IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

C.M.A.No.308 of 2015

Between:

Municipal Corporation,
Rajahmundry, reptd., by
its Commissioner.

... Appellant

And

M/s Hyperion Green Energy India
Pvt. Ltd., Hyderabad, reptd., by its
Managing Director and two others.

... Respondents

JUDGMENT PRONOUNCED ON 05.10.2018

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

1. Whether Reporters of Local newspapers may be allowed to see the Judgment? : No

2. Whether the copies of judgment may be marked to Law Reporters/Journals? : Yes

3. Whether Their Lordships wish to see the fair copy of the Judgment? : Yes

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE GUDISEVA SHYAM PRASAD

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< Gist:
> Head Note:

! Counsel for the appellant: Mr. Mr. Ancha Panduranga Rao

^ Counsel for respondent No.1: Mr. R.Raghunandan
Senior counsel
for Mr. D.Narender Naik

Counsel for respondent Nos.2 & 3: None appeared

? Cases Referred:
1. (1958) 2 QBP 127
2. (1977) 2 All.E.R.862
3. (1978) 1 All.E.R.976
4. (2017) 1 ALD 177 (DB)
5. 566 F.Suppl. 1210 (D.Mass.1983)

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
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Counsel for the appellant: Mr. Ancha Panduranga Rao

Counsel for respondent No.1: Mr. R.Raghunandan
Senior counsel
for Mr. D.Narender Naik

Counsel for respondent Nos.2 & 3: None appeared

The Court made the following:

JUDGMENT: (*per Hon'ble Sri Justice C.V.Nagarjuna Reddy)*

This Civil Miscellaneous Appeal arises out of common order, dated 06.04.2015, in respect of I.A.No.404 of 2014 in O.S.No.96 of 2014 on the file of the learned Judge, Family Court-cum-IX Additional District and Sessions Judge, East Godavari District at Rajahmundry.

2. At the outset, we would like to observe that along with the C.M.A., the appellant has filed C.M.A.M.P.No.612 of 2015 for injunction restraining respondent No.1/defendant No.1 from invoking the bank guarantee, dated 01.07.2010, and respondent No.3/defendant No.3 bank from paying the amounts to respondent No.1 under the said guarantee. By order, dated 14.05.2015, this Court has granted the interim relief. Seeking vacation of the said interim order, respondent No.1 has filed C.M.A.M.P.No.1434 of 2015.

3. The learned standing counsel for the appellant has submitted that since the bank guarantee furnished by his client has expired during the pendency of this appeal, no further adjudication of the appeal is necessary.

4. Mr. R.Raghunandan, learned Senior Counsel appearing for respondent No.1, has submitted that the appellant, having obtained interim order of injunction from this Court, cannot

take advantage of expiry of the bank guarantee. He has further submitted that his client filed C.M.A.M.P.No.899 of 2017 as far back as 22.06.2017 seeking a direction to the appellant to renew original bank guarantee, dated 01.07.2010, pending the appeal. We would like to refer to this application at a later stage. As the relief claimed in this application and the C.M.A. is one and the same and the CMA being of the year 2015, it is appropriate to dispose of the C.M.A. itself along with the miscellaneous applications.

5. The appellant – the Municipal Corporation of Rajahmundry functioning under the Hyderabad Municipal Corporation Act, 1955 (for short 'the Act'), in order to save power, introduced a pilot project to assess the consumption pattern of the power and found that by installing certain power saving devices, power could be saved up to 27.5%. Accordingly, the appellant called for tenders for installation of power savers in Rajahmundry Municipal Corporation area. Pursuant to the tenders invited by the appellant, respondent No.1 quoted the lowest price over all other tenderers. As per its proposal, respondent No.1 agreed to install LED lights and to give 60.17 % energy saving lights. Respondent No.2 informed that respondent No.1 is its authorized representative and authorized dealer for all its LED lighting products and that the latter was

authorized to represent it in the tender. Thus, respondent No.1 is the lead partner in the tender. Considering the offer of respondent No.2, the appellant issued work order on 27.10.2009 and the agreement was concluded on 05.11.2009 (hereinafter referred to as "the project agreement") stipulating the duration of the contract as seven years commencing from the date of completion of installation of LED lights or six months from the date of the agreement.

6. The project agreement provided for the methodology for payment of money to the respondents in the following stages.

> "Stage 1: Upon completion of 3285 Nos. Of street lights (30%) petitioner shall pay 30% of monthly instalment;
> Stage 2: Upon completion of 3285 Nos. Of street lights (60%) petitioner shall pay 60% of monthly instalment;
> Stage 3: Upon completion of 3285 Nos. Of street lights (90%) petitioner shall pay 90% of monthly instalment;
> Stage 4: Upon completion of 1174 Nos. Of street lights (100%) of monthly instalment."

7. Under Clause 33(b) of the agreement, the appellant agreed to enter into a tripartite Escrow agreement with respondent No.1 and the bank of the former and immediately thereafter open the separate Escrow project account. It was further agreed that the amount equal to monthly instalment defined in Table-5

will be transferred to separate Escrow project account from the appellant's account. It was also stipulated in the said Clause that the bank of the appellant shall be bound to secure and pay respondent No.1's dues as payable under the said Clause in accordance with the tripartite ESCROW account agreement. For proper understanding, clause-33 of the agreement is reproduced hereunder.

> "33. Payment Mechanism & Guarantee of Payment By The MCR
>
> a. Under this agreement HYPERION is required to finance the project initially and realise payments through instalments made by the MCR. In order to provide payment security acceptable to the HYPERION's financers, an Escrow account mechanism shall be adopted by MCR for routing its payments. Payments shall be routed through an Escrow account to be opened immediately after award of contract.
>
> b. For this purpose, the MCR shall enter a tripartite Escrow agreement with the HYPERION and the MCR's Bank and immediately thereafter open the separate ESCROW project account. Amount equal to monthly instalment defined in Table-5 will be transferred to separate Escrow project account from the MCR's account. Streams having adequate monthly inflows to cover the payment due to the HYPERION will be assigned by the MCR to the project and the assigned revenues will be routed through the

Escrow account until it is closed in accordance with agreed terms, consequent to the full and final settlement of the HYPERION's dues and the HYPERION's certification accordingly. The MCR's Bank shall be bound to secure and pay the HYPERION's dues as above in accordance with the tripartite ESCROW Account Agreement.

c. The MCR is responsible hereunder for arranging the execution of the tripartite agreement and for opening & adequately funding the Account."

8. It is an admitted fact that instead of opening Escrow account, a substitute arrangement was made between the parties, as per which, the appellant created a revolving bank guarantee for a sum of Rs.10,66,25,016/- with the understanding that the bank guarantee is to be renewed once in every six months. As per the terms of the agreement, the appellant stopped paying amounts from September, 2014. The fact, however, remains that the appellant has not terminated the agreement. When respondent No.1 sought to invoke the bank guarantee, the appellant filed O.S.No.96 of 2014 for the following reliefs.

"a) to declare, that the Bank Guarantee dt.01-07-2010 issued by the 3rd defendant in favour of 1st defendant is vitiated by fraud, illegal, invalid, in-operative and un-enforceable (sic);

b) for a consequential injunction restraining the 1st defendant from invoking and the 3rd defendant from paying the amounts under the Guarantee dt.01.07.2010 issued to 1st defendant;
c) for a permanent injunction restraining defendants 1 and 2 from taking away the lights installed by them in the plaintiff's corporation limits;
d) to award costs of the suit and
e) to grant such other relief or reliefs as deemed fit and proper in the circumstances of the case and justice be rendered."

9. Along with the suit, the appellant filed I.A.No.403 of 2014 for interim injunction restraining respondent Nos.1 and 2 from taking away the street lights installed by them in the appellant's corporation limits and I.A.No.404 of 2014 for interim injunction restraining respondent No.1 from invoking bank guarantee, dated 01.07.2010, and respondent No.3-bank from paying the amounts to respondent No.1 under the said Bank Guarantee, pending the suit.

10. In the said suit, respondent No.1 filed a counter-affidavit, wherein it has denied the allegation that the alternative arrangement of Bank Guarantee made by the then Commissioner of the appellant was vitiated by collusion and fraud and that, in lieu of Bank Guarantee, the appellant itself has made an alternative arrangement by furnishing the Bank

Guarantee through respondent No.3, which is nothing but a form of Escrow arrangement. It has alternatively averred that even otherwise, having performed the contract under the arrangement of Bank Guarantee for a substantial period, which was made effective by the succeeding Commissioners i.e., up to Mr. Manicka Raj, the appellant has acquiesced in raising any such objection. It has further averred that the Bank Guarantee given by respondent No.3 is an unconditional and irrevocable one and therefore, respondent No.1 is entitled to invoke the same and realize the amount due to it on default of payment of instalments by the appellant. It has further averred that as per the agreement, dated 05.11.2009, it was under obligation to make an Escrow arrangement. Respondent No.1 has denied the allegation that it has not completed the project as per the agreement and that, it has installed lights of inferior quality and failed to attend to the faults, complaints and maintenance of lights. Though respondent Nos.2 and 3 filed separate counter-affidavits, they are not of relevance for being discussed.

11. Having regard to the respective pleadings of the parties, the lower Court has framed the following points:

> "1. Whether the petitioner in I.A.No.404 of 2014 is entitled for interim injunction pending disposal of the suit restraining the 1st respondent from invoking the bank guarantee and restraining the 3rd

respondent from disbursing the amounts to the bank guarantee?
2. Whether the petitioner in I.A.No.403 of 2014 is entitled for interim injunction pending disposal of the suit restraining the respondent Nos.1 and 2 from taking away the street lights installed by them in plaintiff's corporation?
3. To what relief?"

12. The lower Court allowed I.A.No.403 of 2014 by making *ex parte* ad interim injunction granted on 13.5.2014 in favour of the appellant absolute, restraining respondent Nos.1 and 2 from removing the street lights installed by respondent No.1. The lower Court, however, dismissed I.A.No.404 of 2014 *inter alia* holding that para-3 of the Bank Guarantee reveals that the guarantor (the appellant) has absolutely, unconditionally and irrevocably guaranteed the full, prompt and punctual payment of the monthly lease rental payments due and payable by it in accordance with the terms and conditions of the project agreement and that in the event of default by the appellant, respondent No.3 agreed and undertook to pay respondent No.1 the monthly lease rental payments becoming due and payable, the aggregate of which under six monthly instalments shall not exceed Rs.79,79,358/-. The lower Court further found that as per the tabular form contained in Ex.P-7-Bank Guarantee, the period of lease was up to seven years and the monthly lease

rentals for each year, i.e., for the first, second, third and fourth stages of installation, were prescribed and that as per Annexure-II, three stages of installation have been completed and 90% of amount of lease rentals was received.

13. Dealing with the plea that Ex.P-7-Bank Guarantee was obtained by fraud, the lower Court found that instead of executing Escrow agreement, the appellant itself has issued Ex.P-6-Omnibus Counter Guarantee, which facilities and guarantees payment through the appellant's Bank, if it fails to pay the amounts to respondent No.1 under the project agreement. The lower Court also observed that it is not the case of the appellant that respondent No.1 has played fraud in issuance of Ex.P-6-Omnibus Counter Guarantee by the appellant and that, on the contrary, it is the appellant itself who gave the said guarantee. The lower Court has rendered a further finding that it is not the case of the appellant that any fraud was committed by respondent Nos.1 and 2 in the tender process or in entering into contract with it. Upon examining the various terms of Ex.P-6-Omnibus Counter Guarantee, the lower Court held that the same constitutes a separate and independent contract, and even if any disputes arise between the parties under the project agreement, in pursuance of which Exs.P-6 and P-7 were executed by the appellant and respondent No.3

Bank respectively, and even if the appellant is entitled to recover the penalties allegedly imposed by it under the project agreement, the same cannot be made a ground to prevent respondent No.1 from encashing the Bank guarantee in respect the amounts due to it under the contract, the recovery for which Ex.P-7-Bank Guarantee was given.

14. Based on the above reasoning and findings, the lower Court has dismissed I.A.No.404 of 2014.

15. At the hearing, the only ground urged by Mr. Ancha Panduranga Rao, learned Standing Counsel for the appellant, is that having installed the street lights, respondent No.1 has not maintained them properly, as a result of which, the appellant has suffered huge loss.

16. Mr. R.Raghunandhan, learned senior counsel representing Mr. D.Narender Naik, learned counsel for respondent No.1, has drawn our attention to Clause-(14) of Ex.P-5-Project Agreement, dated 05.11.2009, and submitted that the monthly lease rental payments for which Ex.P-7-Bank Guarantee was given is different from the monthly maintenance charges and that, even assuming that there is any dispute regarding maintenance of street lights, the same has nothing to do with the amounts recoverable under Ex.P-7-Bank Guarantee.

17. We have carefully gone through Ex.P-7-Bank Guarantee, which is the subject matter of the dispute. The relevant terms of the bank guarantee read as under:

> "Now thereafter in order to induce MCR to make disbursement under the said project agreement, the parties hereto agree as follows:
> 1. The GUARANTOR shall guarantee HYPERION not exceeding the aggregate of six monthly lease rental payments payable by MCR to HYPERION thereon which guarantee shall stand automatically renewed for further period/s and for subsequent aggregate amount of six monthly payments as per the schedule of payment given in Clause-2 of this Guarantee hereof until the end of the Contract Terms as per Clause-42 of the Project Agreement.
> 2. The guarantor hereby notes that the following monthly instalments thereon are payable by MCR as per the schedule below on or before the 15th of each month.
> (a) Upon installation of the first batch of 3285 nos. of LED street lights and upon confirmation of the same by MCR, the MCR shall pay as per Table-I below:

Table-1			
Period	Monthly Payments	No. of Payments Per year	Total Payment Per year
1st year	Rs.398968.00	12	Rs.4787618.00
2nd year	Rs.400468.00	12	Rs.4805618.00
3rd year	Rs.382173.00	12	Rs.4585640.00
4th year	Rs.383637.00	12	Rs.4603640.00
5th year	Rs.365303.00	12	Rs.4383662.00
6th year	Rs.366805.00	12	Rs.4401662.00
7th year	Rs.368305.00	12	Rs.4419662.00
		Grand total	Rs.31987502.00

(b) Upon installation of the second batch of 3285 nos. of LED street lights and upon confirmation of the same by MCR, the MCR shall pay as per Table-2 below in addition to the payments in Table-1:

Table-2			
Period	Monthly Payments	No. of Payments Per year	Total Payment Per year
1st year	Rs.398968.00	12	Rs.4787618.00
2nd year	Rs.400468.00	12	Rs.4805618.00
3rd year	Rs.382173.00	12	Rs.4585640.00
4th year	Rs.383637.00	12	Rs.4603640.00
5th year	Rs.365303.00	12	Rs.4383662.00
6th year	Rs.366805.00	12	Rs.4401662.00
7th year	Rs.368305.00	12	Rs.4419662.00
			Grand total Rs.31987502.00

(c) Upon installation of third batch of 3285 nos. of LED street lights and upon confirmation of the same by MCR, the MCR shall pay as per Table-3 below in addition to the payments in Table-1 and Table-2:

Table-3			
Period	Monthly Payments	No. of Payments Per year	Total Payment Per year
1st year	Rs.398968.00	12	Rs.4787618.00
2nd year	Rs.400468.00	12	Rs.4805618.00
3rd year	Rs.382173.00	12	Rs.4585640.00
4th year	Rs.383637.00	12	Rs.4603640.00
5th year	Rs.365303.00	12	Rs.4383662.00
6th year	Rs.366805.00	12	Rs.4401662.00
7th year	Rs.368305.00	12	Rs.4419662.00
			Grand total Rs.31987502.00

(d) Upon installation of fourth batch of 1093 nos. of LED street lights and upon confirmation of the same by MCR, the MCR shall pay as per Table-4 below in addition to payments in Table-1, Table-2 and Table-3:

Table-4			
Period	Monthly Payments	No. of Payments Per year	Total Payment Per year
1st year	Rs.132989.00	12	Rs.1595873.00
2nd year	Rs.133489.00	12	Rs.1601873.00
3rd year	Rs.127379.00	12	Rs.1528547.00
4th year	Rs.127879.00	12	Rs.1534547.00
5th year	Rs.121768.00	12	Rs.1461221.00
6th year	Rs.122268.00	12	Rs.1467221.00
7th year	Rs.122768.00	12	Rs.1473221.00
			Grand total Rs.10662503.00

3. GUARANTOR absolutely, unconditionally and irrevocably guarantees the full, prompt and punctual payment of the monthly lease rental payments by the MCR becoming due and payable in accordance with the terms and conditions of the Project Agreement and in the event of default by the MCR, agrees and undertakes to pay to HYPERION the monthly lease rental payments, becoming due and payable without demur provided further that this guarantee at any point of time shall be for aggregate amount of six monthly instalments as per payment schedule mentioned in Clause-2 of this Guarantee and initially not exceeding Rs.79,79,358/- (Rupees Seventy Nine Lacs Seventy Nine Thousand Three Hundred Fifty Eight only) and which guarantee shall be renewed and/or reinstated for the subsequent six monthly lease rental payments valid for six months, in both the cases whether the MCR has paid monthly lease rental payments and interest on due date/s or on failure of the MCR to pay the said instalments on due dates, GUARANTOR pays the guaranteed monthly lease

rental payments on receipt of notice from HYPERION which notice should certify that the claim pertains to the guaranteed lease payments currently covered by the Bank Guarantee, within the claim period, until the entire sum of Rs.10,66,25,016/- (Rupees Ten Crores Sixty Six Lakhs Twenty Five Thousand and Sixteen only) has been guaranteed to HYPERION in full as per payment schedule herein above given."

18. The restriction on the Court's power to grant injunction against encashment of bank guarantee is based on the principle that commercial trading must go on, on the solemn guarantee either of the Letter of Credit or by Bank guarantee, irrespective of any dispute between the contracting parties. This view propounded by Lord Jenkins L.J., in ***Hamzeh Melas & Sons Vs. British Imex Industries Ltd.***,[1] was repeated in all subsequent English decisions on the point (e.g, See: ***R.D. Harbottle (Mercantile) Ltd. Vs. National Westminster Bank Ltd***[2], ***Edward Owen Engineering Ltd Vs. Barclays Bank International Ltd***[3]).

19. A Division Bench of this Court speaking through one of us (CVNR, J) in ***M/s AMRCL-Harsha (JV) Vs. Visakhapatnam Port Trust***[4] summarized the principles on the scope of interference with encashment of Bank Guarantees by the Courts as under:

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[1] (1958) 2 QBP 127
[2] (1977) 2 All.E.R.862
[3] (1978) 1 All.E.R.976
[4] (2017) 1 ALD 177 (DB)

"From the judgments of the English and the Indian Courts, the following legal principles emerge:

(i) An unconditional bank guarantee is a solemn undertaking given by the bank which gives an unfettered right to the beneficiary under such guarantee for its invocation. The Courts shall not embark upon adjudication of dispute between the parties with reference to the terms of the contract, in pursuance of which bank guarantee is furnished by a party to the other. Such dispute, however, shall be allowed to be raised separately by the party at whose instance the bank guarantee is given, before the forum available to it in law.

(ii) The Courts shall not ordinarily interfere with the right of the beneficiary to invoke the bank guarantee except for the purpose of preventing fraud or irretrievable injustice being caused. While considering the plea of irretrievable injustice, the Courts must apply the test similar to that applied in ITEK Corporation (6-supra)

(iii) The Court must read the recitals in a bank guarantee as a whole. Even if the bank guarantee contains the recitals such as conditional or irrevocable, the Court has to look into the other recitals before coming to the conclusion as to the true nature of the guarantee. If in spite of such words unconditional or irrevocable, a bank guarantee contains any conditions which need to be fulfilled by the beneficiary, or where the invocation is conditional upon non-fulfillment of the obligation by the party at whose instance the bank guarantee is furnished, such guarantee cannot be treated as an unconditional or irrevocable guarantee and the Court can grant injunction, if the conditions, if any, stipulated in the bank guarantee are not satisfied by the party for invoking such guarantee."

20. From the above excerpted Bank Guarantee conditions, it is manifestly clear that based on the phase-wise installation of the LED street lights, the appellant is liable to pay specified sums to respondent No.1. Under Clause-3 of Ex.P-7, should the appellant commit default in making such payment, respondent No.3 undertook unconditionally and without any demur to pay the amounts under Ex.P-7 to respondent No.1. It is not the pleaded case of the appellant that respondent No.1 has not fulfilled its part of contractual obligation in installing the LED street lights as per the project agreement. Therefore, once respondent No.1 carried out its part of obligation, the liability of respondent No.3 to pay the amounts due under Ex.P-7 to respondent No.1 is unconditional and absolute.

21. As per the settled legal position summarized above, where the party is unable to establish either fraud or irretrievable injustice, applying the test of ***ITEK Corporation Vs. The First National Bank of Boston***[5], the Court cannot grant injunction against encashment of the Bank Guarantee. Having got the Bank Guarantee issued through respondent No.3, instead of opening an Escrow account, which, in our opinion, would have been more advantageous to respondent No.1, it lies ill in the mouth of

[5] 566 F. Supp. 1210 (D.Mass.1983)

the appellant to prevent the encashment of the Bank Guarantee by respondent No.1 on a specious plea of fraud against no other than its own functionary. It is not the pleaded case of the appellant that any action was taken against the then Commissioner who agreed for the arrangement of the Bank Guarantee. On the contrary, respondent No.1 pleaded that the successor Commissioners have followed the same arrangement before payments were abruptly stopped to respondent No.1 during the currency of the agreement period. This averment remained uncontroverted. The appellant has not terminated the project agreement and allowed the same to continue to operate for the full period for which it was entered into. Ex.P-7-Bank Guarantee being an unconditional one, the appellant cannot prevent respondent No.1 from invoking the same, purportedly on the ground that certain disputes arose in maintenance of the LED lights, which *ex facie* does not appear to be covered by Ex.P-7-Bank Guarantee.

22. For the afore-mentioned reasons, we are of the opinion that the order of the lower Court to the extent it dismissed I.A.No.404 of 2014 does not suffer from any illegalities.

23. Coming to CMAMP.No.899 of 2017, in the affidavit filed in support thereof, the applicant-respondent No.1 averred that the Ex.P-7-Bank Guarantee was initially issued on 01.7.2010;

that the same was being renewed/reinstated from time to time; and that the Bank Guarantee was last renewed up to 30.6.2017, on which date, the currency of the agreement period expired. Before the expiry of validity of Ex.P-7-Bank Guarantee, respondent No.1 has filed the afore-mentioned application. The said application was not heard. In view of the interim order granted by this Court restraining respondent No.1 from encashing Ex.P-7-Bank Guarantee, without a corresponding condition that the appellant must keep the Bank Guarantee alive, the appellant has not renewed the Bank Guarantee.

24. After the case was adjourned on 28.9.2018, a counter-affidavit is filed by the Commissioner of the appellant, wherein it is averred that as the very Bank guarantee (Ex.P-7) itself was obtained by fraud, its subsequent extension is also fraudulent and that therefore, respondent No.1 is not entitled for further extension.

25. We are afraid, we cannot accept this stand taken on behalf of the appellant for the reasons already discussed above. But for the interim order granted by this Court in this appeal, respondent No.1 would have been able to encash the said Bank Guarantee before its validity expired. Since respondent No.1 is succeeding in this appeal, it is entitled to be placed in the same position as it would have been but for the interim order granted

by this Court on the analogy of principle of restitution and also by applying the doctrine of *Actus curia Neminem gravabit* (an act of the Court should prejudice no one).

26. For the afore-mentioned reasons, while we do not find any merit in this Civil Miscellaneous Appeal, we direct the appellant to restore the revolving Bank Guarantee as was in force on the date on which the appellant secured interim order from this Court, i.e., 14.5.2015 within two weeks from the date of receipt of a copy of this order.

27. As a sequel to dismissal of the Civil Miscellaneous Appeal, interim order, dated 14.5.2015, in CMP.No.612 of 2015, is vacated and CMP.Nos.612, 694 and 1434 of 2015 and 781 and 899 of 2017 are dismissed of as infructuous.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE GUDISEVA SHYAM PRASAD

05th October, 2018
Note:
LR copies to be marked.
B/o
GHN/DR