

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMM. ARBITRATION PETITION (L) NO.243 OF 2016

Larsen & Toubro Limited)
a Company registered under the Companies Act, 1956)
having its Registered Office at L & T House, Ballard Estate,)
P.O. Box No. 278, Mumbai-400 001)...Petitioner

vs.

1. Shree Ahuja Properties & Realtors Private Ltd.)
a Company registered under the Companies Act, 1956)
having its Registered Office at Rajpipla,)
Opp. Standard Chartered Bank, Linking Road,)
Santacruz (West), Mumbai-400 054)
2. Punjab National Bank,)
Maker Tower, 'E' Ground floor, Cuffe Parade,)
Mumbai-400 005)..Respondents

Dr. Birendra Saraf, along with Mr. Sachin Chandarana, Mr. Rashid Boatwalla, and Lipsa Unadkat, instructed by M/s. Manilal Kher Ambalal & Co., for the Petitioner.

Mr. P. Chidambaram, Senior Advocate, along with Mr. Ankur Chawla, Mr. Aditya Raut, Ms. Sujata More, Ms. Kanika Singh, and Mr. Bhuvneshwar Pathak, instructed by M/s. Desai Desai Carrimjee & Mulla for the Respondent No.1.

CORAM: S.J. KATHAWALLA, J.
Judgment reserved on: 9th November, 2016
Judgment pronounced on: 9th January, 2017

JUDGMENT:

1. By the above Arbitration Petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act'), the Petitioner -- Larsen & Toubro Limited ('L & T') has sought reliefs against Respondent No.1 -- Shree Ahuja Properties and Realtors Pvt. Ltd. ('Ahuja Properties') and the Respondent No. 2 -- Punjab National Bank ('PNB') in terms of prayer clauses (a) to (d) of the Petition, interalia for Ahuja Properties to furnish security towards the claim of L & T, appointment of Court Receiver for the unoccupied flats in the Residential Project at Prabhadevi, an order of injunction against Ahuja Properties, its servants, agents and officers from in any manner dealing with and/or creating third party rights in respect of the unoccupied flats in the Project. L & T is also seeking urgent reliefs in the nature of a temporary order and injunction to restrain Ahuja Properties from in any manner invoking or making any demand on, or receiving, or recovering any amount from PNB, under a document titled "Performance Guarantee" bearing No.2175ILGO16614 dated 16th July, 2014 ('PG') extended from time to time, the last being upto 31st December, 2016, and against PNB from making payment under the PG to Ahuja Properties and/or anyone else.

2. Since Ahuja Properties had issued an invocation letter dated 25-10-2016 to PNB, L & T on 26-10-2016 filed the present Petition and moved this Court for urgent ad-interim reliefs, when PNB was restrained from making any payment to Ahuja

Properties under the PG upto 27-10-2016. On 27-10-2016, Ahuja Properties submitted in Court a copy of the invocation letter dated 25-10-2016, and it was contended on behalf of L & T that the same was not in accordance with the PG. Ahuja Properties therefore withdrew the said invocation letter with liberty to issue a fresh letter of invocation. In the evening of 27-10-2016 itself, Ahuja Properties by a fresh letter of invocation sought to invoke the PG. L & T therefore, on 28-10-2016, moved this Court in Chambers for urgent ad-interim reliefs. L & T was allowed to carry out amendments to the Petition, without prejudice to the rights and contentions of the parties. The matter was listed on 04-11-2016 for final hearing, and in the meantime the order restraining PNB from making any payment under the said PG was passed. The matter was finally heard on 04-11-2016, and the same was reserved for orders after the parties filed their written submissions.

3. The brief facts as set out by L & T in the above Petition are as under:

3.1 In or about November, 2009, Ahuja Properties floated a tender for construction of a world class residential complex at Prabhadevi, Mumbai ('the said Project'). L & T was one of the many entities which participated in the bidding for the said tender.

3.2 L & T was appointed as a Contractor by Ahuja Properties under Contract dated 02-03-2010 ('the Contract') [at page 64 Exhibit C to the Petition]. M/s. DTZ International Property Advisers Pvt. Ltd. were appointed as the Project Manager.

3.3 Under the said Contract, the stipulated date of completion of works by L & T was 28-02-2012 ('original completion date').

3.4 Under Clause 8.1 of the Contract, L & T was required to submit, interalia an unconditional and irrevocable, on demand: (A) Performance Bond ('Performance Guarantee') in the format attached to the conditions of the Contract as Annexure B, which Guarantee was to be issued by a reputed national or international bank in Mumbai, being 2.5% of the Contract sum and (B) the Performance Indemnity Bond, in the format attached to the conditions of the Contract as Annexure AA (the 'Performance Indemnity Bond') for an amount of 2.5% of the Contract sum.

3.5 The works under the Contract were not completed on or before the original completion date i.e. 28-02-2012.

3.6 Extensive correspondence was exchanged between L & T and Ahuja Properties, with regard to the works not being completed on or before the original completion date.

3.7 After several meetings and discussions, the parties executed a Supplementary Agreement dated 01-08-2013 ('Amended Contract') [at page 341 - Exhibit J to the Petition], which provided for a revised completion date of 28-02-2014.

3.8 On 13-09-2013, Ahuja Properties appointed High Point Project Management Solutions Private Limited as the Project Manager.

3.9 On 01-10-2013, Revised Milestone Schedule was executed by Ahuja

Properties with the Revised Contract Value of Rs.400 Crores which covered the scope of work to be carried out by L & T as per the Supplementary Agreement.

3.10 Pursuant to Clause 8.1 of the Contract, L & T through PNB got the Bank Guarantee issued in favour of Ahuja Properties being PG No. 2175ILGO16614 dated 16-07-2014, which is found at page 297 of the Petition, and which is in accordance with the format provided at page 210 of the Contract.

3.11 Post the execution of the Supplementary Agreement, due to external factors, and factors attributable to Ahuja Properties, there were several delays in execution of the work as contemplated under the Amended Contract, some of which delays are set out in clause (q) of paragraph 5 of the Petition. Ahuja Properties for reasons best known to them also unilaterally and surreptitiously removed certain activities from L & T's scope of work as set out in clause (5) of Paragraph 5 of the Petition. The bills raised by L & T since May 2015 are not certified by Ahuja Properties till date, though L & T is fully entitled to such certification and payment, which resulted in further delay in completing the Project. The prejudicial approach of the Project Manager resulted in further delay being caused, whilst mutually arriving at the value of the work which had been removed from the scope of the work of L & T. The Project Manager in or about September, 2015, unilaterally issued a list of certain activities and termed the same as "incomplete works".

3.12 That after much persuasion and follow up, at a meeting held on 06-03-2016,

Ahuja Properties and L & T agreed to the final list of accounts. However, there were disputes between Ahuja Properties and L & T in the final accounts, more particularly with regard to MEP floors, Energy Meters, Motion Detectors, etc. On 7th September, 2016, L & T received an e-mail from the Project Manager wherein it was alleged that there were certain problems with regard to the plumbing installation by L & T. Though discussions between the parties were immediately held and the representatives of Ahuja Properties were satisfied with the explanation offered, and steps were taken by L & T towards rectification, the Project Manager by his email dated 12-10-2016 enlarged the allegations made earlier in the email dated 07-9-2016 and threatened L & T with consequences including invocation of the Performance Guarantee and Indemnity Bonds, in case L & T failed to certify the alleged defects as set out in the emails of 07-09-2016 and 12-10-2016 respectively. The same was responded to by L & T vide its letter dated 14-10-2016. L & T also addressed a Notice dated 19-10-2016 through its Advocate to Ahuja Properties and interalia demanded payment of its dues of Rs.115,80,88,257/-. The Project Manager again by his letter dated 20-10-2016 called upon L & T to rectify the shortcomings within a period of seven days of the email, which according to L & T showed that the Project Manager, for reasons best known to him, was "hell-bent" to blame L & T for the alleged defects which had resulted in the work carried out by the other sub-contractors. Apprehending that Ahuja Properties may fraudulently seek to invoke the Performance

Guarantee, L & T addressed a letter/email dated 25-10-2016 to PNB, informing PNB that Ahuja Properties may fraudulently seek to invoke the Performance Guarantee and requested PNB not to honour the invocation by Ahuja Properties.

3.13 Ahuja Properties invoked the Bank Guarantee as set out hereinabove on 27-10-2016, which led L & T to file the above Arbitration Petition.

4. Mr. Saraf, the Learned Advocate appearing for L & T has taken me through some of the above facts and made the following submissions:

4.1 That the PG dated 16th July, 2014, at page 297 of the Petition is in the nature of a contract of indemnity and not a Bank Guarantee.

4.2 That without prejudice to the submission that the PG is in fact a contract of indemnity and not a Bank Guarantee, assuming whilst denying that the PG is a Bank Guarantee, the PG is a conditional Bank Guarantee and therefore cannot be invoked until the conditions mentioned therein have been met.

4.3 That the ratio of the judgment in the case of *Hindustan Construction Company Ltd. vs. State of Bihar and others*¹ would apply with greater force to the facts of the present case.

4.4 That the letter of invocation dated 27th October, 2016 is not in accordance with the terms of the PG and is fraudulent and bad in law and cannot be acted upon.

4.5 That special equities exist in favour of L & T. In the present case,

¹ 1999 (8) SCC 436

irretrievable injustice will be caused to L & T, if the amount under the PG is allowed to be released in favour of Respondent No.1.

4.6 That the decisions relied upon on behalf of Ahuja Properties do not render any assistance to Ahuja Properties since in those cases the word "indemnity" was not used and those guarantees were not conditional guarantees, as in the present case.

5. Ahuja Properties has in its Reply denied and disputed all the allegations and submissions made by and on behalf of L & T. According to Ahuja Properties, the Project Manager had to address a detailed letter dated 26th December, 2013 to L & T giving item-wise delay in completion of the Project. It was also pointed out that the program for execution of work being submitted by L & T was inaccurate and misleading. From time to time, the Project Manager in a series of emails, called upon L & T to ramp up the progress of work as the same had already been substantially delayed. Again on 17-05-2014, the Project Manager vide his letter examined the reasons given by L & T as the reasons for the delay in its letter dated 28-02-2014 and informed L & T that the same are unacceptable and untenable. By the said letter, the Project Manager also stated that L & T's delay in completion of works had led to significant losses to Ahuja Properties which included fall in sales, additional interest payable to the financial institutions, loss of good will and other losses connected with the above. The Project Manager by his letter dated 04-11-2014, put L & T on notice under Clause 17.10 of the Contract that the rate of the progress of the

work is too slow to ensure completion within the applicable time. L & T was also called upon to take such steps as were necessary to expedite progress of the work. L & T was also informed that their delays were resulting in additional losses and costs to Ahuja Properties and that these losses/costs would be recovered from L & T. It is submitted that infact L & T sent an email to Ahuja Properties in which it was interalia admitted by L & T that it needs to augment its resources to execute the work. The Project Manager vide his letters dated 30-01-2015, 03-02-2015, 12-10-2015 addressed to L & T kept on recording that L & T had failed to deliver the completed Project by 25-02-2014 in terms of the Contract, and there was already a delay of 48 weeks and that even now L & T were unable to confirm the date of completion with any confidence. It was also recorded that L & T seemed incapable of managing the required works. The alleged personal assurances of L & T were highlighted by the Project Manager. The Project Manager also informed L & T that due to L & T's miserable failure to perform the Contract and complete the work within the stipulated timelines and the constraints being faced by Ahuja Properties in meeting its commitments to its customers for handing over the flats, Ahuja Properties, in exercise of the powers conferred on it under the Contract was constrained to decide not to undertake certain sections and portions of the work from L & T and get them executed through other contractors in the interest of execution and completion of the work. Ahuja Properties vide its letter dated 26-08-2015 issued to L & T, highlighted

the failure of L & T to complete the Project by the revised completion date which had resulted in substantial loss to Ahuja Properties, and therefore intimated to L & T that it had incurred losses in excess of Rs. 100 Crores on account of L & T's breaches and delay. L & T vide its letter dated 2nd September, 2015, for the first time, sought to raise a plea of having incurred losses of Rs.100 Crores in an attempt to mask its own failure and liabilities under the Contract. According to Ahuja Properties, the Project Manager after undertaking a detailed survey of the Project, issued to L & T a list of incomplete works by his letters dated 09-10-2015 and 20-10-2015. Against this list, as of today, only 42% of the incomplete work still remained to be completed by L & T. The Project Manager by his letter dated 29-12-2015, forwarded to L & T the Master Claim Register which detailed the claims of Ahuja Properties against L & T, which totalled up to Rs.143,87,24,077/-, excluding claims for which the amount was yet to be conclusively assessed and crystalized. However, L & T continued to allege in its letters that the delays continued in execution of the works due to "external factors" and "factors attributable to Ahuja Properties". Ahuja Properties was therefore, left with no alternative but to invoke the Performance Guarantee.

6. The Learned Advocate appearing for Ahuja Properties has after taking me through the above facts and the extensive correspondence exchanged by and between L & T and Ahuja Properties, making allegations and cross allegations against each other, made the following submissions:

6.1 That the submission of L & T that the PG is in the nature of a contract of indemnity and not a Bank Guarantee is incorrect and a mere afterthought. In this context, the correspondence exchanged by L & T with PNB as well as Ahuja Properties and the stand taken in the Arbitration Petition as originally filed is relevant.

6.2 That the subject Bank Guarantee is an unconditional Bank Guarantee and the same cannot be treated as a conditional Bank Guarantee for reasons alleged by L & T or otherwise.

6.3 That the letter of invocation dated 27th October, 2016 is as required in law and cannot be termed as fraudulent or bad in law as alleged by L & T.

6.4 That no special equities exist in favour of L & T in the present case as alleged, or at all.

6.5 That L & T has not made out any case of fraud or irretrievable injustice.

6.6 The submissions of Ahuja Properties is fortified by the following decisions of the Hon'ble Supreme Court and this Hon'ble Court:

- (i) *U.P. Co-operative Federation Ltd. vs. Singh Consultants and Engineers (P)Ltd.*²;
- (ii) *Vinitech Electronics Pvt. Ltd. vs. HCL Infosystems Ltd.*³;
- (iii) *Simplex Infrastructure Ltd. vs. Siemens Ltd. and another*⁴;
- (iv) *ITD Cementation India Ltd. vs. Reliance Infrastructure Ltd. &Ors.*⁵;

² 1988 (1) SCC 174

³ 2008 (1) SCC 544

⁴ (2015) SCC Online Bom. 34

⁵ Bombay High Court judgment dated 22nd Jan. 2014 in Notice of Motion (L) No. 160 of 2014 in Suit (I) No. 57 of 2014.

(v) *Housing Development and Infrastructure Ltd. vs. Mumbai International Airport Pvt. Ltd. and others*⁶

7. I will now deal with the submissions advanced on behalf of the parties.

8. Relying on Clause 3 (i) of the PG which states that, *"We hereby undertake to indemnify you and keep you indemnified from and against any losses and damages that may be caused to or suffered by you by reason of any default or defaults on the part of the Contractor in performance of the contract or carrying out any works under the Contract or otherwise in the observance and performance of any of the terms and conditions relating thereto in accordance with the true intent and meaning thereof"* it is submitted on behalf of L & T that the PG is infact an indemnity granted to Ahuja Properties and not a Bank Guarantee. It is submitted that by the PG, Ahuja Properties has been indemnified against any loss or damage that may be caused to it by reason of any default by L & T, and therefore express words leave no element of doubt that the same is not a guarantee but an indemnity against any loss or damage that may be suffered. It is further submitted that from a reading of Clause 8.1(a) of the Contract, which is referred to in Clause 8.2 of the PG and in furtherance to which, the PG is given, it can be seen that the performance Bond was required to be given by L & T to Ahuja Properties in the form provided by Ahuja Properties itself. It was this Performance Bond, which was in the nature of an indemnity, which has been defined

6 Bombay High Court judgment dated 29th November, 2012 in Arbitration Petition (L) No. 1538 of 2012.

as a 'Performance Guarantee' in the said Clause and therefore, bears the nomenclature, 'Performance Guarantee'. It is therefore, submitted that the nomenclature i.e. Performance Guarantee which is only a term for convenience, will not change the character or nature of the document. It is submitted that the fact that the PG states that the claim by Ahuja Properties shall be paid without demur or reference to L & T or that the decision of Ahuja Properties as to whether L & T has made any default or default being binding on PNB, does not in any manner alter the nature of the contract from an indemnity to a guarantee. Reference to the 'Performance Guarantee' in subsequent clauses of the PG does not in any manner alter the character of contract of indemnity. Once the Contract itself states that what PNB has undertaken is to 'indemnify' and 'keep indemnified' Ahuja Properties, it establishes the real relationship between the parties and the nature of the obligations undertaken thereunder. Subsequent reference to 'Performance Guarantee' does not alter the contract. The words 'Performance Guarantee' is merely a nomenclature for the document 'Performance Guarantee'. At various places such as in Clauses 3(x) and 3(xi) of the PG, the term 'Performance Bond' has also been used. It is submitted that to make a claim under the indemnity given under the PG, it is incumbent upon Ahuja Properties to establish that it has suffered loss or damage by reason of a default on part of L & T. This is a pre-condition for the obligation of PNB under the indemnity being invoked. There is no delay on the part of L & T and in fact, L & T is entitled to receive

Rs.115.80 Crores from Ahuja Properties and therefore the PG cannot be invoked without following due process of law for enforcement of an indemnity.

9. The learned Senior Advocate appearing for Ahuja Properties has submitted that the contention, that the document at Exhibit E being in the form of a contract of indemnity and not a bank guarantee, has been raised for the first time by way of an amendment which was tendered before this Court at the time of the final hearing on 04-11-2016. This is clearly an afterthought to overcome the grave lacunae in the case of L & T, in as much as L & T was well aware that the document at Exhibit E to the Petition, was an unconditional and unequivocal bank guarantee and nothing else. The said amendment is therefore clearly an afterthought and is nothing but a poor attempt to evade the well established legal principles governing unconditional bank guarantees. It is submitted that both the parties have always referred to and understood the document at Exhibit E to the above Petition as a Bank Guarantee and nothing else. This contention is supported by the fact that in the Arbitration Petition, L & T has referred to the document at Exhibit E to the Petition as a Performance Guarantee. The Bank Guarantee is extended by L & T on 8 occasions. As can be seen from Exhibit "F-5" (Page 314 of the Petition) L & T has written letters to the PNB stating the Subject as, "Amendment of Bank Guarantee", and have further stated that, *"Please arrange to issue amendment letter to the following Bank Guarantee issued by you on our behalf... Kindly send us the guarantee documents duly executed*

for onward transmission to the beneficiary". On every occasion when PNB has extended the Bank Guarantee at the request of L & T, PNB has by its letter addressed to Ahuja Properties inter alia recorded as under:

"At the request of LARSEN & TOUBRO LIMITED, L & T House, N.M. Marg, Ballard Estate, Mumbai-400 001, we hereby amend the abovenamed guarantee as under:

"THE VALIDITY OF THE GUARANTEE IS HEREBY EXTENDED UP TO 31-12-2016 AND CLAIM UNDER THIS GUARANTEE MUST REACH US IN WRITING BY 31-12-2016"

.....

Notwithstanding anything contained hereinabove:

- i. our liability under this bank guarantee shall not exceed Rs. 10,00,00,000/- (Rupees Ten Crores only);*
- ii. This bank guarantee shall be valid upto, and*
- iii. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if you serve upon us a written claim or demand on or before 31-12-2016. Whereafter it ceases to be in effect in all respects whether or not the Original is returned to us.*

All other terms and conditions remain unchanged.

This letter forms an integral part of the original guarantee referred above and may be kept attached thereto."

Even in the prior correspondence exchanged between the parties, the said document is referred to as a Performance Guarantee and not as a Contract of Indemnity. In the

letter dated 25-10-2016 (Exhibit S-1) [pages 442A - 442E to the Petition) addressed by L & T to PNB Bank and again in the letter dated 19-10-2016 issued by the Advocate for L & T to Ahuja Properties and the Project Manager annexed as Exhibit R to the Petition, (pages 425-440), the document at Exhibit E to the Petition, is referred to as 'Performance Guarantee'. That even in the format annexed with the Contract, the document to be provided in terms of Clause 8.1 is referred to as a Performance Guarantee and not as an Indemnity Bond. Indemnity Bond has been separately provided under the Contract and cannot be confused with the Performance Guarantee. That at page 42 of the Petition, L & T itself has observed the distinction between performance guarantee and indemnity bond and has used the two phrases in the same sentence referring to 2 different documents.

10. Clause 8.1(a) of the Contract is relevant and is reproduced hereunder :

"8.1 The contractor undertakes to obtain and deliver to the Employer simultaneous with the Commencement Date:

(a) An unconditional and irrevocable on demand : (A) Performance Bond in the form attached to these Conditions of Contract as Annexure 'B' (the "Performance Guarantee") which shall be issued by a reputed national or international bank in Mumbai approved by the Employer at its sole and absolute discretion for the purpose, for an amount of 2.5% (two point five per cent) of the Contract Sum; and (B) Performance Indemnity Bond in the form attached to these

conditions as Annexure AA (the "Performance Indemnity Bond") for an amount of 2.5% (two point five per cent) of the Contract Sum. The Performance Guarantee and the Performance Indemnity Bond are collectively referred to as the "Performance Bond".

11. The above Clause makes it clear that L & T is required to provide to Ahuja Properties two separate documents, the first document being an unconditional and irrevocable on demand Performance Bond in the format attached to the conditions as Annexure "B" (Performance Guarantee) of a national or international bank in Mumbai for an amount of 2.5% of the Contract Sum and the other document being the Performance Indemnity Bond in the format attached to the conditions as Annexures AA (Performance Indemnity Bond) for an amount of 2.5% of the Contract Sum. The said Clause however, makes it clear that the Performance Guarantee and the Performance Indemnity Bond shall collectively be referred to as "Performance Bond". It is argued on behalf of L & T that the Performance Bond mentioned in Part A of Clause (a) of Paragraph 8.1, though defined as "Performance Guarantee" is nothing but a Performance Indemnity Bond. L & T is well aware that Part B of Clause (a) of Paragraph 8.1 requires L & T to provide Performance Indemnity Bond and is defined as Performance Indemnity Bond. Since Clause 8.1 of the Contract clearly brings out the distinction between the Performance Bond, which is specifically defined as a 'Performance Guarantee' in Clause (a) of Part A of Paragraph 8.1 and the 'Performance Indemnity Bond' defined as 'Performance Indemnity Bond' forming part

of Part B of Clause (a) of paragraph 8.1, the attempt on part of L & T to contend that both the documents referred to in Part A and Part B of Clause (a) of Paragraph 8.1, are Performance Indemnity Bonds, cannot be accepted. This is further made clear by the formats of the said two documents that is the document at Annexure B, which is titled as 'Performance Guarantee' and the second document which is referred to in Clause (a) of Paragraph 8.1, as 'Performance Indemnity Bond', also titled in the format as 'Performance Indemnity Bond'. In my view, only because the language used in the document, is "undertaken to indemnify and keep indemnified Ahuja Properties", does not make the subject document a 'Performance Indemnity Bond'.

12. The ingredients of a Bank Guarantee finds mention in Paragraph 9 of the decision of the Hon'ble Supreme Court in the case of *Hindustan Construction Co. Ltd. V/s. State of Bihar and Ors. (supra)* in which it is stated that, "*what is important therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished*".

Clauses 2 and 3 of the subject Bank Guarantee are reproduced hereunder:

"2. Under the Contract, the Contractor has agreed to provide a

Performance Guarantee in terms of clause 8.1 of the Contract for an amount of Rs.10,00,00,000/- (Rupees Ten Crores only) in the form of a Bank Guarantee.

3(i). We hereby undertake to indemnify you and keep you indemnified to the extent of the sum of Rs.10,00,00,000/- (Rupees Ten Crores only) from and against all losses and damages that may be caused to or suffered by you by reason of any default or defaults on the part of the contractor in performance of the contract or carrying out any works under the contract or otherwise in the observance and performance of any of the terms and conditions relating thereto in accordance with the true intent and meaning thereof and in the event of any default or defaults on the part of the contractor as aforesaid, we shall forthwith on demand pay to you any sum or sums not exceeding in the total of the said sum of Rs.10,00,00,000/- (Rupees Ten Crores only) as may be claimed by you from the Contractor as your losses and/or damages by reason of such default or defaults on the part of the contractor as aforesaid without demur or without reference to the Contractor.

(ii) Notwithstanding anything to the contrary, we agree that your decision as to whether the Contractor has made any such default or defaults and the amount or amounts to which you are entitled by reasons thereof, will be binding on us and we shall not be entitled to ask you to establish your claim or claims under this performance Guarantee but shall pay the same forthwith without any objection or excuse. (emphasis supplied).

(iii) We undertake to pay to you any money so demanded from time to time notwithstanding any dispute or disputes raised by the Contractor in

any suit or proceeding pending before any court of tribunal or arbitration relating thereto our liability under these presents being absolute and unequivocal. "

The above Clauses make it clear in no uncertain terms that the amount claimed by Ahuja Properties from L & T under the said Bank Guarantee towards their losses and/or damages by reason of default or defaults on the part of L & T, shall be forthwith paid to Ahuja Properties without demur or without reference to L & T. The decision of Ahuja Properties as to whether L & T has made any such default or defaults and the amounts to which Ahuja Properties is entitled to by the reasons thereof, will be binding on the PNB Bank and they shall not be entitled to call upon Ahuja Properties to establish their claim or claims under the Performance Guarantee, but shall pay the same without any objection or excuse. The amount demanded shall notwithstanding any dispute raised by L & T in any Suit or proceeding pending before any court of tribunal or arbitration relating thereto, and the liability under the bank guarantee, shall be absolute and unequivocal. If L & T would have been correct that the Bank Guarantee which is invoked by Ahuja Properties is not a Bank Guarantee, but is an Indemnity Bond and therefore it is incumbent upon Ahuja Properties to establish that it has suffered any loss and damage by reason of any default on the part of L & T, the aforesaid Clauses more particularly Clause (ii) of paragraph 3 would have found no place in the said PG. Therefore, on a reading of the terms of the PG, it is clear beyond

any doubt that the document which is referred to as the Performance Guarantee by Ahuja Properties, is in fact, a 'Performance Guarantee' and by no stretch of imagination can be termed and treated as Performance Indemnity Bond requiring Ahuja Properties to first establish that L & T has committed default, and that such default has caused loss to Ahuja Properties. In view thereof, none of the submissions made by L & T and recorded in paragraph 8 hereinabove can be accepted and the same are rejected.

13. The next contention advanced on behalf of L & T is that assuming whilst denying that the PG is not in the nature of a contract of indemnity but a Bank Guarantee, the PG is a conditional Bank Guarantee and cannot be invoked until the conditions mentioned therein have been met. In support of this contention, L & T has relied on the judgment of the Hon'ble Supreme Court in the case of *Hindustan Construction Company Ltd. vs. State of Bihar (supra)*. It is submitted on behalf of L & T that Clauses 2 and 3 (i) of the Guarantee make it apparent that the terms of the contract are read into the PG. Clause 3 (i) of the PG clearly shows that the PG was given to indemnify Ahuja Properties from and against losses and damages that may be caused to them by reason of "*any default or defaults on the part of the Contractor in performance of the Contract or carrying out any works under the contract or otherwise in the observance and performance of any of the terms and conditions relating thereto in accordance with the true intent and meaning thereof and in the*

event of any default or defaults on the part of the Contractor as aforesaid.." It is therefore submitted on behalf of L & T that the PG could be acted upon only when such alleged default was committed by L & T in accordance with the true intent and meaning of the contract and not otherwise. It is submitted that in the present case, the terms of the primary contract including Clause 30 have been read into the PG and therefore there is a pre-condition for the invocation of the PG and that is the occurrence of an event of default under clause 30 of the Contract. Therefore, in the event of there being a dispute and that too a serious dispute as to whether there was any default as contemplated in Clause 30 and whether the conditions of Clause 30 have been complied with, the pre-condition of the conditional PG itself is in dispute. The same would thus require adjudication in arbitration. Till such adjudication is done, it is not open to Ahuja Properties in the circumstances set out in the Petition, to invoke the PG. Relying on the decision of the Hon'ble Supreme Court in Hindustan Construction Company (supra), it is submitted that in the present case also, the operative part of the PG expressly mentions the terms, the true intent and the meaning of the contract. The ratio of the judgment in the case of Hindustan Construction Company (supra) would apply with greater force to the facts of the present case.

14. Ahuja Properties has submitted that the terms of the subject Bank Guarantee make it clear beyond any doubt that the PG is an unconditional Bank Guarantee and

that the ratio laid down by the Hon'ble Supreme Court in the case of Hindustan Construction Company Ltd.(supra) would not apply as alleged by L & T.

15. In the case of *Hindustan Construction Co. Ltd. vs. State of Bihar and others* (supra), clause 9 of the Principal Agreement reads thus:

“ 9. ADVANCE MOBILIZATION LOAN:

The Employer, will make an advance loan to the Contractor at 13 per cent simple interest per annum for the costs of mobilization in respect of the works in a lump sum amount equivalent upto 15 per cent of the Contract Price named in the Letter of Acceptance, payable in the proportionate amounts of foreign and local currencies as provided for in the Contract. Payment of the loan will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto, (ii) Provision by the Contract of the Performance security in accordance with Clause 5, and (iii) provision by the Contractor of a Bank Guarantee by a Bank acceptable to the Employer in an amount equal to the advance loan, such Bank Guarantee to remain effective until the advance loan has been completely repaid by the Contractor out of current earnings under the Contract and certified accordingly by the Engineer. A form of bank guarantee acceptable to the Employer is indicated in Section 9. Annex. B. The advance loan shall be used by the contractor exclusively for mobilization expenditures, including the acquisition of Constructional Plant, in connection with the works. Should the Contractor misappropriate any portion of the advance loan, it shall become due and payable

immediately, and no further loan will be made to the Contractor thereafter. The advance mobilization loan, shall be paid within 15 days of the date of certification.”

The Bank Guarantee furnished by the Hindustan Construction Company provided as under:

“ In accordance with the provisions of the Conditions of Contract, Clause 9 (Advance Mobilisation Loan) of the abovementioned contract, the Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered officer at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay - 400 038 (hereinafter called 'the Contractor') shall deposit with the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singbhum, Bihar, a bank guarantee to guarantee their proper and faithful performance under the said clause of the contract in an amount of Rs. 10,00,000 (Rupees Ten lakhs only).

We, the State Bank of India, incorporated under State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay - 400 023 (hereinafter referred to as 'the said Bank'), as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singbhum, Bihar, on his first demand without whatsoever right of objection on our part

and without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract. (emphasis supplied)

We further agree that no change or addition to or other modification of the terms of the contract or of works to be performed thereunder or of any of the contract documents which may be made between the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, and the contractor, shall in any way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification.

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The Hon'ble Supreme Court, whilst interpreting the said Guarantee held that the Bank Guarantee was conditional by observing in paragraphs 12 and 13 of its order as follows:

“12. Where the Bank, in the above Guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any

right of objection, but these expressions are immediately qualified by following:

“...in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract”.

13. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "Advance Mobilisation Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could

be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee”.

16. In the first part of Clause 3 (i) of the subject Bank Guarantee, PNB has undertaken to indemnify Ahuja Properties and to keep indemnified to the extent of the sum of Rs. 10 crores from and against all losses and damages that may be caused or suffered by Ahuja Properties by reason of any default or defaults on the part of the Contractor in performance of the contract or carrying out any works under the Contract or otherwise in the observance and performance of any of the terms and conditions relating thereto in accordance with the true intent and meaning thereof. Unlike the Bank Guarantee in the case of Hindustan Construction Company (supra), except for a mention that L & T has agreed to provide a Performance Guarantee in terms of Clause 8.1 of the contract for an amount of Rs. 10 crores in the form of a Bank Guarantee, there is no specific clause of the contract incorporated in the Bank Guarantee and Clause 3.1 of the Guarantee only refers to the observance and performance of the terms and conditions of the contract generally. In the second part of Clause 3 (i) though the words, "in the event of any default or defaults on the part of the contractor as aforesaid" are used, they are immediately followed by the words, "we

shall forthwith on demand pay to you any sum or sums not exceeding in the total sum of Rs. 10 cores as may be claimed by you from the contractor or your losses and/or damages by reason of such default or defaults on the part of the Contractor without demur or without reference to the Contractor" which is not the case in the language used in the Bank Guarantee in Hindustan Construction Company (supra). A complete answer is thereafter found in Clause (ii) of paragraph 3 of the PG which proceeds to record the agreement between PNB and Ahuja Properties and clarifies beyond any doubt that the decision of Ahuja Properties as to whether L & T has made any default or defaults, and the amounts to which Ahuja Properties are entitled by reason thereof, will be binding on PNB and they shall not be entitled to ask Ahuja Properties to establish their claim or claims under the PG, but shall pay the same forthwith without any objection or excuse. This agreement/clarification found in Clause (ii) of the subject Bank Guarantee is again not found in the Bank Guarantee in the case of Hindustan Construction Company. In view of the clear language of Clause (ii) of paragraph 3 of the PG, the question of accepting the interpretation sought to be given by L & T to Clause (3) of the PG, to the effect that Ahuja Properties is bound to establish that L & T has committed default of the terms and conditions of the contract causing loss and damage to Ahuja Properties before insisting on receiving the amounts claimed under the letter of invocation of PG, does not and cannot arise and the said submission is rejected. In view of the non-inclusion of any specific clause of

the contract in the instant Bank Guarantee and inclusion of Clause (ii) in paragraph 3 of the PG, the ratio of the Judgment in the case of Hindustan Construction Company (supra) would not apply to the facts of the present case. I therefore hold that the subject Bank Guarantee, unlike the Bank Guarantee in the case of Hindustan Construction, is an unconditional guarantee. The language of the Guarantee in the case of Hindustan Construction Company (supra) was materially different from the language of the Bank Guarantee in the present case and would therefore lend no assistance to L & T.

17. It is next contended by L & T that the letter of invocation dated 27th October, 2016, is not in accordance with the terms of the PG and is fraudulent and bad in law and cannot be acted upon. In support of this contention, it is submitted on behalf of L & T that despite not complying with the default clause i.e. Clause 30 of the Contract, Ahuja Properties, after the withdrawal of the first notice has once again by notice dated 27th October, 2016 sought to invoke the PG making false and incorrect allegations against L & T without providing any particulars whatsoever of the alleged losses and damage caused to Ahuja Properties. This has been done clearly with a view to present a false basis for a contention that the terms of the PG are complied with. It is submitted that this is a fraudulent act on part of Ahuja Properties to defraud L & T of Rs. 10 crores inspite of being well aware that L & T has performed obligations under the contract and it is in fact Ahuja Properties who is liable to make payment of

outstanding dues to L & T. No claim was asserted by Ahuja Properties at the Meeting held in March, 2016. It is submitted that even as late as on 20th October, 2016, in response to the claim made by L & T in its Advocate's letter dated 19th October, 2016 (Exhibit-R page 441 of the Petition) that there were outstanding invoices of Rs. 32 crores, Ahuja Properties stated that there was an outstanding invoice of Rs. 4.4 crores which excludes deduction for gypsum plaster rectification work and previous over paid amount of RS Bill No. 52, and that the invoice was being processed. It is submitted that if the claim of Ahuja Properties would have been in excess of the invoice, the question of processing the same would not have arisen. Thus even till 20th October, 2016, Ahuja Properties was suggesting that the payment of L & T invoices would be made. The question therefore of Ahuja Properties suffering any damages and invoking the PG of Rs. 10 crores does not arise. It is submitted that the action of Ahuja Properties invoking the PG is also fraudulent, since despite the request made by the Advocate for L & T by its letter dated 19th October, 2016 to Ahuja Properties and the Project Manager to appoint an expert in accordance with Clause 32.1 (a) of the Contract, to decide upon the disputes and differences between the parties, neither Ahuja Properties nor the Project Manager have appointed the said expert. This is so because Ahuja Properties is well aware that L & T has performed its obligations under the amended contract and that Ahuja Properties is required to make outstanding payments to L & T and this fact would be

confirmed by the expert also and therefore the fraudulent invocation would become evident. It is also submitted that the project in question received the occupation certificate in August, 2015 and also the permission from the Police Authorities. This by itself certifies that there is no default on part of L & T, as the requisite permissions are received by the project, and possession of more than 50 per cent of the units have been handed over to the end users. The entire invocation is therefore ex-facie fraudulent and illegal and is a fraudulent attempt on part of Ahuja Properties to enrich itself.

18. I have already held hereinabove that the subject Bank Guarantee is an unconditional Bank Guarantee and it is agreed and set out in Clause (ii) of paragraph 3 of the Bank Guarantee that, notwithstanding anything to the contrary, the decision as to whether L & T has made any default/s and by reason/s thereof, the amount/s to which Ahuja Properties is entitled, will be binding on L & T and L & T shall not be entitled to ask Ahuja Properties to establish its claim/s under the Performance Guarantee, but shall pay the same forthwith without any objection or excuse. Such being the bargain entered into between PNB and Ahuja Properties at the instance of L & T, L & T cannot be heard to say that Ahuja Properties is required to provide particulars of the losses and damage caused to them in the letter of invocation. PNB is not entitled to seek and Ahuja Properties is at this stage not required to provide details of the loss and damage caused to them as alleged by L & T. There is a series of

correspondence wherein repeatedly parties have blamed each other for the delay in completing the Project. Ahuja Properties has repeatedly alleged in its correspondence that because of the delays on the part of L & T and L & T not being equipped to handle several works covered under the Contract, Ahuja Properties was compelled to involve other contractors to complete the work. Ahuja Properties has by its letter dated 26th August, 2015 contended that they have suffered losses in excess of Rs. 100 crores in view of L & T not completing the work as agreed under the Contract. In fact, it is subsequent to this claim of Ahuja Properties that L & T immediately by its letter dated 2nd September, 2015 alleged that they have a claim in excess of Rs. 100 crores against Ahuja Properties. Therefore, admittedly the parties have repeatedly made allegations against each other, thereby giving rise to disputes between them which can be decided only through adjudication. The bald statement made by L & T therefore, that the allegation of Ahuja Properties in their correspondence of having suffered losses is completely baseless, cannot be accepted. In the Meeting held in March, 2016, specific items of work have been discussed. It cannot be said that since no claim was asserted by Ahuja Properties in that Meeting, the claims subsequently made by Ahuja Properties are fraudulent. In fact, there are a number of letters addressed by Ahuja Properties to L & T prior to March, 2016 making several serious allegations against L & T and recording that they have failed to complete the Project as agreed, thereby causing loss to Ahuja Properties, some of which are set out in paragraph 5

hereinabove. It is true that L & T in its Advocate's letter dated 19th October, 2016, has recorded that there were outstanding invoices of Rs. 32 crores. However, Ahuja Properties has immediately on the next day in its reply dated 20th October, 2016 denied that there were outstanding invoices of Rs. 32 crores. They have stated that there was an outstanding invoice of Rs. 4.4 crores which excludes deduction for gypsum plaster rectification work and previous over paid amount of R.A. Bill No. 52 and the said invoice is being processed. Relying on this statement in the letter it is submitted on behalf of L & T that if the claim of Ahuja Properties would have been in excess of the invoice, the question of processing the same would not have arisen. Such a submission, to put it mildly, is ridiculous. For the purpose of accounting, every bill is required to be processed. Even for the purpose of crystallising its claim against L & T, Ahuja Properties would be required to process all the bills received from L & T. Again, it is ridiculous to suggest that just because Ahuja Properties did not appoint an expert at the request of L & T, the invocation is fraudulent and contrary to the terms of the PG and the settled law. The request for appointment of an expert was made only on 19th October, 2016 obviously since by a letter dated 12th October, 2016, addressed to L & T, the Project Manager had recorded that he will be advising his client to invoke the Guarantee as well as the indemnity. On 25th October, 2016 the Bank Guarantee was first invoked and thereafter again the same was invoked on 27th October, 2016. Ahuja Properties certainly cannot be expected to appoint an expert

overnight. Therefore, it cannot be said that there is delay on the part of Ahuja Properties in appointing an expert, and it also cannot be said under any circumstance that for this reason the invocation is fraudulent or contrary to the terms of the PG or the settled law. Again, the submission of L & T that it is established that there is no default on their part, since Ahuja Properties have received the occupation certificate or requisite permissions and more than 50 per cent of the units have been handed over to the end users cannot be accepted, since as stated earlier, Ahuja Properties as far back as in the letters dated 30th January, 2015, 3rd February, 2015 and 12th October, 2015 recorded that L & T is incapable of managing the required work and that because of the delay on their part, Ahuja Properties had to complete certain sections of the Project through other contractors.

19. It is trite law that a Court can restrain encashment of a bank guarantee in cases of established fraud in issuance of the same. The fraud has to be absolute and egregious vitiating the very foundation of the bank guarantee. In the instant case, L & T has not made out any case of fraud whatsoever much less a case of egregious nature.

20. L & T has next contended that irretrievable injustice will be caused to L & T if the amount under the PG is allowed to be released in favour of Ahuja Properties and therefore special equities exist in its favour. It is submitted that in paragraphs 17 and 19 of the Petition, the assets and properties of Ahuja Properties are not enough to

secure repayment of L & T's claim. All along, Ahuja Properties has in their reply only set out the extent of work carried out by them, and being presently carried on by them. There is no mention whatsoever of the financial strength of Ahuja Properties and its liabilities and encumbrances. Ahuja Properties has not disclosed its accounts and financials to show that it has sufficient liquidity and assets, thereby admitting L & T's averments in paragraphs 17 and 19. L & T has also stated in paragraph 16 of the Petition that Ahuja Properties has several liabilities. The same has not been dealt with in the reply. L & T has expressed an apprehension that Ahuja Properties will deal with the unoccupied flats/units to the detriment of L & T and dispose of the properties to defeat the claim of L & T. A disclosure was sought of unsold and unoccupied flats/units in the Project. None of these allegations have been appropriately dealt with by Ahuja Properties. It is submitted that at the time of arguments it was pointed out to the Court that for the last 2 financial years, Ahuja Properties has suffered losses. The figures were not specifically mentioned before the Court. It is submitted that at the time when the submissions were made with regard to the financial condition of Ahuja Properties before the Court, the same were not disputed by Ahuja Properties. It is therefore submitted that special equities arise in favour of L & T and L & T will suffer irretrievable injustice if the PG is encashed. In view of the precarious financial position of Ahuja Properties, it would lead to unjust enrichment by Ahuja Properties which ought not to be permitted.

21. The Hon'ble Supreme Court has repeatedly held that to avail of the said ground it must be decisively established and proved to the satisfaction of the court that there would be no possibility whatsoever of recovery of the amount by the beneficiary. In this Context, paragraph 14 of the decision of the Hon'ble Supreme Court in *U.P. State Sugar Corporation Ltd. vs. Sumac International Ltd.*⁷ is relevant and reproduced hereunder:

“14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances

⁷ (1997) 1 SCC 568

and realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

In the case of *Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineerings Works (P) Ltd.*⁸ the Hon'ble Supreme Court observed as follows:

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

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29. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of

8 (1997) 6 SCC 450

the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

30. We are constrained to make these observation with regard to the manner in which the High Court had dealt with this case because this is not an isolated case where the courts, while disobeying or not complying with the law laid down by this Court , have at time been liberal in granting injunction restraining encashment of bank guarantees.

31. It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.

32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety, to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of

the parties. It is time that this tendency stops."

22. The Bank Guarantee is in the sum of Rs. 10 crores. L & T has not even alleged in its Petition that Ahuja Properties will not be able to refund the amount of Rs. 10 crores i.e. the amount claimed by Ahuja Properties under the Bank Guarantee. L & T has in paragraphs 17 and 19 of the Petition only made bald statements that to the best of its knowledge the assets and properties of Ahuja Properties are not enough to secure repayment of the amount of Rs. 115,80,88,257/- of L & T. Again in paragraph 19 it is alleged that the existing assets and properties of Ahuja Properties are not sufficient to meet the existing claim of L & T of Rs. 115,80,88,257/-. It is also contended that the unoccupied flats/units are not enough to secure the claim of L & T and L & T apprehends that Ahuja Properties will deal with, dispose of the unoccupied flats/units in a manner detrimental to the interest of L & T. Firstly I am of the view that L & T has not made out even a prima facie case that an amount of Rs. 115,80,88,257/- is due and payable by Ahuja Properties to L & T. In fact Ahuja Properties has by its letter dated 29th December, 2015 forwarded to L & T the Master Claim Register which detailed the claims of Ahuja Properties against L & T which totalled upto Rs. 143,87,24,077/-. As stated earlier, it is only after Ahuja Properties in its letter dated 26th August, 2015 recorded that it has incurred losses in excess of Rs. 100 crores on account of L & T's breaches and delay, that L & T by its letter dated 2nd September, 2015 claimed that it has incurred losses of Rs. 100 crores in view of

the alleged conduct of Ahuja Properties. L & T cannot make bald allegations against Ahuja Properties and then expect Ahuja Properties to provide them with the particulars pertaining to their financial status. Ahuja Properties in paragraph 1 of its Affidavit in Reply stated that, *"on account of the urgency, I am not dealing with each and every statement contained in the Petition parawise. That the averments made in the petition are denied in their entirety unless specifically admitted hereinafter."* Ahuja Properties has in clause (viii) of para 4 of its Affidavit in Reply further stated as under:

" That further Respondent No. 1 is promoted by the Ahuja Construction Group which has been in the construction business for the last 30 years. The Ahuja Group has over the years successfully completed 44 projects aggregating to approximately 3 million square feet and is currently developing approximately 10 million square feet of the value of approximately Rs. 7,000.00 crores. Thus, the apprehension of the Petitioner is factually baseless and the present case is not a fit case for granting any direction in terms of providing a security for the alleged but baseless and motivated claim of Rs.115.00 crores of the Petitioner, which itself is a counterblast and purely speculative. "

In response L & T, in its Affidavit in Rejoinder, has only stated that, *"I deny that there is any doubt about the financial wherewithal of the Ahuja Group as it has successfully completed 44 projects as alleged or at all. I deny that any apprehension by the Petitioner is baseless as alleged or for the reasons alleged or otherwise or at all. L*

&T despite being aware that Ahuja Properties is a Company registered under the Companies Act, 1956 and its balance-sheets and accounts are easily accessible, did not bother to produce the same even at the time of arguments. Instead, for the first time in the written submissions certain figures are given with regard to the alleged loss made by Ahuja Properties on the basis of certain financial statements of Ahuja Properties filed with the Ministry of Corporate Affairs. The practice of introducing for the first time, fresh arguments and/or fresh material in the written submissions is strongly deprecated by this Court in several matters and therefore this Court has not taken cognizance of the same. In any event merely because the Company has made certain losses does not establish that L & T will not be able to recover its dues, if any award is ultimately passed in favour of L & T. Therefore, the submission on part of L & T that special equities exist in its favour as irretrievable injustice will be caused to them, if the amount under the PG is allowed to be released in favour of Ahuja Properties, cannot be accepted.

23. Since I have already reached a finding as stated hereinabove that a document has to be interpreted on its own terms and in the present case the document is clear and unambiguous and clearly states that Ahuja Properties is not required to establish before PNB the damage or loss caused to it for the alleged default on the part of L & T and that PNB is bound to make payments as claimed by Ahuja Properties in its letter of invocation, I am not dwelling on the issue whether L & T's contention that

the PG is conditional, is an afterthought. I also do not accept the contention advanced on behalf of L & T that the facts of the cases relied upon by Ahuja Properties, and the nature of the Bank Guarantee in those cases were clearly different and distinct. Those were unconditional Bank Guarantees as much as the present Bank Guarantee which, as held earlier, is also an unconditional Bank Guarantee. In the circumstances, L & T has not made out a case for any reliefs as sought or otherwise, and the above Petition is dismissed. However, there shall be no order as to costs.

24. At the request of the Learned Counsel appearing for L & T, the ad-interim order shall continue upto 23rd January, 2017.

(S.J. KATHAWALLA, J.)