

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 02ND DAY OF JUNE, 2023

R

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No. 753 OF 2023 (GM-RES)

BETWEEN:

PG SETTY CONSTRUCTION TECHNOLOGY PVT. LTD.,
REPRESENTED BY ITS MD
M.G.SOMASHEKAR
HAVING ITS REGISTERED OFFICE AT #74,
SANDESH ARCADE, 3RD FLOOR
REGISTERED UNDER COMPANIES ACT, 1986
SAHUKAR CHENNAIAH ROAD
17TH MAIN, KUVEMPUNAGAR NORTH
SARASWATHIPURAM
MYSORE - 09
REG. NO. 2558411999

... PETITIONER

(BY SRI JAYAKUMAR S. PATIL, SENIOR ADVOCATE A/W.,
SRI V.V.GUNJAL, ADVOCATE)

AND:

- 1 . THE MANAGING DIRECTOR
KARNATAKA STATE POLICE
HOUSING AND INFRASTRUCTURE
DEVELOPMENT CORPORATION
A WHOLLY OWNED
GOVERNMENT OF KARNATKA ENTERPRISE
NO.59, RICHMOND ROAD
(GEN. K.S.THIMMAYYA ROAD)

BENGALURU - 560 025.

- 2 . EXECUTIVE ENGINEER CONTRACTS
KARNATAKA STATE POLICE
HOUSING AND INFRASTRUCTURE
DEVELOPMENT CORPORATION
NO. 59, RICHMOND ROAD,
(GEN. K.S.THIMMAYYA ROAD)
BENGALURU - 560 025
md@ksphc.org
- 3 . ASSISTANT GENERAL MANAGER
CANARA BANK
MID CORPORATE BRANCH
MYSURU - 570 017
cd4966@canarabank.com

... RESPONDENTS

(BY SRI G.PAPI REDDY, SR.ADVOCATE A/W
SRI PRAKASH G. PAWAR, ADVOCATE FOR R1 AND R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH ANNEXURE-C NO.PHC/CONTRACT/BG ENCASHMENT / 2022-23 DATED 16.12.2022, ANNEXURE-F NO.PHC/CONTRACT / ENCASH / 2022-23 538 DATED 30.12.2022 OF RS.1,15,13,500/- (RS.ONE CRORE FIFTEEN LAKHS THIRTEEN THOUSAND FIVE HUNDRED ONLY) / BOTH ISSUED BY THE R2 AS ILLEGAL ARBITRARY AND WITH MALAFIDE INTENTION, BEING EXTRANEIOUS TO THE CONTRACT IN DISPUTE PERTAINING TO CHAMRAJ NAGAR AND MANDYA.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 22.05.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner/P.G. Setty Construction Technology Private Limited (hereinafter referred to as 'the Company' for short) is knocking at the doors of this Court seeking stalling of the act of the 1st respondent/Karnataka State Police Housing and Infrastructure Development Corporation ('the Corporation' for short) in encashing the Bank Guarantee of ₹1,15,13,500/- and has sought for a mandamus directing the respondents to restore/refund the bank guarantee that is encashed along with interest at 18% per annum.

2. Heard Sri Jayakumar S. Patil, learned senior counsel appearing for the petitioner and Sri G.Papi Reddy, learned senior counsel appearing for respondents 1 and 2.

3. Facts in brief, germane for consideration of the *lis*, are as follows:

The petitioner is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 on 10-08-1999. It is the case of the petitioner that it has abundant experience in the construction of all projects in lumpsum on turnkey basis. Likewise, the Board of the Corporation awards a contract in favour of the

petitioner for the purpose of construction of 144 Police Quarters in Mandya and Chamarajnagar Districts under a particular scheme – Police Gruha 2020 Scheme. The quarters were to be constructed in lumpsum on turnkey basis. The kind of construction was also indicated in such entrustment. The petitioner claims to have successfully completed the project among several other projects of the Corporation at various places. For the construction of the project, the petitioner and the Corporation entered into a contract and the contract contained certain conditions – one such condition was a defect liability period.

4. The operation of the defect liability period and the alleged shoddy construction upon which the Corporation encashed the bank guarantee of ₹1,15,13,500/- furnished by the petitioner at the time of construction in furtherance of the contract is what drives the petitioner to this Court in the subject petition. The issue thus, in the petition, is not with regard to any other fact of the contract between the parties but confined to whether the act of the Corporation in encashing the Bank Guarantee furnished by the petitioner is in tune with the contract or illegal.

5. The learned senior counsel appearing for the petitioner would contend with vehemence that the construction is over, bills are completely paid and the quality of construction was checked before payment of bills and the contract between the parties stood concluded. The defect liability period that the contract recognizes was with regard to infrastructure facilities only and the reason for encashing the Bank guarantee now by the Corporation is for petty mistakes or general problems in the construction which do not relate to infrastructure facilities. Therefore, the Corporation which is a State under Article 12 of the Constitution of India could not have encashed the Bank Guarantee for any reason contrary to the contract. It is his submission that the Bank guarantee so encashed must be returned forthwith along with interest at 18% per annum from the date it is encashed till the date of payment. He would seek to place reliance on the judgment of the Apex Court in the case of ***HINDUSTAN CONSTRUCTION COMPANY LIMITED v. STATE OF BIHAR AND OTHERS***¹ to buttress his submissions.

¹ (1999) 8 SCC 436

6. Per-contra, the learned senior counsel appearing for the Corporation would vehemently refute the submissions of the petitioner to contend that the construction was of so poor quality that the building began to develop cracks the moment construction was completed. What the petitioner has claimed to have completed the construction is a shoddy construction coming within the defect liability period itself and not beyond the period of contract. He would submit that the nature of construction is such that there can be no human being living in those quarters as the walls have cracked, water is seeping in large quantity when it rains. It is the case of the respondents that the petitioner has hoodwinked the Corporation by using materials that are of sub-standard and the entire construction has become dilapidated. He would seek to contend that the Corporation has not acted beyond the contract and has encashed the Bank guarantee as the petitioner refused to undertake any repair in the building as was indicated to it. No fault can be found in the act of the Corporation is the emphatic submission of the learned senior counsel. He would seek dismissal of the petition.

7. I have given my anxious consideration to the submissions made by the respective learned senior counsel and have perused the material on record.

8. To consider the aforesaid submissions, it is germane to notice the genesis of the issue. The petitioner, a construction Company is entrusted with the construction of Police Housing Quarters under a particular scheme viz., Police Gruha 2020 Scheme in furtherance of which an agreement is entered into on 07-09-2017 between the petitioner and the Corporation. Certain covenants in the agreement are germane to be noticed and they read thus:

" "

5. Priced Bill of Quantities (BOQ): The agency should furnish the Priced Bill of Quantities (BOQ) for the Accepted Lump Sum Amount of the Contract to the Executive Engineer, Mysore Division, Mysore. A copy of the Priced Bill of Quantities (BOQ) & drawings are to be furnished to the Executive Engineer (Contracts) / Accounts Section (H.O) after the approval by Head Office, Bangalore.

6. Period of Completion of the Work: Sixteen months including monsoon which will be reckoned from the date of this letter of acceptance or from the date of issue of encumbrance free site by the Executive Engineer (Mysore) which ever is later.

The work shall be carried out to the fullest satisfaction of the Engineer incharge & user Department.

The agency should prepare & furnish the quality plan (Plan of various quality tests to be carried out at various stages of project) in consultation with concerned AE & AEE of the project and submit the same to Executive Engineer (Mysore) & Executive Engineer (Quality Control).

7. Security Deposit: *The agency has furnished the Bank Guarantee vide **No.4966PGSEBG20-17 Dtd:21.08.2017** issued by **Canara Bank, Mid Corporate Branch, Mysore** towards **Security Deposit amount of Rs.1,15,13,500/- (Rupees One Crore Fifteen Lakhs Thirteen Thousand Five Hundred Only)** which is valid up to **31.12.2020**.*

8. Defects Liability Period: *The agency should stand guarantee for the quality of work and performance for the work executed during Defects Liability period. Defects Liability period shall mean the period after the issue of certificate of completion of work by the Engineer-in-charge during which the structure has to function without any trouble or defects. Defects Liability period shall be **24 months** from the date of completion as certified by the Engineer-in-charge. During Defects Liability period any structural defects found in the work executed, the agency is solely responsible for repairing / replacing the required part of the work and also the agency should attend to any defects immediately after the receipt of the intimation from EMPLOYER. This clause is in addition to other penalties leviable on account of quality issues included in the contract."*

The afore-quoted clauses would indicate the period of completion of work which is 16 months including monsoon and the petitioner had to prepare and furnish quality plan in consultation with the Assistant Engineer, Assistant Executive Engineer of the project and submit it to the Executive Engineer. The defect liability period

indicates that defect liability period would be commencing from the date of completion of the project as certified by the Engineer-in-charge and shall operate for a period of 24 months from the date of completion so certified. The petitioner furnishes a Bank Guarantee in furtherance of the contract. The Bank Guarantee reads as follows:

"To:
Executive Engineer (Contracts),
KSPH & IDCL. No. 59,
Richmond Road
Bangalore - 560 025.

WHEREAS M/s P G Setty Construction Technology Pvt Ltd, having registered office at # 74, Sahukar Chennaiah Road, 17th Main, Saraswathipuram, Mysore - 570 009 (hereinafter called "the contractor") has undertaken, in pursuance of Contract tender notification **No. PHC/CNT/PG2020/PKG-06/14/2017-18/WI-563** to execute "**CONSTRUCTION OF 144 NOS (132 PC+ 12 SI) POLICE QUARTERS IN MANDYA & CHAMARAJANAGARA DISTRICTS UNDER POLICE GRUHA 2020 SCHEME (PG-2020/PH-3/PACKAGE NO. 06/2017-18) ON LUMP SUM TURNKEY BASIS, USING ALTERNATE TECHNOLOGY/ CONVENTIONAL METHOD OF CONSTRUCTION (FRAMED STRUCTURE) TWO COVER SYSTEM.**" (Hereinafter called "the contract");

AND WHEREAS it has been stipulated by you in the said contract that the contractor shall furnish you with a bank guarantee by a recognized bank for the sum specified therein as security for compliance with his obligations in accordance with the contract.

AND WHEREAS we have agreed to give the contractor such a bank guarantee.

NOW THEREFORE we hereby affirm that we are the guarantor and responsible to you, on behalf of the contractor, up to a total of Rs. 1,15,13,500/-(Rupees One Crore Fifteen Lakhs Thirteen Thousand Five Hundred Only) for construction work and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of as aforesaid without your needing to prove or to show grounds or reasons for your demand for the specified therein.

We hereby waive the necessity of your demanding the said debt from the contractor before presenting us with the demand. We further agree that no change or addition to or other modification of the terms of the contract or of the works to be performed there under or of any contract documents which may be made between you 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.

This guarantee shall be valid until upto 31-12-2020. (i.e. 30 days beyond the date of expiry of the defects liability period).

- 1. Our liability under this bank guarantee shall not exceed Rs. 1,15,13,500/-(Rupees Ore Crore Fifteen Lakhs Thirteen Thousand Five Hundred Only)*
- 2. This bank guarantee shall be valid up to 31-12-2020*
- 3. We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only and only if you serve upon us a written claim or demand on or before 31-12-2020*

"This Bank Guarantee shall be effective only when the BG message is transmitted by the issuing Bank through SFMS to Vijaya Bank, Indira Nagar Branch, Bangalore(IFSC CODE-VIJB0001301) (Bank of Beneficiary) and written confirmation to that effect is issued by Bank of Beneficiary."

The defect liability period mandates that in the event of any structural defects are found in the work executed, the petitioner is solely responsible for repairing or replacing the required part of the work and the petitioner should attend to any defect immediately. The work, according to both the parties, was completed on issuance of a certificate by the Engineer-in-charge on 31-07-2021. Therefore, the defect liability period would operate up to 31-07-2023. After the construction was completed, with the issuance of work satisfactory certificate, the bills of the petitioner were cleared. The problem cropped up after clearance of bills.

9. The problems one by one emerged in the construction. In this regard communications galore between the Engineer, the petitioner and the Corporation. On 02-12-2021 a communication is made to the Executive Engineer by the Corporation which reads as follows:

ಗೆ,

ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರು,
ಕರ್ನಾಟಕ ರಾಜ್ಯ ಪೊಲೀಸ್ ವಸತಿ ಮತ್ತು
ಮೂಲಭೂತ ಸೌಲಭ್ಯ ಅಭಿವೃದ್ಧಿ ನಿಗಮ ನಿ.
ಮೈಸೂರು ವಿಭಾಗ, 4ನೇ ಮುಖ್ಯರಸ್ತೆ
ಇ & ಎಫ್ ಬ್ಲಾಕ್, ರಾಮಕೃಷ್ಣನಗರ

ಮಾನ್ಯರೇ,

ವಿಷಯ:- ಚಾಮರಾಜನಗರ ಜಿಲ್ಲಾ ಘಟಕದ ಸಂತೇಮಾರನಹಳ್ಳಿಯಲ್ಲಿ ನೂತನವಾಗಿ ನಿರ್ಮಿಸಿರುವ ವಸತಿಗೃಹಗಳ ನ್ಯೂನತೆಗಳನ್ನು ದುರಸ್ತಿ ಪಡಿಸುವ ಬಗ್ಗೆ.

ಉಲ್ಲೇಖ:- ಪಿಎಸ್‌ಐ, ಸಂತೇಮಾರನಹಳ್ಳಿ ಪೊಲೀಸ್ ಠಾಣೆ, ರವರ ಪತ್ರ ಸಂಖ್ಯೆ:ಸಂ.ಪೊ.ಠಾ/ಸಿಸಿ/296/2021, ದಿನಾಂಕ.22-11-2021.

ಮೇಲ್ಕಂಡ ವಿಷಯ ಮತ್ತು ಉಲ್ಲೇಖನಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ, ಚಾಮರಾಜನಗರ ಜಿಲ್ಲಾ ಘಟಕದ ಸಂತೇಮಾರನಹಳ್ಳಿಯಲ್ಲಿ ನೂತನವಾಗಿ ನಿರ್ಮಿಸಿರುವ 12 ಸಂಖ್ಯೆಯ ಪಿಸಿ ವಸತಿ ವಸತಿಗೃಹಗಳಲ್ಲಿ ಈ ಕೆಳಕಂಡ ನ್ಯೂನತೆಗಳು ಕಂಡುಬಂದಿದ್ದು ಇದರಿಂದ ವಸತಿಗೃಹಗಳಲ್ಲಿ ವಾಸಿಸುತ್ತಿರುವ ಅಧಿಕಾರಿ / ಸಿಬ್ಬಂದಿಗಳಿಗೆ ತೊಂದರೆಯುಂಟಾಗುತ್ತಿರುವುದಾಗಿ ತಿಳಿಸಿ ದುರಸ್ತಿ ಪಡಿಸಿಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

ದುರಸ್ತಿ ವಿವರ

1. ನೀರಿನ ಪಂಪು.
2. ಬೋರ್‌ವೆಲ್ ಜಿಯೋ ಪೈಪ್ ಅಳವಡಿಸಬೇಕಾಗಿರುತ್ತದೆ.
3. ಮೇಲ್ಭಾಗ ರಿಪೇರಿ.
4. ಟಾಯ್ಲೆಟ್ ಫಿಟ್.
5. ವಸತಿಗೃಹ-03 ರಲ್ಲಿ ಫ್ಲಾಟ್‌ರೀಟ್ ರಿಪೇರಿ.
6. ವಸತಿಗೃಹ-01 ರಲ್ಲಿ ಕಾಮನ್ ಟಾಯ್ಲೆಟ್ ರೋ ಬಾಗಿಲನ್ನು ಅಳವಡಿಸಬೇಕಾಗಿರುತ್ತದೆ.
7. ಮಳೆ ಬಂದಾಗ ವಸತಿಗೃಹದ ಕಾರಿಡಾರ್‌ನಲ್ಲಿ ಮಳೆ ನೀರು ನಿಲ್ಲುತ್ತಿದ್ದು ಸರಿಪಡಿಸಬೇಕಾಗಿರುತ್ತದೆ.

ಆದುದರಿಂದ ಸಂತೇಮಾರನಹಳ್ಳಿಯಲ್ಲಿ ನೂತನವಾಗಿ ನಿರ್ಮಿಸಿರುವ ವಸತಿ ವಸತಿಗೃಹಗಳ ಸಮುಚ್ಚಯದ ನ್ಯೂನತೆಗಳನ್ನು ತೀವ್ರವಾಗಿ ದುರಸ್ತಿ ಪಡಿಸಿಕೊಡುವಂತೆ ಈ ಮೂಲಕ ಕೋರಲಾಗಿದೆ.”

The defects are indicated. What was indicated was in about 12 houses there were serious water logging and certain construction contrary to what was agreed upon. Though these defects were indicated, the petitioner did not act immediately and set the things right. Again a communication is made on 24-01-2022 indicating several defects. When the Corporation got fed up in asking the

petitioner to get the defects rectified of the shoddy construction, they were left with no choice but to encash the Bank Guarantee and accordingly encashed it. The Bank Guarantee was no doubt furnished by the petitioner on 21-08-2017 for the purpose of security during the period of construction. The Bank guarantee was renewed from time to time and was in force even as on the date on which the Corporation sought encashment of the Bank guarantee in its favour. The issue now is whether the Corporation was justified in encashing the Bank guarantee using the defect liability period clause in the agreement.

10. The learned senior counsel for the petitioner would submit that every plumbing work or dampness in the walls is said to relate to infrastructure facilities, which cannot be. According to the learned senior counsel the liability upon the petitioner to cure the defects was only *qua* the structural defects found in the work executed. There is no structural defect in the case at hand. Therefore, the Bank guarantee could not have been encashed. I decline to accept the said submission on the very perusal of the agreement. The agreement clearly indicates that any liability for

any structural defects found in the work executed, the petitioner would be solely responsible and it is required to attend to the defects for its repair immediately. The defects are being pointed out to the petitioner from time to time by the Corporation. The latest of the communication made by the Corporation to the petitioner was on 25-10-2022. It reads as follows:

"....

ಮೇಲ್ಕಂಡ ವಿಷಯ ಹಾಗೂ ಉಲ್ಲೇಖಿತ ಪತ್ರಗಳಿಗೆ ಸಂಬಂಧಿಸಿದಂತೆ, ಪೊಲೀಸ್‌ಗೃಹ 2020 ಯೋಜನೆಯಡಿಯ 3ನೇ ಹಂತದಲ್ಲಿ ಮಂಡ್ಯ ಮತ್ತು ಚಾಮರಾಜನಗರ ಜಿಲ್ಲೆಗಳಲ್ಲಿ 144 ವಸತಿಗೃಹಗಳನ್ನು (52+92) ಪೂರ್ಣಗೊಳಿಸಿ ಇಲಾಖಾ ವಶಕ್ಕೆ ಹಸ್ತಾಂತರಿಸಲಾಗಿರುತ್ತದೆ. ವಸತಿಗೃಹಗಳನ್ನು ಇಲಾಖಾ ವಶಕ್ಕೆ ಹಸ್ತಾಂತರಿಸಿದ ನಂತರ ಗುತ್ತಿಗೆ ಕರಾರಿನಂತೆ 2 ವರ್ಷಗಳ ಕಾಲ ನಿರ್ವಹಣಾವಧಿಯನ್ನು ತಮ್ಮ ವತಿಯಿಂದ ನಿರ್ವಹಿಸಬೇಕಾಗಿರುತ್ತದೆ.

ವಸತಿಗೃಹಗಳನ್ನು ಹಸ್ತಾಂತರಿಸಿ ಸರಿಸುಮಾರು ಒಂದು ವರ್ಷ ಕಳೆದರೂ ಸಹ ಉಪಯುಕ್ತ ಇಲಾಖೆಯವರಿಂದ ಮೇಲ್ವಿಚಾರಣೆಯ ಬಿಗುಕುಕೊಂಡಿದ್ದು ನೀರು ಸೋರುವಿಕೆ, ಶೌಚಾಲಯದ ಮೇಲ್ವಿಚಾರಣೆಯಿಂದ ನೀರು ಸೋರುವಿಕೆ, ಬಾಗಿಲಿನ ಚೌಕಟ್ಟುಗಳು ಗೆದ್ದಿಲು ಹುಳುಗಳು ತಿಂದು ಹಾಳಾಗಿರುವುದು ಹಾಗೂ ನೈರ್ಮಲೀಕರಣದ ಕೆಲಸಗಳ ಕುರಿತಂತೆ ಅನೇಕ ರೀತಿಯ ನ್ಯೂನತೆಗಳನ್ನು ಸರಿಪಡಿಸಿಕೊಡುವಂತೆ ಈ ಕೆಳಗೆ ಸಹಿ ಮಾಡಿರುವವರಿಗೆ ಪ್ರತಿನಿತ್ಯ ದೂರವಾಣಿ ಕರೆ ಮಾಡಿ ತಿಳಿಸಿರುತ್ತಾರೆ.

ವಸತಿಗೃಹಗಳನ್ನು ಹಸ್ತಾಂತರಿಸಿದ ನಂತರ ಕಂಡುಬರುವಂತಹ ನ್ಯೂನತೆಗಳನ್ನು ನಿರ್ವಹಣಾವಧಿಯಲ್ಲಿ ಸರಿಪಡಿಸಿಕೊಡುವುದು ತಮ್ಮ ಆದ್ಯ ಕರ್ತವ್ಯವಾಗಿದ್ದು ಈ ವಿಷಯದ ಬಗ್ಗೆ ಅನೇಕ ಪತ್ರಗಳನ್ನು ವ್ಯವಹರಿಸಲಾಗಿದ್ದು ಹಾಗೂ ವಿಭಾಗ ಮತ್ತು ಕೇಂದ್ರ ಕಚೇರಿಯ ಮಟ್ಟದಲ್ಲಿ ಸಭೆಗಳನ್ನು ಸಹ ನಡೆಸಿ ತಮಗೆ ತಿಳಿಸಲಾಗಿರುತ್ತದೆ. ದಿ.01.08.2022 ರಂದು ನಿಗಮದ ವ್ಯವಸ್ಥಾಪಕ ನಿರ್ದೇಶಕರು, ಮೈಸೂರು ವಿಭಾಗ ವ್ಯಾಪ್ತಿಯ ಕಾಮಗಾರಿಗಳ ಪರಿವೀಕ್ಷಣಾ ಸಮಯದಲ್ಲಿ ತಮ್ಮೊಡನೆ ಪೊಲೀಸ್ ಆಯುಕ್ತರ ಕಚೇರಿ ಮೈಸೂರು ಇಲ್ಲಿ ಸಭೆಯನ್ನು ನಡೆಸಿ ನ್ಯೂನತೆಗಳನ್ನು ಸರಿಪಡಿಸುವಂತೆ ಆದೇಶವನ್ನು ನೀಡಿರುತ್ತಾರೆ.

ಉಲ್ಲೇಖಿತ ಪತ್ರ (26)ರಲ್ಲಿ ತಮ್ಮಿಂದ ನಿರ್ಮಿಸಿ ಹಸ್ತಾಂತರಿಸಲಾಗಿರುವ ಎಲ್ಲಾ ವಸತಿಗೃಹಗಳನ್ನು ಪರಿವೀಕ್ಷಿಸಿ ಗುಣಮಟ್ಟದ ಹಾಗೂ ವಿನ್ಯಾಸದ ನ್ಯೂನತೆಗಳ ಬಗ್ಗೆ ಹಾಗೂ ಪ್ರಸ್ತುತ ವಾಸ್ತು ಸ್ಥಿತಿಯ ವಿವರವಾದ ವರದಿಯನ್ನು ಸಲ್ಲಿಸುವಂತೆ ಆದೇಶಿಸಲಾಗಿರುತ್ತದೆ. ಈ ಕುರಿತು ದಿ.20.07.2022 ರಂದು ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರು (ವಿನ್ಯಾಸ), ಸಹಾಯಕ ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರು (ಗು) ಉಪವಿಭಾಗ, ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರು, ಮೈಸೂರು ವಿಭಾಗ ಹಾಗೂ ಸಹಾಯಕ

ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರವರೊಡನೆ ಮೈಸೂರು ಮತ್ತು ಚಾಮರಾಜನಗರ ಜಿಲ್ಲೆಗಳಲ್ಲಿ ನಿರ್ಮಿಸಲಾದ ವಸತಿಗೃಹಗಳನ್ನು ಪರಿವೀಕ್ಷಣೆ ಮಾಡಲಾಗಿರುತ್ತದೆ.

ವಸತಿಗೃಹಗಳಲ್ಲಿ ಕಂಡುಬರುವಂತಹ ನ್ಯೂನತೆಗಳನ್ನು ಸರಿಪಡಿಸಿರುವ ಕುರಿತು ಯಾವುದೇ ರೀತಿಯ ವರದಿಗಳನ್ನು ಸಹ ತಾವು ಈ ಕಚೇರಿಗೆ ಸಲ್ಲಿಸಿರುವುದಿಲ್ಲ. “ನಿರ್ವಹಣಾವಧಿಯಲ್ಲಿ ವಸತಿಗೃಹಗಳಲ್ಲಿ ಕಂಡುಬರುವಂತಹ ನ್ಯೂನತೆಗಳನ್ನು ಉಪಯುಕ್ತ ಇಲಾಖೆಯವರು ತಿಳಿಸಲಾದಂತೆ ಸರಿಪಡಿಸದೇ ಇದ್ದ ಪಕ್ಷದಲ್ಲಿ ತಮ್ಮ ನಿರ್ವಹಣಾವಧಿಯನ್ನು ಮುಕ್ತಾಯಗೊಂಡ ಬಗ್ಗೆ ಈ ಉಪವಿಭಾಗ ಕಚೇರಿಯಿಂದ ಶಿಫಾರಸ್ಸು ಮಾಡಲಾಗುವುದಿಲ್ಲ. ನ್ಯೂನತೆಗಳನ್ನು ಸರಿಪಡಿಸಿಕೊಡುವುದು ಅಶೀ ಜರೂರು ಎಂದು ಪರಿಗಣಿಸುವುದು ತಪ್ಪಿದಲ್ಲಿ ಸವರಿ ಕೆಲಗಳಿಗೆ ತಗಲುವ ವೆಚ್ಚವನ್ನು ಅಂದಾಜಿಸಿ ನಿಮ್ಮ ಹೊಣೆ ಮತ್ತು ಜವಾಬ್ದಾರಿಕೆಯ ಮೇಲೆ ಕೈಗೊತ್ತಿಕೊಳ್ಳಲು ಮೇಲಾಧಿಕಾರಿಗಳಿಗೆ ಶಿಫಾರಸ್ಸು ಮಾಡಲಾಗುವುದು.” ಈ ವಿಷಯದ ಕುರಿತು ಕ್ರಮ ತೆಗೆದುಕೊಂಡ ಬಗ್ಗೆ ಈ ಪತ್ರ ತಲುಪಿದ ಒಂದು ವರದಿಗಳಿಗೆ ವರದಿಯನ್ನು ಸಲ್ಲಿಸುವಂತೆ ಸೂಚಿಸಲಾಗಿದೆ.

ತಮ್ಮ ವಿಶ್ವಾಸಿ

ಸಹಿ/-

ಸಹಾಯಕ ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರು,

ಕ.ಲಾ.ಪೊ.ವ. & ಮೂ.ಸೌ.ಅ.ನಿ(ನಿ),

ಗ್ರಾಮೀಣ ಉಪ ವಿಭಾಗ, ಮೈಸೂರು.”

There are various defects communicated in the communication. It is also indicative of the fact that repeated calls made to the petitioner by the Corporation have all been deliberately ignored and therefore, left with no choice they have encashed the Bank Guarantee.

11. It is not that the petitioner was taken by surprise of the encashment of Bank Guarantee coming as a bolt from the blue to the petitioner. Photographs are appended to the statement of objections filed by the Corporation. The photographs are not

disputed. A perusal at the photographs would clearly indicate the kind of construction that the petitioner has undertaken of the project. They are on the face of it shoddy. Dampness in the entire quarters, water logging, cracks in the walls, cracks in the terrace, leakages from all quarters in the solar panels; door frames that are used was so poor quality that they are already eaten by termites etc. Though this Court would not assess the quality by looking at pictures, but it is always "*a picture is worth a thousand words*", not in all cases but in cases of this kind. The photos produced speak for themselves. Since the photos are not disputed, the liability also speaks for itself. The submission now made is that those defects would not come within the defect liability period as they all petty problems which the Corporation has to get it solved by skilled labourers, who are skilled in those works. These do not belong to structural defects or infrastructure defects are all submissions, which are only noted to be rejected.

12. The contract between the petitioner and the respondent/Corporation for construction of quarters appears to have been taken for granted by the petitioner. The construction if it

is of such poor quality, it is high time that such contractor should be penalized; penalized I mean, in a manner known to law, in terms of the contract. That is what exactly done by the Corporation. The act of penalizing the petitioner for such shoddy construction is done by encashing the Bank guarantee. No fault can be found with the act of the Corporation in encashing the Bank guarantee.

13. Insofar as the judgment relied on by the learned senior counsel for the petitioner in the case of **HINDUSTAN CONSTRUCTION COMPANY LIMITED** (*supra*) is concerned, there can be no qualm about the principle laid down by the Apex Court that the Bank Guarantee should be encashed only for the purpose for which it is furnished and not for any other purpose. The Apex Court has held as follows:

"8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to

secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In U.P. Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. [(1988) 1 SCC 174] the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351 (CA)] was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In 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] , National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd. [(1995) 4 SCC 515] , State of Maharashtra v. National Construction Co. [(1996) 1 SCC 735] , Hindustan Steelworks Construction Ltd. v. Tarapore & Co. [(1996) 5 SCC 34] as also in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] the same principle has been laid down and reiterated."

The judgment of the Apex Court afore-quoted, in fact supports the Corporation, as the Corporation has encashed the Bank Guarantee only for the purpose for which it has been issued in terms of the contract as the defect liability period operated and is even now operating up to 31-07-2023 in view of the construction being

completed on 31-07-2021. These are matters of record and the defect liability period is a part of the contract.

14. Furnishing of Bank Guarantee as a security for and during the execution of the contract, or for the purpose for which it is issued, and the obligation cast upon the Bank to permit encashment of Bank Guarantee, is considered and interpreted by the Apex Court in plethora of judgments. To quote a few, the Apex Court in the case of ***U.P. CO-OPERATIVE FEDERATION LIMITED v. SINGH CONSULTANTS AND ENGINEERS (P) LTD***² observes as follows:

"33. This Court was concerned with the bank guarantee and referred to the previous decision of this Court in United Commercial Bank v. Bank of India [(1981) 2 SCC 766 : AIR 1981 SC 1426 : (1981) 3 SCR 300] . This Court found that this case was covered. The court observed that the court should not, in transaction between a banker and banker, grant an injunction at the instance of the beneficiary of an irrevocable letter of credit, restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank, acting on behalf of the beneficiary against a document of guarantee, indemnity at the instance of the beneficiary.

34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in

² (1988) 1 SCC 174

exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere."

(Emphasis supplied)

The Apex Court observes that the Bank guarantee must be honoured free from interference by Courts failing which the trust in commerce, internal and international would be irreparably damaged, save in cases where there is fraud played while encashing the Bank guarantee. There is no fraud played in the case at hand by the Corporation in encashing the Bank Guarantee. It is encashed purely in terms of conditions of contract. The Apex Court, in a later judgment, in the case of **ANDHRA PRADESH POLLUTION CONTROL BOARD v. CCL PRODUCTS (INDIA) LIMITED**³ has held as follows:

"15. We are unable to subscribe to the legal position which has been formulated by the Tribunal. A bank guarantee constitutes an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued. Such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued.

16. The principle which we have adopted accords with a consistent line of precedent of this Court. In Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd. [Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.,

³ (2019) 20 SCC 669

(1996) 5 SCC 450] a three-Judge Bench of this Court held thus : (SCC p. 454, paras 4-5)

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. ...

5. ... The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties."

... ..

18. A bank guarantee constitutes an independent contract. In *Hindustan Construction Co. Ltd. v. State of Bihar* [*Hindustan Construction Co. Ltd. v. State of Bihar*, (1999) 8 SCC 436] , a two-Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms : (SCC p. 442, para 9)

"9. 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. The terms

of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

(emphasis supplied)

19. *The settled legal position which has emerged from the precedents of this Court is that absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee."*

(Emphasis supplied)

The Apex Court holds that in the absence of fraud or irretrievable injustice and special equities, the Courts exercising jurisdiction under Article 226 of the Constitution of India should not interfere with the invocation or encashment of Bank Guarantee, so long as the invocation is in terms of the Bank Guarantee.

15. The Apex Court, in the following cases, has considered the obligation under the Bank Guarantee and has held that the Courts cannot interfere, interdict or put a halt on the execution or encashment of Bank Guarantee, unless circumstances would warrant as explained therein. The Apex Court in the case of

GENERAL ELECTRIC TECHNICAL SERVICES CO. INC. V. PUNJ**SONS (P) LTD.,⁴** has held as follows:

"10. *The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would tantamount to suppression of material facts, in the sense that the mobilisation advance was, under the contract to be recovered from the running bills. It was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills and what was the corresponding amount of the mobilisation advance and to what extent the amount covered by the bank guarantee remained payable. In any event, the High Court said, that GETSCO could not demand full amount of the bank guarantee on April 17, 1989. It seems to us that the High Court has misconstrued the terms of the bank guarantee and the nature of the inter-se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETSCO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent. Secondly, the Bank is not concerned with the outstanding amount payable by GETSCO under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of GETSCO to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee. The demand by GETSCO is under the bank guarantee and as per the terms thereof. The Bank*

⁴ (1991) 4 SCC 230

has to pay and the Bank was willing to pay as per the undertaking. The Bank cannot be interdicted by the court at the instance of respondent 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the bank guarantee."

(Emphasis supplied)

Further, in the case of **HINDUSTAN STEELWORKS CONSTRUCTION LTD. V. TARAPORE & CO.**⁵ the Apex Court has held as follows:

"14. The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that in India only a reasonable amount can be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantee making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till an adjudication in that behalf is made either by a court or an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the

⁵ (1996) 5 SCC 34

bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. **The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of the bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee.** In *General Electric Technical Services Co. Inc. v. Purj Sons (P) Ltd.* [(1991) 4 SCC 230] while dealing with a case of bank guarantee given for securing mobilisation advance it has been held that the right of a contractor to recover certain amounts under running bills would have no relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the bank had to pay on demand without a demur and that the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. *Larsen and Toubro Ltd. v. Maharashtra SEB* [(1995) 6 SCC 68] and *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] were also cases of work contracts wherein bank guarantees were given either towards advances

or release of security deposits or for the performance of the contract. In both these cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above-referred three subsequent decisions of this Court also go to show that the view taken by the High Court is clearly wrong."

(Emphasis supplied)

Subsequently, in the case of **NATIONAL HIGHWAYS AUTHORITY OF INDIA V. GANGA ENTERPRISES**⁶, the Apex Court has held as follows:

"10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on-demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on-demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of

⁶ (2003)7 SCC 410

the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court."

(Emphasis supplied)

In the light of the aforesaid judgments of the Apex Court, what would unmistakably emerge is that ***the Bank Guarantee is not furnished for, it to be photo-framed and hung on the wall,*** it has a purpose. The purpose is redeemed by the Corporation and cannot be found fault with.

16. It is rather surprising how the Engineers of the Corporation or the Engineers concerned have cleared the bills without inspecting the construction and the quality of construction, as complaints have arisen immediately after the completion certificate is issued. The Police Gruha 2020 scheme is not a private project or private scheme. It is a scheme funded by the Government. If it is a scheme funded by the Government, it is public money. Therefore, contractors undertaking construction utilizing public money cannot be seen to make constructions that are very poor and the life of such inhabitants there becoming

unlivable, as this Court, has in plethora of cases come across, contractors undertaking shoddy constructions particularly of low income group (LIG) and mid income group (MIG) houses, in certain cases, even in high income group (HIG) houses. Therefore, it is for the respondent/State to take care that proper constructions are made under any scheme which involves public money, so that public money is not misused by such contractors who undertake such constructions and bring those Engineers to books who would approve such shoddy constructions, as and when it is found.

17. For the aforesaid reasons, finding no merit in the petition, the petition deserves to be rejected and is accordingly rejected.

Pending application, if any, also stand disposed, as a consequence.

**Sd/-
JUDGE**

bkp
CT:SS