IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 44 of 2015

Present:-
Mr. Justice Sajjad Ali Shah.
Mr. Justice Muhammad Junaid Ghaffar.

Trading Corporation of Pakistan -------------------------------- Appellant

Versus

M/s Abdulla Mezroei Metal
Trading Company & another ------------------------------------- Respondents

HCA No. 68 of 2015

M/s Abdulla Mezroei Metal
Trading Company & another ----------------------------------- Appellant

Versus

Trading Corporation of Pakistan ------------------------------- Respondents

Date of hearing: **19.10.2015.**

Date of judgment: **24.11.2015**

Appellant: **Through Mr. Rafiq Ahmed Kalwar Advocate.**

Respondent **Through Mr. Aftab Ali Khan Advocate.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. By this common judgment we intend to decide the aforesaid High Court Appeals which have been filed against judgment dated 10.12.2014 passed by a learned Single Judge of this Court in Suit No. 30 of 2010. The appellant in High Court Appeal No.44 of 2015 is aggrieved by the impugned judgment to the extent of directions for reimbursement in respect of performance guarantee en-cashed for UAE Dirham 1,239,000/- whereas, the appellant in High Court Appeal No.68 of 2015 is aggrieved by setting aside of the award of the Sole Arbitrator passed in its favour for US$ 3,465,000/- in the arbitration proceedings. For ease of reference hereinafter, the appellant in High Court Appeal No. 44 of 2015 will be referred as "***defendant***", whereas,

the appellant in High Court Appeal No. 68 of 2015 would be referred as "***plaintiff***".

2. Precisely, the relevant facts are that the defendant had floated a tender bearing No. 34 of 2005 which was opened on 18.8.2005 and in which the plaintiff had offered to supply 50,000 metric tons of Prilled Urea at a price of US$ 225 per metric ton which was accepted on 31.8.2005 and a performance guarantee equal to 3% of contractual value was issued, whereafter, a Letter of Credit was opened on 21.9.2005. According to the plaintiff's case there were some discrepancies in the Letter of Credit and therefore, certain amendments were requested on behalf of the plaintiff and the final amended LC was issued on 25.10.2005 which required that the first shipment of 25000 metric tons was to be made on 10.11.2005, and, the second shipment on 15.11.2005. For numerous reasons (to be discussed later on) the shipment could not be effected, whereafter, the defendant cancelled the contract and forfeited the performance guarantee against which the plaintiff filed Suit No.1059 of 2008 wherein the defendant had filed an application under Section 34 of the Arbitration Act, 1940, seeking referral of the dispute for decision by the Arbitrator pursuant to clause 24 of the terms and conditions of the tender. The said application was dismissed vide order dated 16.4.2009 against which an Appeal bearing No. 151 of 2009 was preferred which was disposed of vide order dated 2.10.2009, whereby, a sole Arbitrator was appointed for adjudication of the dispute. The learned Sole Arbitrator after recording evidence passed its Award on 18.1.2010, whereby, the defendant was directed to refund the amount of performance guarantee en-cashed by it equal to UAE Dirham 1,239,000/- in addition to payment of US$ 3,465,000/- as claimed by the plaintiff. The plaintiff sought enforcement of the Award by filing Suit No. 30 of 2010 and vide impugned judgment the Award has been modified, whereby, the award in favour of the Plaintiff in respect of payment of compensation / damaged of US$ 3,465,000/- has been set aside however, the order for refund of the amount of performance guarantee against the defendant has been maintained.

3. Counsel for the defendant has contended that though there were certain amendments which were required to be effected in the Letter of Credit, however, on 25.10.2005 the Letter of Credit stood amended as desired, and on the basis of amended Letter of Credit, the plaintiff was

required to effect first shipment on 10.11.2005 and second shipment on 15.11.2005. Counsel has further contended that instead of shipping the goods, the plaintiff kept on seeking extension(s) in the date of shipment on one ground or the other, whereas, the Letter of Credit and the dates of shipment both had expired and the plaintiff had failed to ship the goods in question within the stipulated time. It has been further contended that the plaintiff wrote letter(s) dated 15.11.2005 and 9.12.2005, whereby, requests were made for extension in the dates of shipment on various extraneous grounds, notwithstanding that Letter of Credit already stood expired, and, the plaintiff had claimed revision of the selling price for the reason that prices had increased in the international market during pendency of amendments in the letter of credit. Counsel further contended that since time was essence of the contract, therefore, on plaintiff's failure to effect shipment within the period of Letter of Credit, the defendant cancelled the contract and forfeited the performance guarantee which was as per the agreement between the parties. Counsel referred to clauses 10 and 11 of the tender document relating to performance guarantee, and, contended that the defendant was entitled to forfeit the performance guarantee if the plaintiff failed to supply the goods within the stipulated period.

4. Conversely, Counsel for the plaintiff has contended that the learned Single Judge while setting aside the Award to the extent of the claim of the plaintiff has erred in law and facts, as according to the Counsel, the plaintiff had led enough evidence in support of its claim as the plaintiff had entered into a further contract with one of its suppliers after having been awarded the tender to whom the plaintiff had also furnished a performance guarantee of US$ 3,465,000/- and upon failure to execute shipment after delay and amendment of Letter of Credit and cancellation, thereafter, could not execute shipment to the defendant. Counsel has contended that the plaintiff after having been awarded the tender had entered into a binding contract to procure the commodity and therefore, the losses incurred by the plaintiff in the shape of forfeiture of its performance guarantee with M/s Gates (with whom the further contract we entered into by the plaintiff) was liable to be compensated by the defendant, as they had failed to give a proper and clean Letter of Credit at the very first instance, hence the impugned order, whereby, the Award given in favour of the plaintiff has been set aside may be modified and the Award may be made rule of the Court. It has been further

contended that the learned Single Judge has examined the entire evidence available before the learned Arbitrator, which according to the Counsel was not permissible while hearing objections to award; hence the impugned order in this regard is not correct in law.

5. We have heard both the Counsel and perused the record. By consent instant appeals are being finally decided at Katcha peshi stage.

6. It appears that the defendant had floated a tender for purchasing Urea in response to which the plaintiff had offered to ship 50,000 metric tons in two shipments which was accepted on 31.8.2005. Thereafter a performance guarantee was furnished by the plaintiff after which a Letter of Credit dated 21.9.2005 was opened by the defendant through United Bank Limited, Avari Tower Branch, Karachi, which was duly advised through Habib Bank Limited, Dubai, UAE. It further appears that admittedly there were some discrepancies in the Letter of Credit which resulted in exchange of correspondence between the parties, whereafter, the Letter of Credit was amended twice. In short the final operative Letter of Credit was established only on 25.10.2005, whereafter, on the same date the defendant extended the time for the 1st shipment of 25000 metric tons to 10.11.2005 whereas, for the 2nd shipment it was fixed as 15.11.2005. In this extension(s) the defendant had categorically mentioned that if shipments are not affected within such date it would be entitled to forfeit the performance guarantee. It is an admitted position that the plaintiff was unable to meet either of the two deadlines of the shipments and none was shipped in fact. Subsequently, the plaintiff again sought extension of shipment dates for the supply vide its letter dated 15.11.2005 and 9.12.2005 which were refused by the defendant and on 2.1.2006, the Letter of Credit was cancelled and the performance guarantee was forfeited. Eventually, the matter was referred to the learned Sole Arbitrator before whom the defendant also filed a counter claim for the losses it suffered on account of plaintiff's failure to supply Urea. The learned Arbitrator after recoding evidence of the parties held that the performance guarantee was wrongly en-cashed by the defendant whereas, it was further held that the plaintiff was also entitled for compensation for losses suffered by it amounting to US $ 3,465,000/-. Insofar as the counter claim of defendant is concerned, the same was dismissed on merits as well as being time barred. Such dismissal of the defendant's claim was not challenged any further. However, the

defendant had vehemently contested the Award in the instant proceedings.

7. The issue before us for adjudication is that as to whether the forfeiture of the performance guarantee by the defendant is justified in the facts and circumstances of the instant case and further as to whether the plaintiff is entitled for the claim of losses amounting to US $ 3,465,000/- awarded by the learned Arbitrator and set aside by the learned Single Judge through the impugned order.

8. Insofar as the forfeiture of the performance guarantee is concerned, perusal of record reflects that the Letter of Credit was issued on 21.9.2005 however, admittedly there were three discrepancies in the Letter of Credit (i) in respect of the spelling of the plaintiff's name, (ii) the correct description of Urea at one place as Granular instead of Prilled and (iii) while part shipment was allowed, part payment was not mentioned. After exchange of correspondence between the parties, admittedly the operative and clear Letter of Credit with all amendments was effectually issued on 25.10.2005 which finally provided two dates of shipment of 25,000 Tons, as 10.11.2005 and 15.11.2005. The performance guarantee was provided and was subject to forfeiture in terms of Clauses 10 and 11 of the tender documents, which provides that *the defendant will have the right to forfeit the performance guarantee if the goods are not supplied within the specified date*. However, clause 12 is also relevant which *required that the defendant shall establish an irrevocable letter of credit in US Dollars in favour of the plaintiff for full value of the contracted quantity through a scheduled bank in Pakistan <u>within 10 days of receipt of required Performance Guarantee from the plaintiff (emphasis supplied).</u>* In the instant matter though the letter of credit was apparently established on 21.9.2005 however, there were certain discrepancies in such letter of credit and those discrepancies appear to have arisen due to fault on the part of the defendant as stated hereinabove, and, therefore, it cannot be said that the letter of credit was established within 10 days of receipt of required performance guarantee in terms of clause 12 of the tender documents. Once the defendant had failed to establish a clear and acceptable letter of credit required to be opened as mentioned in clause 12 of the tender documents, the defendant on the same plain loses its right to seek encashment of the performance guarantee. The submission of the performance guarantee and its forfeiture is directly linked, with the

establishment of a clean and operative letter of credit within the period specified in clause 12 of the tender document, failing which the plaintiff cannot be held responsible for its failure to effect shipments within the original period specified in the letter of credit, at least to the extent of encashment of performance guarantee. In our opinion once the defendant failed to establish a letter of credit, it loses its authority to seek encashment of performance guarantee in terms of Clauses 10 and 11 of the tender document, as vehemently relied upon by the Counsel for the defendant. In such circumstances, we are of the view that since the dispute in respect of the non-operational Letter of Credit was directly attributed to the conduct of the defendant, the encashment of the performance guarantee was not justified and therefore, the Award of the arbitrator as well as the findings of the learned Single Judge in the impugned order (though on a different reasoning) in this regard appears to be correct and does not require any interference by this Court. We may also clarify that our reasoning for upholding the impugned order is in addition to the discussion of the learned Single Judge on this issue. Consequently, High Court Appeal bearing No. 44 of 2015 filed by the defendant is hereby dismissed.

9. Adverting to the claim of the plaintiff as agitated through High Court Appeal No.68 of 2015 which was granted by the learned Arbitrator to the tune of US$ 3,465,000/- and was set aside through the impugned judgement, it would suffice to observe that while hearing appeals arising out of Arbitration matters, either in respect of setting aside of the award or making the same as a rule of the Court, the appellate jurisdiction exercised by this Court is limited only to the extent, that whether the Court below has erred in arriving at just conclusion or has misread the evidence as well as the findings of the learned Arbitrator. However, in the instant matter, the learned Single Judge has also examined the evidence before him and has also recorded his reasoning for perusal of such evidence as well, (*which under normal circumstances is not required to, while hearing cases of Arbitration Awards*) and after recording his reasoning, has set aside the Award of the Arbitrator issued in favour of the plaintiff in respect of claim for damages as well as for compensation. After a thread bare perusal of the impugned order, we are of the opinion that the learned Single Judge has arrived at a proper and just conclusion while setting aside the Award given in favour of the plaintiff and after having examined the entire material before him. We do not see any

reason to upset such finding of the learned Single Judge, which in our opinion has been arrived at after appreciating the relevant facts and law, and this Court while sitting in appeal in an Arbitration matter, is precluded from examining the entire evidence and to interfere in the impugned order on the reasoning that a different conclusion of fact could possibly be drawn. It may also be noted that the learned Single Judge while upsetting the award in this regard, has dealt in detail as to why and in what manner, though limitedly, the arbitration award can be set aside, and to what extent. The learned Single Judge has also dilated upon the limited exercise of power of intervention in this regard, settled though the judgments of the Apex Court in various cases, including the case of ***Federation of Pakistan and others Vs. Joint Venture Kocks KG/Rist*** **(PLD 2011 SC 506)** (see Para 14 & 15) and we tend to agree with such reasoning for having a deeper appreciation of the material before him. Insofar as refusal to grant damages and compensation is concerned, the relevant finding of the learned Single Judge in this regard is as under:-

> 23. As regards the award of damages to the plaintiff, the learned arbitrator held as follows (Para 66 of the award): "So far damages is concerned, it arises on account of forfeiture of amount by the shipping/supplying companies. As already discussed in the detail the [plaintiff] entered into a contract with Gates for supply of Urea *but on account of non-establishment of clear and operative LC by [TCP] in their favour, they could not open LC in favour of Gates within stipulated period* with the result that they cancelled the contract and forfeited the amount of US $ 3,465,000/-. Since this amount was *forfeited by [Gates] on account of complications created by [TCP]* therefore the [plaintiff] is entitled to recover this amount from [TCP]."
> (Emphasis supplied)
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> With respect, the learned arbitrator has materially misread the evidence. As has been shown herein above, insofar as Gates was concerned, the plaintiff treated the TCP letter of credit as valid and operative from the day it was opened. It gave immediate instructions for the procurement of the Urea and accepted, and obtained TCP's assent to the nomination of, the vessel selected by Gates. What it failed to do, despite repeated reminders from Gates, was to open the letter of credit in favour of the latter. Obviously, Gates would not supply the Urea until such credit was in place and when it failed to materialize terminated the contract and forfeited the cash payment. The plaintiff took a calculated commercial risk, which ultimately failed. The failure of the contract with Gates was therefore entirely the plaintiff's own doing and responsibility.
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> 24. What needs to be carefully considered in the present context is whether the conclusions I have arrived at above are simply a substitution of my own findings for those of the learned arbitrator, or a recognition (and correction) of a serious and material misreading of the evidence by him. The existence of this distinction in principle but the difficulties on occasion of maintaining it in practice has been highlighted in Para 15 above. I have closely considered this point. In order to determine the objection as regards the award of damages, I have had to review the evidence in some depth and to a not inconsiderable extent. However, this was unavoidable in the circumstances of the present case. (I must here endorse the criticism of the parties by the learned arbitrator that the relevant facts had to be "culled out" from a record produced in a "very haphazard manner": see Para 55 of the award. Like the learned arbitrator

> I also faced considerable difficulty in this regard.) I conclude that the situation at hand falls in the latter, and not the former, of the categories noted above. The award in this respect must therefore be regarded as falling on that side of the dividing line that permits the exercise by the Court of its supervisory jurisdiction in terms of section 30. Having concluded that there was a serious and material misreading of the evidence, the next question that must be asked is whether has been a substantial and serious miscarriage of justice on account thereof? This question must have be answered in the affirmative. The loss of the sum awarded ought to fall on the plaintiff. By the award it has been laid at TCP's door. In the present context, the fact that (as found by the learned arbitrator) TCP suffered no loss on account of the non-supply of the Urea is not relevant. TCP is being made to pay out US$ 3,465,000/- to cover a loss that which ought, in law and fact, to lie and remain where it fell, namely in the plaintiff. It is for the plaintiff, and not TCP, to bear this burden. The award cannot therefore be sustained under this head and must be modified.
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> 25. Accordingly, I conclude that the award must be set aside to the extent of the award of US$ 3,465,000/-.The reimbursement of the amount forfeited on the performance guarantee, UAE Dirham 1,239,000/-, is however be sustained and upheld. I therefore direct that the award be and is hereby so modified. As so modified, it is made rule of Court in the following manner, i.e., that TCP shall make payment of UAE Dirham 1,239,000/- to the plaintiff within one month of the date of the decree ("stipulated date") and if it fails to do so, it must then also, from that date, pay markup (on the amount in UAE Dirham) at the rate of 5% per annum up to the date of actual payment. Payment may be made in Pak Rupees at the exchange rate prevailing on the date of actual payment, but if such date is after the stipulated date then the exchange rate shall be that prevailing on the date of actual payment or the stipulated date whichever is more favorable to the plaintiff. Decree to follow accordingly."

10. Perusal of the aforesaid findings of the learned Single Judge appears to be well reasoned and in accordance with the law and we are respectfully in agreement with such findings and do not see any reason to upset such findings. Moreover, the Counsel for plaintiff has also failed to point out any illegality and or perversity in arriving at such conclusion and has not been able to show us any material whereby we could exercise any discretion in favor of the plaintiff and upset such findings. Accordingly High Court Appeal No. 68 of 2015 filed by the plaintiff is also dismissed.

11. In view of hereinabove facts and circumstances of the instant case both the aforesaid appeals of the respective parties are hereby dismissed, however, with no order as to costs.

Dated 24.11.2015

JUDGE

JUDGE