

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 879 of 2022

Order with signature of Judge(s)

1. For orders on CMA No.9311/2022 (Urgent Application)
2. For orders on CMA No.9312/2022 (U/O XXXIX rules 1 and 2)
3. For orders on CMA No.9313/2022 (U/O XXVIII rule 18 r/w order XXVI rule 9 r/w 151 CPC)

09.06.2022

Mr. Obaid-ur-Rehman Khan, Advocate for the plaintiff

1. Urgency granted.

2&3. Learned counsel for the plaintiff submits that the plaintiff was awarded Contract dated 26.06.2019 in respect of Infrastructure Up-gradation of Karachi Shipyard and Engineering works, Package-I: Repair/Replacement of Workshop Steel Roof Trusses, which contract is available at page 73, showing that FIDIC terms were applicable to the parties, which per learned counsel, under clause 2.6 required an independent and impartial Engineer to be appointed to oversee the work. Per learned counsel, the scope of the work and BOQ are available at pages 313 and 391, the duration of the Contract was 12 months and per learned counsel, while the plaintiff was busy in executing the work in accordance with BOQ, certain differences arose between the parties that resulted in the plaintiff issuing letter dated April 29, 2022 to the defendant Nos.2 and 3. Calling upon the latter as a Notice under FIDIC clause 67.1, which per learned counsel, is available in the FIDIC terms at page 267 requires Engineer's decision to be rendered in no later than eighty-four days. As the plaintiff was still mobilized at the site, where his material and labour were available and the work was substantially having been performed, instead of proceeding with the FIDIC conditions of contract, the defendant No.2 chose to issue a letter dated 02.05.2022 (page 579) directing the plaintiff to move forward to Arbitration under

clause 64.1 and in the interim also directed him to assist the third party contractor to complete the remaining work.

Learned counsel states that in these unwarranted circumstances the plaintiff reached the defendant No.2 through letter dated 20.05.2022, which resulted in the defendant attempting to encash bank guarantees of the plaintiff maintained with HBL (available at page 767 and 769), that led the plaintiff to file Suit No.-956 of 2022, where this Court through Order dated 27.05.2022 restrained the defendant from taking any payments from the bank guarantee.

Per learned counsel, the cause of action in the case at hand accrued when the defendant chose to engage defendant No.4 to do the remaining work, while at the same time having appointed defendant No.7 to survey the work performed by the plaintiff at the site and for making inventories of available material. Learned counsel states that in principle he has no objection in respect of this exercise, however by showing this Court page Nos. 867 and 871, states that *in fact* the Managing partner of M/s. Gravity Works has been Director Quality Assurance of the defendant No.7, not only so, she is also related with directors of defendant No.7, learned counsel states that he has serious doubts that the defendant No.7 having been engaged for the assessment of the work performed by the plaintiff, would be able to issue an unbiased report. Counsel contends that that termination of plaintiff's work through letter (page 812) is in violation of the FIDIC terms, where a final report had to be furnished by the independent Engineer under clause 67.1 afresh. Not only so, by engaging the new contractor in league with a surveyor that may have conflicting interests, plaintiff does not expects a fair treatment. A request is made for the appointment of an independent surveyor being member of the Pakistan Engineering Council of reputable quality i.e. M/s. Mushtaq & Bilal, SMK Associates or Nasir Ali Ashrafi Associates through the Nazir of this Court. Ordered accordingly.

Let this exercise be completed within 15 days with the assistance of the Nazir of this Court at the cost of Rs.50,000/- other than the fee payable to the independent evaluator/surveyor.

Issue notice to the defendants for **28.06.2022**. In the meanwhile, Nazir is directed to liaise with the above indicated firms to inspect and survey the project site and ascertain the amount of leftover material thereon and the quantity of the work having been performed or undertaken by the plaintiff or is in progress, and to ascertain the value of the same as per the terms of the agreement and BOQ and submit report before the next date of hearing. In the meanwhile, defendant No.4 is restrained from entering into the project site that may lead to disturbing the plaintiff, its employees, agents, contractors or sub-contractors do the work mandated to it in the next fifteen days till the above evaluation exercise is being completed.

JUDGE

B-K Soomro