

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM. ARBITRATION PETITION NO. (L) 670 OF 2018**

Pratibha Industries Limited ... Petitioner

Versus

Propel Developers Pvt. Ltd. ... Respondents

Mr.Ashwin Shankar alongwith Mr. Bimal Rajashekhar for the Petitioner.

Mr.Pravin Samdani, Senior Advocate with Ms. Apeksha Munot, Ms. Paridhi Saraf instructed by Wadia Ghandy for the Respondents.

CORAM : S. J. KATHAWALLA, J.

RESERVED ON : 23rd AUGUST, 2019

PRONOUNCED ON : 11th OCTOBER, 2019

P.C.

1. The captioned Commercial Arbitration Petition has been filed by the Petitioner seeking an order restraining the invocation of certain Bank Guarantees as set out more particularly in the Petition. The guarantees are all identical in their material terms. Having regard to the terms of the Bank Guarantees and the well settled legal position in this regard, the submissions made by the parties and the issues arising in the present Arbitration Petition will have to be considered.
2. The Petitioner had submitted a bid in a tender invited by Respondent No. 1, to carry out construction of certain residential and commercial buildings, referred to as Towers 5, 6, 7 and 8 as also a common podium for 8 towers. Under clause

6 of the Letter of Intent dated 5th October 2011, the Petitioner was required to submit a Bank Guarantee till the end of the defects liability period.

3. Pursuant to the tender and the Letter of Intent, on or about 30th April 2012, Respondent No. 1 issued a Work Order dated 27th March 2012. Under the Work Order it was required that the Petitioner furnish certain Bank Guarantees as stipulated in clauses 4.1 and 4.5 thereof. The Work Order contained various other provisions such as those relating to the Defects Liability Period (clause 8), the order of precedence of documents (clause 13) etc.
4. During the course of the contract the Petitioner raised various R.A. Bills and submitted to Respondent No. 1 *inter alia* 12 Bank Guarantees in relation to retention money and towards mobilisation advance. These Bank Guarantees, set out below, which were last renewed between February and April 2018, form the subject matter of the present Petition.

Bank Guarantees given by the Petitioners					
Sr. No.	Name of the Bank	Bank Guarantee Number	Amount	Original Issued	Last Renewal
1	Bank of Baroda	0669IGPER033713	50,00,000	29-11-2013	07-02-2018
2	Bank of Baroda	0669IGPER019512	1,50,00,000	24-07-2012	13-04-2018
3	Bank of Baroda	0669IGPER023613	1,00,00,000	16-08-2013	13-04-2018
4	Bank of Baroda	0669IGPER002114	2,00,00,000	30-01-2014	13-04-2018

5	Bank of Baroda	0669IGPER014413	2,00,00,000	17-05-2013	14-02-2018
6	Bank of Baroda	0669IGPER033413	2,00,00,000	29-11-2013	14-02-2018
7	Bank of Baroda	0669IGPER004913	1,20,00,000	27-02-2013	15-02-2018
8	Indian Overseas Bank	2998/ILG/25/15	25,00,000	03-02-2015	01-03-2018
9	Indian Overseas Bank	2998/ILG/26/15	25,00,000	03-02-2015	01-03-2018
10	Indian Overseas Bank	2998/LG/127/2015	1,00,00,000	31-08-2015	28-02-2018
11	Union Bank of India	049580IGLOO24514	2,00,00,000	23-05-2014	01-02-2018
12	Union Bank of India	049580IGL0004916	50,00,000	10-02-2016	08-03-2018
Total Amount - 14,20,00,000/- (Rupees Fourteen Crore Twenty Lakh)					

5. "Following is the extract of one such Bank Guarantee:

[NOTE: SOME WORDS ARE UNCLEAR ON THE BANK GUARANTEE COPY]

To,

*M/s. Runwal Homes Pvt. Ltd.
Runwal & Omkar Esquare, 5th Floor,
Op. Sion-Chunabatti Signal,
Sion (East), Mumbai – 400 022*

Dear Sirs,

*In Consideration of M/S. RUNWAL HOMES PVT. LTD. having their corporate office at Runwal & Omkar Esquare, 5th Floor, Opp Sion-Chunabatti Signal, Off Eastern Express Highway, Sion (East), Mumbai – 400 022. (herein after referred as the “Employer”, which expression shall unless repugnant to the context or meaning thereof include its successors and assigns _____ awarded to M/S. PRATIBHA INDUSTRIES LIMITED (hereinafter referred to as the “Contractor” which expression shall unless repugnant to the context or meaning therefore, _____ successors, administrators, executors and assigns), a contract by issue of Developer’s _____ LOI No. LOIRHPL/PIL/05 10/2011-12 dated 5th Oct. 2011 and the same having _____ unequivocally accepted by the Contractor, resulting in a contract values at 361,58,488,532/48 (**Rupees Three Hundred Sixty One Crores Fifty Lacs Forty Eight Thousand Five Hundred Thirty Two & Paise Forty Eight Only**) for Civil & Structural works for Building 5,67 & 8 (Basement and Podiums + Stilt + 39 Habitable Floors) and Extended Basement and Podium at Runwal Greens, Commercial Residential and Development site at Mulund, (W), Mumbai – 400 080. (hereinafter called the “Contractor”).*

*The Contractor has agreed to furnish a Bank Guarantee to the Developer value amount to **Rs. 2,00,0,000/- (Rupees Two Crore Only)** towards Retention Money for satisfactory performance and completion of the contract.*

*NOW in consideration of the premises and at the request of the said Contractor, We, **Union Bank of India**, having registered office at Union Bank Bhavan, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai – 400 021 & having one of its **Industrial Finance Branch at Union Bhavan 1st Floor, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai – 400 021**, which expression shall, unless assigns do hereby guarantee and undertake unconditionally to pay the Developers immediately on demand any or, all monies payable by the Contractor to the extent of **Rs. 2,00,00,000/- (Rupees Two Crore Only)** as aforesaid at any time up to ----- without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any such demand made by the Developers and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. the Bank agrees that the Guarantee herein contained shall be irrevocable and shall continue to be enforceable till the Developers discharge this guarantee or _____, whichever is earlier.*

The Developer shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee, from time to time to vary or to extend the time for performance of the Contract by the contractor. The Developers shall have the fullest liberty without affecting this guarantee, to postpone from time to time the exercise of any powers vested in them or of any right and to exercise the same at any time in any manner, and either to enforce or to forebear to enforce any covenants contained or implied, in the Contract between the Developers and the Contractor any other course or remedy or security available to the Developers. The bank shall not be relieved of its obligations under these presents by any exercise by the Developers of its liberty with reference to the manners aforesaid or any of them or by reason of any other act or forbearance or other acts of omission or commission on the part of the Developers or any other indulgence shown by the Developers or by any other matter or thing whatsoever which under law would but for this provision have the effect of relieving the Bank.

The Bank also agrees that the Developers at its option shall be entitled to enforce this Guarantee against the Bank as a debtor, in the first instance without proceeding against the Contractor and notwithstanding any security or other guarantee that the Developers may have in relation to the Contractor liabilities.

*Notwithstanding any dispute/difference pending, between the Developers and the Contractor, **M/S. PRATIBHA INDUSTRIES LIMITED** and/or any dispute being referred to the arbitrator, the right of the Developers to recover the outstanding sum upto **Rs. 2,00,00,000/- (Rupees Two Crore Only)** from the Bank in the manner aforesaid will not be affected or suspended by reason of the fact that any dispute or dispute is/are pending before any office, tribunal or court and any demand made by the Developers shall be conclusive and binding.*

*The Bank further undertakes and agrees that the Bank shall make payment to the Developers demand draft favouring “**M/S. Runwal Homes Pvt. Ltd**” payable at Mumbai of the aforesaid amount of **Rs. 2,00,00,000/- (Rupees Two Crore Only)** immediately upon demand being made aforesaid, without in any manner referring to, or seeking consent of or instructions from the contractor and without in any manner, explicitly or by conduct, issuing notice of the Bank’s intent to honour the Bank’s commitment under this guarantee or on the issue of any instructions to the contrary issued by the Contractor.*

This guarantee shall not be affected by any change in the constitutions of the Bank or of the Contractor or for any other reason/whatsoever.

“Notwithstanding anything contained hereinabove”

1. *Our liability under this Guarantee is restricted to **Rs. 2,00,00,000/- (Rupees Two Crore Only)**.*
2. *This Bank Guarantee shall remain in force upto _____.*
3. *We are liable to pay the guaranteed amount or any part thereof under the Bank Guarantee only if you serve us written claim on demand on or before 20.04.2015.*
and
4. *Unless a demand or claim is made on or before _____, all your rights under this guarantee shall stand extinguished and we shall be discharged from all liabilities thereafter.*

Date:

Place : Mumbai”

6. A perusal of the guarantees, which are materially identical, show that the same contemplated payment being made on invocation, to Respondent No. 1, of all monies payable by the Petitioner to the extent set out therein “*unconditionally*” and “*without any demur, reservation, contest, recourse or protest and/or without any reference...*” to the Petitioner. The terms of the Bank Guarantees make it clear that the same are irrevocable and that Respondent No. 1 herein was entitled to enforce the guarantees against the Banks without proceeding against the Petitioner first. Payment was to be made by the Banks notwithstanding any dispute that may be pending between the Petitioner and Respondent No. 1.
7. It is the case of the Petitioner as urged by Mr. Shanker learned Counsel appearing for the Petitioner that some of the Bank Guarantees were given as a counter security for the mobilisation advance and these Bank Guarantees given

towards the mobilisation advance had to be returned to the Petitioner, as the mobilisation advance had already been recovered by Respondent No. 1 by way of deduction from R.A. Bills raised by the Petitioner.

8. As regards the Bank Guarantees relating to retention money, it is submitted that 50% were to be returned on “virtual completion” of the project and the balance 50% on the expiry of 12 months therefrom. It is the case of the Petitioner that there has been “virtual completion” for the work done by the Petitioner and consequently the Bank Guarantees ought to be returned. It is the case of the Petitioner, as urged by Mr. Shanker, that Respondent No. 1 is wrongfully withholding the Bank Guarantees. He submits that the withholding of the Bank Guarantees is evidence of an intention not to return them and therefore this intention shows that there is egregious fraud being played by Respondent No. 1 on the Petitioner.
9. Mr. Shanker further submits that the Bank Guarantees are conditional Bank Guarantees as they contemplate a demand being made only for monies “payable” by the Petitioner / Contractor to Respondent No. 1 and payment is only on satisfaction that there is an outstanding sum owed to Respondent No. 1. He places reliance on a judgment of the Supreme Court in *Gangotri Enterprises Limited v. Union of India & Ors.* [(2016) 11 SCC 720] to urge that for a sum to be due or payable it needs to be an admitted sum which stood adjudicated by a Court of law and therefore till such adjudication there could be no encashment of the Bank Guarantees.

10. On the basis of the above submission Mr. Shanker states that the language of the Bank Guarantees referred to above does not make them unconditional. He submits that the prior clause on the amount being 'payable' prevails over the subsequent clause for payment without demur etc. and therefore the requirement for the amount to be payable is a condition which would prevail over the otherwise unconditional language of the Bank Guarantee. Certain extracts from Lewison on Interpretation of Contracts have been relied upon. An attempt was thereafter made to suggest how the Bank Guarantee conditions in their entirety may be harmoniously read. As a sequitor Mr. Shanker submits that as no amount is payable by the Petitioner to Respondent No. 1, there is no question of invoking the Bank Guarantees.
11. Mr. Shanker further submits that Respondent No. 1 is not a trustworthy or financially robust company. Reliance is placed on ROC records of Respondent No. 1 and certain RERA orders in this regard and it is submitted that if at the end of the arbitration the Petitioner succeeds, it will not be possible to recover money from Respondent No. 1.
12. Per contra, Mr. Samdani learned Senior Advocate for Respondent No. 1 has submitted that the Bank Guarantees are on the face of them unconditional. He submits that the same clearly show that the amounts stated therein are to be paid on demand regardless of any dispute that may be raised by the Petitioner. Mr. Samdani further submits that the judgment in Gangotri Enterprises Limited, (supra) is being misread and he has submitted various reasons for

distinguishing the judgment, which are dealt with hereafter. Mr. Samdani further submits that it is well settled that a Bank Guarantee is an independent contract. He submits that it is further well settled that egregious fraud must mean fraud played on the bank issuing the Bank Guarantee and has to be of such a magnitude as to vitiate the underlying transaction or the foundation of the Bank Guarantee itself, and no such case has been made out. Mr. Samdani further submits that there is no case of special equities made out as understood by law, and in any event Respondent No. 1 being a part of the Runwal Group, which is a leading real estate developer, cannot be said to be financially untrustworthy.

13. It is stated by Mr. Samdani that there are various disputes on merits justifying the retention of the Bank Guarantees and the entitlement of Respondent No. 1 to invoke and encash the same. He submits that the Petitioner has delayed the project and has failed to satisfactorily perform the same, which facts he says are based on the documents available on the record. Accordingly, he submits that the Petition ought to be dismissed. Mr. Samdani has placed reliance upon the following judgments:

- (i) Larsen & Toubro Limited v. Shree Ahuja Properties & Realtors Private Limited – (2017) 2 Bom CR 227;
- (ii) U.P. State Sugar Corporation v. Sumac International Limited – (1997) 1 SCC 568;

- (iii) ABG Ports Limited v. PSA International Pte. Ltd &Ors. – 2013 (1) Mh.L.J. 755;
 - (iv) Himadri Chemicals Industries Limited v. Coal Tar Refining Co. –(2007) 8 SCC 110;
 - (v) U.P. Cooperative Federation Limited v. Singh Consultants and Engineers (P) Ltd. – (1988) 1 SCC 174.
14. Having heard the learned Counsel for the parties, and having perused the Written Submissions tendered by both sides, for the reasons set out hereafter, I am of the view that no case is made out for grant of injunctive relief as sought for by the Petitioner.
15. As set out above it is broadly the case of the Petitioner that the Bank Guarantees in question were furnished to secure the mobilisation advance and in relation to retention money. It is the case of the Petitioner that as the mobilization advance had (as claimed by the Petitioner) already been recovered in full by way of deduction from R.A. Bills, those Bank Guarantees should be returned. It is the further case of the Petitioner that the Bank Guarantees relating to retention money were to be returned 50% on “virtual completion” of the project and 50% within 12 months thereafter as per clause 4.5 of the Work Order. It is the Petitioner’s contention that the work was complete and they had therefore achieved “virtual completion” and accordingly the Bank Guarantees in this regard were liable to be returned.

16. The argument of the Petitioner appears to be that the occasion for invoking the Bank Guarantee could not have arisen as the Bank Guarantees were intended to operate only for a limited time i.e. until recovery of the mobilisation advance and until virtual completion (for 50%) and 12 months thereafter (for the balance 50%).
17. It is well settled as laid down in several judgments of this Court and of the Supreme Court, including those cited by Mr. Samdani on behalf of Respondent No. 1; that invocation and encashing of Bank Guarantees will be restrained only in very limited circumstances and on two well established grounds of fraud and special equities. Time and again various Courts have noted that fraud must be in connection with the issuance of the Bank Guarantee and must be such as would vitiate the very foundation of the Bank Guarantee. It is not every allegation of fraud that warrants interference with the encashment of a Bank Guarantee. The fraud must be egregious in nature and must go to the root of the matter as would vitiate the entire underlying transaction for which the guarantee was given.
18. It is not the Petitioner's case that the Bank Guarantee were given in the first instance as a consequence of any fraud played upon the Petitioner. They were given under contractual provisions which both sides accepted and acted upon. Merely stating that the Bank Guarantees ought to be returned and have been wrongly withheld by Respondent No. 1, even assuming for arguments' sake that this is correct, does not constitute a ground of fraud for the purpose of restraining invocation of a Bank Guarantee, let alone one of egregious nature as

would vitiate the underlying transaction. Even otherwise, I am not prepared to simply accept the bald contention of the Petitioner that the withholding of the Bank Guarantees, even assuming for arguments' sake that the case is correct, shows any intention on the part of Respondent No. 1 not to return them as per the contract. Respondent No. 1 has given its justification, and relied on documents, for withholding the Bank Guarantees for reasons of non timely completion and defects in the Petitioner's work and these grounds cannot be said to be entirely baseless or untenable, at this stage. I am at pains to once again note that even if everything the Petitioner says is accepted, which it is not, there is on the Petitioner's own showing no case of fraud made out, as would justify an injunction being granted.

19. It is further the Petitioner's case that the Bank Guarantees are conditional and can only be invoked upon satisfying the Banks that an amount is in fact payable. It is the Petitioner's case that no amount is payable as on date and therefore regardless of the other terms of the Bank Guarantees, the clause in the Bank Guarantees which speaks of monies being payable must prevail and makes the Bank Guarantees conditional Bank Guarantees, which cannot be invoked at this stage. It is further alleged that no amounts have been claimed as being payable by the Petitioner to Respondent No. 1.
20. A harmonious reading of the clauses of the Bank Guarantees show that the Bank Guarantees in question are clearly irrevocable and unconditional. The Bank Guarantees clearly state that the Bank undertakes 'unconditionally' to pay

Respondent No. 1 immediately on demand by Respondent No. 1. Merely because the Bank Guarantees contain a sentence stating that the payment shall be of “...*all monies payable by the Contractor...*” does not make the Bank Guarantees conditional. Nowhere do the Bank Guarantees require the Bank to assess whether in fact any amount is payable to Respondent No. 1. On the contrary the Bank Guarantees are categorical in their terms that the payment would be made on a demand by Respondent No. 1 and such payment would be made notwithstanding any dispute that may be pending between the parties before any forum. The Bank Guarantees further clarify that notwithstanding any dispute or difference between the Petitioner and Respondent No. 1 the right to recover the amounts stated in the Bank Guarantees will not be affected or suspended by reason of the fact that any dispute is pending. For abundant clarity, it is stated that a demand by Respondent No. 1 shall be conclusive and binding.

21. From a perusal of the above Bank Guarantees it is clear that there is an unconditional undertaking on behalf of the Banks to pay the Respondent No. 1 immediately on demand, the sums claimed as being payable by the Petitioner to Respondent No. 1. The wording of the Bank Guarantees to the effect that payment would be made without demur, reservation, contest, recourse or protest and/or without any reference to the Petitioner, makes it very clear that the Bank Guarantees were to be payable without any involvement of the Petitioner, or any disputes raised by the Petitioner, let alone showing some

positive proof of amounts payable by the Petitioner to Respondent No. 1. It is entirely untenable to contend that on the one hand the Banks shall pay without reference to any dispute, but on the other hand if the Petitioner raises any dispute whether monies are in fact payable to Respondent No. 1 by the Petitioner, then that would be a ground for the Banks to refuse payment. I am afraid that such an interpretation would not be consonant with the unconditional terminology of the Bank Guarantees.

22. A holistic reading of the terms of the Bank Guarantee make it clear that what is required is simply a demand made by the Developer for amounts it claims are payable to it by the Petitioner. It is made clear that this does not mean that the invocation letter need even say that any amount is payable by the Petitioner to Respondent No. 1. It further appears that the sentence in question referring to monies being payable by the Petitioner has a relation to the sum for which the Bank Guarantees are capped and are not intended to make the Bank Guarantees conditional upon some positive proof having to be furnished to the Bank by Respondent No. 1 of any sum being due and payable as contended by the Petitioner. To read the Bank Guarantees in this manner would be to do violence to the terms thereof which, as stated above, evidently contemplate an unconditional and irrevocable obligation on the part of the Bank to pay Respondent No. 1.
23. It needs no reiteration that a Bank Guarantee is a separate, stand-alone and independent contract from the underlying transaction / contract. To require

Respondent No. 1 to satisfy the Bank about any amounts being payable under the underlying contract, would defeat the very purpose of an unconditional Bank Guarantee. Having held that the terms of the Bank Guarantees are clear and that there is no condition precedent therein for invocation, and having regard to the fact that there is no inconsistency or contradiction between any of the clauses, there is no question of any so called prior clause prevailing as argued by the learned Counsel for the Petitioner. Be that as it may, a bare reading of the Bank Guarantee would show that in fact the obligation to pay 'unconditionally' is the first / prior part of the clause and therefore by the Petitioner's own argument it is that part which will prevail over the subsequent use of the words "all monies payable by the Contractor".

24. Mr. Samdani has urged at some length that there are considerable disputes raised by Respondent No. 1 as to the quality of the work done by the Petitioner. He further states that there are considerable delays in the Petitioner's work and the sums under the Bank Guarantees have rightly been invoked. For the reasons set out above, I am not required to go into the issue as to what claims Respondent No. 1 may have on merits. It may well be that Respondent No. 1 has a valid claim for payments due to it and likewise it may well be that the Petitioner has a good case to seek recovery of the amounts of the Bank Guarantee, but that is not something that this Court is required to delve into.
25. The reliance placed by the Petitioner on the judgment in Gangotri Enterprises Limited (supra) is misconceived. The facts in that judgment were entirely

different from those in the present case. In the case before the Supreme Court, there were two contracts, under one of which the Bank Guarantee was furnished. The Railways sought to invoke the Performance Bank Guarantee for claims arising under the contract for which there was no Bank Guarantee. In this context the Supreme Court restrained the invocation of the Bank Guarantee by further holding that the claim under the contract in which there was no Bank Guarantee was a claim for damages and there was no sum due and payable as yet under that contract. As rightly argued by Mr. Samdani, the case before the Supreme Court was more a case on the law of damages than that of Bank Guarantee, and it turned purely on the peculiar facts of that case.

26. Lastly, it is contended that Respondent No. 1's balance sheet shows that it is not a trustworthy or financially robust company and therefore it would be impossible to recover the amounts under the Bank Guarantee and consequently special equities arise in favour of the Petitioner.
27. The Supreme Court and this Court has on various occasions considered what constitutes special equities. As held by the Supreme Court in the above judgments, to constitute special equities there must be more than a mere apprehension that the other party will not be able to refund the amount of the Bank Guarantees. In U.P. State Sugar Corporation (*supra*) the Supreme Court has clearly laid down what kind of situations may constitute special equities, which do not cover the present case. A mere bald contention that there are some RERA orders against Respondent No. 1 and that Respondent No. 1 will

not be able to service its liabilities, does not show that it would be impossible for the Petitioner to recover the amount of the guarantee if the Petitioner ultimately succeeds.

28. In accordance with the principles laid down in Himadri Chemicals Industries Limited (*supra*) one would have to see whether there are any exceptional circumstances made out or whether it is only mere apprehensions expressed by the Petitioner. Mr. Samdani on behalf of Respondent No. 1 has urged that Respondent No. 1 is part of the Runwal Group which is one of the leading real estate developers in the city. The Group has executed projects aggregating to more than 25 million square feet. It is stated that there is no default in respect of any financial facility taken. In the very project to which the subject matter of the present dispute relates i.e. Runwal Greens, out of around 1600 units, Respondent No. 1 has handed over possession of approximately 1100 units till date.
29. Apart from the mere contention raised by the Petitioner that it may not be able to recover the sums of the Bank Guarantees, there is nothing significant placed on record to justify this apprehension. . It appears to be nothing but a bald apprehension, and certainly this is not a case which would fall within the narrow scope of special equities as understood by this Court and the Supreme Court.
30. Accordingly, I see no reason to restrain the invocation / encashment of the Bank Guarantees by Respondent No. 1. Needless to say there will be no prejudice caused to the Petitioner herein, as the Petitioner will be entitled to press for

appropriate orders / reliefs in the arbitration proceedings, and if it succeeds the sum forming the subject matter of the Bank Guarantees, may well be directed to be refunded. These are all matters that are best left to the arbitration and all the rights and contentions of the parties in this regard are specifically kept open.

31. Accordingly, the Petition filed under Section 9 is dismissed with no order as to costs.

(S.J. KATHAWALLA,J.)