

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

*In the matter of an application for  
injunction under Article 143 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.*

**YAPKA DEVELOPERS (PRIVATE)  
LIMITED**

No. 352, High Level Road, Nawinna,  
Maharagama, Sri Lanka.

**Court of Appeal Case No:  
CA/INJ/06/2022**

**PETITIONER**

**VS.**

1. Secretary,  
Ministry of National Policies,  
Economic Affairs,  
Resettlement & Rehabilitation,  
Northern Province Development &  
Youth Affairs,  
No. 365B, Galle Road, Colombo 03
2. Secretary,  
State Ministry of Rural Housing and  
Construction & Building Materials  
Industries Promotion,  
2<sup>nd</sup> Floor, "Sethsiripaya",  
Sri Jayawardenapura Kotte,  
Battaramulla.

3. Mr. W. S. Sathyananda,  
Secretary,  
Ministry of Urban Development and  
Housing,  
2<sup>nd</sup> Floor, “Sethsiripaya”,  
Sri Jaywardenapura Kotte,  
Battaramulla.
4. Eng. Keerthi Ranjith Abeysiriwardena,  
Additional Secretary (Housing &  
Construction Division),  
Ministry of Urban Development and  
Housing,  
2<sup>nd</sup> Floor, “Sethsiripaya”,  
Sri Jaywardenapura Kotte,  
Battaramulla.
5. Ms. N. D. Namarathne,  
Additional Secretary (Development),  
Ministry of Urban Development and  
Housing,  
2<sup>nd</sup> Floor, “Sethsiripaya”,  
Sri Jaywardenapura Kotte,  
Battaramulla.
6. Mrs. W. A. M. Abeywardena  
Director General (Engineering),  
Ministry of Urban Development and  
Housing,  
2<sup>nd</sup> Floor, “Sethsiripaya”,  
Sri Jaywardenapura Kotte,  
Battaramulla.

7. Hon. Attorney General,  
Attorney General's Department,  
Hulftsdrop Street,  
Colombo 12.

8. Sampath bank PLC,  
No. 110,  
Sir James Peiris Mawatha,  
Colombo 02.

**RESPONDENTS**

**Counsels** Sandamal Rajapaksha instructed by Sithara Sampath Wijewaedena for  
the Petitioner  
Dammika Rajapakse for the 8<sup>th</sup> Respondent

**Supported on:** 30.11.2022

**Decided on:** 01.12.2022

## **Mayadunne Corea J**

This application is made by the petitioner seeking a constitutional injunction pursuant to article 143 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The petitioner being a partner of a consortium has entered into a contract with the government of Sri Lanka. The Consortium consists of two other partners namely N D Enterprises of 8<sup>th</sup> floor Hemkunt, House Building, 6 Rajendra Place, New Delhi India, and Archedium (Private Ltd) of 2<sup>nd</sup> floor of Liberty Arcade, R A De Mel Mawatha, Colombo 03. It was submitted that the Petitioner as the contractor had entered into a contract marked P2 with the government of Sri Lanka as the employer, for the construction of housing units, for the conflict-affected families in the Northern and Eastern provinces of Sri Lanka. The petitioner submits that the P2 contract was entered into for the construction of 7000 houses. However, during the initial stage 300 houses were to be completed. The petitioner has been informed to commence the construction of 300 housing units within the stipulated time namely by 13.10.2020. For this purpose, there was a contractual requirement for the Petitioner to submit a performance bond. The Petitioner submits that in terms of clause 4.2 of the Contract data he had submitted the performance bond guarantee no 3100 2020 0049 valued at Rs. 72,800,000.00.

The Petitioner has been informed by a letter dated 8.7.21 (P3) that he should construct the 300 housing units on 13.10.2020. The said letter also informs the Petitioner to complete the work before 14.01.2021. It is pertinent to note that the parties had entered into the contract marked P2 on 17.05.2019 for the construction of houses. Subsequently, the Petitioner made a request for an extension of time, and as per the available material submitted to this Court, on the petitioner's request extensions have been granted up to 29.07.2021 (P3). As the petitioner has failed to complete the said housing units the following observations had been made in the letter marked P3. The said observations are as follows;

- Still you have not completed even 12 houses.
- The Technical Team has been changed from time to time and it seriously affected the progress of the site.
- Assigned workforce is not adequate.

- Quality control at the individual sites is in very poor condition.

Further, it is noted that you did not produce the following to show progress.

- Confirmed shipping arrangement details for the next 278 Houses.
- Exact completion date or work schedule for next houses.

The petitioner did not contest the said observations but submitted that due to the prevailing situation in the country at the relevant time they were unable to complete the task. As per the said letter, it is evident that the relevant ministry on 28.10.2020 released an advance payment of 72 million to the Petitioner. By letter P3, the ministry has refused to extend the time period for the Petitioner to complete the construction. The petitioner replied to the said letter on 9.8.21 (P4). Thereafter Subsequent to another application by the Petitioner requesting to grant an extension, Ministry has given a further extension of a time up to 31.12.2021 and also extended the tax exemption date granted to the Petitioner up to 31.12.2021. However, the ministry has also requested to extend the validity period of the performance bond. (P5A, P5B, P8A). This has been complied with by the Petitioner and the Performance bond extended from time to time till 31.12.2022(P8b).

Thereafter the Petitioner submits that he could not import the necessary raw materials for the construction due to certain restrictions relating to the importation of raw materials. The petitioner has subsequently made a request to the Ministry to provide necessary assistance to obtain the importation license. The Ministry by letter dated 21.02.2022 has informed the director department of import control to issue an Importation license to the Petitioner (P6D). However, the petitioner submits that the Ministry had failed to provide the necessary assistance for the importation of raw materials until April 2022.

The Petitioner also submits that thereafter due to various intervening decisions taken by the government namely temporarily suspending the importation of certain goods the Petitioner could not meet the deadline to complete the project. On 08.11.2022 the Petitioner made a further request seeking a further extension to complete the construction as the contract period was to end on 30.11.2022(P16). The Petitioner submits that he has not got the requested extension from the Ministry. However, the petitioner contends that through information

received the Petitioner believes that the employer is not going to extend the contract period but would encash the Performance bond.

The Petitioner submits that as per clause 19 (1) of the Contract he is entitled to an extension on request and further, submits that also, under clauses 8.4 and 8.5 he is entitled to an extension. However, we find that under clause 19.1 for the contractor to seek an extension pursuant to the said clause he should give notice to the engineer. The Petitioner has failed to submit to this court any document to demonstrate that he has complied with the said clause and given the notice to the engineer seeking an extension.

In anticipation of him not getting the requested extension from the employer and in his apprehension that the Ministry is going to encash the performance guarantee, he has sought injunctive relief from this Court. He further submits that he is seeking this relief until he files a Civil action against the Respondent Ministry before the commercial High Court and District Court of Colombo.

In considering this application it is pertinent to note that the Petitioner has failed to demonstrate to this Court with any substantive material his apprehension, that the performance guarantee furnished is going to be encashed. what is pleaded is his belief which is not substantiated by any material. It is also pertinent to note that the petitioner on previous occasions had been given several extensions to complete the construction which he has failed to do.

In essence, by this application, the petitioner is seeking relief pertaining to a matter where his relationship with the Respondent is based on a contract. It is not denied by the petitioner that the breach of the contract would result in an actionable wrong which has a remedy provided by the contract itself.

In any event, the petitioner has failed to demonstrate to this court that he has complied with the contractual requirements to obtain an extension that would have been available to him under P2.

The Petitioner is inviting this Court to injunct the Respondents from encashing or from releasing the performance guarantee issued on behalf of the Petitioner. The Performance guarantee marked as P8b is a contract between the bank and in this instance the Secretary Ministry of Urban Development and Housing who is the beneficiary.

**In Edward Owen Engineering Ltd vs Barclays Bank International Ltd 1978 1 ALL ER 976** it was held

*“A performance guarantee was similar to a confirmed letter of credit. Where, therefore, a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the bank had notice of the fraud. ....”*

This principle has been followed in a number of cases in Sri Lanka.

**In Hemas Marketing Pvt Ltd vs Chandrasiri and others 1994 2SLR 181**, it was held *“When a bank has given a guarantee, it is required to honor it according to its terms and is not concerned whether either party to the contract which underlay the contract was in default. The whole purpose of such commercial instruments was to provide security which was to be readily, promptly and assuredly realizable when the prescribed event occurred. The only exception to the rule is where fraud by one of the parties to the underlying contract has been established and the bank had notice of the fraud. A mere plea of fraud put in for the purpose of bringing the case within this exception and which rests in the uncorroborated statements of the applicant will not suffice.”* In the said judgment, Dr. Ranaraja J further observed as follows, *“It is only in exceptional circumstances that Courts will interfere with the machinery of obligations assumed by the banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to underlying rights and obligations between merchants at either end of the banking chain. Courts will leave the merchants to settle their disputes under the contract by litigation.”*

**In Indica Traders (Pvt) Limited v Seoul Lanka Constructions (Pvt) Limited and others (1994) 3 SLR 387.** it was held

*“It is thus clear that business transactions between a bank and a beneficiary, constituted in the nature of a performance bond, a performance guarantee, letter of guarantee or a irrevocable letter of credit, whereby the bank is obliged to pay money to a beneficiary, are not tripartite transactions between the bank (surety), the beneficiary (creditor) and the party at whose instance the bond, guarantee or letter is issued (the principal debtor) but, simply transactions between the bank and the beneficiary. A bank thereby guarantees to the beneficiary payment of money and is obliged to honour that guarantee according to its terms. Any dispute that may arise between the beneficiary (creditor) and the party at whose instance the guarantee or letter is given (the principal debtor), on the underlying contract, cannot be urged to restrain the bank from honouring the guarantee or letter according to its terms. In an application for an injunction to restrain the bank from making payment, the Court has to consider whether there is a challenge to the validity of the bond, guarantee or letter itself, upon which payment is claimed and whether the conditions as specified in writing are satisfied. If the challenge to the validity is not substantial and the conditions as specified in the writing are met, prima facie no injunction should be granted and the bank should be left free to honour its obligation.*

*The only exception to this general rule is where it is established by the party applying for the injunction that a claim for payment upon such bond, guarantee or letter is clearly fraudulent. A mere plea of fraud put in for the purpose of bringing the case within this exception and which rest on the uncorroborated statement of the applicant will not suffice. An injunction may be granted only in circumstances where the Court is satisfied that the bank should not effect payment. Therefore, an injunction may be granted on the ground of fraud only where there is clear evidence as to:*

*(i) the fact of fraud and,*

*(ii) the knowledge of the bank as to the facts constituting the fraud.....”*



A performance bond is similar to letters of credit issued by the bank, and the said bank is obliged to pay once the demand is made if it satisfied the terms stipulated. It is a contract independent of the underline main agreement between the petitioner and the Respondents. The dispute between the petitioner and the respondents in this instance is not a dispute between the bank and the beneficiary in whose favor the performance guarantee has been issued.

In the instant case before us, the Petitioner has not pleaded nor has he demonstrated any act of fraud by the Respondents. In the absence of any fraud disclosed by the Petitioner himself, it is safe to come to the conclusion that there cannot be a fraud that has been informed to the bank and is within the knowledge of the bank. There is a long line of judgments that Recognizes fraud as the exception where a court will interfere in a commercial transaction by granting an injunction as prayed in this case. That too is, if the petitioner is successful in establishing fraud. In our view, in this instance, the petitioner has failed to establish the need for intervention of this Court

It is clear on the pleadings that the Petitioner has failed to complete the execution of the contract he has entered with the respondent. The petitioner conceded that after the grant of three extensions the petitioner has been able to complete only 12 houses out of the 300 houses that were to be constructed during the initial phase. It is common grounds that the Petitioner has obtained an advance payment of 72 million. The said sum has been released to the petitioner on the strength of the Performance bond submitted by the Petitioner. The said performance bond is the instrument the petitioner is seeking to injunct the respondents from encashing and/or releasing.

It is also pertinent to note that the Petitioner as the partner of the consortium has instituted this action under his name. Though he pleads that he is duly authorized to institute this action on behalf of the other partners no such documentary proof has been submitted to this court.

As stated above in the absence of any material to establish fraud by the Respondents this Court is not inclined to interfere with the bank's contractual obligation to its beneficiary. It is also

pertinent to note that if as alleged by the Petitioner if there are violations of the conditions of the contract the Petitioner can settle the said disputes in an appropriate forum pursuant to the remedies that are provided in the contract itself.

When this application was supported, the counsel appearing for the 8<sup>th</sup> Respondent, the bank submitted that they would abide by any order of this Court.

This court has constantly held that the injunctive remedy under the Constitution will be exercised by this court only on exceptional grounds. The Petitioner has failed to demonstrate that there are exceptional grounds in this instance, for this court to intervene.

Accordingly, for the aforesaid reasons we are not inclined to grant an injunction in terms of article 143 of the constitution of the Democratic Socialist Republic of Sri Lanka thus, this application for an injunction is dismissed.

**Judge of the Court of Appeal**

**C.P Kirtisinghe, J**

I agree

**Judge of the Court of Appeal**