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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P.(I) (COMM.) 206/2019, I.A. 8617/2019
M/S UMAXE PROJECTS PRIVATE LIMITED Petitioner

Through: Mr. Viplav Sharma, Adv.
versus

AIR FORCE NAVAL HOUSING BOARD & ANR. Respondents
Through: Mr. Nishant Kumar, Mr. Prashant
Bhatnagar and Mr. Aditya Chaudhary,
Advs. For R-1
Mr. V. K. Gupta, Adv. For R-2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER
% **11.07.2019**

SANJEEV NARULA, J.:

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 *inter alia*, seeks interim measures in the nature of restraining the Respondent No.1 from invoking/encashing the five bank guarantees for an amount of Rs. 3.76 crores.

Brief factual background

2. Petitioner is a large scale construction company. Respondent No. 1 (Air Force Naval Housing Board, hereinafter "AFNHB") is a society registered under the Societies Registration Act, 1860. In or around 2010, Respondent No. 1 invited tenders for construction of 430 Dwelling Units (DUs) comprising 8 Number of Residential Blocks having Ground + 64 Floors with double basement in three different types including civil and architectural works, internal and external sanitation & plumbing works,

internal electrical works, internal and external fire fighting, roads, external development work, main Gate and guard room, boundary wall, sewage treatment plant, rain water harvesting etc. at near Jhajra Village at Prem Nagar, Dehradun ('Dehradun Project') for Rs. 98.00 Crores. The Petitioner submitted its bid and was selected and pursuant to Letter of Acceptance (LoA) dated 4th May 2010, a formal agreement was executed for the said project (Dehradun agreement). Clause 18 of this agreement contains the arbitration clause. For the purposes of submitting tender, executing arbitration agreement, execution of contract work under subject Contract and for other collateral purposes, the Petitioner furnished following Bank Guarantees:

<u>S. No.</u>	<u>Bank Guarantee No. and its nature</u>	<u>Amount (Rs.)</u>	<u>Present validity</u>
1.	00070005610 (Performance BG)	50,00,000	17 September 2019
2.	00070005710 (Performance BG)	70,00,000	24 September 2019
3.	00070005810 (Performance BG)	50,00,000	24 September 2019
4.	00070005910 (Performance BG)	46,02,000	24 September 2019
5.	00070005512 (Performance BG)	1,60,00,000	28 August 2019
		Total = 3,76,02,000	

3. It is the case of the Petitioner that 95% of the Project has been completed by the Petitioner and all 430 DUs were handed over to the allottees/Respondent No. 1 and the payment due to the Petitioner, in terms of the completed work and extra work completed by the Petitioner has since

been wrongfully withheld by the Petitioner. In consequence thereof, the aforementioned bank guarantees to the tune of Rs. 3,76,02,000 were liable to be released. It is thus alleged that the Respondent No. 1 has wrongfully and fraudulently invoked all the bank guarantees in breach of the terms of the agreement, vide invocation letter dated 13th June 2019.

4. The Plaintiff has filed the present petition seeking a stay on the invocation and encashment of the bank guarantees. The learned counsel for the Petitioner has raised two primary grounds for seeking the relief sought in the present petition. His first ground of challenge is that the invocation is contrary to the terms of the bank guarantees. He contends that the invocation letter is non-conforming with the terms set out in the bank guarantees. He argues that it was incumbent for the Respondent No.1 to specifically state in the invocation letter the conditions stipulated in the bank guarantees. In support of this proposition, he relied upon judgments of this Court in ***ABIR Infrastructure Pvt . Ltd. v. Teestavalley Power Transmission* 214 (2014) DLT 235, *Puri International (P) Ltd. v. National Building Construction Company* 1997 (1) ARBLR 691 Delhi and *Ansal Properties and Industries v Union of India and Others* 1994 IIAD Delhi 68**. Secondly, his argument is that the Petitioner has already completed 99.5% of the work under the contract and construction in respect of 430 flats has been completed and possession thereof has also been handed over to the Respondents. Additionally, he submits that all the necessary statutory compliances including furnishing of completion certificate are in place. The work was completed in accordance with the terms of the contract and thus at this stage, invocation of the bank guarantee is a fraudulent act on the part of

Respondent No. 1. Elaborating on this contention, he also argued that in fact it is the Petitioner who has to recover an amount of Rs. 7.5 crores from the Respondent No. 1 and therefore, Respondent No. 1 is not justified in invoking the Bank Guarantees. Lastly, he submits that in case the Respondent No. 1 were to expend an amount of Rs. 50 lakhs to the Petitioner, he would be in a position to complete the balance work as stipulated in the contract.

5. Learned counsel for the Respondent No. 1 on the other hand, opposes the present petition on the ground that the Petitioner has not disclosed any of the well known exceptions to refuse to grant of stay of invocation of the bank guarantee. He submits that the Petitioner has not averred or established a case of fraud or irreparable injury and therefore, the Petitioner is not entitled to relief sought in the petition. On merits, he argues that the contentions of the Petitioner are misconceived. The Petitioner has abandoned the work mid-way and as a result, the Respondent No. 1 had to complete the balance work on its own. He submits that as per Petitioner's own letters, it is an admitted position that till March, 2019, only 85 % of the flats were ready and therefore, Petitioner's contention that the work is completed to the extent of 99.5%, is totally false and misleading. Since the Petitioner is in breach of the contract, Respondents have contractual right to invoke the bank guarantees.

6. He further submits that the completion certificate relied upon by the Petitioner stipulates that the same is conditional and cannot be accepted as a proof of successful completion of the project as per terms and specifications

provided in the contract. He also refuted Petitioner's contention regarding the invocation letter not being enforceable by referring to the terms of the Bank Guarantees and by relying upon the judgments of this Court in *Essar Oil Limited v Oil India Limited* 71 (1998) DLT 302, *Feedback Brisa Highways OMT Private Limited v Bhabaneshwar Expresways Private Limited* 2017 SCC OnLine Del 7738, *Tecpro System Ltd. v Tamil Nadu Generation and Distribution and Generation Corporation Limited and Ors.* MANU/TN/4227/2016.

Analysis and Findings

7. I have given my thoughtful consideration to the rival contentions of the parties. The law relating to bank guarantees is no longer *res integra*. The Supreme Court and also this Court in its several decisions have expressed views on the subject that have been followed consistently. No need is felt to reiterate the principles enunciated in the plethora of judgments and it would suffice to refer to the judgment of this Court in *Classic-KSM Bashir JV v Rites Limited* MANU/DE/1731/2018, wherein the jurisprudence relating to the law relating to bank guarantee has been succinctly summarized:

"33. The law of injunction in the case of bank guarantee is no longer res integra. In Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. (1997) 6 SCC 450, Supreme Court reiterated this law as under:

"21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary

to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are ***Svenska Handelsbanken v. Indian Charge Chrome*** [(1994) 1 SCC 502] , ***Larsen & Toubro Ltd. v. Maharashtra SEB*** [(1995) 6 SCC 68] , ***Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.***[(1995) 6 SCC 76] and ***U.P. State Sugar Corpn. v. Sumac International Ltd.*** [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of *U.P. State Sugar Corpn.* [(1997) 1 SCC 568] as follows: (SCC p. 574, para 12) "The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir

*John Donaldson, M.R. in **Bolivinter Oil SA v. Chase Manhattan Bank** [(1984) 1 All ER 351, CA] are apposite:*

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

(emphasis supplied)

*The aforesaid passage was approved and followed by this Court in **U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.** [(1988) 1 SCC 174]*

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.

*34. In **Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.** (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a contract by the respondent is not a plea of fraud of a egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:*

"24. The next question that falls for our consideration is as to whether the present case falls under any of or both the

exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any "special equities" in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

"That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12- 2003."

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any "irretrievable injury" or "irretrievable injustice". There is no plea of any "special equities" by the appellant in its favour. So far as the plea of "irretrievable injustice" is concerned the appellant in its petition merely stated:

"That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration

nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant."

28. The plea taken as regards "irretrievable injustice" is again vague and not supported by any evidence.

35. In Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr. (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

"9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "... if the contract had frustrated on account of impossibility..." but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional, no doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

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11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the

contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

*12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.** [**Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**, (2007) 8 SCC 110], at para 14: (SCC pp. 117-18) "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:*

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent

and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to

honour the payment under the guarantee.”

8. Bearing in mind the aforementioned principles, relating to the scope of the jurisdiction of this Court, I now proceed to consider the contentions raised by the learned counsel for the Petitioner. There is actually no quarrel on the proposition canvassed by the Petitioner that the bank guarantee has to be enforced in terms thereof. However, each case will turn on its own facts. In order to appraise this assertion, the terms of the bank guarantee and the invocation letter have to be read in consonance in order to decide whether there is non-compliance on the part of the parties invoking the bank guarantee. At this juncture, it would be apposite to first take note of the terms of the bank guarantees which read as under:

“We Oriental Bank of Commerce, E-Block, Harsh Bhawan, New Delhi -110001, herein after referred to as the Bank) in consideration of AFNHB, having agreed to pay the contractor at rates as provided in the agreement executed between them, herby agree with AFNHB.

We Oriental Bank of Commerce do hereby under take to pay the amount due and payable under this guarantee without any Demur, merely on a demand from Board, stating that the amount claimed is due by way a loss or damage caused to or would be caused to or suffered by the Board, by reason or any breach by the said agreement or by reason of the contractor's failure to perform the said agreement. Any such demand made on the Bank, shall be conclusive as regards the amount due and payable by the Bank, under this guarantee.

However, our liability under this Bank Guarantees shall be restricted for any amount not exceeding value of this Bank Guarantee.

We Oriental Bank of Commerce, Further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said agreement and that it shall continue to be enforceable till Board

certifies that the Terms & Condition of the said agreement has been full and properly carried out by the said contractor and accordingly discharged the guarantee. The Bank understood that the Onus of extending the validity of Bank Guarantee in time, as per the requirement of Board is with the contractor.

That it will, in the event of the contractor, failing to honor any of the condition stipulated in its agreement OR in the event of the contractor not completing the work as per specification and drawing, or in the event of the contractor committing breach of the contract or any provision these of or in the event of the contract failing. To renew this guarantee, at any time during the course of contract and settlement of account including the period covered by its extension, pay to AFNHB without any Demur on mere demand by DG AFNHB, the sum or sums which in the opinion of the DG AFNHB, the contract is liable to pay AFNHB. Any such demand made on the Bank, shall be conclusive as regards, the amount due and payable by the Bank under the guarantee. However our liability under the Bank under the Bank Guarantee shall be restricted to an amount not exceeding Rs 50,00,000.00 (Rs. Fifty Lacs Only).

We Oriental Bank of Commerce of India further agree with Board that the Board shall have the fullest liberty without effecting in any manner our obligation here under to vary any of the terms & Condition of the said agreement or to extend time of performance by the contract or from time to time or to postpone for any time or from time to time any of the powers exercisable by the Board against the said contract or and to forbear or enforce any of the Terms & Condition relating to the said agreement and we shall not to relived from our liability by reason of any such behalf or exaction the granted to the said contractor or for any forbearance, act or omission on the part of Board or any indulgence by Board to the said contractor or by any such matter or thing, whatsoever which under law relating to sureties would but this provision have effect of so reliving us. We Oriental Bank of Commerce undertake not to revoke this guarantee during its currency except with the previous consent of the Board writing.

That as to whether occasion has arisen for the demand of the amount covered by Bank Guarantee the decision of DG AFNHB,

shall be final and accepted by the Bank without any reference to the Contractor.

That this Bank Guarantee shall be enforceable against the Bank, as a first charge and not available to be appropriated by the Bank towards claims, if any due, to the contractor. That to give effect to the guarantee, the DG AFNHB, shall be at liability to act as, through the Bank were the principal debtors.

AFNHB's rights to recover the said amount will not be affected or compounded due to any dispute raised by Contractor or to that any dispute is pending before any officer, Courts, Arbitrator/ Umpire.

This Bank Guarantee shall in all respect and for all purpose be binding and operative till the validity including extended period. If required, AFNHB may ask for extension of this period of Bank Guarantee during its validity, in case the period of Bank Guarantee is not extended by the Bank on receiving the intimation from AFNHB then the letter of extension shall be treated as encashment of Bank Guarantee and the Bank shall remit the amount to AFNHB. For enforcing legal rights/ remedies under this Bank Guarantee, the Courts of NCT/ Delhi/ New Delhi will have exclusive jurisdiction.

And that the Bank shall not revoke the Bank Guarantee during its currency except with the previous consent in writing of the DG AFNHB and agree that any change in the constitution of the said contractor or said Bank shall not discharge our liability hereunder. This Bank Guarantee shall In all respect and for all purpose be blinding and operative till the validity Including extended period. It shall not be necessary for the Board to proceed against the contractor before proceeding against the Bank and the guarantee herein contained shall be enforceable against the Bank notwithstanding any security, which the Board may have obtained from the contractor.

That this Bank Guarantee shall be enforceable against the Bank or a first charge and not available to be appropriated by the Bank towards Claim, if any due to the contactor. That to give affect for the guarantee, the DG AFNHB shall be at liberty to act as through the Bank were the principal debtors.

That this Bank Guarantee shall be valid in full for a period from 30.7.2010 to 25.07.2012.

Notwithstanding anything contained herein above;

1. Our liability under the Bank Guarantee shall not exceed Rs 50.00.000.00 (Rs. Fifty Lacs Only).

2. **This unconditional and irrevocable Bank Guarantee shall be valid upto 25.07.2012.**

3. We are liable to pay the guarantee amount or any part thereof under this unconditional and irrevocable Bank Guarantee only and only if "the DG AFNHB" serves upto us a written claim or demand on or before midnight of 25th July, 2012.” *

9. The invocation letter reads as under:

“1. This office is holding the flowing BOB of M/s Umaxe Projects, who is executing the Meerut Project on our behalf: -

Sl. No.	BGB No.	Amount	Validity
1.	10480042317	50,00,000	13 Sep 19
2.	10480053218	57,50,160	19 Jun 19
3.	10480015618	38,33,440	25 Jun 19
4.	10480001319	1,00,00,000	25 Jul 19
5.	10480030718	38,33,440	09 Aug 19
6.	10480023518	57,50,160	11 Aug 19

2. The contractor has been found wanting in execution and timely completion of the project. In accordance, therefore, with the correct agreement this communication as treated as “NOTICE FOR ENCASHMENT” and proceeds be forwarded to the Board through RTGS as per following details:

(a) Account No. -
000701073530

(b) Name of the Beneficiary- Air force
Naval Housing Board

(c) Name of the Bank- ICICI Bank
Ltd

* The terms of all the Bank guarantees are *pari materia* to each other.

(d) Address of the Bank- 9A. Phelps Building.
Connaught Place New Delhi - 110001
(e) IFSC Code-
ICIC0000007

3. Kindly acknowledge and confirm on top priority. ”

10. The counsel for the Petitioner has strongly contended that the aforesaid invocation is improper as it does not specifically make a declaration as required under first clause of the bank guarantee. I am however not convinced with the arguments of the Petitioner. The invocation letter clearly makes a statement to the following effect: *“the contractor has been found wanting in execution and timely completion of the project”*. This according to me is sufficient compliance for invocation of the bank guarantee as per the terms of the bank guarantee. The language of the bank guarantee clearly envisages that for invocation, Respondent No. 1 is only required to state that there has been a breach on the part of the Petitioner. The bank guarantee in first clause, relied upon by the Petitioner has several conditions which are all disjointed with the word “or”. It is not necessary that all the conditions are necessarily required to be met for invocation of the bank guarantee. Even if one such condition is mentioned in the invocation letter, it would be sufficient compliance. It is also significant to note that one such condition is *“by reason of the contractor’s failure to perform the said agreement”*. The wordings of this condition are wide enough and envisage that any failure on part of the contractor would be sufficient to invoke the bank guarantee. In the invocation letter it is categorically stated that the ‘contractor has been found wanting in execution’ and this means that there was a failure to

perform on its part. The second clause of the bank Guarantee is independent it stipulates “That it will, in the event of the contractor, failing to honor any of the condition stipulated in its agreement OR in the event of the contractor not completing the work as per specification and drawing, or in the event of the contractor committing breach of the contract or any provision these of or in the event of the contract failing. To renew this guarantee, at any time during the course of contract and settlement of account including the period covered by its extension, pay to AFNHB without any Demur on mere demand by DG AFNHB, the sum or sums which in the opinion of the DG AFNHB, the contract is liable to pay AFNHB.”. There is no condition prescribed in this clause that the Beneficiary has to necessarily state that it has suffered loss or damages. The condition prescribed for invocation is that *“the contractor is not completing the work as per specification”* or *“in the event of contractor committing breach of the contract”*. There is no stipulation of the beneficiary having suffered a loss or damage and prerequisite for invocation. Moreover, what is essential is the substance rather than the reproduction of the words. The Bank guarantees were linked to performance of the contractor and thus failure or breach on its part would justify the invocation and restraining the same would defeat the purpose for which the bank guarantee was furnished. The Judgments relied upon by the Petitioner are distinguishable on facts. The judgment in ***Puri International (P) Limited v National Building Construction*** (supra) has been distinguished by this Court in the case of ***Feedback Brisa Highways OMT Private Limited v Bhubaneshwar Expressways Private Limited & Anr.*** 2017 SCC OnLine Del 7738. In ***Puri International*** (supra) the invocation was not in terms of the bank guarantee for the reason that the

invocation letter merely stated that that the beneficiary was lodging its claim for encashment of the BG without any statement that there was any breach of the contract by the party on whose behalf it was issued. In the present case, the invocation letter pointedly states that “*contractor has been found wanting in execution and timely completion of the project*”. Similarly, the judgments in *Ansal properties (supra)* and *Abir Infrastructure (supra)* can also be distinguished, referring to the judgment of this Court in *Explore Computers Pvt. Ltd. v Cals Ltd. 2006 (90) DRJ 480*, the relevant portions of which are being reproduced hereunder:

“**33.** The recital of the bank guarantee shows that the amount had been advanced by the plaintiff to defendant No. 1 as per the supply order and in view thereof the bank guarantee was being furnished against any loss or damage suffered by the buyer (the plaintiff) by reason of breach by the supplier (the defendant No. 1). The bank guarantee was payable by the bank without any demur merely on demand from the buyer stating that the amount claimed was by way of loss or damage caused to the buyer-plaintiff by reason of breach by supplier-defendant No. 1 of the terms and conditions of the agreement or by reason of the Supplier's failure to perform the said Agreement. The amount was payable notwithstanding any dispute raised by defendant No. 1 in any legal proceedings.

34. The letter of invocation dated 19.07.1997 states that the bank guarantee was being invoked due to cancellation of the purchase order.

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38. In my considered view the letter of invocation meets the requirement of the terms and conditions of the bank guarantee. It has to be kept in mind that the bank was to secure the advance given by the plaintiff to defendant No. 1 Any loss or damage caused or suffered by the buyer by reason of breach by the supplier was to give cause to the encashment of the bank guarantee. The supplies in the present case were not made at all. Thus the very purpose for which the advance had been given was

defeated since the defendant No. 1 cancelled the contract on account of its inability to supply the goods. The plaintiff has proved on record that such cancellation did take place by defendant No. 1 by proving the relevant documents even though for purpose of invocation of the bank guarantee it was not obliged to do so. Defendant No. 1 even issued cheques towards refund of the payment of the advance but those cheques were also dishonoured and the same have been proved by PW1. Thus the statement made in the invocation letter dated 19.07.1997 to the effect that the bank guarantee was being invoked due to the cancellation of the purchase order would suffice to meet the terms and conditions of the bank guarantee.”

(Emphasis supplied)

The factual situation of the present case is similar to that in *Explore Computers Pvt. Ltd. v Cals Ltd (supra)*. Therefore, in my view the invocation letter is in terms of the Bank Guarantee and the Petitioner's contention is meritless. Even otherwise, it has been held in the case of *Essar Oil Limited v. Oil India ltd. (supra)* that the objection to the effect that the invocation is not in terms of the bank guarantee and at the stage of invocation, the party at whose instance it has been furnished has no role to play, except if it so desires, to bring the relevant facts to the notice of the bank. The ultimate decision in this regard has to be by the guarantor bank.

11. On the pleas advanced before the Court relating to the completion of the project and the alleged breaches, it is only required to be observed that such questions cannot be adjudicated upon in the present petition under Section 9 of the Act, and this would fall within the domain of the Arbitral Tribunal. It can however be said that certain communications which have been shown to the Court indicate that the

project was not completed by the Petitioner. In this regard, the communication dated 13th June, 2009, is relevant and the same is reproduced hereunder:

“Ref No. : UPPL/HO/19-20/015

Dated: 13.06.2019

The Director General
Airforce Naval Housing Board
Race Course, Delhi

Sub. : Construction for Residential Project Comprising Of Dwelling Units and Related External Development Work at Prem Nagar, Village Jhajra, Dehradun.

Reg: Release of Bank Guarantees

Dear Sir,

Reference to our letters dated 20.12.2018 and 30.05.2019, wherein we had submitted that we have completed the project and handed over around 85% flats. We further requested to Your Goodselfs during the meeting in Your Goodselfs office to kindly release the performance guarantees at the earliest. We make our humble submission to kindly do the needful. We shall highly be obliged.

Assuring Your Goodselfs of our best cooperation at all times.

Thanking You
For & On Behalf of
M/s Umaxe Projects Pvt. Ltd.”

12. As per the Respondent No. 1, as on 6th March, 2019, the Petitioner had handed over only 327 flats and thereafter, they had to carry out the construction to do the balance work on their own and incur expenses. They strongly refute the Petitioner’s contention that the entire work has been

completed. Respondents have further annexed several photographs to show that the Petitioner has abandoned the work and the work is not up to mark and there are several deficiencies therein. Thus, there is a serious dispute between the parties relating to completion of the contract. The settled position in law is that a Bank Guarantee is an independent contract between the bank and the beneficiary thereof. Irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. The exercise to determine the defaulting or breaching party is not necessary to be carried out for determining the issue of invocation of Bank Guarantee. Resultantly whether the Petitioner has indeed completed the contract or not cannot be a ground to seek stay on the invocation of the bank guarantee (*Zillion Infra Projects (P) Ltd. v Fab-Tech Works & Constructions Pvt. Ltd. (2015) 224 DLT 371*). The Beneficiary is entitled to realize the Bank Guarantee in terms thereof irrespective of any pending disputes relating to the terms of the contract. The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

13. Learned counsel for the Petitioner also argues that the invocation of bank guarantee would cause irretrievable injury. This contention is also bereft of merit as the Supreme Court has in *U.P. State Sugar Corporation vs. Sumac International Ltd. AIR 1997 SC 1644* has explained as to what would be irretrievable injury in the following words:

“The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in

irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases”

In *Zillion Infra Projects (P) Ltd. v Fab-Tech Works & Constructions Pvt. Ltd.*, (supra) again it was observed by this Court:

“13. On the question of irretrievable injury, the Supreme Court in U.P. State Sugar Corpn. (Supra), held that to avail of this exception, the party seeking an injunction would have to show that exceptional circumstances exist which make it impossible for the guarantor to reimburse himself if he ultimately succeeds and this will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank Guarantees. There must be a fraud in connection with the Bank Guarantee”

Merely because the invocation of the bank guarantee would cause financial distress to the Petitioner, cannot be a ground to say that the exception of an irreparable injury should be invoked in the present petition. There is no merit in the petition and thus, the same is dismissed.

14. At this stage, Mr. V.K. Gupta, learned counsel appearing for the Oriental Bank of Commerce, states that on account of verbal assurance given to the Court, the bank guarantees were not encashed as the arguments in the present petition were yet to be heard. Therefore it is now clarified that since

the present petition is dismissed, the Respondent No.2 is free to proceed in the matter in accordance with law.

15. Order *dasti*.

SANJEEV NARULA, J

JULY 11, 2019

Pallavi

