

IN THE HIGH COURT OF SINDH AT KARACHI
(APPELLATE JURISDICTION)

First Appeal No.26 of 1995

(Bankers Equity Limited v. East West Insurance Company Limited & Others)

Before:

Muhammad Faisal Kamal Alam J &
Sana Akram Minhas J

Appellant:	Bankers Equity Limited Through, Mr. Mirza Sarfaraz Ahmed, Advocate
Respondent No.1:	East West Insurance Company Limited None
Respondent No.2:	Azeem Engineering Company (Pvt) Limited None
Respondent No.3:	Kamal Ghee and Allied Industries (Pvt) Limited None
<u>Date of Hearing:</u>	15-12-2025
<u>Date of Decision:</u>	30-3-2026

J U D G M E N T

1. **Sana Akram Minhas, J:** The present Appeal arises out of the Order and Decree dated 15.5.1994 ("**Impugned Order**") passed by the learned Chairman of the Banking Tribunal-I ("**Tribunal**"), in Suit No.2138/1993 (*Bankers Equity Limited v. East West Insurance Company Limited & Others*) ("**Banking Suit**") instituted by the Appellant viz. Bankers Equity Limited ("**BEL**").
2. On an application filed by Respondent No.1 ("**Insurance Company**") under Order 7 Rules 10 and 11 of the *Code of Civil Procedure, 1908*, the Tribunal through the Impugned Order, held that BEL's Banking Suit was not maintainable against the Insurance Company, on the ground that it did not fall within the definition of "*customer*" under the erstwhile *Banking Tribunals Ordinance, 1984* ("**1984 Ordinance**"). As no relief had been claimed by BEL against the remaining Respondents No.2 and 3, the Tribunal consequently dismissed the Banking Suit.

Status Of BEL (Appellant) In Liquidation

3. BEL has been in liquidation pursuant to winding-up proceedings pending before this Court since the year 2000 in Judicial Companies Miscellaneous No.15/2000 (*State Bank of Pakistan v. Bankers Equity Limited & Another*). The Official Assignee of this Court is acting as the Official Liquidator of BEL.
4. As the winding-up of BEL was initiated during the subsistence of the now repealed *Companies Ordinance, 1984*, the said proceedings shall continue to be governed by the provisions of that Ordinance, in terms of clause (f) of the proviso to Section 509(1) of the *Companies Act, 2017*.
5. Since the present Appeal has been instituted by BEL itself, permission under Section 316 of the repealed *Companies Ordinance, 1984* (corresponding to Section 310 of the *Companies Act, 2017*) is not required, as the said provision applies only to proceedings instituted *against* a company in liquidation, and not those instituted *by* it.

Factual Background As Set Out In The Complaint Of BEL (Appellant)

6. The Respondent No.3 (viz. Kamal Ghee and Allied Industries (Pvt) Limited) sought BEL's financial assistance to establish a vegetable ghee manufacturing unit ("**Proposed Project**") at Burewala, District Vehari, Punjab. BEL approved the request vide sanction letter dated 8.7.1989.
7. Thereafter, BEL and Respondent No.3 executed an Agreement for Financing dated 10.9.1989 ("**Finance Agreement**"), whereby BEL agreed to disburse a sum of Rs.14,000,000/- directly to Respondent No.2 viz. Azeem Engineering Company (Pvt) Limited ("**Supplier**"). The Respondent No.3 was deemed to have purchased the machinery from BEL at a purchase price of Rs.26,550,413/-, representing the contract price plus mark-up.
8. Subsequently, by an agreement dated 27.10.1989 ("**Original Supply Contract**") executed between the Supplier and the Respondent No.3, the Supplier agreed to supply the complete plant and machinery within nine (9) months of the opening of the Letter of Credit ("**LC**"). BEL established the LC on 28.11.1989 (amended on 6.10.1990) and 7.4.1991, and made payments thereunder between 14.12.1989 and 14.8.1990. Of the LC value of Rs.13,550,000/-, 10% (amounting to Rs.1,355,000/-) was retained as retention money.
9. Although commercial production was expected by January 1990, it did not commence despite repeated extensions. BEL's site visit revealed that

payments had been released on incorrect certification, as a substantial portion of the machinery had neither been delivered nor erected.

10. Consequently, a revised agreement dated 28.4.1992 (**“Revised Supply Contract”**) was executed between the Supplier and Respondent No.3, under which the remaining machinery worth Rs.6,000,000/- was to be supplied by 31.8.1992, and the entire task, including supply, fabrication, and erection, completed by 31.12.1992.
11. To secure the delivery of machinery and commencement of production, the Respondent No.3 furnished BEL an Advance Payment Guarantee dated 5.5.1992 (**“Insurance Guarantee”**), issued by the Insurance Company (at the written request of the Supplier and the Respondent No.3), for Rs.6,000,000/- on behalf of the Supplier. The Insurance Guarantee obliged the Insurance Company to pay BEL unconditionally and on demand, up to Rs.6,000,000/- if the Supplier defaulted under the Original Supply Contract and the Revised Supply Contract, and treated the Insurance Company as *“principal debtor”* for the guaranteed amount.
12. Later, on 4.7.1992, the Insurance Company issued an Advance Payment Bond, enhancing the Guarantee to Rs.8,000,000/- (from the earlier Rs.6,000,000/-) and extending its validity to 31.01.1993 (from the earlier 31.12.1992), with all other terms unchanged.
13. The revised terms also went unheeded, whereupon BEL, by letter dated 5.1.1993, invoked the Insurance Guarantee. An exchange of correspondence thereafter ensued between BEL and the Insurance Company, the latter seeking particulars of the precise nature of the default allegedly committed by the Supplier under both the Original Supply Contract and the Revised Supply Contract.
14. Dissatisfied with the Insurance Company’s response, BEL ultimately instituted, on 4.9.1993, the Banking Suit under the 1984 Ordinance for recovery of Rs.8,000,000/- along with mark-up, seeking judgment and decree solely against the Insurance Company (Respondent No.1), and not against the other Respondents – viz. the Supplier (Respondent No.2, being the beneficiary of the LC established by BEL and on whose behalf the Insurance Company furnished the Insurance Guarantee), and Respondent No.3 (whose Proposed Project was financed by BEL and who was the applicant of the LC).

15. The Tribunal considered the issues¹ arising in the Banking Suit, including the question of its maintainability. By the Impugned Order, the Tribunal held that the Banking Suit was not maintainable against the Insurance Company, as it did not qualify as a “*customer*” under the 1984 Ordinance, and, no relief having been claimed against the Supplier (Respondent No.2) or Respondent No.3, dismissed the Banking Suit in its entirety.

Submissions Of BEL (Appellant)

16. Learned Counsel for BEL contended that the Impugned Order erroneously dismissed the Banking Suit on the ground that the Insurance Company did not qualify as a “*customer*” within the meaning of Section 2(c) of the 1984 Ordinance. He emphasized that, under the Insurance Guarantee, the Insurance Company had unequivocally undertaken to pay the specified amount on demand unconditionally, without reference to the Supplier, and had expressly agreed to be treated as the “*principal debtor*.” Counsel further submitted that, in view of the express terms of the Insurance Guarantee, the Tribunal erred in holding that the Insurance Guarantee was not in respect of the finance granted by BEL, and was merely intended to secure performance of the contract(s) for the supply of plant and machinery for the Proposed Project.

Primary Question For Determination

17. The central question that arises is whether the Insurance Guarantee constitutes “*finance*” within the meaning of the 1984 Ordinance, so as to bring the Insurance Company within the definition of “*customer*” and confer jurisdiction upon the Tribunal.

Opinion Of The Court

18. The submissions advanced on behalf of BEL have been considered, and the record has been examined.

¹ Issues:

- (1) Whether the Defendant No.1 does not fall within the purview of “customer” as defined under Section 2(b) of the Banking Tribunals Ordinance, 1984?
- (2) Whether the Honourable Tribunal has no jurisdiction to entertain and proceed with the suit against the Defendant No.1?

Statutory Definitions Of “Customer” And “Finance” And Contents Of Insurance Guarantee

19. Considering that the key question for adjudication is whether the Insurance Company qualifies as a “customer” and whether the subject Insurance Guarantee constitutes “finance” under the 1984 Ordinance, the relevant statutory definitions are reproduced below.

2. **Definitions:** *In this Ordinance, unless there is anything repugnant in the subject or context:–*

- (a)
- (b)
- (c) **“customer”** means a person who has obtained finance from a banking company or is the real beneficiary of such finance, and includes a surety and an indemnifier;
- (d)
- (e) **“finance”** includes an accommodation or facility under a system which is not based on interest but provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire purchase, lease, rent-sharing, licensing, charge or fee of any kind, purchase and sale of any property, including commodities, patents, designs, trade marks and copyrights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika certificate, modaraba certificate, term finance certificate or any other mode other than an accommodation or facility based on interest and also includes guarantees, indemnities and any other obligation, whether fund based or non-fund based, and any accommodation or facility the real beneficiary whereof is a person other than the person to whom or in whose name it was provided;

20. So also, since the case turns on the precise wording of the Insurance Guarantee, the same is reproduced below.

ADVANCE PAYMENT GUARANTEE

Bankers Equity Limited
1st Floor, Finance & Trade Centre
Shahrah-e-Faisal
Karachi

Dear Sir

SUB: INSURANCE GUARANTEE ON BEHALF OF M/S AZEEM ENGINEERING COMPANY (PVT) LTD FOR SUPPLY OF GHEE MAKING MACHINERY TO M/S. KAMAL GHEE AND ALLIED INDUSTRIES (EVT) LTD

Whereas we understand that AZEEM ENGINEERING COMPANY (PVT) LIMITED, having registered office at 2-3, Gulzaib Colony, Mumtazabad, Multan have entered into a contract with M/s. Kamal Ghee and Allied Industries (Pvt) Ltd, Burewala, District Vehari for the supply of Banaspati Ghee Manufacturing Plant of 60 tons capacity per day comprising on machinery for oil storage, pre-refining, harding, post-refining, deodorizing, ghee filling, steam generation, ammonia compressor, hydrogen generation and handling equipments, hydrogen gas storage, soap manufacturing, tin making; electrical equipment, workshop equipments, insulation material, laboratory equipment and weighing equipments for Rs. 14.00 Million (Rupees Fourteen Million only).

Whereas as per terms of contract, you have opened Letter of Credit on account of M/s. Kamal Ghee and Allied Industries (Pvt) Ltd **and have made a payment of Rs.12.600 Million to M/s. Azeem Engineering Company (Pvt) Ltd for supply of Machinery.** M/s Azeem Engineering Company (Pvt) Ltd. has supplied machinery for Rs.6.6 Million and machinery for Rs.6 Million is to be supplied to M/s. Kamal Ghee & Allied Industries (Pvt) Ltd. **[Emphasis added]**

M/s. East West Insurance Company Limited, having our head office at 410-Qamar House, M.A. Jinnah Road, Karachi, **hereby guarantee to pay to you unconditionally on demand** any sum upto but not exceeding Rs.6,000,000.00 (Rupees Six Million only) **if M/s. Azeem Engineering Company (Pvt) Ltd failed to fulfil their obligations in accordance with the terms and conditions of the contract dated 27-10-1989 and revised contract dated 28-04-1992 without reference to M/s. Azeem Engineering Company (Pvt) Ltd and we will be treated as Principal debtors** against your claim upto Rs.6,000,000.00 (Rupees Six Million only). **[Emphasis added]**

This guarantee shall become effective from the date of issue and thereafter remain valid as on 31-12-1992 or till the supply of equipment is completed which ever is earlier. All claims lodged within this period will be entertained.

Notwithstanding anything contained herein before, our liability under this guarantee is restricted to a sum of Rs.6,000,000.00 (Rupees Six Million only).

No claim whatsoever will be considered as valid after above mentioned period and the Insurance company's liability under this guarantee shall stand discharged and extinguished completely after the expiry from the time mentioned above unless during this period a claim has been filed with the Insurance Company.

For and on behalf of
M/s. East West Insurance Co. Ltd

Examination Of Insurance Guarantee And Its Obligations

21. An examination of the aforesaid Insurance Guarantee makes clear the following:
- i) Well before the execution of the Insurance Guarantee dated 5.5.1992, BEL (on Respondent No.3's application) had already opened LCs on 28.11.1989 and 7.4.1991 in favour of the Supplier (i.e. beneficiary) and had made payments thereunder between 14.12.1989 and 14.8.1990 of the entire sum of Rs.12.6 million to the Supplier.
 - ii) The Insurance Company's unconditional obligation to pay is triggered if Supplier fails to fulfil its contractual obligations under the Original Supply Contract and the Revised Supply Contract.
 - iii) The payment becomes directly enforceable against the Insurance Company without reference to the Supplier, and the Insurance Company is expressly treated as the principal debtor, upon the Supplier's failure to fulfil its obligations under the said contract(s).
22. It now stands settled that a guarantor cannot be held liable beyond the terms of its guarantee and is bound to perform only such obligations as it has

expressly undertaken thereunder. In other words, the guarantor cannot be fastened with any obligation in excess of, or *de hors*, its express undertaking, and is required to discharge only such liability as arises from the instrument itself.

23. In **National Grid Company**², the Supreme Court was dealing with a guarantee containing an unequivocal and unconditional undertaking, whereby it was expressly stipulated that the beneficiary, in its sole discretion, could demand payment at any time during the subsistence of the guarantee, and that its determination regarding the sponsor's default, delay, or failure in performance would be final and unquestionable. It was in the context of such explicit terms that the guarantee was held to be irrevocable and enforceable on mere demand, without recourse to any underlying dispute.
24. The Supreme Court, in **Shipyard K. Damen International**³, authoritatively held that the enforcement of a bank guarantee is to be determined solely with reference to its terms and conditions. It was held that extraneous claims, counter-claims, or disputes between the contracting parties do not constitute a valid ground to restrain the encashment of a guarantee. Where the guarantee is unconditional in nature, the bank is left with no discretion and is under an unequivocal obligation to honour the demand, having no defence to resist its enforcement once invoked in terms thereof.
25. Similarly, in **Sukh Chayn Private Limited**⁴, the Supreme Court reaffirmed that where a bank or insurance guarantee embodies a categorical undertaking imposing an absolute and unconditional obligation upon the guarantor to pay the guaranteed amount, such guarantee constitutes an independent and autonomous contract. In such circumstances, the liability of the guarantor is not contingent upon, nor affected by, any dispute arising between the parties to the underlying transaction. Consequently, the guarantor is bound to honour its commitment strictly in accordance with the terms of the guarantee, irrespective of allegations regarding breach or non-performance of the primary contract.
26. These pronouncements settle the principle that an unconditional guarantee operates independently of the underlying contractual disputes, and its enforcement cannot be restrained except in exceptional circumstances recognized by law.

² 1999 SCMR 2367 (*National Grid Company PLC v. Government of Pakistan*)

³ 2003 CLD 1 (*Shipyard K. Damen International v. Karachi Shipyard and Engineering Works*)

⁴ 2021 SCMR 1446 (*Atif Mehmood Kiyani v. Sukh Chayn Private Limited*)

27. The position in the present Appeal, however, is materially distinguishable. A careful examination of the Insurance Guarantee in question reveals that the undertaking to pay is not couched in unconditional terms. The Insurance Guarantee does not provide that its encashment shall be automatic or mandatory upon a mere demand by BEL, nor does it exclude the possibility of objection, obstruction, or delay by reference to any other agreement, instrument, or document. Significantly, the terms of the Insurance Guarantee do not vest BEL with sole or unfettered discretion to conclusively determine the occurrence of default or failure on the part of the Supplier, much less declare such determination to be final and binding upon the guarantor viz. Insurance Company.
28. In the absence of such express stipulations, the subject Insurance Guarantee cannot be construed as an unconditional or “*on-demand*” instrument. Consequently, the Insurance Company (i.e. guarantor) cannot be precluded from examining the validity of the demand, nor can it be restrained from questioning BEL’s (the beneficiary’s) assertion of default by making reference to the underlying contractual arrangements (viz. the Original Supply Contract and the Revised Supply Contract) or other relevant documents. The enforcement of such a Guarantee, therefore, remains subject to the existence and proof of default, and cannot be sustained merely on the basis of a unilateral demand.
29. This Court is also not persuaded by BEL’s contention that the mere use of certain expressions in the Insurance Guarantee such as “*without reference to M/s. Azeem Engineering Company (Pvt) Ltd*” or that the Insurance Company (i.e. guarantor) shall be treated as a “*principal debtor*” converts the instrument into an unconditional undertaking. These expressions relate to the manner of enforcement and the extent of liability, but do not dispense with, or override, the express condition upon which the liability itself is founded. The foundational requirement of failure to perform in accordance with the contract (viz. Original Supply Contract and Revised Supply Contract) remains intact and must be satisfied before any liability can arise.
30. In **Pakistan Engineering Consultants**⁵, a Division Bench of this Court noted that courts are generally reluctant to restrain a bank from honouring an unconditional bank guarantee or letter of credit, except in cases of apparent fraud or injustice, and that adjustments may be made for legitimate claims. A performance bond, unlike a bank guarantee, cannot be encashed without a prima facie finding of default, and encashment is not justified where fault is unclear.

⁵ 1993 CLC 1926 (*Pakistan Engineering Consultants v. Pakistan International Airlines Corporation*)

31. In *Husein Industries Ltd*⁶ and reiterated recently in *Ziauddin Ahmed & Co.*⁷, a Single Judge of this Court ruled that in Pakistan, courts generally do not restrain encashment of mobilization guarantees even if there is a contractual dispute. For other guarantees, whether an injunction is granted depends on the guarantee's language: if payment is conditional on default by the principal debtor, an injunction may be allowed until default is proved; if the guarantee is unconditional or leaves the creditor as sole judge of default, injunctions are generally refused unless there is fraud or special equity in favour of the plaintiff.

Statutory Scope of "Finance" Under The 1984 Ordinance And Independent Commercial Guarantees

32. The jurisdiction of the Tribunal is a special and limited jurisdiction, which is attracted only where the claim pertains to recovery of "*finance*" extended by a banking company to a "*customer*" within the meaning of the law. It is, therefore, incumbent upon BEL to establish, as a foundational requirement, that the Insurance Company falls within the definition of "*customer*" and that the subject matter of the claim constitutes "*finance*".
33. Counsel for BEL has placed reliance on the 1984 Ordinance to contend that the Insurance Guarantee falls within the definition of "*finance*" and that the guarantor i.e. the Insurance Company is, therefore, to be treated as a "*customer*". Even though the definition of "*finance*" includes guarantees, indemnities and other non-fund-based facilities, such inclusion is not without context. The statutory scheme contemplates guarantees in connection with or ancillary to finance extended by a financial institution, and not every independent commercial guarantee irrespective of its nature and purpose.
34. In the present case, the Insurance Guarantee in question is not an instrument whereby any advance, or financial accommodation has been extended to BEL, nor does it secure the repayment of any such facility under the Finance Agreement dated 10.9.1989. Rather, it is an advance payment/performance guarantee issued in the context of a commercial contract (viz. the Original and Revised Supply Contracts) and linked exclusively to the performance of the said two Supply Contracts between private parties. The Insurance Guarantee secures the Supplier's performance obligations (viz. the supply of plant and machinery), not repayment of finance. To treat such an instrument as "*finance*"

⁶ PLD 2020 Sindh 551 (*Husein Industries Ltd v. Sui Southern Gas Company Ltd*)

⁷ PLD 2024 Sindh 374 (*Ziauddin Ahmed & Co. v. Karachi Shipyard and Engineering Works Ltd*)

within the meaning of the statute would amount to an unwarranted expansion of the definition beyond its intended scope.

35. The contention that the Insurance Company falls within the expression “*customer*” by virtue of having issued the Insurance Guarantee is predicated on an overbroad and misplaced interpretation of the statutory framework. The legislative intent is to cover obligations ancillary to financing transactions, and not to convert every independent commercial guarantee into “*finance*” for the purpose of conferring jurisdiction upon the Tribunal.
36. Accordingly, the effort to invoke the statutory framework governing recovery of “*finances*”, and to treat the Insurance Company as a “*customer*” on that basis is misconceived. The rights and liabilities of the parties must be determined strictly in accordance with the terms of the Insurance Guarantee itself. When properly construed, the Insurance Guarantee in question is conditional, limited in scope, and enforceable only upon strict compliance with its terms. The liability sought to be enforced is thus not a liability arising out of “*finance*”, but one arising out of an alleged breach of a commercial contract, and thus falls outside the ambit of the Tribunal’s jurisdiction. Any attempt to enlarge its scope beyond these conditions, or imposing obligations on the Insurance Company akin to those of a financial “*customer*” would be inconsistent with both the express terms of the instrument and the legal principles governing performance guarantees. Enforcement must, therefore, remain confined to the specific obligations and conditions set out in the Insurance Guarantee.

Conclusion

37. For the foregoing reasons, the subject Insurance Guarantee cannot be brought within the ambit of “*finance*” nor can the Insurance Company be treated as a “*customer*” under the applicable statutory framework viz. the *Banking Tribunals Ordinance, 1984*. The Tribunal, therefore, rightly held that the Banking Suit was, inter alia, not maintainable against the Insurance Company. The Impugned Order and Decree call for no interference. This Appeal is **dismissed**, with no order as to costs.

JUDGE

JUDGE