IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 212 of 2019

Plaintiff	:	M/s. Shan Associates, through Mr. Rizwan Ahmed Siddiqui, Advocate.
Defendants Nos. 1 to 3	:	Getz Pharma (Private) Limited & others, through Mr. Faisal Siddiqui, Advocate.
Defendant No.4	:	Adamjee Insurance Company Limited, through Mr. Anwar Kamal, Advocate.

Dates of hearing: 06.09.2019, 08.10.2019 and 09.10.2019.

ORDER

YOUSUF ALI SAYEED, J – The Defendant No.1 apparently published a tender inviting bids in relation to Heating, Ventilation and Air Conditioning (HVAC) and mechanical and plumbing works involved in the construction of a new manufacturing facility termed the "Astola Project", with the Plaintiffs bid in that regard being accepted in terms of a Letter of Award dated 24.03.2015 (the "**LOA**") for a final offer price of Rs.809,388,215/- (the "**Contract Price**"), following which the Plaintiff and the Defendant No.1 entered into a Contract Agreement dated 01.06.2015 (the "**Contract**"), incorporating various addenda as specified in Clause 2 thereof, including but not limited to the LOA and the Volume of the Tender Documents setting out the Instructions to Tenderers as well as the General and the Special Conditions of Contract, wherein the Plaintiff and Defendant No.1 were referred to as the "Contractor" and "Employer", with the Defendants Nso.2 and 3 being the designated "Engineer" and "Consultant" respectively.

2. Clause 21 of the LOA read with Clause 15 of the Instructions to Tenderers envisaged the submission of a Performance Bond, which was to remain valid till completion of the maintenance period under the Contract, whereas Clause 10 of the LOA read with Clause 78 of the General Conditions, provided *inter alia* that a "Mobilization Advance of up to 10% of the Contract Price shall be paid to the Employer in two equal parts upon submission by the Contractor of a Mobilization Advance Guarantee/Bond for the full amount of the advance in the specified form from a Scheduled Bank in Pakistan or an approved Insurance company". In compliance of such obligations, the Plaintiff accordingly arranged for a Performance Bond and Mobilization Advance Bond (hereinafter collectively referred to as the "**Bonds**") in favour of the Defendant No.1 through the Defendant No.4/-, each being dated 01.06.2015, for the like amount of Rs.80,938,821/- accordingly.

3. Following a reference to the Contract, the operative parts of the Bonds were worded as follows:

> **The Performance Bond:**
>
> "We, M/S ADAMJEE INSURANCE COMPANY LTD. (the Guarantor), waiving all objections and defense under the Contract, do hereby irrevocably and independently guarantee to pay to the Employer without delay upon the Employer's first written demand without cavil or arguments and without requiring the Employer to prove or to show grounds or reasons for such demand any sum or sums up to the amount stated above, against the Employer's written declaration that the Principal has refused or failed to perform the obligations under the Contract which payment will be effected by the Guarantor to Employer's designated Bank & Account Number.

PROVIDED ALSO THAT the Employer shall be the sole and final Judge for deciding whether the Principal (Contractor) has duly performed his obligations under the Contract or has defaulted in fulfilling said obligations and the Guarantor shall pay without objection any sum or sums up to the amount stated above upon first Written Demand from the Employer forthwith and without any reference to the Principal or any other"

The Mobilization Advance Bond:

"NOW, THEREFORE, the Guarantor hereby guarantees that the Contractor shall use the advance for the purpose of above mentioned Contract and if he fails and commits default in fulfillment of any of his obligations for which the advance payment is made, the Guarantor shall be liable to the Employer for payment not exceeding the aforementioned amount.

Notice in writing of any default, of which the Employer shall be the sole and final Judge, on the part of the Contractor, shall be given by the Employer to the Guarantor and on such first written demand, payment shall be made by the Guarantor of all sums then due under Guarantee without any reference to the Contractor and without any objection.

The Guarantee shall remain in force until the advance is fully adjusted against payment from the Interim Payment Certificates of the Contractor or until 30-11-2016 whichever is earlier.

The Guarantor's liability under his Guarantee shall not in any case exceed the sum of Rs.80,938,821/- (Rupees Eighty millions nine hundred thirty eight thousand eight hundred twenty one only) is Guarantee shall remain valid up to the aforesaid date and shall be null and void after the aforesaid date or earlier if the advance made to the Contractor is fully adjusted against payments from Interim Payment Certificates of the Contractor is fully adjusted against payments from Interim Payment Certificates of the Contractor provided that the Guarantor agrees that the aforesaid period of validity shall be deemed to be extended if on the above mentioned date the advance payment is not fully adjusted."

4. Whilst the Performance Bond was initially specified as remaining in force from 01.06.2015 to 30.11.2016, vide Endorsements dated 08.08.2017 and 09.08.2018 the period thereof was extended with the amount secured being reduced vide the first endorsement from Rs.80,938,821/- to Rs.63,734,647/-, with the second of these endorsements stipulating inter alia that:

> "Notwithstanding anything contained herein to the contrary, it is hereby declared agreed that the validity period of the withinmentioned Performance Bond is hereby extended with effect from 31-07-2018 to 30-07-2019 for Construction Period and with effect from 31-07-2019 to 30-07-2020 for Maintenance Period Rs. 63,734,647/= (rupees Sixty Three Millions seven hundred thirty four thousand six hundred forty seven only).
>
> Subject to known or reported loss/ litigation till date.
>
> All other terms and conditions of the abovementioned bond remain unaltered."
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> [Sic]

5. Similarly, an Endorsement dated 09.08.2018 issued by the Defendant No.4 in respect of the Mobilization Advance Bond provided as follows:

> "Notwithstanding anything contained herein to the contrary, it is hereby declared agreed that the validity period of the withinmentioned Mobilization Advance Bond is hereby extended with effect from 31-07-2018 to 30-07-2019 for the reduced amount From Rs.70,297,252/- by Rs.13,588,140/= to Rs.56,709,112/=
>
> Subject to known or reported loss/ litigation till date.
>
> All other terms and conditions of the abovementioned bond remain unaltered."
>
> [Sic]

6. Apparently, a dispute subsequently arose between the Plaintiff and Defendant No.1 as to (i) alleged delays in execution of works under the Contract, as well as (ii) the quality of the works undertaken, and following correspondence on the matter, the Contract then came to be terminated by the Defendant No.1 in terms of a letter dated 25.01.2019 (the "**Termination Notice**"), invoking Sections 92(a) and 84(a) thereof, thereby calling upon the Plaintiff to convey the factum of termination onwards to all sub-contractors and suppliers, stop all works and quit the project site, and to refund the unutilized Mobilization Advance amount quantified at Rs.54,592,656/- as well as liquidated damages in accordance with the terms of the Contract. Vide separate letters dated 25.01.2019 and 28.01.2019, addressed to the Defendant No.4, the Defendant No.1 also made calls for encashment in respect of the Performance Bond and the Mobilization Advance Bond respectively.

7. The operative parts of the aforementioned letters dated 25.01.2019 and 28.01.2019 addressed by the Defendant No.1 to the Defendant No.4 in relation to the Bonds proceed in the following terms:

> **The letter dated 25.01.2019 in respect of the Performance Bond:**
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> "We refer to the subject Bond executed by Adamjee Insurance Company in favour of Getz Pharma (Pvt.) Limited ("Employer"), guaranteeing to pay the Employer an amount of Rs.63,734,647 in the event Shan Associates ("Principal") fails or refuses to perform the works under "Package No. C-600-001 (Mechanical, HVAC & Plumbing Works, Astola Project ("Works") in accordance with the contract dated June 1st, 2015 ("Contract"). The relevant clause of the aforesaid bond is reproduced herein below for ease of your reference:
> …

We hereby notify you by declaring in writing that the principal has failed and committed default in performing his obligations under the Contract.

Therefore, we demand you to pay us Rs.63,734,647/- immediately as guaranteed under the bond without any reference to the principal and without any objection. Copy of the Bond along with extension is attached."

The letter dated 28.01.2019 in respect of the Mobilization Advance Bond:

"We refer to the subject Bond executed by Adamjee Insurance Company Ltd. ("Surety or Guarantor") in favour of Getz Pharma (Pvt) Limited ("Employer") on request of Shan Associates ("Contractor"), guaranteeing to pay the Employer the mobilization advance amount in the event Contractor commits default of any of its obligations under the Contract, for which the advance payment is made.

Per the Contract dated 1st June, 2015, signed between the Employer and the Contractor ("Contract"), the Employer paid an advance amount of Rs. 73,497,846/- to the Contractor an interim payments returnable on pro-rata basis upon performance of Works.

Through this demand letter, we declare that the Contractor has committed default in performing his obligations, which resulted into termination of Contract. Till date, the Employer has recovered only Rs. 18,905,190 from contractor's running bills out of total mobilization advance of Rs. 73,497,846/-.

We demand you to pay us the remaining Mobilization Advance amount of Rs. 54,592,656 immediately as guaranteed under the bond without any reference to the Principal and without any objection."

8. Being aggrieved, the Plaintiff has brought this suit, assailing the termination of the Contract and encashment of the Bonds, eliciting final relief in the following terms:

"A. Declare that the Termination Notice dated 25.01.2019 is void as the same has been issued in utter violation of the agreed terms and conditions of the Contract Agreement and the Defendant No.1 is not entitled for the termination of the contract unilaterally without adopting to the terms and conditions of the contract, further, the construction time is still available upto 30th July, 2019.

B. Declare that the demand of the Defendant No.1 to seek encashment of the Performance Bond and Mobilization Bond executed on 09.08.2018 for the construction period available upto 30.07.2019, is unlawful and the Defendant No.1 is not entitled to for the encashment of the same and Performance Bond is not liable to for encashment as the amount of the Receivables/pending running bills of the work done by the Plaintiff about are about Rs.267,974,804/-.

C. Direct the Defendant No.4 not to encash the Performance Bond till resolution of the dispute between the Plaintiff and the Defendants No.1 & 2.

D. Restrain the Defendants, their agents, employees and persons working under them from encashment of the Performance Bond and Mobilization Bond.

E. Mandatory Injunction cancelling the Termination Notice/Letter as the same is illegal, malafide and void being based upon fraud, misrepresentation, coercion and undue influence.

F. Permanent Injunction restraining the Defendants No.1 & 2 from denying the full access of the Plaintiff to their assets available at site.

G. Restrain the Defendant No.1 from the tendering the remaining work under the said contract, to any third party, unless the matter is settled.

H. Any other better or consequential relief that this Honourable Court may deem appropriate in the circumstances of the case.

G. Costs." [sic]

9. It is in this framework that separate applications have been filed, firstly under Order 39, Rules 1 and 2 CPC and secondly under Section 94(c) CPC, being CMA Nos. 1806/2019 and 1847/2019 (collectively the "**Injunction Applications**") in relation to the Performance Bond and Mobilization Advance Bond respectively, with interim Orders being made on 04.02.2019 and 06.02.2019 restraining encashment thereof.

10. Thereafter, an Application bearing CMA No.4702/2019 (the "**Stay Application**") has also been filed under Section 34 of the Arbitration Act, 1940, quite remarkably on behalf of the Plaintiff, seeking that the Suit be stayed in light of the provision for settlement of disputes set out in Clause 94 of the Contract. It is these three Applications that are being addressed, as follows herein below.

The Stay Application

11. In respect of the Stay Application learned counsel for the Plaintiff placed reliance on the judgments reported as *Pakistan State Oil Company Limited v. M/s. Jilani (PVT) Limited and another 2018 MLD 1770*, *Ch. Abdur Rauf v. Mrs. Zubeda Kaleem, Etc 2001 UC 6* and *Arbab Abdul Qadir v. Mst. Bibi Fatima NLR 1984 AC 399*, which dilate upon the general principle applicable in relation to the stay of proceedings under Section 34 of the Arbitration Act, 1940, in a suit between parties to an arbitration agreement, and sought to contend that the option to invoke Section 34 was equally applicable to a plaintiff in as much as the same envisaged "any party to such legal proceedings" making an application in that regard.

12. As none of the authorities cited on behalf of the Plaintiff deal with a matter such as the one at hand, where the application seeking that the proceedings be stayed emanates from the side of the Plaintiff, it would serve no useful purpose to unnecessarily burden this judgment by embarking on a discussion thereof. Suffice it to say that for appreciating the scope and mandate of Section 34 in the context of the dispute for purposes of the Stay Application, a plain reading thereof is sufficient, the section providing as follows:-

> **S. 34. Power to stay legal proceedings where there is an arbitration agreement**. -Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority, may make an order staying the proceedings.

13. What immediately stands out from an examination of Section 34, is that the term "any party to such legal proceedings", as emphasized by learned counsel for the Plaintiff, is followed by the qualification "at any time before filing a written statement or taking any other steps in proceedings". Needless to say, only a defendant to a suit would file a written statement, *a priori* it is apparent that Section 34, when read as a whole and in its proper context, does not cater to an application from the side of a plaintiff.

14. Furthermore, as pointed out by learned counsel or the Defendant No.1, the scheme of the relevant clause of the Contract providing for Dispute Resolution is not such as even otherwise admits to an immediate referral of the matter to arbitration, as the same envisages a determination by the Engineer prior to arbitral proceedings being necessitated and commenced.

15. Accordingly, it is apparent that the Stay Application is misconceived, hence is dismissed accordingly.

The Injunction Applications

16. Turning then to the Injunction Applications, so as to facilitate appreciation of the dispute in its proper perspective, within the framework of the Contract, it is pertinent to note that, Clause 92(a) and 84(a) thereof, as invoked for purpose of termination, read as follows:

> **92. Termination of Employer**
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> a). If the Contractor shall commit breach or fail to perform or fulfill conditions of contract relating to quality, design, progress, time of performance of the work or any part thereof or if without reasonable cause suspend the execution or performance of the works or substantial or material part thereof, before completion or if he fails to proceed with the work with reasonable diligence, speed and progress or if he refuses or neglects to comply with notice in writing from the Engineer requiring him to remove defective work or improper materials and or requiring him to take appropriate measures to the satisfaction of the Engineer to expedite the progress of work, and if the Contractor shall continue such above breach or failure for fourteen (14) days after a notice by Registered Post specifying the same has been given to him by the Employer, the Employer may, without prejudice to his other rights or remedies, by further written notice by Registered Post terminate the employment of the Contractor under the Contract.
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> **84. Employer's Right**
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> Employer shall have power to adopt any of the following courses as they may deem best suited to the interest of Employer:
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> a. To terminate the Contract (to which termination, 14 (fourteen) days' notice in writing to the Contractor under the hand of Employer shall be conclusive evidence) and in which case the Security Retention of the Contractor shall stand forfeited, and be absolutely at the disposal of Employer.

17. Pressing his case for interim relief, learned counsel for the Plaintiff contended that (a) the Performance Bond was security for payment of liquidated damages, which could not be granted without evidence, (b) that the terms of the Bonds were vague and ambiguous, requiring evidence for purpose of proper interpretation so that the intention of the parties could be correctly discerned, (c) that the Bonds were a conditional security, therefore evidence was required to be recorded prior to encashment, (d) that as the Bonds were insurance guarantees, the principle of encashment applicable to a bank guarantee would not apply, and (e) that no breach of the Contract had occurred on part of the Plaintiff as the delays were attributable to the Defendant No.1, hence termination of the Contract and encashment of the Bonds was unwarranted.

18. Expounding on such contentions, it was submitted that there had been no breach on the part of the Plaintiff and a significant portion of the contract had already been performed by the Plaintiff, with substantial sums having fallen due and remaining payable on account of the works carried out to date. It was contended that at the time of extension of the Bonds vide the Endorsements, the same were made conditional by inclusion of the term '*Subject to known or reported loss/litigation till date*'. It was averred that the inclusion of such term made the Bonds conditional as encashment could not then be sought on account of losses that had materialized prior to extension, meaning that if a contractual term has not been complied with or it has been breached prior to the extension then the performance security could not be invoked. It was submitted that the term 'loss' as mentioned in the said extension of security, is to be construed in a broader context so as to entail loss of time or loss by way of any breach that may have been committed by any party.

19. Reliance was also placed on SRO No. 696(1)/2018 dated 01.06.2018 issued by the Securities Exchange Commission of Pakistan in exercise of powers conferred under the Insurance ordinance, 2000, containing an 'Explanation' stating as follows:

> 'Explanation: The guarantee/bonds issued under this rule shall not be construed as bank guarantees issued by commercial banks and such guarantees/bonds shall be claimable in accordance with the terms and conditions provided in the contract of guarantee; The insurer shall clearly state such disclaimer on the contract of guarantee while issuing guarantees/bonds'.

It was submitted that in view of the Explanation, the principles of encashment applicable to bank guarantees would not apply.

20. Reliance was also placed on the judgment of a learned Division Bench of this Court reported as Pakistan Engineering Consultants vs. Pakistan International Airline Corporation & others 1993 CLC 1926, where whilst holding that no order could be passed restraining the encashment of a Mobilization Advance Bond, the encashment of a Performance Bond had been restrained on the basis that it would not be just and proper to allow its encashment as the same was dependent on the commission of default. It was pointed out that such judgment had been upheld in appeal before the Honourable Supreme Court in terms of its decision reported earlier in time as Pakistan Engineering Consultants vs. Pakistan International Airline Corporation & others 1989 SCMR 379. Reliance was also placed on single-bench Judgments of this Hon'ble Court where the encashment of this Court in the cases reported as *Crescent Steel & allied products limited vs. Messrs Sui*

Northern Gas pipe line Limited and another 2013 CLD 1110; Messers Zeenat brother (Pvt) Limited vs. Aiewan-e-Iqbal Authority through Chairman, Aiwan Iqbal Complex Lahore & 3 others PLD 1996 Karachi 183; and *Messer Jamia Industries Limited vs. Messers Pakistan Refinery Limited, Karachi PLD 1976 Karachi 644*.

21. Conversely, it was submitted by learned counsel for the Defendant No.1 that the termination of the Contract had ensued for good cause, as various works were not completed on the agreed completion date as a result of which the completion of the entire project had been impeded. Attention was invited to a Letter dated 28.09.2018, whereby the Plaintiff has himself acknowledged that certain works had been inordinately delayed, as well as to an Interim Payment Certificate dated 17.01.2019, which has been duly acknowledged and received by the Plaintiff, reflecting that only 21.53% of the total works had been completed as on the date thereof. It was submitted that even if the 10th and 11th Running Bills submitted by the Plaintiff, as were currently under process of verification, were factored in, in the context of the Contract Price it was apparent that less than 24% of the work required under the Contract had been carried out by the Plaintiff, despite the lapse of almost four years.

22. It was submitted that it is a well settled position in that the performance of a bond/guarantee stands on a footing similar to an irrevocable letter of credit and it is not concerned in the least with the issue as to whether the supplier of such bond/guarantee has performed his contracted obligation or not, nor with the question whether the supplier is in default or not and the issuer of such a bond/guarantee must make payment thereunder upon a demand being made in accordance with its terms,

if so stipulated, without proof or conditions, and encashment cannot be interfered with irrespective of the existence of a dispute nor could an injunction restraining payment be granted on such a ground. It was submitted that the plea advanced on behalf of the Plaintiff that encashment of the Bonds ought to be restrained in view of the alleged existence of a dispute and the plea for the referral thereof to arbitration was thus misconceived and untenable.

23. It was emphasised that the amount of Mobilization advance which was guaranteed through the Mobilization Advance Bond was the Defendant No.1's money which had been advanced/loaned to the Plaintiff so that he could perform his obligations under the contract without any financial constraints and now this money of the Defendant No.1 had been wrongly retained by the Plaintiff despite the termination of the Contract.

24. It was argued that a restraint could not be imposed in relation to the encashment except in cases of fraud or in light of special equities. Reliance was placed on the judgments of the Honourable Supreme Court in the case reported as Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd. PLD 2003 SC 191 and Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 Supreme Court 311.

25. It was pointed out that in the instant case, the Plaintiff had not even alleged fraud and as far as special equities is concerned, it was submitted that there were none operating in favour of the Plaintiff.

26. It was submitted further that the principles laid down by the Courts in relation to Performance Bonds and Mobilization Advance Bonds issued by banks were equally applicable to such bonds when issued by insurance companies, reliance being placed on the judgment of a learned single judge of the Islamabad High Court in the case reported as Montage Design Build v. The Republic of Tajikistan & 2 others', 2015 CLD 8. On this very point, it was stated that the reference on behalf of the Plaintiff to SRO No.696(I)/2018 dated 01.08.2018, issued under the Insurance Ordinance, 2000 so as to contend that the explanation to para 3 (1) served to demonstrate that insurance guarantee and bonds were on different footing from such guarantee and bonds issued by banks was entirely misconceived. It was submitted that such an interpretation of the Explanation to para 3 (1) was patently incorrect as the explanation itself clarified that such guarantee and bonds issued by Insurance Companies 'shall be claimable in accordance with the terms and conditions provided in the contract of guarantee'.

27. With reference to the Judgments cited on behalf of the Plaintiff, it was submitted that the same were either irrelevant or distinguishable. In this regard, it was pointed out that

    (a) The judgment reported at PLD 2003 SC 215 was not relevant as the dispute in that case was regarding the period of the validity of the bank guarantee, which was not at issue in the matter at hand.

    (b) The case reported at PLD 1969 SC 80 did not pertain to the question of restraining orders against the encashment of a Performance Bond or Mobilization Advance Bond.

(c) With reference to the case reported at 1993 CLC 1926, it was submitted that it was not clear from that judgment whether the terms of the instrument under consideration in that case were conditional and whether the instrument itself contemplated that its encashment would only take place on the condition of default. It was submitted that the judgment could not be relied upon for the proposition that performance bonds cannot be encashed unless there is default because such a proposition ran contrary to the judgments of the Supreme Court in the cases of Shipyard K. Damen (supra) and National Construction (supra). Furthermore, it was pointed out that whilst such judgment had indeed been upheld by the Honourable Supreme Court, the judgment of the Apex Court reported at 1989 SCMR 379 hinged on the point that interim orders and the discretion exercised by a High Court is not ordinarily to be interfered with unless such exercise is found to be arbitrary, and could not be regarded as a precedent that a performance bond cannot be encashed without proven default.

28. In the wake of the arguments advanced on behalf of the main contesting parties, learned Counsel for Defendant No.4 merely stated that the Defendant No.4 had no personal interest in the matter, and would act in accordance with such Orders as may finally be made on the Injunction Applications.

29. Having considered the submissions advanced at the bar, it merits consideration at the outset that the contention raised on behalf of the Plaintiff as to the terms of the Bonds being vague and ambiguous appears patently

misconceived, as the wording thereof is explicit and unconditional. The mere use of the term *Subject to known or reported loss/litigation till date*' in the respective Endorsements does not, in my view, serve to impose any conditionality but merely signifies that the reduction in liability would not impair any prior loss as may have been reported or be subject to litigation.

30. The seminal authority from our jurisprudence defining the parameters for interference by a Court in relation to the encashment of a performance guarantee is the decision of the Honourable Supreme Court in the case of Shipyard K. Damen (Supra), where various precedents on the subject of guarantees were examined by the Apex Court, including various judgments of the Supreme Court of India as well the decisions of the English Courts in the cases of *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146 and *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, from which the following principles were distilled:

> "(i) The performance of guarantee stands on the footing similar to an irrevocable letter of credit of Bank, which gives performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier has performed his contracted obligation or not, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee all demand if so stipulated without proof or conditions. Only exception is when there is a clear fraud of which Bank has notice.
>
> (i) There is an absolute obligation upon the banker to comply with the terms and conditions as enumerated in the guarantee and to pay the amount stipulated therein irrespective of any disputes there may be between buyer and seller as to whether goods are up to contract or not.

(ii) The bank guarantee should be enforced on its own terms and realization against the bank guarantee would not affect or prejudice the case of contractor, if ultimately the dispute is referred to arbitration for the reason, once the terms and conditions of the guarantee were fulfilled, the bank's liability under the guarantee was absolute and it was wholly independent of the dispute proposed to be raised.

(iii) The contract of bank guarantee is an independent contract between the bank and the party concerned and is to be worked out independently of the dispute arising out of the work agreement between the parties concerned to such work agreement and, therefore, the extent of the dispute and claims or counter-claims were matters extraneous to the consideration of the question of enforcement of the bank and were to be investigated by the arbitrator.

(iv) Where the bank had undertaken to pay the stipulated sum to respondent, at any time, without demur, reservation, recourse, contest or protest, and without any reference to the contractor, no interim injunction restraining payment under the guarantee could be granted.

(v) The Bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

(vi) When once bank guarantee is discharged, the obligation of the bank ends and there is no question of going behind such discharge bank guarantee. Courts should refrain from probing into the nature of the transactions between the bank and customer, which led to the furnishing of the bank guarantee.

(vii) In the absence of any special equities and the absence of any clear fraud, the bank must pay on demand, if so stipulated and whether the terms are such must be have to found out from the performance guarantee as such.

(viii) The unqualified terms of guarantee could not be interfered with by Courts irrespective of the existence of dispute."

31. As can be discerned, from the standpoint of the present case, the starting position is that the bank or insurance guarantee is independent of the contract between the parties giving rise to its issuance. This follows what is known as the 'autonomy principle', which recognises the autonomy of the issuer institution to 'unconditionally' respond to a compliant call on an unconditional guarantee in fulfilment of its promise to pay, and in the absence of the 'fraud exception', is neither obliged nor entitled to consider the contract between the parties.

32. The parameters for application of the 'fraud exception in interlocutory proceedings in respect of performance bonds and guarantees was considered by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2015] 1 WLR 697, on appeal from the Supreme Court of Mauritius, and came to be distinguished from ordinarily applicable test formulated by the House of Lords in the case of *American Cyanamid Co v Ethicon Ltd [1975] AC 396*. In the context of performance bonds and guarantees, the relevant test was then succinctly set out by the Privy Council in the following terms:

> "in interlocutory proceedings the correct test for application of the fraud exception to the strict general rule that the court would not intervene to prevent a banker from making payment under a letter of credit following a compliant presentation of documents was whether it was seriously arguable that on the material available the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and that the bank was aware of such fraud."

33. Ergo, once a call had been made, as in the instant case, the Court cannot then grant injunctive relief against the beneficiary as the right to payment under the instrument already stands crystallised when the call is made.

34. So far as injunctive relief against the issuer is concerned, in such situations, an injunction could be granted in theory only if the fraud exception were satisfied.

35. Even then, merely establishing fraud is not always enough, and the balance of convenience – the harm to the beneficiary in preventing the bank from paying, weighed against the harm to the applicant in allowing the bank to pay – must justify restraining payment. The case of *Tetronics (International) Limited v. HSBC Bank Plc, BlueOak Arkansas LLC* [2018] EWHC 201 (TCC) provides an illustration of the "very considerable difficulty" facing any applicant seeking an injunction to prevent payment to a beneficiary, even where the beneficiary's fraud is established, with the court in that case holding that whilst the applicant (Tetronics) had met the onerous pre-trial evidential test for the fraud exception, even so, the balance of convenience ultimately favoured permitting payment to the beneficiary.

36. In the present case, one does not have to go so far, as no plea has been raised as to fraud underpinning the calls for encashment of the Bonds or indeed that such calls are not within the validity of the Bonds or otherwise not in consonance with the terms thereof. Indeed, the plaintiff has quite evidently entered into the Contract as a commercial arrangement at arm's length, with no plea of duress, whether economic or otherwise, having been raised, and from the face of the Injunction Applications it is apparent that the case of the Plaintiff is that (i) that no breach of the Contract had occurred on part of the Plaintiff as the delays were attributable to the Defendant No.1 and further time for construction was envisaged under the Contract up to 30th July, 2019, and running

bills submitted by the Plaintiff for works carried out remain pending for settlement, hence the Defendant No.1 is not entitled for encashment of the Bonds, and (ii) the Defendant No.1 has terminated the contract and approached the Defendant No.4 for encashment the Bonds without adhering to the course available for amicable settlement under Clause 94 of the Contract.

37. In this regard, it is pertinent to note that the judgment of the Honourable Supreme Court in the case of *Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 Supreme Court 311* as well as that of the Supreme Court of India in the case of *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another* (decided on July 9, 1969), as referred to in Shipyard K. Damen (Supra), squarely address and answer this aspect of the case set up by the Plaintiff.

38. In the case of *Messrs National Construction (supra)*, it was held by the Apex Court as follows:

> In the instant case, therefore, the bank guarantees furnished by the appellants contain categorical undertaking and impose absolute obligations on the banks to pay the amount, irrespective of any dispute which may arise between the parties regarding the breach of contract. In our view the Courts must given effect to the covenants of the bank guarantees, the performance guarantees, for the smooth performance of the contracts. Those guarantees are independent contracts and the bank authorities must construe them, independent of the primary contracts. They should encash them notwithstanding any dispute arising out of the original contract between the parties. In the instant case, therefore, the encashment of the bank guarantees cannot be postponed pending decision of the arbitration proceedings, which may take years to conclude.

39. Additionally, in *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another 1996 SCC (1) 735*, as referred to in the case Shipyard K. Damen (Supra), it was observed that:--

> "At this juncture it seems necessary to analysis the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contract is not barred and the cause of action for the same is independent of enforcement of the guarantee."

40. As to the contention that the Performance Bond was security for payment of liquidated damages, which could not be granted without evidence, it merits consideration that in *Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and another 1996 SCC (5) 34*, as similarly referred to in Shipyard K. Damen (Supra), it was concluded that:--

> "The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that on India only reasonable amount ca be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantees making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till and adjudication in that behalf is made either by a court on an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantees is a independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the

primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus called to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank gurantee."

...

"We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that' is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and. the relief for injunction was sought by the contractor/Respondent No.1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case

justifying interference by restraining the appellant from enforcing the bank guarantees."

41. In *Cargill International v Bangladesh Sugar and Food Industries Corporation [1996] 2 LLR 524*, Morison J said, when considering an application for an injunction to restrain a call on a bond;

> "However, it seems to me to be implicit in the nature of a bond, and in the approach of the Court to injunction applications, that, in the absence of some clear words to a different effect, when the bond is called, there will, at some stage in the future, be an "accounting" between the parties in the sense that their rights and obligations will be finally determined at some future date. The bond is not intended to represent an estimate of the amount of damages to which the beneficiary may be entitled for the breach alleged to give rise to the right to call."

42. As to the plea that the principle laid down in relation to bank guarantees would not apply to the Bonds in the instant case as the same were issued by an insurance company, no compelling rationale was put forward in support of such proposition. On the other hand, in the case of *Montage Design Build v. The Republic of Tajikistan & 2 others' 2015 CLD 8*, as cited on behalf of the Defendant No.1, it was observed by a learned single Judge of the Islamabad High Court as follows:

> "8. Before proceeding further, it is necessary to discuss the nature of a Mobilization Advance Guarantee, and the distinction between a conditional and unconditional guarantee. In construction or service contacts, the advance paid is known as 'Mobilization Advance'. Normally, as a pre-condition for the release of the advance to the contractor, the latter is required to furnish a guarantee, either from a Bank or an Insurance company. There are, therefore, two separate distinct agreements/contracts, the underlying agreement and the Bank or Insurance Guarantee. On completion of the agreed work the Guarantee is released, or may be enforced if a default is committed. Depending on the intention of the

parties, a Bank or Insurance guarantee may be either 'conditional' or 'unconditional'. A conditional Guarantee can only be invoked on fulfillment of the condition(s) stipulated therein e.g. proof of a breach or default. On the other hand, in case of an 'unconditional' guarantee, the guarantor i.e. the Bank or an Insurance Company is under an obligation to honour its commitment by making the payment on demand, regardless of a dispute between the parties arising out of or connected with the underlying agreement/contract."

"10. The Mobilization Guarantee is an independent contract, and the terms and conditions stipulated therein determine its nature and the consequent effect. Like any other contract, a Guarantee comes into existence as a legally binding agreement between two or more willing parties. It, therefore, has to be read and interpreted independent of any other agreement, or the underlying agreement pursuant to which it has been furnished."

"23. It is, therefore, obvious that a Bank or Insurance Guarantee is an independent contract and its autonomy is to be protected. As a rule courts do not interfere with the autonomy of an unconditional and irrevocable guarantee, except in certain exceptional circumstances. The two exceptional circumstances are, fraud and irretrievable injustice or injury. It is not sufficient to raise or allege the plea of fraud, rather a prima facie case has to be made out to demonstrate an established fraud, both of the fact of fraud and the knowledge of the Bank or Insurance Company. The scope of 'irretrievable injury or injustice' is narrow and limited. The basic test is that the Court has to be satisfied that the plaintiff will have no adequate remedy if the injunction is refused. It is settled law that in money matters there can be no irreparable loss or injury, because a decree is executable. In Order to satisfy the test for the granting of an injunction, restraining the encashment of an irrevocable and unconditional guarantee, the question ought to be answered is, whether a money decree passed by a competent court would be executable? If the answer is in the affirmative, a case for granting an injunction will not be made out, as it would not amount to irrevocable injury or injustice. Another example given in this regard is when an irrevocable and unconditional guarantee is furnished, while the primary or underlying contract has never come into existence. Such a case is illustrated by the facts in 'Kirloskar Pneumatice Company ltd. v. National Thermal Power Corporation ltd, and another", AIR 1987 Bombay 308. The irretrievable injury or injustice, therefore, must be of the type illustrated in the Itek Corporation case, as discussed above, the plea must be genuine and immediate and not speculative. 'A mere apprehension that the other party will not be

> able to pay is not enough'. There must be certainty and the impossibility to recover be 'decisively established'. Moreover, relying on the principle that a guarantee is independent and its autonomy ought to be protected, a court will not be influenced by the dispute arising out of the primary or underlying agreement, and whether or not in the suit a prima facie case is made out. The rule, as discussed above, has inevitably been laid down to ensure certainty of binding contractual commitments, keeping the sanctity and autonomy of a guarantee as a paramount consideration, so as to ensure confidence in the commercial and mercantile spheres. It may, therefore, be summed up that Courts are slow and show restraint in interfering in the encashment of an unconditional guarantee, except in very exceptional cases as highlighted above."

43. As can be seen from the aforementioned precedent, there is no distinction to drawn in the matter merely because the Bonds have been issued by an insurance company rather than a bank.

44. Under the given facts and circumstances, no prima facie case for an injunction restraining encashment of the Bonds stands made out, hence the Injunction Applications stand dismissed.

JUDGE

Karachi
Dated _____