

THE HIGH COURT OF SINDH AT KARACHI

Suit No.1165 of 2017

Plaintiff: **M/s. Data Steel Pipe Industries (Pvt.) Ltd.
through Mr. Arshad Tayebaly and Ms.
Heer Memon Advocates.**

Defendant No.1: **M/s. Sui Southern Gas Company Ltd
through Mr. Asim Iqbal, Advocate along
with Mr. Muhammad Ali, AGM (Procurement)
SSGCL.**

- 1. For hearing of CMA No.7382/2017.**
- 2. For hearing of CMA No.17604/2017.**

Date of hearing: **23.11.2018**
Date of Order: **23.11.2018**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction and through application at Serial No.1, the plaintiff seeks a restraining order in respect of encashment of Performance Guarantee bearing No.001/16/129/LG/TC and through application at Serial No.2, the plaintiff seeks discharge/release as well as return of the said Guarantee.

2. Learned Counsel for plaintiff submits that originally a contract was entered into through a Letter of Intent dated 22.07.2015 with defendant No.1 for supply of a total of 31000 meters of two types of pipes; however, it was delayed and supply could not be made in time and subsequently, plaintiff filed Suit bearing No.1681 of 2016 before this Court, wherein through an application under Order XXIII Rule 3, C.P.C., matter was compromised and decreed, whereby, it was acknowledged that 609 meters of pipe has been delivered and plaintiff was required to

further deliver 2694 meters of pipes on or before 30.08.2016, whereas, original contract stood cancelled and terminated. He submits that it was further agreed that after delivery, the payment would be made within thirty (30) days without deduction of any amount towards the losses, penalty or late payment charges. He submits that terms of the compromise in that Suit have been achieved and when plaintiff approached for discharge of Performance Guarantee in question, impugned Letter dated 21.04.2017 has been issued, whereby liquidated damages are being claimed in respect of short supply from the original contract; hence, instant Suit. He submits that such act on the part of defendant No.1 is based on harassment and mala fides as once the matter was compromised, which has been honored by both the parties, then there is no question of any liquidated damages. He submits that both the applications as well as entire Suit can be decided by granting prayer of the plaintiff.

3. On the other hand, learned Counsel for defendant No.1 submits that as per clause 3 of the compromise application, on completion of the delivery and after payment being made against the delivery, the Contract/Purchase Order No.12/TKT/17485 shall stand terminated in terms of the contract. He submits that as per clause 27 and 28 of the original contract, liquidated damages can be claimed against delayed or short supply of material, whereas, admittedly, there was delay on the part of plaintiff and it is only 3000 meters, which has been supplied out of total quantity of 31000 meters; hence, defendant No.1 is entitled to claim liquidated damages. He submits that this claim is based on actual expenses and costs incurred due to such delay and for that he has referred

to the correspondence and summary of such claim placed on the record along with plaint.

4. I have heard both the learned Counsel and perused the record. The facts have been stated hereinabove briefly, in that the original or earlier Contract bearing No.12/TKT/17485 dated 22.7.2015 entered into by the parties in respect of supply of a total of 31000 meters of pipes of different specifications, and upon default, Suit No.1681 of 2016 was filed before this Court, wherein certain interim orders were passed. Thereafter, compromise application bearing CMA No.11213 of 2016 was filed on 09.08.2016. It would be appropriate to reproduce the contents of the application, which reads as under:-

“It is respectfully submitted that the parties above-named have settled their dispute out of Court on the following terms and conditions:-

1. That the Plaintiff has already delivered 609 meters of 42” OD x 0.812” WT line pipe out of the total contract and agrees to deliver another 2694 meters of 42” OD x 0.812” WT line pipe on or before 30th August 2016.
2. That the parties agreed that on completion of the delivery, as stated in paragraph 1 above, the entire payment for the items delivered shall be paid within a period of 30 days from the receipt of the invoice without deduction of any amount towards losses, penalty or late payment charges.
3. That on completion of the delivery and after payment being made against the delivery, as mentioned in paragraphs 1 and 2 above, the contract being Purchase Order No.12/TKT/17485 shall stand terminated in terms of the contract.
4. That the instant suit may be disposed of in the above terms with no order as to costs.”

On this application, on 09.08.2016, orders were passed on the basis of compromise reached between the parties through the above application. Perusal of the contents of compromise application reflects that, insofar as plaintiff is concerned, 609

meters of the pipes were already delivered, and further delivery of 2694 meters, was agreed upon. The parties further agreed that on completion of the delivery, as stated in paragraph No.1, the entire payment of the items delivered shall be paid within a period of thirty (30) days from the receipt invoice without deduction of any amount towards the losses, penalty or late payment charges and para No.3 of the compromise application provides that on completion of the delivery and after payment being made against the delivery, as mentioned in paragraphs No.1 and 2 above, the contract being Purchase Order No.12/TKT/17485 shall stand terminated in terms of the contract. It is not in dispute that delivery of 2694 meters of pipe was made within time as agreed and payment to that effect has also been released. Now the precise objection on behalf of defendant No.1 is to the extent of words used in para No.3 of the application “that contract shall stand terminated in terms of the contract” and to this, it has been contended that the contract provides for liquidated damages. It is their case that the original contract remained intact even after compromise, and once the delivery of pipes as per compromise has been made, Defendant No.1 could call and invoke the termination clause of that contract in its entirety, including the claim in respect of liquidated damages for the entire short supply of pipes from the original contract. However, with utmost respect, I may observe that this argument is not only absurd, misconceived but so also fallacious, inasmuch as, once a compromise was entered into willingly by and on behalf of defendant No.1, the terms of contract i.e. original contract stands novated. It is settled law that if terms are novated, then the original contract cannot be enforced in totality on the basis of original terms and conditions. It is the novated contract which

remains in field. Section 62 of the Contract Act, 1872 reads as under;

“62. Effect of novation, rescission and alteration of contract:- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed”

The above provision make it clear that if the parties to the contract agree to substitute a new contract in place of the original one, then the original contract need not be performed. Therefore, performance of original agreement between the parties is dispensed with only where the parties to the contract agree to substitute the original contract by a new contract¹. It is not a matter of dispute that the original contract stood novated through compromise which is part of the order of the Court as well. If the contention of defendant No.1, as raised, is accepted, then there appears to be no point at least for the plaintiff to enter into compromise. Performance Guarantee was already available for 31000 meters and in that case, defendant No.1, could have and ought to have enforced the entire Performance Guarantee for default, but that was not done and instead they entered into a compromise. Therefore, after entering into compromise, they are not entitled to claim liquidated damages in respect of original contract or the original quantity so to say, which no more remains in field. The defendant No.1 intends to retain and invoke termination clause of said contract in its entirety and that too in its original form, whereas, such contract no more remains in field. This perhaps cannot be permitted in law. Para 3 of the compromise application at the most can be read to mean that termination clause would remain in field even in the novated contract, but only in respect of modified and compromised quantity of approximately 3000 meters

¹ Mrs. Mussarat Shaukat Ali v Mrs. Safia Khatoon (1994 SCMR 2189)

and not beyond that; and if plaintiff had failed to honor this quantity, (which is not the case) then perhaps, liquidated damages to that extent could have been claimed, but not for the entire undelivered or short quantity.

5. In view of hereinabove facts and circumstances of the case, by means of short order in the earlier part of the day, both these applications were allowed, whereby, the Performance Guarantee was discharged and ordered to be given back to the Plaintiff and these are the reasons thereof.

J U D G E

Faizan/P.A.