IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MRS.JUSTICE A.A.NAKKIRAN

WP.No.8590 of 2011

M/s.Balaji Hotels and Enterprises Limited
represented by its Authorised Signatory
the.Mallikarjuna Reddy ... Petitioner

Vs

1. The Chennai Metropolitan Development Authority
represented by its Member Secretary, Chennai-8
2. Bank of Baroda, represented by its Chief Manager
Chennai-17
3. M/s.Robus Hotels Private Limited, Chennai-17
4. M/s.Ramani Hotels Limited, Mumbai-49 ... Respondents

Prayer:- This Writ Petition has been filed, under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the 1st Respondent, in the impugned letter, issued by the 1st Respondent to the 2nd Respondent, bearing Lr.No.F518102/06, dated 14.09.2010 and to quash the same as illegal, arbitrary and passed contrary to the order dated, 15.04.2010, passed by this Court in WP.No.23397/2004 and consequently, to direct the 1st Respondent to refund the amount of Rs.68,61,000/- encashed by invoking the bank guarantees, bearing Nos.40/39 and 38/76, issued in lieu of the security deposit to the Petitioner and permit the Petitioner to issue fresh bank guarantees for the said sums, thus restoring status quo ante.

For Petitioner : Mr.Rahul Balaji

For Respondents : Mr.P.Kumaresan, AAG, assisted by Mrs.K.Mageswari-R1

R2-No Appearance

Mr.K.Harishankar-R3
Mr.T.V.Ramanujan, SC for Ms.R.Ramya-R4

ORDER

(Order of the Court was made by S.S.SUNDAR, J.)

1. This Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, to quash the impugned letter, issued by the 1st Respondent to the 2nd Respondent, dated 14.09.2010 and to direct the 1st Respondent to refund the amount of Rs.68,61,000/-, encashed by the 1st Respondent, by invoking the bank guarantees, bearing Nos.40/39 and 38/76 issued by the Petitioner in lieu of the security deposit at the time of development of construction of the building, put up by the Petitioner earlier.

2. The brief facts, which are necessary for disposal of this Writ Petition, are as follows:-

   (a) The Petitioner is a Company intended to promote a Hotel Project in the Mount Road, which was taken over from its predecessor, M/s.Balaji Industries Private Limited. After the merger, the Petitioner applied for planning permission to put up a huge construction, consisting of 2 basement floors plus ground floor plus 15 floors, which was later revised to basement plus ground plus 14 floors.

   (b) At the time of submission of the application for planning permission, the

Petitioner was required to give security deposit for a sum of Rs.56,88,000/- and a further sum of Rs.11,73,000/-. Later, the Petitioner was permitted to furnish bank guarantees in lieu of the security by virtue of the order passed by this Court in a Writ Petition filed by the Petitioner, challenging the constitutionality and legality of the collection of the security deposit. Later, the Petitioner received a show cause notice, dated 20.09.1997, from the 1st Respondent, calling upon the Petitioner to show cause why the bank guarantees issued by the Petitioner should not be invoked for certain violations in the terrace floor columns, which were constructed upto roof level with beams tied, which is contrary to the approved plan.

(c) It is the specific case of the Petitioner that the columns put up in the terrace was not for any further construction or any structure in violation of the planning permission, but it is only to ensure installation of a few equipments to satisfy the pollution control norms, such as, air handling units, ventilation, exhaust fans, water tanks, etc. It is also the specific case of the Petitioner that the Petitioner had clarified the position to the 1st Respondent to the effect that the Petitioner had no intention to put up any structure or construction in deviation to the original plan. The case of the Petitioner is that the Petitioner was given to understand that the matter had been treated as closed as the explanation offered by the Petitioner and the undertaking given by the Petitioner were upto the satisfaction of the Officials of the CMDA.

(d) However, once again, the 1st Respondent sought to invoke the bank guarantees, by issuing a letter dated, 03.08.2004, by making a reference to the show cause notice issued by the 1st Respondent on 20.09.1997. While invoking the bank guarantees, the 1st Respondent stated that on further instructions, some unauthorised construction was noticed on the Southern side set back and a temple has been constructed unauthorisedly in the OSR area, which was handed over to CMDA. The said communication, invoking the bank guarantees, was challenged by the Petitioner in WP.No.23397 of 2004. The said Writ Petition along with a batch of Writ Petitions, was disposed of by the Division Bench of this Court, by order dated, 15.04.2010, wherein it was ordered as follows:-

> "8. The 2nd Respondent appears to have passed an order dated 8.7.2002 proposing to levy security deposit only during the pendency of the application for regularisation. It was not the case of the 2nd Respondent that there was no such scheme in operation. In fact, the documents filed by the Petitioner in WP.No.37468 of 2002, substantiate his contention that regularisation application was pending. The question is as to whether during the pendency of the regularisation application before the statutory authority it was open to the CMDA to collect the security deposit.
>
> 9. The Tamil Nadu Town and Country Planning Act, 1971 was amended by Act 58 of 1998 and a provision was inserted as per Section 113A, giving exemption in respect of development of certain lands or buildings. The provision was further amended by Act 7 of 2002 by giving a cut off date as 31.3.2002. As per the amended provision the Government was given power to exempt any land or building or class of lands or buildings developed on or before 31.3.2002 in the Chennai Development Planning Area from the provisions of the Tamil Nadu Town and Country Planning Act, 1971. The rule provides payment of regularisation fee at such rate not exceeding twenty thousand rupees per square meter. Therefore, the amended provision gives a right to the developers to

> make an application for regularisation. It is upto the statutory authority to consider the application for regularisation in case the Applicant satisfies the essential condition for consideration of his application for regularisation. When the statutory authority was ceased of the matter and a decision in the application for regularisation is yet to be taken, it was not proper on the part of the 2nd Respondent to collect security deposit on the ground that there was deviation in the construction made by the concerned Applicant. Therefore, we are of the view that the application for regularisation submitted by the respective Applicants should be considered on merits and as per law. The question of realisation of the security deposit would depend upon the order to be passed in the application for regularisation. In view of our direction to consider the regularisation application, we are of the view that it is not necessary to consider the challenge made to the impugned rule at this point of time and the said question is left open to be decided in the appropriate proceedings.
>
> 10. The question of invoking the security deposit with respect to other Petitioners who have not submitted their regularisation application would be considered by the 2nd Respondent on merits and as per the law."

(e) From the reading of the above said order of this Court, this Court is able to see that the Petitioner's case, which is not a case of regularisation, has been dealt with along with the batch of Writ Petitions. However, the Member Secretary of the CMDA, based on the observations of the Division Bench, while disposing of the Writ Petitions filed by the Petitioner and others, passed an order, invoking the bank guarantees, by specifically stating that the Petitioner has not submitted any regularisation application for the building. After submitting a reply to the communication dated 14.09.2010, the present Writ Petition is filed by the Petitioner, challenging the order of the 1st Respondent, dated 14.09.2010, invoking the bank guarantees and for other reliefs, as stated above.

3. The learned counsel for the Petitioner challenged the impugned order mainly on the ground that the impugned order, invoking the bank guarantees is wholly arbitrary, illegal and in violation of the principles of natural justice, as no opportunity was given to the Petitioner, before invoking the bank guarantees. The learned counsel then pointed out that there is no violation in the construction put up by the Petitioner and therefore, the invocation of the bank guarantees is wholly invalid and without jurisdiction.

4. In several communications and the counter affidavit, the 1st Respondent has pointed out the following violations:-

   i. In terrace floor, columns were constructed upto roof level with beams tied which is not in the approved plan.

   ii. Some of the structures, viz. scrubbing systems, cooling tower, cooling tank, gas bank, etc. are unauthorisedly constructed on Southern side setbacks which is in violation of rules.

   iii. A small temple has been constructed unauthorisedly in the Original Side Rules area which has been handed over to CMDA.

5. It is now admitted before this Court that the small temple, which was originally there in existence, was pulled down and therefore, the violation of constructing a temple in the open space reserve area does not exist. Similarly, it is pointed out that the so called constructions on the Southern side setback, which was pointed out as a violation, were also not in existence, as those small constructions have been demolished or removed long back.

6. Finally, referring to the subsequent developments, the learned counsel for the Petitioner submitted that the impugned order is without an application of

mind. Though the construction was put up by the Petitioner originally for establishment of a Hotel and a commercial building simultaneously, it is stated that due to the financial crisis faced by the Petitioner, the property as a whole, which was developed by the Petitioner, was the subject matter of recovery, which was initiated by the Financial Institution to recover the money, which was advanced to the project of the Petitioner.

7. The properties, namely, the commercial building as well as the Hotel were purchased by the Respondents 3 and 4, which were impleaded subsequently in the Writ Petition. It is admitted that the completion certificate was issued to the subsequent purchasers for the building and they have also paid the development charges, as are applicable to the 1st Respondent. The 1st Respondent has no quarrel or claim as against the Respondents 3 and 4, who are the subsequent purchasers and who are in possession and enjoyment of the multi-storey buildings as on date. It is also pointed out by the Petitioner that the Petitioner is not inclined to involve the Respondents 3 and 4 for the liabilities of the Petitioner for any deviation in the construction originally put up by the Petitioner pursuant to the planning permission obtained by the Petitioner. Therefore, this Court is of the view that the Respondents 3 and 4 are not necessary and proper parties in this Writ Petition.

8. Be that as it may. Now, the question that arises for consideration in this Writ Petition is whether the 1st Respondent can invoke the bank guarantees furnished by the Petitioner for the violations pointed out by the 1st

Respondent.

9. As pointed out earlier, even in the counter affidavit filed by the 1st Respondent in the Writ Petition, the violations, according to the 1st Respondent, are not only on account of the terrace floor columns that were constructed upto the roof level with beams tied, but also on account of the structures that were put up on the Southern side of the ground floor, which according to the 1st Respondent, has reduced set back area in violation of the Rules. The other major deviation is also regarding the unauthorised construction of the temple reducing the OSR area.

10. In several such communications, it is indicated that the total amount of Rs.68,61,000/- was referred to as the amount, which is liable for the unauthorised construction on the Southern side set back area and the unauthorised construction in the OSR area, which have not been handed over to CMDA. In the communication dated 03.08.2004, of the Member Secretary of the CMDA, it is mentioned as follows:-

> "In the show cause notice dated 20.09.1997, the deviations noticed were intimated to the Applicant and he was asked to show cause why the bank guarantee should not be called in by CMDA.
>
> The reply received to show cause notice from the Applicant 4th cited is not acceptable. On further inspection it was noticed that some of the structures are unauthorisedly constructed on Southern side set back which is in violation of rules.
>
> Also a small temple has been constructed unauthorisedly in the Original Side Rules area which has been handed over to CMDA.
>
> Hence, the bank guarantee is invoked and you are requested to transfer the bank guarantee amount of Rs.68,61,000/- (Rs.56,88,000/- + Rs.11,73,000/-) (Rupees sixty eighty lakhs and

> sixty one thousand only) in favour of Member Secretary, CMDA, immediately."

11.The learned counsel for the Petitioner referred to the Minutes of the Meeting of the Committee of Senior Officers, held on 06.06.2011 in the Chambers of Secretary to Government, Housing and Urban Development Department, Government of Tamil Nadu and Vice Chairman I/C, CMDA, wherein the application for issuance of completion certificate for the multi-storey commercial buildings, purchased by the Respondents 3 and 4, came up for consideration. Since the completed building satisfied the completion certificate norms, the subject was placed before the Committee for discussion and a decision was taken to issue a completion certificate. While considering the issues, the facts relating to the Petitioner's claim have been discussed. From the reading of the subject and the discussions, this Court has no hesitation to hold that the invocation of the bank guarantees is totally unjustified in the present case. It is only the columns and tie beams in the terrace floor, which were shown as violations in the entire building. In the minutes of meeting of the Committee, dated 06.06.2011, consisting of Secretary to Government and Senior Officers of CMDA, the request for issuance of completion certificate was considered.

12.On the Issue No.2, the Committee has recorded as follows:-

> **"Issue No.2:-** Columns and tie beams in Terrace floor – the deviation not provided in completion certificate norms"
>
> The constructed building satisfied CC Norms in force except a few incidental structures in the terrace floor which is in deviation to the approved plan. As per the approved plan, the terrace floor is meant for open terrace, lift machine room and staircase head room. As on

site, the terrace floor is used for running the pipes relating to air conditioning system, the accessories meant for building facade, erection of Dish Antennas, etc. For supporting these elements a grid of columns of height about 2.40 meters is constructed at the terrace floor. However, no room is constructed at the terrace floor for regular activity. The CC norms does not provide any guideline for this kind of deviations."

Ultimately, the Committee has concluded as follows:-

"4. Regarding the Issue No.2 – relating to additional construction of columns and beams in the terrace floor which are not found covered in the approved plan, the Applicant has stated these columns and beams constructed in the terrace floor is meant for running the ducts for air conditioning system, to fix the dish antennas and to install the railing for movement of building maintenance unit.

The CSO was further informed that the height of the building upto terrace is 56.65 mts. Even if the unauthorised addition of skeleton construction is taken as forming part of the building height, the total height of the building will become 60.05 mts. And the setback required for this height will be 13 mts. all around the building. As the required setback is available, it satisfied the Development Regulation requirements.

The CSO observed that the additional constructions made in terrace floor are not included in the structures/deviations listed as permissible in terrace floor as per the CC norms. However, considering the fact that these structures are not habitable space and have no roof over it and the structures are only skeleton in nature facilitating support to installation of pipe lines etc., the CSO recommended that the request may be forwarded to the Government for favourable consideration for issue of completion certificate, subject to collection of Development charge for additional part of the building in the top most storey not covered in the approved plan and **subject to the condition that the security deposit shall not be refunded in view of the deviations made (even though considered for issue of completion certificate.)"**

13. In the counter affidavit, the three violations pointed out are, viz. (1) construction of columns in the terrace floor, (2) reduction of side set back on the Southern side and (3) reduction of OSR area due to construction of a temple. From the proceedings initiated by issuing show cause notice dated

20.09.1997, it is seen that all along the invocation of the bank guarantees was only for three violations noted above. The 1st Respondent has now admitted that there is no set back violation or reduction of OSR area (on account of the demolition of the temple itself). The amount that has been illegally recovered from the Petitioner, namely, Rs.68,61,000/- by way of encashing the bank guarantees, is now accountable only for the alleged violation, namely, unauthorised erection of column on the terrace which is now regularised, however, with an observation that the security deposit shall not be refunded. The impugned order is liable to be set aside, as the same is not only unauthorised, but also in violation of principles of natural justice, having regard to the admitted facts.

14. The show cause notice in 1997 was issued before invoking the bank guarantees for three specific violations. Now, the 1st Respondent has admitted the demolition of the temple. The learned counsel appearing for the Petitioner has submitted that all the temporary constructions in the ground floor noted as violations for reducing the side set back had been demolished. The learned Additional Advocate General appearing for the 1st Respondent has not disputed the submission. As regards the violation by construction of columns and other deviations in the top floor, it is admitted that the columns are not meant to cover the floor, but for running the units for air conditioning and electrical equipments. Hence, there is no floor violation or requirement of additional set back then provided by the Petitioner. It has now been made clear in the proceedings dated 16.06.2011 that the structures in the terrace

are not habitable space having no roof and the structures are only skeleton in nature, facilitating support to installation of pipe lines, etc. However, it is still considered as deviation for the purpose of withholding the security deposit. When we examine the impugned order, dated 14.09.2010, no opportunity was given to the Petitioner despite subsequent events after the issuance of show cause notice. There are further developments. When the violation in the top floor is not structural and meant for facilitating support to pipe lines, etc, the impugned order invoking the bank guarantees is arbitrary, illegal and violative of principles of natural justice. The factual ground, on which, the impugned order has been challenged in the Writ Petition, is admitted. In the counter affidavit, it is stated that this Court has not directed to give further opportunity to the Petitioner. When change of circumstances/ events are admitted, the impugned order, without affording further opportunity, is illegal. The learned Additional Advocate General is unable to point out any statutory rule or regulation, justifying the invocation of the bank guarantees or collection of any money especially when development charges have been collected from the subsequent purchasers as seen from the proceedings dated 16.06.2011. In the counter affidavit, few other deviations are referred to. However, in the show cause notice, there is no reference to them. Hence, the Petitioner cannot be held liable.

15. In the result, this Writ Petition is allowed. The impugned order dated, 14.09.2010, of the 1st Respondent is set aside and the 1st Respondent is directed to refund the sum of Rs.68,61,000/- (Rupees sixty eight lakhs and

sixty one thousand only) with interest at the rate of 6% p.a. from the date of this Writ Petition, forthwith to the Petitioner. No costs.

(S.S.S.R.J.) & (A.A.N.J.)
07.12.2022

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Srcm

To

1. The The Chennai Metropolitan Development Authority, represented by its Member Secretary, Chennai-8.

S.S.SUNDAR, J.
and
A.A.NAKKIRAN, J.

Srcm

WP.No.8590 of 2011

07.12.2022