank guarantee. Even the circumstances stipulated in the contract between the beneficiary and the contract awardee, in which the bank guarantee could be invoked, are also of no relevance insofar as the liability of the bank to honour the bank guarantee is concerned.

(viii) In order for the aspect of performance, or failure of performance, of the parent contract, by either party, to become relevant as a consideration for invocation of the bank guarantee, *they have necessarily to be incorporated by express reference in the bank guarantee itself*. In other words, if the bank guarantee were to stipulate that the bank would be required to make payment to the beneficiary only in the event of failure, on the

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<sup>5</sup> (1981) 2 SCC 766

<sup>6</sup> (1996) 5 SCC 34

part of the contract awardee, to abide by its obligations under the Contract, *then* the aspect of performance of the contract by the contract awardee would become a relevant consideration, while assessing the obligation of the bank to make payment to the beneficiary.

(ix) Similarly, oftentimes, a contract may stipulate the particular stage at which, or exigency in which, the bank guarantee could be invoked by the beneficiary. Such a stipulation in the contract would, however, become relevant for the bank, when called upon by the beneficiary to honour the bank guarantee, *only if that stipulation figures expressly in the body of the bank guarantee itself.*

(x) Else, the bank is not expected, much less required, to advert to the covenants of the original contract between the contract awardee and the beneficiary, to which the bank is a stranger – just as the contract awardee is a stranger to the bank guarantee. Nor is it required to enter into the disputes between the contract awardee and the beneficiary of the bank guarantee, or into the aspect of performance, or non-performance, of the contract. Nor, for that matter, is the bank entitled to examine whether the stage at which the contract between the parties envisages invocation, or enforcement, of the bank guarantee, has, or has not, been reached. The bank, being a stranger to the contract between the contract awardee and the beneficiary of the bank guarantee, has no authority to probe into the said

contract, *unless the terms of the bank guarantee expressly require it to do so*. The bank has necessarily to be concerned only with the terms of the bank guarantee, to which alone it is a party.

(xi) If the invocation of the bank guarantee by the beneficiary thereof is, therefore, in terms of the bank guarantee, the Court cannot interdict the bank from honouring the bank guarantee, by referring to the covenants in the contract between the contract awardee and the beneficiary of the bank guarantee. Any such attempt by the Court would amount to directing the bank to violate the contract, with the beneficiary of the bank guarantee, to which it is a party and, therefore, to direct the bank to commit an illegality. This, quite obviously, is completely impermissible.

(xii) Equally, it is not permissible, either, for the Court to interdict the invocation of a bank guarantee on the ground that the stage for such invocation, as per the contract, has not been reached, or that the exigency in which the bank guarantee could be invoked as per the contract, does not exist, *unless that stage, or that the exigency, is incorporated as a condition for invocation in the bank guarantee itself*.

(xiii) Interdiction of invocation of unconditional bank guarantees would be justified, where the invocation is otherwise in terms of the covenants in the bank guarantees, only where

there is found to exist egregious fraud, or special equities, or where irretrievable injustice would ensue were invocation not to be injuncted. In this regard, I deem it appropriate to reproduce, with humility, the following passages from my decision in *Kuber Enterprises v. Doosan Power Systems India Pvt Ltd*<sup>7</sup>, in which I have followed the Division Bench pronouncement in *CRSC Research and Design Institute*<sup>3</sup>:

“18 Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in *SES Energy Services India Ltd. v. Vedanta Ltd*<sup>8</sup> has noted these exceptions and observed thus:-

“9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in *CRSC Design*<sup>3</sup> to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from *BSES Ltd. v. Fenner India Ltd.*<sup>9</sup>, neatly encapsulates this position:

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<sup>7</sup> 2021 SCC OnLine Del 5049

<sup>8</sup> 2021 SCC OnLine Del 4196

<sup>9</sup> (2006) 2 SCC 728

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of nonintervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.*<sup>1</sup>, that this Court, correctly declared that the law was 'settled.'”

(Italics and underscoring in original)

Additionally, in para 72 of the report in *Svenska Handlesbaken v. Indian Charge Chrome*<sup>2</sup>, a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in *Hindustan Steelworks Construction Co. Ltd. v. Tarapore & Co.*<sup>6</sup> held, after noticing and interpreting *Svenska Handlesbaken*<sup>2</sup>, that, in *Svenska Handlesbaken*<sup>2</sup>, the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it was held, "not much importance" could be attached "to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case". *Vinitec Electronics Private Limited v. HCL Infosystems Ltd*<sup>10</sup> and *BSES Ltd.*<sup>9</sup>

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<sup>10</sup> (2008) 1 SCC 544

hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice.

19. While, therefore, there appears to be some fluidity in judicial thinking on the issue of whether the "fraud" element would permeate the other two considerations of "special equities" and "irretrievable injustice", there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose."

37. In this context, it is necessary to distinguish between *recitals in a bank guarantee which set out the purpose for issuing the bank guarantee* and *recitals which set out the conditions for invoking the bank guarantee*. These are aspects which are often confused with each other. Bank guarantees issued in compliance with the requirements in commercial contracts often set out, in their preambular or opening recitals, the fact that they are being furnished to ensure performance of the contract by the contractor/contract awardee. *That recital, by itself, does not make performance of the contract by the contract awardee, a condition for invocation of the bank guarantee.* A bank guarantee has, therefore, to be carefully read in order to understand the exact governing condition in which the bank guarantee would become invocable, and in which the bank would be obligated to honor the bank guarantee.

38. This aspect would become clear if one refers, in the present case, for example, to the bank guarantee dated 6<sup>th</sup> October, 2018. The opening preambular recital in the bank guarantee states that the bank

guarantee was being provided, “as a security/guaranteeing from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement”. This opening recital does not make the fact of compliance or non-compliance by the contractor, i.e. by the petitioner, of its obligations under the agreement with HPL, a relevant consideration, where the aspect of invocability of the bank guarantee is concerned. That has to be decided by the covenants governing invocation as contained in the bank guarantee, which read thus:

“1. We, HDFC Bank Limited, E-13/29, 2nd Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110001 (hereinafter referred to as "the Bank") hereby undertake to pay to the Employer an amount not exceeding Rs. 7,500,000.00(Rupees SEVENTY FIVE LAKHS ONLY) *on demand by the Employer.*

2. We, HDFC Bank Limited (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this guarantee *without any demure, merely on a demand from the Employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this Guarantee.* However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 7,500,000.00 (Rupees SEVENTY FIVE LAKHS ONLY).

3. We, the said bank further undertake to pay the Employer any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and Contractor(s) shall have no claim against us for making such payment.”

**39.** Though, therefore, the opening preambular recital, identifies the *purpose* for providing of the bank guarantee as ensuring compliance, by the contractor, i.e. by the petitioner, of its obligations under the agreement with HPL, the only condition requiring fulfilment, by HPL, to be entitled to the benefit of the bank guarantee is “a demand ... stating that the amount claimed (was) required to meet the recoveries due or likely to be due from” the petitioner.

**40.** To that extent, one may say that the use of the expression, “unconditional”, in respect of bank guarantees, is actually a misnomer. Bank guarantees are, etymologically, never “unconditional”. (Courts have, however, classically referred to bank guarantees such as those issued in the present petitions as “unconditional”.) What has to be identified is the condition in the bank guarantee which governs the obligation(s) of the bank thereunder. Even in the present case, the bank guarantees furnished by the petitioner were, *stricto sensu*, not unconditional; the only condition was, however, that a demand letter was required to be issued by HPL.

**41.** It is a important to note the specific stipulation, in the bank guarantee, that the only requirement to be met by HPL was raising of a demand on the bank, *stating that* the amount claimed was required to meet recoveries due or likely to be due from the petitioner. Whether these amounts were actually due or likely to be due is, for the purposes of the bank guarantees forming subject matter of the present petition, completely irrelevant. What was required was a statement from HPL to the bank, stating that these amounts were due or likely to be due from the petitioner.

**42.** Once such a statement was made, neither could the Bank refuse to honour the bank guarantee by going behind the statement or seeking to verify whether the statement was right or wrong, nor could any Court interdict such invocation on that ground. To repeat, what was required by the bank guarantees was a statement by HPL that the amounts in question were required to meet the recoveries due or likely to be due from the petitioner, and no more. Once such a statement was made, any interdiction against invocation of the bank guarantee by examining whether, in fact, any such amount was, or was not, due from the petitioner to HPL, would be an unjustified exercise and would also be in the teeth of the express covenants of the bank guarantee.

**43.** A plea for stay of invocation of a bank guarantee would be predicated either on the premise that the invocation was contrary to the terms of the agreement between the parties or contrary to the terms of the bank guarantee itself.

**44.** Once, however, the beneficiary of the bank guarantee proceeds towards invocation of the bank guarantee by writing to the bank, the first argument, of the invocation being contrary to the terms of the parent contract between the parties, ceases to be available to the contractor. The reason is simple. Referring to the facts of the present case, the petitioner has instructed the bank to issue bank guarantees favouring HPL, for availing the benefit of which HPL merely had to communicate to the bank stating that the amount claimed was required to meet the recoveries due from the petitioner. Once, therefore, such a

communication was made by HPL to the bank, the petitioner could not seek, thereafter, to interdict invocation of the bank guarantee by referring to the terms of the original contract. No equities could sway in favour of the petitioner in such a situation, predicated on the terms of the contract, breach of the contract, default or absence of default, etc. The petitioner cannot, in such circumstances, seek to come between the two independent contractual parties, namely the bank and HPL, in the matter of performance of the contract between those parties, to which the petitioner is a stranger.

**45.** If, therefore, the grievance of the petitioner is that the invocation of the bank guarantee by HPL, though otherwise in accordance with the covenants in the bank guarantee, is contrary to the covenants in the parent agreement, the remedy with the petitioner would be to proceed against HPL to recover the monies released by HPL by invocation of the bank guarantees, not to interdict such invocation, which is a matter between the bank and HPL, and to which the petitioner is a complete stranger. The grievance of the petitioner, in such an event, is vis-à-vis HPL, and not the Bank. The grievance between the petitioner and HPL, being relatable not to the covenants of the bank guarantee, but to the covenants of the agreement between the petitioner and HPL, would have to be decided on the basis of the appropriate protocol in that regard; if arbitrable, by arbitration, else by judicial adjudication.

**46.** In the present case, the covenants in the contract, as well as the aspect of compliance/non-compliance with the contractual obligations have not been made conditions governing honouring of the bank

guarantees by the bank. The bank guarantee dated 17<sup>th</sup> December, 2016, merely requires HPL to demand, of the bank, the amount governed by the bank guarantee and the bank would become immediately liable to transmit the amount to HPL. The remaining three bank guarantees are a trifle more specific, in requiring the demand from HPL to state that the amount claimed was required to meet the recoveries due or likely to be due from the petitioner. Once such a demand, with such a statement, is made by HPL, the demand is conclusive regarding the amount covered thereby and operates *proprio vigore*, rendering the bank liable to honour the bank guarantee and to pay, to HPL, the amount covered by the bank guarantee, as demanded by it. All the four bank guarantees are equally categorical in stipulating that the demand by HPL would be conclusive regarding the liability of the bank, notwithstanding any dispute raised by the contractor, i.e. the petitioner.

**47.** There is no dispute that the letter dated 1<sup>st</sup> July, 2021, from HPL to the bank specifically stated that the amount claimed was required to meet the recoveries due or likely to be due from the petitioner. The contractual pre-condition in the bank guarantees, thereby, stood completely satisfied. The bank became, thereby, bound, by law, to credit the amount covered by the bank guarantees into the account of HPL.

**48.** Applying the above principles to the fact of the present case, it is clear that no case for interdicting invocation of the subject bank guarantees, consequent on the letter of invocation dated 1<sup>st</sup> July, 2021,

issued by HPL to the bank, can be said to exist. As already noted, the stipulation, in the letter, to the effect that the amount claimed was required to meet the recoveries due or likely to be due from HPL satisfied the pre-invocation requirement as contained in the bank guarantee. Whether, in fact, these amounts were due or likely to be due, from the petitioner are beyond the scope of inquiry by the Court- and, indeed, was also beyond the scope of inquiry by the bank when approached by HPL. Once HPL made the requisite statement in terms of the concerned clauses in the bank guarantees, the matter had to address there. Subsequently, if it was found that the statement was incorrect-as the petitioner would seek to contend-the remedy with the petitioner would be to seek restitution in the substantive arbitral proceedings. There are several ways in which this can be done, and it is not for this Court to offer any suggestion in that regard. Suffice it to state that no case for restraining invocation of the bank guarantees, as having been invoked contrary to the terms of the bank guarantees, can be said to exist.

**49.** There are, however, as already noted earlier, select circumstances in which invocation of an “unconditional” bank guarantee, even if superficially in terms of the covenants in the bank guarantee governing its invocation, may be interdicted by a Court. These are (ii) where the bank guarantee is vitiated by egregious fraud, (iii) where irretrievable injustice would result if the bank guarantee were permitted to be invoked, and, (iv) where special equities exist, as would justify interdiction or invocation of the bank guarantees.

Applying the above principles:

**50.** Fraud has not even been pleaded by the petitioner and, indeed, Mr. Mehta was candid in submitting that he was not seeking to contend that the invocation of the bank guarantees was justified on the ground of egregious fraud. Egregious fraud, in any case, as already noted, would have had to vitiate the bank guarantees themselves, in order for it to be pleaded as a ground to restrain invocation. The bank guarantees having been issued by the bank at the instance of the petitioner and as required by the covenants of the agreement, it cannot be said that the bank guarantees were fundamentally vitiated on the ground of egregious fraud.

**51.** The petitioner's contention that HPL owes, to the petitioner, amounts in excess of the amount covered by the bank guarantees is obviously completely tangential to the issue at hand. Any amounts owed by HPL to the petitioner would have to form subject matter of resolution by arbitral proceedings. This Court does not require to return any finding, in the present case, regarding the petitioner's entitlements against HPL, or *vice versa*.

**52.** Nor can the present case be said to be one of special equities or irretrievable injustice. Indeed, the contention of learned Senior Counsel for the petitioner was essentially predicated on the irretrievable injustice principle, as learned Senior Counsel sought to contend that the financial condition of HPL was so precarious that, were the bank guarantees to be permitted to be encashed and the

amounts credited into the account of HPL, there was every likelihood of HPL not being financially in a position to reconstitute the petitioner, even though the petitioner to succeed in arbitration.

**53.** I have already alluded to the rival contentions of learned Counsel regarding the financial condition of HPL. Learned Counsel for both sides have invited my attention to certain recitals in the audited statement of accounts and balance-sheet of HPL. They cannot all be said to be pointing one way, or to be making out a case of HPL being in such straitened financial circumstances as to be unable to pay the amount covered by the subject bank guarantees to the petitioner, if so directed at a later stage in the arbitral proceedings. No case of irretrievable injustice can, therefore, be said to exist.

**54.** Special equities, as held by the Supreme Court in *UP State Sugar Corporation*<sup>1</sup> and in *Svenska Handelsbanken*<sup>2</sup>, have to partake the character of irretrievable injustice. Even otherwise, it cannot be said that any such case of special equities has been made out by the petitioner, as would justify interdicting invocation of the subject bank guarantees. Indeed, the contentions of learned Senior Counsel for the petitioner essentially revolved around compliance with the conditions stipulated in the bank guarantee for transfer of the guaranteed amount to the credit of HPL, and on the aspect of irretrievable injustice.

**55.** In view thereof, it cannot be said that, within the boundaries of the law relating to interdiction of invocation of the irrevocable bank guarantees, a case for such interdiction has been made out by the

petitioner in the present case, insofar as the subject bank guarantees are concerned.

**56.** The prayers in the petition would, therefore, necessarily have to be rejected.

**OMP (I) (COMM) 201/2021**

**57.** The factual matrix of this petition is largely similar to that of OMP (I) (COMM) 200/2021. The contract in question was relating to upgradation of a hospital situated at Asansol, West Bengal. The other relevant contractual stipulations were identical to those contained in the agreement forming subject matter of OMP (I) (COMM) 200/2021.

**58.** This petition concerns, as already noted, a single Bank Guarantee No.003GT02182190021 dated 7<sup>th</sup> August, 2018 for ₹ 2,87,73,594.00. The covenants in the bank guarantee, governing its invocation, are identical to those in the bank guarantees forming subject matter of OMP (I) (Comm) 200/2021.

**59.** Clearly, the factual and legal position which obtains in the present case is identical to that obtains in OMP (I) (COMM) 200/2021. The observations and finding of this Court in the OMP (I) (COMM) 200/2021 would, therefore, apply *mutatis mutandis* to the present case.

**60.** The prayer for restraining invocation of the Bank Guarantee, forming subject matter of OMP (I) (COMM) 201/2021 would also,

clearly, have to be rejected.

**OMP(I) (COMM.) 202/2021**

**61.** The factual matrix of this petition is largely similar to that of OMP (I) (COMM) 200/2021. The contract in question was in relation to completion of a project of the National Disaster Response Force, Ghaziabad, Uttar Pradesh. The other relevant contractual stipulations were identical to those contained in the agreement forming subject matter of OMP (I) (COMM) 200/2021.

**62.** This petition concerns four Bank Guarantees, tabulated in para 10 *supra*. The governing covenants of the Bank Guarantees are identical to those forming subject matter of OMP (I) (Comm) 200/2021.

**63.** Clearly, the factual and legal position which obtains in the present case is identical to that obtains in OMP (I) (COMM) 200/2021. The observations and finding of this Court in the OMP (I) (COMM) 200/2021 would, therefore, apply *mutatis mutandis* to the present case.

**64.** The prayer for restraining invocation of the Bank Guarantee, forming subject matter of OMP (I) (COMM) 202/2021 would also, clearly, have to be rejected.

## Conclusion

65. All three OMPs are, therefore, dismissed. Pending applications, if any, also stand disposed of.

66. It is made clear that the above decision is limited to the aspect of the prayer for stay of invocation of the Bank Guarantees. It shall not operate as a restraint on the petitioner seeking any other remedy under Section 9 of the 1996 Act before the learned Arbitral Tribunal. Any such application if made shall be considered by the learned Arbitral Tribunal on its own merits.

67. There shall be no orders as to costs.

**MAY 2, 2022**  
*kr/r.bararia/dsn/ss*

**C. HARI SHANKAR, J.**