

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.2349 of 2018

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **Wartsila Pakistan (Pvt) Ltd., Through M/s. Mansoor Ali Ghanghro & Syed Maqbool Hussain Shah, Advocate.**

Defendant No.1: **Gul Ahmed Energy Limited Through M/s. Khalid Anwar, Rashid Anwar, Yousuf Naseem and Anas Makhdoom, Advocates**

Defendant No.2: **Standard Chartered Bank (Pakistan) Limited Through Mr. Altaf Ahmed Saher, Advocate.**

For hearing of CMA No. 17941/2018.

Dates of Hearing: **28.02.2019, 14.03.2019 & 28.03.2019.**

Date of Order: **28.03.2019**

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration and Permanent Injunction; whereas, through CMA No.17941/2018, the Plaintiff seeks a restraining order against the Defendants from encashment of the Performance Guarantee No.779020406114-T for US \$ 2,284,426/-.

2. Learned Counsel for the Plaintiff submits that the Plaintiff entered into an Operation and Management Agreement dated 18.09.1996, inter-alia, for operation, management and maintenance of a Power Plant of Defendant No.1 for 136.17 M.W at Korangi Industrial Area, Karachi, and thereafter there were supplemental Agreements executed on 15.11.2001 and 12.10.2007, which are deemed to be an integral part of the main Agreement. Per learned Counsel Clause-9 of the Agreement provided for the price and payment; whereas, clause 9.2 relates to maintenance and in clause 9.3.3 terms of payment has been provided, whereby, the Invoices raised by the Plaintiff for its services were to be paid within 30 days from the date of Invoice, and if there is any delay in payment interest at prime rate plus 2% was to be charged. According to him in terms of Clause 9.5, a payment guarantee was to be provided through an

Escrow Management; whereas, it is the case of the Plaintiff that an amount of EUR 3,408,368.00 is outstanding till 14.12.2018 and despite several assurances, the Defendant No.1 has failed to make payment and has defaulted. He submits that pursuant to the Agreement in question, a Performance Guarantee for US \$ 2,284,426/- has also been furnished by the Plaintiff through Defendant No.2, whereas, after delay in payments, the Plaintiff has invoked the termination Clause 16.1.1 through a Notice dated 07.12.2018, which provides that if the Customer i.e. Defendant No.1 fails to comply with any other material obligation under this Agreement, and such failure is not remedied or cured within 60 days, the Contractor (Plaintiff) can terminate the Agreement. According to him instead of responding to this notice, the defendant No.1 has approached Defendant No.2 for encashment of the Performance Guarantee; hence instant Suit. He further submits that in the counter affidavit, various objections have been raised regarding non-performance of the Agreement by the Plaintiff in respect of defects in transformer, short supply of spare parts, maintenance issues, turbo charger problem and exhaust stacks; however, through a detailed rejoinder all such objections have been responded to, with supporting documents i.e inspection reports and other material generated from time to time, which fully satisfies the objections so raised on behalf of Defendant No.1. According to him the amount is overdue and instead of making payment of the same, Defendant No.1 has come up with objections and intends to seek encashment of the Performance Guarantee, which is not justified and is rather illegal.

3. On the other hand learned Counsel for Defendant No.1 has read out Clause-9 as well as 16 of the Agreement in question and submits that the dispute, if any, between the parties is to be referred to Arbitration and for that a separate application has already been filed by Defendant No.1; however, for the present purposes according to him in terms of Clause 9.5 no Escrow Account was ever established as it was only relevant when the Project was being financed by the Lenders i.e. Banks, who have since been repaid w.e.f. 2009; whereas, during the entire period of the Agreement, the Plaintiff has never pressed upon opening of an Escrow Account or for making any other arrangement in respect of Clause 9.5. Per learned Counsel the interim order has been obtained by misrepresentation and concealment of facts as there is no Performance Guarantee involved in this case, and rather a Letter of

Credit has been established by Standard Chartered Bank, U.K in favor of Defendant No.1; whereas, even the said Bank has not been jointed as a Defendant and it is only the Advising Bank in Pakistan, which has been arrayed as Defendant No.2. Per learned Counsel there is huge amount outstanding against the Plaintiff as detailed in Paras-21 & 22 of the Counter Affidavit and even if the claim of the Plaintiff is set off, an amount of Rs.800 Million approximately is still outstanding against the Plaintiff; therefore, no case is made out. Learned Counsel has then referred to Section 126 of the Contract Act, 1872 and submits that the Letter of Credit in question has to be honoured by the Guarantor without any reference or objection of the Plaintiff. According to him this is not a Performance Guarantee as usually executed in such matters, but it is a Letter of Credit, and in terms of International Banking Standards notified as UCP-600 (Article 4 & 5 thereof), the Bank in question is not supposed to seek permission or attend to objections of the Customer as it is a matter between the Bank and the beneficiary i.e. Defendant No.1. In support of his contention he has relied upon the case reported as ***Haral Textile Mills Limited v. Banque Indosuez Belgium, S.A. and others (1999 SCMR 591)*** and submits that this Judgment of the Hon'ble Supreme Court clearly defines the distinction between a Performance Guarantee and a Letter of Credit and the mode and manner in which a Letter of Credit is to be honoured. In view of such position he has prayed for dismissal of the Injunction Application.

4. Learned Counsel for Defendant No.2 submits that they are only a proforma party and are acting as an Advising Bank to the Letter of Credit in question and has got nothing to do with the merits of the case and will abide by the orders of the Court as may be passed.

5. While exercising his right of rebuttal, learned Counsel for the Plaintiff has contended that the instrument in dispute is not a Letter of Credit but a Standby Letter of Credit / Performance Bond; hence reliance on the case of ***Haral Textile Mills Limited (supra)*** is not relevant. As to the observations of the Court in its Order dated 14.3.2019, he submits that through Affidavit, all relevant documents have been filed and it was never the intention of the Plaintiff to conceal any document; whereas, as a Counsel he has acted upon the instructions of the Plaintiff. According to him, the documents were not annexed as they were all expired documents, therefore, no concealment could be alleged. As to the

objection regarding Arbitration Clause in the Agreement, learned Counsel submits that before invoking the Arbitration Clause, there is a condition precedent, which has to be satisfied as per Clause-18 thereof, and since the Defendant No.1 has failed to enter into any consultation; therefore, this clause within itself cannot be acted upon until such conditions are met or satisfied. In support he has relied upon the cases reported as ***Pakistan Engineering Consultants v. PIA & others (1993 CLC 1926)***, ***Pakistan Engineering Consultants v. PIA & others (1989 SCMR 379)***, ***Shaukat & Raza (Pvt.) Ltd. v. Pakistan Steels Corp. Ltd & others (1988 CLC 342)*** & ***Eckhardt & Company and another v. Muhammad Hanif (PLD 1986 Kar 138)***.

6. I have heard all the learned Counsel and perused the record. Facts have been briefly discussed hereinabove to the effect that Plaintiff entered into an Operation and Management Agreement dated 18.09.1996 for operation and maintenance of the Power Plant of Defendant No.1 at Karachi. Clause 4 of the Agreement deals with Performance Bond and provides that “*The Contractor (Plaintiff) shall submit a performance bond (the “Performance Bond”) to the Customer before start of commissioning in the form of a letter of credit, conditioned on the timely and satisfactory compliance by the Contractor with its obligations under this Agreement*”. Before proceeding further it is very important for the Court to first deal with this issue. It is the case of the Plaintiff that the instrument in question is a performance guarantee / bond and not a letter of credit; whereas, Defendant No.1’s case is that it is a Letter of Credit and in view of the dicta laid down by the Hon’ble Supreme Court in the case of ***Haral Textile Mills Limited (supra)***, this Court cannot, and must not, pass any injunctive order against its encashment / honoring. Alternatively, as argued in rebuttal, the case of the Plaintiff is that at most, this is a Standby Letter of Credit; hence the dicta laid down by the Hon’ble Supreme Court in the case of ***Haral Textile Mills Limited (supra)***, which was in respect of a Letter of Credit and not a Standby Letter of Credit, is not applicable. In view of this position, first it is to be examined that as to whether the instrument in question is a Performance Guarantee simplicitor, or a Letter of Credit. Performance Guarantee / Bond is defined as a business agreement between a client and a contractor for the contractor to perform all of their obligations under the contract. A performance guarantee might also include a clause to protect the client against losses incurred in case the

contractor fails to perform and enforcement action is required or an alternative Contractor Needs to be engaged.<http://www.businessdictionary.com/definition/performance>. A performance bond is issued to one party of a contract as a guarantee against the failure of the other party to meet obligations specified in the contract. It is also referred to as a contract bond. A performance bond is usually provided by a bank or an insurance company to make sure a contractor completes designated projects.<https://www.investopedia.com/terms/p/performancebond.asp>. Performance Guarantee means any guarantee by any person of the performance of the obligation of another person (other than obligations in respect of payments, indebtedness or other monetary obligation of any kind) under contracts of such other person to design, develop, manufacture, construct or products or production facilities (and related nonmonetary obligations) or to provide services related to any of the foregoing.<https://www.lawinsider.com/dictionary/performance-guarantee>. On the other hand a Letter of credit is a letter from a bank guaranteeing that a buyer's payment to a seller will be received on time and for the correct amount. In the event that the buyer is unable to make payment on the purchase, the bank will be required to cover the full or remaining amount of the purchase. This is a direct payment method in which the issuing bank makes the payments to the beneficiary, whereas, a standby letter of credit is a secondary payment method in which the bank pays the beneficiary only when the holder cannot.<https://www.investopedia.com/terms/l/letterofcredit.asp>

7. The above definitions reflect that in fact a Performance Bond within itself is not an instrument; rather it is a form of document which guarantees something in Agreement and Contracts. It can be through a Bank Guarantee or and Insurance Guarantee or for that matter via a Letter of Credit or even a Standby Letter of credit. Perusal of the record reflects that pursuant to the Agreement in question, the instrument executed and as required was in the form of a Standby Irrevocable Letter of Credit. Initially the Letter of Credit was from another Bank, however, in 2011, the same was issued by Defendant No.2. The last instrument is dated 24.04.2014 for an amount of US \$ 2,219,820/-. It is to be noted that this document having Reference Transaction No:779020406114-T was never placed on record by the Plaintiff; but by Defendant No.1

through its counter affidavit of Defendant No.1, and while confronted it was argued on behalf of the Plaintiff that it was an expired document; hence, was not deemed necessary. However, it appears that notwithstanding its expiry from time to time, the same instrument with same Reference Number, as and when needed, was extended after its expiry and so also amended in respect of the amount in question. But, the document itself remained the same, the one, which was established for the first time between the parties i.e. the Standby Letter of Credit. Various amendments have been placed on record, which also reflects that these are in respect of the same Letter of Credit be it “standby” as contended. On the other hand, the Plaintiff in its Plaint has made an attempt to call this instrument as a “*Performance Guarantee*”. It would be advantageous to refer to Paras-9 & 10 of the Plaint, which reads as under:-

“9. However, to the utter shock and distress of the plaintiff, the defendant No.1 rather than curing the defects and making good its material obligations to make timely payments to the plaintiff, under the O&M Agreement; **has threatened to seek encashment of the entire Performance Guarantee (in the sum of USD 2,284,426/-)** and is playing a fraud against the plaintiff. True copy of the Performance Guarantee is attached and marked as “G”.

10. It is submitted that, in the even **the encashment of the said Performance Guarantee takes places, the plaintiff would suffer from irretrievable harm and injustice and may very well have to cease operations in Pakistan due to the immense financial loss.** It is further submitted that one hand, the plaintiff has been deprived of its rightful payment of EUR 3,408,368/- (as of the date of this suit) for the effective and efficient services rendered under the O&M Agreement and on the other hand, the defendant No.1 seeks to fraudulently, unjustly enrich itself through encashment of the Performance Guarantee. It is submitted that, there is prima facie case of fraud on part of the defendant No.1 and special equities operate in favour of the plaintiff from in the form of preventing irretrievable harm and injustice being caused to the plaintiff.”

8. It has never been the case of the Plaintiff that any Letter of Credit was ever issued in favour of Defendant No.1 and through Annexure “G” at Page-399, a document has been placed on record calling it as a *Performance Guarantee*, which was also crucially considered at the time of granting the ad-interim injunction; but later on it has transpired after filing of counter affidavit and hearing the parties, that that the said document is in fact an amendment in the main Letter of Credit bearing Transaction No:779020406114-T. It is in fact insertion of a Clause in field 77-C, which refers to some Performance Bond; however, it remains a fact that the instrument in question was not a *Performance Guarantee* but a Standby Letter of Credit for performance. It would be advantageous to refer to original Clause 77-C of the instrument in question, wherein, the amendment was carried out through Annexure “G”. Clause-77C reads as under:-

"77C DETAIL OF GUARANTEE

WE HEREBY ISSUE OUT STANDBY IRREVOCABLE LETTER OF CREDIT AS FOLLOWS. PLEASE ADVISE THE SBLC TO THE BENEFICIARY ADDING YOUR CONFIRMATION.

QUOTE

BENEFICIARY:

GUL AHMED ENERGY LIMITED

35-B BLOCK 06,

PECHS KARACHI,

PAKISTAN

APPLICANT;

WARTSILA NSD PAKISTAN (PVT) LIMITED

16-KILOMETER, RAINWIND ROAD

LAHORE PAKISTAN

MAXIMUM AMOUNT OF CREDIT: USD 2,219,820.00

EXPIRY DATE: 15TH APRIL 2015

PARTIAL DRAWINGS: PERMISSIBLE

AVAILABILITY: PAYABLE AT SIGHT AGAINST PRESENTATION OF THE FOLLOWING ORIGINAL DOCUMENTS:

1. BENEFICIARY'S DRAFT DRAWN ON US MENTIONING DRAWN UNDER STANDARD CHARTERED BANK, LETTER OF CREDIT NO.779020406114-T.

2. BENEFICIARY'S DULY SIGNED DRAWING CERTIFICATE IN THE FORMAT ATTACHED HERETO AS ATTACHMENT NO.1 FORMING AN INTEGRAL PART OF THIS LETTER OF CREDIT.

UPON RECEIPT OF DOCUMENTS AT SCB, PAKISTAN COUNTERS IN STRICT COMPLIANCE WITH LETTER OF CREDIT TERMS WE WILL REMIT PROCEEDS IN PAK RUPEE EQUIVALENT OF INVOICE VALUE AT THE PREVAILING OD BUYING RATE AT THE TIME OF NEGOTIATION, IN ACCORDANCE WITH YOUR INSTRUCTIONS AS PER LC TERMS.

OTHER INSTRUCTIONS:

THIS LETTER OF CREDIT IS SUBJECT TO THE UCP, ICC PUBLICATION NO.600. THIS LETTER OF CREDIT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH (PAKISTAN) LAW AND SHALL BE SUBJECT TO THE JURISDICTION OF (PAKISTANI) COURTS

CONFIRMATION INSTRUCTIONS: CONFIRM."

9. Similarly at the same time it would also be advantageous to refer to Annexure "G" at Page-399, which has been termed and called as a Performance Guarantee by the Plaintiff in its pleadings. The same reads as under:-

"79 NARRATIVE

PLEASE INCLUDE THE FOLLOWING CLAUSES IN FIELD 77C.

THE PERFORMANCE BOND SHALL BE VALID FOR A PERIOD OF ONE (1) YEAR AND SHALL BE VALID FOR A PERIOD OF ONE (1) YEAR AND SHALL BE RENEWED ANNUALLY ONE (1) MONTH BEFORE ITS EXPIRY PROVIDED THAT (SAVE IN LAST CONTRACT YEAR) ANY PERFORMANCE BOND WILL NOT EXPIRE UNLESS AND UNTIL THE PERFORMANCE BOND FOR THE FOLLOWING YEAR HAS BEEN PROVIDED TO THE BENEFICIARY.

PROVIDED HOWEVER THAT THIS GUARANTEE WILL EXPIRE ON 02 NOVEMBER 2019 AT THE LATEST, AFTER WHICH DATE OUR LIABILITY WILL CEASE AND THIS GUARANTEE SHALL BECOME NULL AND VOID WHETHER THE ORIGINAL HAS BEEN RETURNED TO US OR NOT.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED."

10. Perusal of the above clearly reflects that the instrument being called as a Performance Guarantee or a Bank Guarantee by the Plaintiff is, and in fact, an additional insertion in main Clause 77C of the Standby Letter of Credit in question. Therefore, on the face of it, the assertion of the Plaintiff to this effect that the instrument in question is a Bank Guarantee (for Performance) is incorrect and appears to be an attempt to mislead the Court by concealing facts. A party coming to the Court must disclose all facts and should not conceal facts, whereas, it is also mandatory on the party coming to the Court for an injunctive relief to place on record all relevant and related documents. In the plaint it has not been disclosed that the Performance of the Plaintiff was secured by means of a Letter of Credit (be it Standby). On the contrary it has been termed as a Performance Bank Guarantee. Both may have somewhat similar implications; but for the purposes of indulgence by the Court in its honoring it is to be treated differently. Though ordinarily even in Bank Guarantees, the Banks are obliged to honor them as and when encashment is sought; however, it has become a practice unfortunately in this Country, that every now and then, the Banks do approach the Customer, and are involved in providing enough leverage and cushion time to the Customer to seek a restraining order from the Court. Even Bank Guarantees furnished to the Nazir of this Court are being dishonored on flimsy grounds that Customer has objected or funds are not available. On the other hand a Letter of Credit or even a Standby Letter of Credit is not an instrument in which the Customer or an Applicant can interfere. It is only dependent on the presentation of documents as mentioned in the credit itself, and if they are in order and as per the credit, the Bank is obliged to honor and pay. There is no ifs and buts attached to this kind of an instrument.

11. A learned Division Bench of this Court in the case of ***Kohinoor Trading (Pvt.) Limited v Mangrani Trading Co. and 2 others*** reported as **1987 CLC 1533** has been pleased to hold (*speaking through Ajmal Mian, J, as his lordship then was*), that under an irrevocable Letter of Credit payment cannot be stopped on the ground that there was some breach on the part of the vendor as to the quality of the goods as it is a negotiable document in the commercial world which is negotiated inter alia inter-se between the banks and therefore, the Court cannot lightly cause its dishonoring

by one bank to another, unless prima facie a sufficiently grave cause is shown. The relevant finding is as under;

4.....The above cases cited by Mr. Nasim Farooqui and the passages from the Book referred to by him indicate that generally an irrevocable letter of credit cannot be dishonoured by a bank but there may be exceptions to the above general rule, for example, where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent but the evidence on the question of fraud and as to the bank's knowledge must be clear, or when there is challenge to the validity of the letter of credit. In the Present case respondent No.3 Bank was to remit L/C amount to: their counterpart in Switzerland on the basis of the commitment made by them. The appellants obtained the documents from respondent No.3 without any protest and without pointing out that there was any breach as to the terms of the L/C. It is also apparent that though the alleged survey report (which according to the learned counsel for the respondents 1 and 2 is an ex parte carried out after several weeks from the date of the delivery) indicates that the packing of the goods were allegedly found in damaged condition, the appellants had taken the delivery of the goods from the carrier without any protest. The question, whether the goods were dispatched by respondent No.2 in accordance with the description given in the letter of credit or whether there was any breach as to the quality would be an issue at the trial. In our view, under an irrevocable letter of credit payment cannot be stopped on the ground that there was some breach on the part of the vendor as to the quality of the goods. **An irrevocable letter of credit is a negotiable document in the commercial world which is negotiated inter alia inter se between the banks and, therefore, the Court cannot lightly cause its dishonouring by one bank to another, unless prima facie a sufficiently grave cause is shown. If we were to accept the contention of Mr. Nasim Farooqui it will gravely impair reliability and sanctity of an irrevocable letter of credit and will lead to commercial uncertainty. An irrevocable letter of credit is open in favour of a, foreign exporter through a bank, which in turn makes commitment to a foreign bank, which in turn makes the payment generally against the bill of lading and other necessary documents after the shipment of the goods.** We may also observe that the reliance upon rule 2 of Order XXXIX, C.P.C. by Mr. Nasim Farooqui is not warranted in the instant case as the alleged breach/injury had already been committed /caused by respondent No.2 before the filing of the suit.

5. We are, therefore, of the view that the learned Single Judge has exercised discretion properly in the matter and has rightly declined to withhold the payment of any of the amount under the irrevocable letter of credit in question. The appeal has no merits and, therefore, it is dismissed in limine.

12. Similarly, the Hon'ble Supreme Court in the case of ***Haral Textile Mills Limited (supra)*** had the occasion to interpret the implication of refusing or restraining encashment of a Letter of Credit and the Hon'ble Supreme Court has been pleased to observe that an irrevocable Letter of Credit is to substitute the issuing Bank for the buyer as to the person, who undertakes to buy the shipping documents and this undertaking is absolute in the sense that so long as the documents are in accordance

with the terms of the Contract, the Bank is under an obligation to accept the same, regardless of any dispute between the seller and the buyer as to the quality of goods or services or otherwise. The only exception according to the Hon'ble Supreme Court is that where it is proved that any demand for payment already made or will thereafter be made is clearly fraudulent or when there is a challenge to the validity of a Letter of Credit on a ground akin to fraud or concealment of material facts. It would be advantageous to refer to the finding of the Hon'ble Supreme Court at Para-12, which reads as under:-

“12. From the above-cited case-law and the celebrated treatises on the subject, it appears that the effect of an irrevocable Letter of Credit is to substitute the issuing bank for the buyer as to the person who undertakes to buy the shipping documents and this undertaking is absolute in the sense that so long as the documents of title to the goods which the seller tenders to the bank are in accordance with the terms of the contract, the bank is under an obligation to accept the same regardless of any dispute between the seller and the buyer as to the quality of the goods or otherwise. Any dispute between the seller and the purchaser is extraneous in such a case. On the basis of the above legal position an elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character which do not call for interference by a Court of law. The above system would break down completely if a dispute as between the seller and the purchaser was to have the effect of freezing the sum in respect of which the Letter of Credit was opened.

It is only in exceptional cases that the Court will interfere with the machinery of irrevocable obligation assumed by banks for the reason that they are the life blood of international commerce. The above exceptional cases include, where it is proved that any demand for payment already made or will thereafter be made will clearly be fraudulent or when there is a challenge to the validity of a Letter of Credit on a ground akin to fraud or concealment of material facts.

It may be observed that holder in due course of a Bill of Exchange executed in respect of a Letter of Credit stands on a higher pedestal than a simpliciter beneficiary under a Letter of Credit. It may be stated that the interest of innocent parties, who may hold drafts upon Letter of Credit, should not be made to suffer by a reason of rights that may exist between the parties to the contract in reference to which the Letter of Credit was issued. It would be a sad day in the business world, if for every breach of contract between the buyer and the seller, a party may come to a Court of equity and enjoin payment on drafts drawn upon a Letter of Credit issued by a bank which owes no duty to the buyer in respect of the breach.

The same principles are applicable to a Bank Guarantee. A contract of Bank Guarantee is a trilateral contract under which the bank has undertaken to unconditionally and irrevocably abide by the terms of the contract. It is founded on an act of trust with full faith to facilitate free growth of trade and commerce in internal or international trade or business. It, like a Letter of Credit, creates an irrevocable obligation to perform the contract in terms thereof. A Bank must honour a Bank Guarantee free from interference by the Courts otherwise trust of any commerce, internal and international, would be irreparably damaged. If a Bank Guarantee is unconditional and irrevocable, the Bank concerned must pay

when demand is made unless the Bank has pledged its own credit involving its reputation. Generally, it has no defence except in case of fraud.”

13. After considering the above case law, this Court is of the view that in transactions where Letters of Credits have been issued as a Banking instrument between the parties for any reason, the Court must restrain itself from interfering in its honoring. It is an international practice amongst and between the Banks and is perhaps the safest mode of transaction for selling and buying goods or services. The Letter of Credits world over are governed, interpreted and acted upon on Uniform Custom and Practice for Documentary Credits (“UCP”), which has been initiated by the International Chamber of Commerce and is easily the most effective in the annals of privately drafted rules for trade. The prevailing edition is commonly known as UCP 600. As per Article 1 of UCP 600 these Rules apply to any documentary credit, (*including to the extent to which they may be applicable, any standby Letter of Credit*) when the text of the Credit expressly indicate that it is subject to these Rules. It further provides that they are binding on the all parties thereto unless modified or excluded by the Credit. Article 4 provides that Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit, whereas, the undertaking of the Bank to honor and negotiate is not subject to claims or defences by the applicant and the issuing Bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like. Article 5 thereof provides that *Banks deal with documents and not with goods, services or performance to which the documents may relate*. Insofar as the instrument in hand i.e. the Standby Letter of Credit as agreed upon between the parties is concerned it clearly provides that this Letter of Credit is subject to UCP-ICC Publication No.600 and is to be governed / construed with Pakistani Law and subject to the jurisdiction of Pakistani Court. Hence, the argument that this is at most a Standby Letter of Credit and is to be governed separately and distinctly is misconceived and is not borne out from the record placed before the Court.

14. The aforesaid discussion has been necessitated from the fact that while filing the Complaint, the document was never addressed to as a Letter of Credit or even a Standby Credit but was called as a Performance Guarantee of a Bank which is admittedly not the case. It cannot be

disputed that these two differ completely and have major differences within them and therefore cannot be equated with each other. More so when the issue and matter before the Court is to restrain the Bank from honoring it. Nevertheless, the two differ, in the bank's position vis-à-vis buyer and seller of goods and services. A bank guarantee is a guarantee given by the bank to the seller, that if the buyer defaults in making payment, the bank will pay to the seller. A letter of credit is a formal document, which a bank issues on behalf of the buyer to the seller. The document states that the bank will honour the drafts drawn on the buyer, for the goods supplied or services rendered; provided the conditions written on the document are satisfied by the supplier (seller). Letter of Credit is a commitment of buyer's bank to the seller's bank that it will accept the invoices presented by the seller and make payment, subject to certain conditions. A guarantee given by the bank to the beneficiary on behalf of the applicant, to effect payment, if the applicant defaults in payment, is called Bank Guarantee. In a letter of credit, the primary liability lies with the bank only, which collects payment from the client afterwards. On the other hand, in a bank guarantee, the bank assumes liability, when the client fails to make payment. When it comes to risk, the letter of credit is more risky for the bank but less for the merchant. As opposed, the bank guarantee is more risky for the merchant but less for the bank. There are five or more parties involved in a letter of credit transaction, an applicant, beneficiary, issuing bank, advising bank, negotiating bank and confirming bank (may or may not be). As opposed, only three parties are involved in a bank guarantee, i.e. applicant, beneficiary and the banker. In a letter of credit, the payment is made by the bank, as it becomes due, such that it does not wait for applicant's default and beneficiary to invoke undertaking. Conversely, a bank guarantee becomes effective, when the applicant defaults in making payment to the beneficiary. A letter of credit ensures that the amount will be paid as long as the services are performed in a defined manner. Unlike, bank guarantee mitigates loss, if the parties to the guarantee, does not satisfy the stipulated conditions. A letter of credit is appropriate for import and export business. In contrast, a bank guarantee suits government contracts¹.

¹ <https://keydifferences.com/difference-between-letter-of-credit-and-bank-guarantee.html>

15. In *“Letters of Credit, The Law and practice of Compliance”* by Ebenezer Adodo published by Oxford University Press, after a detailed and threadbare examination of law and precedents from International Jurisdiction, it has been explained that Standby Letter of Credit is an undertaking by a bank or other financial institution at the instance of a party (i.e. the account party) to pay a certain sum of money to the beneficiary should a specified event occur. The contemplated event is almost always a default by the applicant on its obligation to the beneficiary. Standby Credit performs the function of the conventional performance bond or on-demand guarantee. The instrument differs from the traditional guarantee in that the issuing bank’s obligation to pay under the former is conditional upon the presentation by the beneficiary of proper documents asserting the applicant’s default, whereas under a guarantee, payment is conditional upon proof of the fact of default. *In other words, a standby credit creates a primary liability to pay on presentation of the required documents, whilst a guarantee creates a secondary liability to pay only if the beneficiary establishes the fact of the applicant’s default*². Standby letters of credit originated in the late forties in the United States where most banks were legally forbidden to issue guarantees; it is used in greater classes of transactions, as opposed to the traditional letter of credit, employed mainly as a means of payment in sales of goods contracts. Likewise, standby credits continue to be resorted to extensively in Canada, Australia, and New Zealand. But in the UK, Singapore, and many other Commonwealth countries, the instrument is infrequently utilized; instead its functional equivalent—variously designated as the performance guarantee, performance bond, first demand guarantee, or bank guarantee—features prominently. The standby credit has one major advantage over its counterpart, although both are governed by the same general legal principles; the standby credit has developed into a financial support instrument used for a far wider range of purposes than the performance guarantee, including support for money obligations and the provisions of credit enhancement for the public bond issues. More importantly, the standby credit is covered by the more detailed and highly successful UCP regime, whereas the performance guarantee has no such a regime except the

² For illuminating analyses of the distinction between the standby credit and the traditional guarantee, see e.g., *East Girard Savings Association v Citizens National Bank*, 593 F 2d 598 (5th Cir, 1979); *Bank of North Carolina v Rock Island Bank*, 570 F 2d 202 (7th Cir, 1978); *Prudential Insurance Company of America v Maquette National Bank of Minneapolis*, 419 F Supp 734 (1976); *Wichita Eagle and Beacon Publishing Co v Pacific National Bank of San Francisco*, 493 F 2d 1285 (9th Cir, 1974); *Gilchrist B. Stockton v First Union National Bank of Florida* 700 So 2d 394 (Ct App Fla, 2001); *Republic National Bank v Northwest National Bank*, 578 SW 2d 109 (Ex, 1978).

comparatively seldom used Uniform Rules for Demand Guarantees (URDG).³

16. From the above, it clearly reflects that in case where Letters of Credit have been issued, there is no concept of consulting the opener of the Letter of Credit before honouring the same in favour of the beneficiaries. In similar terms, the Courts are also required to show restraint from passing any injunctive orders in dispute when Letters of Credit are being honoured. If this is not done, then the entire system of commercial activity in the country as well as outside the country would be jeopardized and a situation would arise when Letters of Credit issued by the Pakistani Banks would not be honoured or accepted worldwide. This will create a situation for which there would not be any redressal and will cripple the commercial activity and business of the country.

17. As to the merits of the case it would suffice to observe that the Suit of the Plaintiff is for recovery of certain amount on the ground that despite rendering services for a very long time, payment has not been made. It is further pleaded that instead of making payment, Defendant No.1 intends to enforce the Standby Letter of Credit, therefore, they may be restrained. The claim of the Plaintiff has been seriously disputed by Defendant No.1 on the ground that the total amount owed by the Plaintiff to Defendant No.1 is much more than their claimed amount, and even if a set-off is allowed, the Plaintiff still owes more than Rs.800 Million. These are disputed facts and cannot be resolved at this injunctive stage and require parties to lead evidence. Moreover, it is also a matter of record that the Letter of Credit has per-se no nexus with the payments being claimed by the Plaintiff. Though an argument was made that for securing such payments an Escrow Account was to be opened, but this is only an argument without any supporting material. The Letter of Credit cannot be stayed nor can the Bank be restrained on the ground that the Plaintiff (applicant of the same) has some outstanding dues against Defendant No.1. Therefore, in this Suit of recovery of dues, there appears to be no justifiable cause to involve the Letter of Credit of

³ The Uniform Rules for Demand Guarantees, promulgated by the International Chamber of Commerce in 1991 as ICC Publication No.458. For an excellent discussion of the Rules, see Roy Goode, 'The new ICC Uniform Rules for Demand Guarantees' [1992]LMCLQ 190.

Performance of Plaintiff which has its own parameters and is an independently executed document.

18. Lastly, the conduct of the Plaintiff is also not confidence inspiring nor requires this Court to exercise any discretionary jurisdiction in passing of an injunctive order. The Plaintiff has concealed material facts from the Court while filing the Plaint and has obtained an ad-interim order; hence, is not entitled to any such equitable relief of injunction. It is settled law that relief of injunction is an equitable relief, whereas, the conduct of a party seeking such a relief has to go through a threadbare scrutiny before any such discretionary jurisdiction could be exercised in its favor. While considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a prima face case, balance of convenience and irreparable injury, but, it has also to take into consideration the conduct of the parties since grant of injunction is otherwise an equitable relief. Here in this matter I am afraid the Plaintiff has not only failed to pass the test of any of the three ingredients as above; rather, has made an attempt to conceal facts; hence, is otherwise not entitled for any such relief. One who does not approach the Court with clean hands or suppresses material facts, can be denied such equitable relief. An affidavit has been filed in support of the Plaint by an authorized person which apparently does not disclose true and real facts, and he has been put to explain his position and the action which may be initiated for having done so. In view of hereinabove facts and circumstances of this case, the injunction application appears to be misconceived, and therefore, same was dismissed on 28.03.2019 in the following manner and above are the reasons thereof.

28.03.2019

**Mr. Mansoor Ali Ghanghro and S. Maqbool Hussain Shah Advocates for Plaintiff.
Mr Qazi Umair Ali holding brief for Mr. Khalid Anwar Advocate for Defendant
No.1.**

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1. Notice for 25.4.2019.
 2. Arguments heard. For reasons to be recorded this application is dismissed with cost of Rs.25,000/- to be deposited in the account of Sindh High Court Bar Library.

On 14.3.2019 Counsel for plaintiff while making his rebuttal was directed to file complete document available as Annexure "G" at pg:339, along with affidavit of the Plaintiff which has been done. On perusal of the same it appears that the Plaintiff has

made an attempt to conceal material facts by withholding the complete document i.e. Annexure "G", and only part of it (amendment) was filed while filing this Suit and obtaining ad-interim injunction. Accordingly Mr. Syed Ahmer Asif, the authorized person of the Plaintiff in this case is directed to explain his position as to why proceedings may not be initiated against him for concealment, furnishing false information as well as false affidavit in violation of section(s) 177, 181, 182 PPC and other enabling provisions as well committing contempt in the face of the Court with such conduct and act.

To come up on **25.4.2019** when Plaintiff's above representative shall be in attendance with his reply.

Judge