IN THE HIGH COURT FOR THE STATE OF TELANGANA

AT: HYDERABAD

CORAM:

*** THE HON'BLE SRI JUSTICE K. LAKSHMAN**

+ WRIT PETITION No.37926 OF 2022

% Delivered on: 30-01-2023

Between:

M/s. Sri Siva Sai Enterprises, rep. by its Managing Partner, Mr. Yavanamanda Siva Rama Raju .. Petitioner

Vs.

$ The Food Corporation of India, New Delhi & Others .. Respondents

! For Petitioner : Mr.Akkam Eshwar

^ For Respondent Nos.1 & 2 : Mr. Dominic Fernandes

For Respondent Nos.3 to 5 : ---

< Gist :

> Head Note :

? Cases Referred :

1. (2016) 11 SCC 720
2. (1996) 5 SCC 34
3. (1974) 2 SCC 231
4. (2020) 2 SCC 540
5. (1983) 4 SCC 417
6. (2002) 9 SCC 463
7. (2005) 3 SCC 790
8. (2010) 5 SCC 306
9. (1969) 2 SCC 343

HON'BLE SRI JUSTICE K. LAKSHMAN

WRIT PETITION No.37926 OF 2022

ORDER:

Heard Mr. Akkam Eshwar, learned counsel for the petitioner and Mr. Dominic Fernandes, learned counsel for respondent Nos.1 and 2. Despite service of notice, none appears on behalf of respondent Nos.3 to 5.

2. The present writ petition is filed seeking to declare the action of respondent No.2 in taking steps to encash bank guarantee bearing no. F33GPGEE20227001 for Rs. 4,40,000/- dated 14.08.2020 and bank guarantee bearing no. F33GPGEE20227004 for Rs. 4,40,000/- dated 14.08.2020 by addressing a letter dated 29.09.2022 to respondent No.3 as illegal, arbitrary and violative of principles of natural justice and to set aside the same.

3. **Facts of the case**:

i) The petitioner, M/s. Sri Siva Sai Enterprises, is a registered partnership firm. It participated in the tender process and submitted its bid in relation to work dealing with handling and transportation of food grains at FSD, Pedapally. The petitioner's bid was accepted and

a Handling and Transportation agreement dated 16.06.2020 was entered into between respondent No.2 and the petitioner.

ii) As per the terms of the agreement, the petitioner was to commence the work from 16.06.2020 and complete it by 15.06.2022. The agreement provided that the petitioner shall submit bank guarantees as security towards the completion of the work and accordingly, the petitioner submitted bank guarantees bearing nos. F33GPGEE20227001 and F33GPGEE20227004 for Rs. 4,40,000/- each (totaling Rs. 8,80,000) both dated 14.08.2020.

iii) According to the petitioner, it successfully completed the work within the time prescribed and as per the agreement. Further, according to the petitioner, the submitted bank guarantees dated 14.08.2020 were to be returned by respondent No.2 within six (6) months from the date of completion of the work.

iv) On 29.09.2022, respondent No.2 addressed a letter to respondent No.3 (bank which issued the said bank guarantees) with a request to encash the said bank guarantees.

v) Respondent No.2 seeks to encash the said bank guarantees in relation to another contract entered into between respondent No.4 (M/s Sri Siva Sai Agencies) represented by its sole proprietor who is respondent No.5 herein. According to respondent No.2, respondent No.4 was awarded a Handling and Transportation Contract at PWS, Nagunoor and a Letter of Acceptance dated 13.10.2020 (hereinafter 'LOA') was issued in its favour.

vi) As per the said LOA, respondent No.4 was to submit a security deposit in the form of an irrevocable and unconditional bank guarantee. However, according to respondent No.2, only 50% of the security deposit was submitted and the remaining security was not submitted within the prescribed time. Therefore, the contract/agreement for work at PWS, Nagunoor in favour of respondent No.4 was terminated.

vii) According to respondent No.2, respondent No.4 is related to the petitioner herein through respondent No.5 as respondent No.5 is a partner in the petitioner firm. Respondent No.2 relying on various clauses of the agreement/contract contends that it is entitled to encash

bank guarantees submitted in relation to one contract for the losses caused by the contractor in relation to another contract.

viii) Therefore, in the present writ petition, the petitioner challenges the action of respondent Nos.1 and 2 in seeking to encash the bank guarantees submitted in relation to works at FSD, Pedapally for the alleged losses caused by respondent No.4 in relation to works agreement at PWS, Nagunoor.

4. **Contentions of the petitioner**

i) The petitioner is a partnership firm and is a separate entity. It is not related to respondent No.4 which is a proprietary concern run by respondent No.5. The petitioner cannot be made liable for the losses caused by another entity merely because one of its partners caused a loss in relation to another contract.

ii) Relying on **Gangotri Enterprises Ltd. v. Union of India**[1], it was contended that bank guarantee issued in relation to one contract cannot be encashed in relation to another contract.

[1]. (2016) 11 SCC 720

5. **Contentions of respondent Nos.1 and 2**

i) Respondent No.4 is related to the petitioner herein through respondent No.5. Respondent No.5 is a partner and was holding a power of attorney to submit the said bank guarantees on behalf of the petitioner herein and he was also authorized to sign the tender documents. Further, respondent No.4 is a proprietorship owned by respondent No.5. Therefore, as respondent No.5 represented respondent No.4 and the petitioner herein, both respondent No.4 and the petitioner herein are related.

ii) Respondent No.4's action of not submitting security deposit in time for works contract at PWS, Nagunoor resulted in losses to respondent No.1.

iii) As respondent No.4 and the petitioner herein are related, respondent No.2 can encash the bank guarantees submitted on behalf of the petitioner herein for the losses caused by respondent No.4 in relation to another contract. Reliance was placed on Clause - IX(f) and Clause - XII (a) of the tender conditions.

6. **Findings of the Court**:

i) From the facts of the case, it is clear that there were two separate contracts entered into between the parties. For the sake of convenience the contracts will be referred to as 'first contract' and 'second contract'.

ii) The first contract was entered into between respondent No.4 represented by respondent No.5 with respondent No.1 for handling and transportation work at PWS, Nagunoor. The first contract was terminated due to non-submission of security deposit by respondent No.4 and allegedly resulted in a loss to respondent No.1.

iii) Subsequently, the second contract was entered into between the petitioner herein (which consists of three partners including respondent No.5 herein) and respondent No.1 for handling and transportation work at FSD, Pedapally. In relation to the said contract, the said bank guarantees were submitted and the works were completed in terms of the contract.

iv) However, the said bank guarantees were not returned and were sought to be encashed to cover the alleged losses caused by respondent No.4 in relation to the first contract on the ground that

respondent No.4 and the petitioner herein are related and Clauses IX (f) & XII (a) of the tender conditions permit respondent No.1 to encash the bank guarantees in relation to another contract.

v) Clauses IX (f) & XII (a) of the tender conditions are extracted below:

> **IX Security Deposit**
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> (f) In the event of the Tenderer's failure, after the communication of acceptance of the tender by the Corporation, to furnish the requisite Security Deposit under clause 7(i)a bythe due date or requisite Security Deposit in the form of Bank Guarantee under 7(i)b & 7(i)c including extension period (applicable to submission of BG only), his Contract shall be summarily terminated besides forfeiture of the Earnest Money and the Corporation shall proceed for appointment of another contractor. Any losses or damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor, without prejudice to any other rights and remedies of the Corporation under the Contract and Law. The contractor will also be debarred from participating in any future tenders of the Corporation for a period of three years. After the completion of prescribed period of three years, the party may be allowed to participate in the future tenders of FCI provided all the recoveries/ dues have been

effected by the Corporation and there is no dispute pending with the contractor/party.

XII Set Off

(a) Any sum of money due and payable to the contractor (including security deposit refundable to the contactor) under this contract may be appropriated by the Corporation and set-off against any claim of the Corporation for the payment of any sum of money arising out of, or under this contract or any other contract made by the contractor with the Corporation.

(b) FCI reserves the right to claim from the tenderer/bidder any amount of tax, interest, penalty and litigation cost, if any, that may be incurred in future due to GST reporting/compliance mistake(s) on the part of the service provider.

Therefore, the issue before this Court is whether a bank guarantee issued in relation to one contract can be encashed to make good the losses caused in relation to another contract.

vi) It is relevant to note that the Hon'ble Supreme Court has consistently held that courts shall be slow in interfering with invocation of unconditional bank guarantees. Unless, the invocation or encashment of bank guarantee is marred by fraud or will result in irretrievable loss to the other party, the courts shall not interfere with

the same. Explaining the said position of law, the Apex Court in **Hindustan Steelworks Construction Ltd. v. Tarapore& Co.**[2] held as follows:

> "23. We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was,

[2]. (1996) 5 SCC 34

> therefore, not right in restraining the appellant from enforcing the bank guarantees."

vii) In the present case, the said bank guarantees were unconditional and irrevocable. The question then would be whether bank guarantees issued in relation to one contract can be encashed in relation to another contract and whether the same will result in irretrievable loss to the petitioner herein.

viii) Dealing with a similar question and a clause similar to Clause XII (a) herein, the Apex Court in **Gangotri Enterprises (Supra)** held that a bank guarantee issued in furtherance of a contract cannot be invoked to cover the losses caused by a contractor in relation to another contract. The Court therein relied on its decision in **Union of India v. Raman Iron Foundry**[3]. The relevant paragraphs are extracted below:

> "12. **It was alleged that firstly, the bank guarantee was not furnished by the appellant in relation to contract dated 22-8-2005 but was furnished in performance of another contract dated 14-7-2006 (Anand Vihar works) which is a separate contract and has nothing to do with the contract dated 22-8-2005. Secondly, it was**

[3]. (1974) 2 SCC 231

alleged that so far as the contract dated 14-7-2006 (Anand Vihar works) is concerned, the work was completed well within time and also to the satisfaction of the respondents and for which completion certificate was also given to the appellant by the respondents on 30-9-2010. Thirdly, it was alleged that since the bank guarantee in question was in the nature of performance guarantee for due execution of the contract dated 14-7-2006 (Anand Vihar works) and the same having been performed by the appellant to the satisfaction of the respondents, the appellant Company was entitled to get its Bank Guarantee No. 12/2006 released from the respondents.

13. It was further alleged that in these circumstances, the respondents have no right to encash the bank guarantee in relation to any dues arising out of other contract with the appellant. It was also alleged that in any event, so long as the disputes arising out of the contract dated 22-8-2005 are not finally decided by the arbitrator and liabilities of the parties are not ascertained as to, who has to pay how much sum by way of damages and whether any one is at all liable to pay, there is no sum “due” or “payable” either by the appellant to the respondents or/and vice versa and hence the respondents cannot invoke Clause 62(1) of GCC for realisation of any money/sum by encashing the bank guarantee from the appellant.

30. In our considered opinion, it may not be necessary for us to go into more details of the issue because, in our

view, the controversy involved in this case remains no more res integra and stands decided by this Court in *Union of India* v. *Raman Iron Foundry* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] . Since the issue stands already decided by this Court and hence it is necessary to examine the facts of the case and law laid down therein in detail and then apply the same to the facts of the case at hand.

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38. In our considered opinion, the case at hand being somewhat identical to this case has to be decided keeping in view the law laid down by this Court in *Raman Iron Foundry case* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] .

39. Coming now to the facts of the case at hand, we find that wordings of Clause 62 of the contract in question with which we are concerned is identical to that of Clause 18 of *Raman Iron Foundry case* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] . Clause 62 of GCC provides for determination of contract owing to default of contractor. The relevant portion of Clause 62 reads as under:

> "The amounts thus to be forfeited or recovered may be deducted from any monies then due or which at any time thereafter may become due to the contractor by the Railways under this or any other contract or otherwise."

40. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22-8-2005

> are still pending. **Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the bank guarantee had been furnished but it relates to another contract dated 22-8-2005 for which no bank guarantee had been furnished.** Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any court of law in any judicial proceedings but it is a disputed sum, and **lastly, the bank guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14-7-2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee.**

ix) However, the decision in **Gangotri Enterprises (supra)** was held to be *per incuriam* by the Apex Court in **State of Gujarat v. Amber Builders**[4]. The Apex Court therein held that **Gangotri Enterprises (supra)** was rendered by relying on the decision in **Raman Iron Foundry (supra)** which was overruled by the Apex Court in **H.M. Kamaluddin Ansari & Co. v. Union of India**[5]. The relevant paragraphs in **Amber Builders (supra)** are extracted below:

> "19. **Shri Sukhwani, learned counsel appearing for the respondents has placed reliance on a judgment of this**

[4]. (2020) 2 SCC 540
[5]. (1983) 4 SCC 417

Court in *Gangotri Enterprises Ltd.* v. *Union of India* [*Gangotri Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720 : (2016) 4 SCC (Civ) 480] to submit that till the demand of the Government is crystallised or adjudicated upon, the Government cannot withhold the money of the contractor. Since this case has been specifically relied upon we are duty-bound to go into the correctness of the view laid down in *Gangotri Enterprises* [*Gangotri Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720 : (2016) 4 SCC (Civ) 480] . The judgment in *Gangotri Enterprises* [*Gangotri Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720 : (2016) 4 SCC (Civ) 480] is primarily based on the judgment of a two-Judge Bench of this Court in *Union of India* v. *Raman Iron Foundry* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] . In this case, this Court held that the Government had no right to appropriate the amount claimed without getting it first adjudicated. The relevant portion of the judgment reads as follows: (*Raman Iron Foundry case* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] , SCC pp. 238 & 244, paras 6 & 11)

> "*6.* … But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo motu, the damages claimed by

it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondent. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the court under Section 41(*b*) because the claim for damages forms the subject-matter of the arbitration proceedings and the court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power under Section 41(*b*) read with the Second Schedule.

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11. … We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so."

20. The judgment in *Raman Iron Foundry* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] was specifically overruled on the issue in hand by a three-Judge Bench of this Court in *H.M. Kamaluddin Ansari & Co.* v. *Union of India* [*H.M. Kamaluddin Ansari & Co.* v. *Union of India*, (1983) 4 SCC 417] . In this case there was a general condition which entitled the Government to recover the damages claimed by appropriating any sum which may become due to the contractor under other pending bills. In this case, this Court disagreed with the findings in *Raman Iron Foundry* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] and held as follows: (*H.M. Kamaluddin Ansari case* [*H.M. Kamaluddin Ansari & Co.* v. *Union of India*, (1983) 4 SCC 417] , SCC pp. 428-29 & 432, paras 21-22 & 31)

"*21*. … With profound respect we find that the aforesaid observation is incongruous with the proposition of law laid down by this Court just before this observation. We find it difficult to agree with the observation of the court that the impugned order in form and substance being the negative the respondent could refuse to pay such amounts if it thinks it has a valid defence, and if it chooses to do so there would be no breach of the injunction order.

22. It is true that the order of injunction in that case was in negative form. But if an order injuncted a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily means that the

amount must be paid. If the amount is withheld there will be a defiance of the injunction order and that party could be hauled up for infringing the injunction order. It will be a contradiction in terms to say that a party is injuncted from withholding the amount and yet it can withhold the amount as of right. In any case if the injunction order is one which a party was not bound to comply with, the court would be loath and reluctant to pass such an ineffective injunction order. The court never passes an order for the fun of passing it. It is passed only for the purpose of being carried out. Once this Court came to the conclusion that the court has power under Section 41(*b*) read with Second Schedule to issue interim injunction but such interim injunction can only be for the purpose of and in relation to arbitration proceedings and further that the question whether any amounts were payable by the appellant to the respondent under other contracts, was not the subject-matter of the arbitration proceedings and, therefore, the court obviously could not make any interim order which, though ostensibly in form an order of interim injunction, in substance amount to a direction to the appellant to pay the amounts due to the respondent under other contracts, and such an order would clearly be not for the purpose of and in relation to the arbitration proceedings; the subsequent observation of the court that the order of injunction being negative in form and substance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, is manifestly inconsistent with the proposition of law laid down by this Court in the same case.

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> *31*. We are clearly of the view that an injunction order restraining the respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor appellant. Such an order was clearly beyond the purview of clause (*b*) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."

21. **In our opinion, the judgment rendered in *Gangotri Enterprises Ltd.* [*Gangotri Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720 : (2016) 4 SCC (Civ) 480] is per incuriam because it relies upon *Raman Iron Foundry* [*Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231] which has been specifically overruled by the three-Judge Bench in *H.M. Kamaluddin Ansari* [*H.M. Kamaluddin Ansari & Co.* v. *Union of India*, (1983) 4 SCC 417]**."

x) It is relevant to note that **Kamaluddin Ansari (supra)** was dealing with a clause empowering the Union of India to withhold any amount due under any pending bills of other contracts. The Court therein interpreting the said clause therein held that Union of India has

ample power to withhold payments of pending bills under any other contract and it is not necessary that such a claim has to be adjudicated as held in **Raman Iron Foundry (supra)**. The relevant paragraphs in **Kamaluddin Ansari (supra)** are extracted below:

> "27. The headings prefixed to a section or a group of sections in some modem statutes are regarded as preambles to those sections. They cannot control the plain words of the statutes but they may explain ambiguous words. The view is now well settled that the headings or titles prefixed to a section or a group of sections can be referred to in determining the meaning of doubtful expressions. It is true that the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The golden rule is that when the words of a statute are clear, plain and unambiguous, that is, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences. The duty of a Judge is to, expound and not to legislate, is a fundamental rule. **If we apply the same principle to the interpretation of Clause 18 of the standard form of contract, it would be clear that the clause unequivocally contemplates a claim for the payment and it is open to the Union of**

India to appropriate any amount due to the contractor under other pending bills. It does not contemplate the amount due and, therefore, the heading of this clause which talks of only 'Recovery of sums due' will not control Clause 18. The clause in our opinion gives wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts.

28. Clause 18 of the standard form of contract earlier was slightly differently worded and it read "whenever under this contract any sum of money is recoverable from and payable by the contractor". **But this formula was deliberately and advisedly altered when the present standard form was introduced and instead the words "whenever any claim for payment of a sum of money arises" were substituted and this chance in phraseology indicated that in order to attract the applicability of the present Clause 18, it was not necessary that there should be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact whether such sum of money was presently due and payable or not.** This Court, however, did not attach importance to this aspect of the matter by observing : (SCC p. 242, para 10).

> "We do not think it is legitimate to construe Clause 18 of the contract between the parties by reference to a corresponding clause which prevailed in an earlier Standard Form of Contract. This is not a statute enacted by the legislature where it can be said that if the legislature has departed from the language used by it in an earlier enactment, it would be a fair presumption to make that the alteration in the language was deliberate and it was intended to convey a different meaning. It is a clause in a contract which .we are construing and there, any reference to a similar or dissimilar clause in another contract would be irrelevant."

29. The Court itself while interpreting Clause 18 of the contract has observed : (SCC p. 240, para 8)

> "It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of Clause 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is a well settled rule of interpretation applicable alike to instruments as to statutes...."

But while dealing with another aspect of clause 18 observed to the contrary that it should not be construed as a statute. It may, however, be pointed out that even after the change in the language of Clause 18 of the standard agreement the Union of India cannot be injuncted from withholding the amount under other bills of the contractor. But it can certainly be injuncted from recovering or appropriating it to the damages claimed.

31. We are clearly of the view that an injunction order restraining the respondents from withholding the amount due under other pending bills to the contractor virtually

> amounts to a direction to pay the amount to the contractor appellant. Such an order was clearly beyond the purview of clause (*b*) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. **But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount**."

xi) It is relevant to note that in all the decisions referred above, the clauses therein granted power to the purchaser/government to either appropriate money submitted in the form of bank guarantee or withhold payments for claims due under other contracts. In other words, in all the above-mentioned cases, the purchaser/government had the power to retain amounts payable to the contractor in relation to any pending bills under other contracts or encash bank guarantees submitted in relation to the other contracts, if there was a claim of losses attributed to the contractor.

xii) The respective clauses in **Raman Iron Foundry (supra)** and **Gangotri Enterprises (supra)** were interpreted to mean that the

government cannot withhold payments for completed works or encash bank guarantees submitted in relation to a contract on the ground that they are entitled for monetary claims arising out of another contract. The decisions in **Raman Iron Foundry (supra)** and **Gangotri Enterprises (supra)** were rendered by Division Benches. However, the decision in **Kamaluddin Ansari (supra)** was rendered by a Full Bench which overruled **Raman Iron Foundry (supra)**.

xiii) As stated above, the Apex Court in **Kamaluddin Ansari (supra)** interpreting the clause therein held that Union of India had ample power to withhold payments of pending bills for claims arising out of other contracts. Therefore, in light of the decision in **Kamaluddin Ansari (supra)**, the petitioner herein cannot rely on **Gangotri Enterprises (supra)** to contend that bank guarantees cannot be encashed in relation to claims arising out of another contract.

xiv) However, it is relevant to note that the decision in **Kamaluddin Ansari (supra)** is not applicable to the facts of the present case.

xv) As stated above, the first contract was entered into between respondent No.4 and respondent No.1 and the second contract was entered into between the petitioner herein and respondent No.1. The two contracts were entered into by two different contractors (respondent No.4 and the petitioner).

xvi) It is relevant to note that Clause XII (a) empowers respondent No.1 to set-off any amounts payable towards any claim arising out of other contracts against the contractor. The said clause uses the words "any sum of money arising out of, or under this ***contract or any other contract made by the contractor with the Corporation***." The said words mean that set-off as provided under Clause XII (a) in relation to any other contract can only be invoked if the contract was entered into between the same parties. For the said clause to operate, the contractor should be the same entity which enters into more than one contract with respondent No.1.

xvii) In the present case, the contractors are different and are separate legal entities. Respondent No.4 is a sole proprietorship run by respondent No.5 whereas the petitioner herein is a partnership firm. This Court cannot accept the contention of respondent Nos.1 and 2

that respondent No.4 and the petitioner herein are related because respondent No.5 is a partner in the petitioner firm. Merely because a person is a partner in a partnership firm, such firm cannot be made liable for the individual separate actions of a partner not related to the business of the firm.

xviii) The Apex Court in **Alembic Glass Industries Ltd. v. CCE**[6] held that merely because two entities have common directors does not make them related or have interest in the business of another. The said principle was affirmed by a Full Bench of the Apex Court in **CCE v. Besta Cosmetic Ltd.**[7]. The relevant paragraph of **Alembic Glass (supra)** is extracted below:

> "7. In our view, this is the heart of the matter. The shareholders of a public limited company do not, by reason only of their shareholding, have an interest in the *business* of the company. **Equally, the fact that two public limited companies have common Directors does not mean that one company has an interest in the *business* of the other.** It is, therefore, not possible to uphold the conclusion of the Tribunal that the assessee and the chemical company were related persons. This being so,

[6]. (2002) 9 SCC 463
[7]. (2005) 3 SCC 790

> it is unnecessary to go into the alternate arguments advanced on behalf of the assessee.

xix) Similarly, the Apex Court in **Indowind Energy Ltd. v. Wescare (I) Ltd.**[8] held that merely because two companies have common directors or shareholders does not make one company liable for the acts of another. The relevant paragraph is extracted below:

> "17. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. **Each company is a separate and distinct legal entity and the mere fact that the two Companies have common shareholders or common Board of Directors, will not make the two Companies a single entity. Nor will the existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other.** If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind."

xx) Further, it is relevant to note that the petitioner herein cannot be made liable as the liability arises out of the first contract

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[8]. (2010) 5 SCC 306

entered into between respondent No.4 and respondent No.1. The petitioner herein is not privy to the contract entered into between respondent No.4 and respondent No.1. Hence, the doctrine of privity of contract applies and the petitioner cannot be made liable for failure to perform contractual obligations which it never agreed to perform.

xxi) Echoing a similar view of privity of contract, the Apex Court in **M.C. Chacko v. State Bank of Travancore**[9] held as follows:

> "9. **Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, cannot enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.** In *Krishna Lal Sadhu* v. *Pramila BalaDasi* [ILR 55 Cal 1315] Rankin, C.J. observed:
>
> > "Clause (*d*) of Section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of

[9]. (1969) 2 SCC 343

> action on the ground of *nudum pactum*. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of 'promisor' and 'promisee'."
>
> Under the English common law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Co.* [1915 AC 847] It has however been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case *Khwaja Muhammad Khan* v. *Husaini Begam* [(1910) 37 IA 152] In a later case *Jamna Das* v. *Ram Autar* [(1911) 39 IA 7] the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

xxii) In the present case, the petitioner cannot be made liable for the alleged breach of respondent No.4 and 5 in relation to another

contract. The said bank guarantees were submitted in relation to the second contract entered into between the petitioner and respondent No.1. The same cannot be invoked for the breaches committed by another contractor (respondent No.4) and the same will result in irretrievable loss to the petitioner herein which has successfully completed the works under its contract.

7. **Conclusion**:

Therefore, in light of the aforesaid discussion, the present writ petition is allowed. The impugned letter dated 29.09.2022 addressed by respondent No.2 to respondent No.3 is set aside. Respondent Nos.1 and 2 are restrained from encashing the said bank guarantees in relation to the losses caused by respondent No.4 for the contract at PWS, Nagunoor. However, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition shall stand closed.

K. LAKSHMAN, J

30th January, 2023

Note: L.R. Copy be marked.
(B/O.) Mgr