

THE HIGH COURT OF SINDH, KARACHI

Present:

Chief Justice Mr. Ahmed Ali M. Shaikh,
Justice Adnan Iqbal Chaudhry.

High Court Appeal No. 28 of 2021

[SPEC ENGERGY DMCC versus Pakistan Petroleum Limited & another]

- Appellant : SPEC ENERGY DMCC through M/s. Arshad M. Tayebaly, Omer Memon and Talha Javed, Advocates.
- Respondent 1 : Pakistan Petroleum Limited through M/s. Makhdoom Ali Khan, Ali Almani, Ghulam Hussain Shah & Sami-ur-Rehman, Advocates along with Ms. Shanza Baig, Head Legal, Azam Shahani, and Sayyed Tauqeer Hussain, Law Officers, PPL.
- Respondent 2 : Nemo.

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- Respondent 2 : Nemo.
- Date of hearing : 17-08-2023

JUDGMENT

Adnan Iqbal Chaudhry J. - These High Court Appeals are from a common order dated 15-02-2021 passed by a learned Single Judge of

this Court dismissing miscellaneous applications of the Appellant in Suit No. 321/2020 and Suit No. 914/2020, and allowing the miscellaneous application of the Respondent No.1 in Suit No. 914/2020. Suit No. 321/2020 was by the Respondent No.1, Pakistan Petroleum Ltd. [PPL], whereas Suit No. 914/2020 was by the Appellant, SPEC Energy DMCC [SPEC], a company incorporated in the UAE.

2. The facts are that PPL had discovered a natural gas reserve at Gambat, District Sanghar, Sindh, and thus floated a tender for “*Works Contract for Gas Processing Facility (GPF-III) at Gambat South Block, on Engineering, Procurement, Construction and Commissioning (EPCC) Basis*” [the project]. Such contract, dated 09-05-2016 [the Contract], was awarded to SPEC on lowest bid. The land of the project was on lease to PPL.

3. As per the Contract, the project was to be completed in 18 months i.e. by 05-10-2017. Per PPL, time was of the essence. The project was not complete even by the time the aforesaid suits were filed in 2020 although SPEC avers that it had completed 80% of the project, which fact is disputed by PPL. Both sides of course fault each other for the delay.

4. The Contract contains an arbitration clause. Part of the dispute between the parties early on relating to change-claims was taken to arbitration by SPEC. While that arbitration was pending, and prior to the subject suits, there were five suits and two J.M.s that were filed by SPEC against PPL, and three suits and two HCAs filed by PPL against SPEC, some still pending, all emanating from disputes under the Contract. In the meantime, PPL encashed some of the bank guarantees furnished by SPEC.

5. On 04-02-2019, a meeting took place between the parties in an attempt to find a way forward. The minutes of that meeting [MoM] recorded *inter alia* that the parties will invite tenders from mutually

agreed firms of international repute for conducting a technical audit of the project, the intent being to assess and quantify the works carried out by SPEC. Thereafter, it appears that further differences arose between the parties and the agreement in the MoM broke down.

6. Eventually, by letter dated 10-05-2019, PPL invoked the termination clause of the Contract. Thereon, a dispute arose between the parties over possession of the site, with PPL alleging that SPEC was trying to remove equipment from the site which had been paid for by PPL. On 13-05-2019, SPEC filed Suit No. 891/2019 to challenge the termination of the Contract and for an injunction to restrain PPL from dispossessing SPEC from the site. By an ad-interim order dated 13-05-2019, PPL was restrained from taking over the site from SPEC and was directed to maintain *status-quo* to that extent. PPL contended that by that time it was already in possession and control of the site. (That interim order was subsequently recalled on 17-05-2022 in deference to the interim order to the same effect passed in these appeals.)

7. PPL then filed Suit No. 321/2020. It was averred that since SPEC was not willing to a joint verification of the works carried out thus far, PPL had gone ahead and engaged an independent engineering firm for such purpose who had prepared a report dated 10-10-2019; that to complete the project post termination of the Contract, PPL had invited quotations from other vendors/contractors for supply and installation of necessary equipment [**the RFQ**]; but that SPEC was creating hindrances at the site thereby adding to PPL's losses; hence the suit for a permanent injunction against SPEC.

8. The two miscellaneous applications in Suit No. 321/2020 that have been decided by the impugned order were as follows. By CMA No. 5148/2020, PPL prayed for a temporary injunction to restrain SPEC from interfering with completion works at the site which were being carried out by PPL itself. PPL submitted that it had already

placed orders with vendors with letters of credit for the required equipment, and had also awarded a contract dated 21-04-2020 for constructing a boundary wall around the site. On this application, and as a preliminary measure, the Court passed an order on 10-07-2020 appointing the Official Assignee as commissioner to inspect the site, and with the assistance of an independent engineering firm, to assess the works done by SPEC and prepare an inventory of its equipment thereat. The other application was CMA No. 6116/2020, moved by SPEC on 30.07.2020, praying that the inspection may also include SPEC's factory at Dubai where it had made ready substantial equipment for the project awaiting transportation to Pakistan, and thus inspection only of the project site would not reveal the entire works undertaken by SPEC.

9. On or about 05-08-2020, SPEC filed Suit No. 914/2020 essentially for specific performance of the Contract and of the terms of the MoM dated 04-02-2019. It was averred that the project had been delayed by PPL itself acting with *malafides*; that it was PPL who committed breach of contract by withholding payments for works already accomplished; that SPEC had nonetheless carried out substantial works and will complete the project if PPL adheres to the Contract and the MoM; and that the equipment being purchased by PPL under the RFQ was a squandering of the exchequer as that equipment was ready with SPEC at Dubai.

10. The two miscellaneous applications in Suit No. 914/2020 that have been decided by the impugned order were as follows. By CMA No. 6224/2020, SPEC prayed *inter alia* for a temporary injunction to restrain PPL from awarding any contract in respect of the project to any third-party. By CMA No. 6225/2020, SPEC prayed for an order to the Official Assignee to conduct a technical audit of the project through an international engineering firm as agreed under the MoM dated 04-02-2019.

11. As mentioned at the outset, the learned Single Judge dismissed all three applications moved by SPEC and allowed PPL's application to restrain SPEC from interfering with completion works at the site.

12. The thrust of the submissions of Mr. Omer Memon, learned counsel for SPEC was on the specific performance of the MoM dated 04-02-2019, in particular on the appointment of an engineering firm of international repute to conduct a technical audit of the project. He submitted that after said MoM the termination of the Contract by PPL was *malafide*; that a technical audit of the project including the equipment lying at SPEC's factory at Dubai was crucial for a decision on the dispute, failing which there would be no point to arbitration. He submitted that in passing the impugned order the learned Single Judge ignored the fact that Suit No. 891/2019 by SPEC against the termination of the Contract was pending, and in the meanwhile SPEC's possession of the site was protected by an interim order dated 13-05-2019 passed therein.

13. Mr. Makhdoom Ali Khan, learned counsel for PPL of course supported the impugned order. He pointed out that a technical audit of the project had already been carried out by NESPAK under the supervision of the Official Assignee pursuant to orders passed in the suit; that SPEC's prayer for inspection of alleged equipment lying at Dubai had no merit when there was no way to determine if that equipment, if any, was intended for the project; and that the interim order dated 13-05-2019 passed in Suit No. 891/2019 was subsequently recalled vide order dated 17-05-2022. He submitted that the fact of the matter remains that the Contract stands terminated; that PPL has commenced works to complete the project itself; that the Contract was not specifically enforceable under sections 12 and 21 of the Specific Relief Act; that SPEC's remedy was at best damages; and that in such circumstances no temporary injunction could follow to restrain PPL from completing the project.

14. Heard learned counsel and perused the record.

15. Having deciphered the facts as above, we advert first to CMA No. 6224/2020 in Suit No. 914/2020, moved by SPEC to restrain PPL from awarding any contract in respect of the project to any third-party, such relief having been sought to advance a suit for specific performance of the Contract awarded to SPEC for that project. In our view, that was the primary application before the learned Single Judge, for if we conclude that such application could not be granted towards specific performance of the Contract, then the MoM to further that Contract becomes insignificant, and the decision given on the other CMAs become consequential.

16. CMA No. 6224/2020 (in Suit No. 914/2020) was filed by SPEC on or about 05-08-2020, much after the termination of the Contract on 10-05-2019, and by which time the PPL had already engaged other vendors for supplying equipment necessary for completing the project itself. *Prima facie*, clause 3.21 of the Contract enabled PPL to terminate the same in the event SPEC did not complete the project within the time stipulated; and *prima facie* clause 3.7.16 of the Contract then entitled PPL to complete the project itself or through another contractor. Therefore, to begin with, the delay of 8 months or so by SPEC in seeking specific performance of the Contract did not help its case.

17. In declining the temporary injunction to SPEC, the learned Single Judge has essentially held that even if it was PPL who had committed breach, damage to SPEC, if any, could be adequately relieved by compensation in money; therefore, in terms of sections 12 and 21(a) of the Specific Relief Act, 1877, the Contract was not specifically enforceable; and consequently, an injunction was barred by section 56(f) of said Act.

18. Thus, the central question for determination in these appeals is whether the subject Contract was specifically enforceable by SPEC in terms of sections 12 and 21 of the Specific Relief Act, 1877, i.e. without

prejudice to the relief instead for compensation/damages for breach of contract allegedly committed by PPL.

19. Section 12 of the Specific Relief Act, 1877 describes contracts of which specific performance may, in the discretion of the Court, be enforced except as otherwise provided. These are contracts where the performance is of a trust [clause (a)]; where there exists no standard for ascertaining the actual damage caused by non-performance [clause (b)]; when pecuniary compensation for non-performance would not afford adequate relief [clause (c)]; or, when it is probable that pecuniary compensation cannot be got for non-performance [clause (d)]. SPEC's case does not involve clause (a) and (d).

20. The Explanation clause to section 12 of the Specific Relief Act then states that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved. On that Explanation clause there was a debate before the Single Judge as to whether the subject Contract could also be treated as a contract for sale of goods. Given the nature of the Contract (*infra*) we do not see the need for that discussion. Clearly the Explanation clause does not deal with all types of contracts, but only raises a presumption with regards to two types of contracts *viz.* for transfer of immovable property and for transfer of movable property. Therefore, in our view, where a contract cannot be categorized as either, the only effect is that said presumption cannot be made by the Court, and it is then for the plaintiff to demonstrate that the contract sought to be specifically enforced is one where pecuniary compensation for non-performance would not afford adequate relief.

21. As per the Contract, it was "*for design engineering, procurement (supply), construction, installation/erection, pre-commissioning, commissioning and startup (including successful commissioning) and performance testing, reliable guarantee testing (RGT) and remedying defects*

including replacement of parts and equipment where required during defect liability period of the project". Admittedly, it was not a contract to transfer immovable property, nor was it simply a contract to transfer movable property or sell goods. It was a contract to design and build, and hence titled by the parties as a 'Works Contract'.

22. The Contract had specified and fixed the price payable to SPEC for performing the works. Stages of payments to SPEC were pinned to milestones which too were identified in the Contract. Therefore, it was not a case where no standard existed for ascertaining the actual damage caused to SPEC by its non-performance so as to attract section 12(b) of the Specific Relief Act. As noted above, SPEC was to design and build a gas processing facility for PPL. The Contract did not award any concession to SPEC so as to raise any issue of operating profits for SPEC. Therefore, it could also not be said that pecuniary compensation for its non-performance would not afford adequate relief so as to attract section 12(c) of the Specific Relief Act. No special circumstances were pleaded by SPEC to demonstrate otherwise. As a consequence, the Contract was hit by section 21(a) of the Specific Relief Act which stipulates that a contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced.

23. In our view there is another hurdle that SPEC faces. Specific performance of the Contract by PPL did not simply entail release of payments to SPEC. Before that the Contract envisages that the works shall be to the satisfaction of PPL; that quality of material has to be approved by PPL; that PPL has to review project progress and may notify changes and amend the bills of quantities; that regulatory permits required during the works have to be procured by PPL; and certificates of successful completion have to be issued by PPL. These acts by PPL are of course dependent on the far more detailed and technical provisions of the Contract setting-out performances by SPEC. Therefore, the Contract runs into such minute and numerous details and is of such a nature that the Court cannot enforce specific

performance of its material terms, which is another bar to specific performance under section 21(b) of the Specific Relief Act. The following *Illustration* given under said provision could not be more apt:

“A contracts with B to execute certain works which the Court cannot superintend:

.....

The above contracts cannot be specifically enforced”.

24. As apparent in the above *Illustration*, the principle underlying section 21(b) of the Specific Relief Act is that the Court cannot superintend a contract of works of the nature mentioned in section 21(b). In *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1, HL, Lord Hoffmann explained that specific performance of a works contract running into details is usually denied as it entails constant supervision by the Court, and also for the reason that terms of specific performance of such a contract cannot be drawn with precision by the Court.

25. When the subject Contract was not specifically enforceable, the relief sought in the suit for incidental injunctions were barred by section 56(f) of the Specific Relief Act which stipulates that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. As observed by the Supreme Court in *Bolan Beverages (Pot.) Ltd. v. Pepsico Inc.* (2004 CLD 1530), where final relief for injunction is barred, no temporary injunction should be granted. In *Pakistan Associated Construction Ltd., v. Asif H. Kazi* (1986 SCMR 820), in somewhat similar circumstances emanating from the termination of a works contract, the Supreme Court upheld the denial of a temporary injunction in view of clauses (a) and (b) of section 21 and section 56(f) of the Specific Relief Act. CMA No. 6224/2020 by SPEC was no exception and was rightly dismissed.

26. We are not swayed by the submission that the impugned order prejudices a prior suit by SPEC, *viz.* Suit No. 891/2019, pending to challenge the termination of the Contract. Admittedly, at that point

SPEC did not seek specific performance of the Contract, rather it appears that in filing the subsequent Suit No. 914/2020 SPEC has split-up its relief. However, we leave that aspect for the learned Single Judge to examine. Suffice to say that the stated consequence of the impugned order on Suit No. 891/2019 is not an argument available to SPEC after it chose to file Suit No. 914/2020.

27. Regards PPL's CMA for restraining SPEC from interfering at the project site, admittedly, the underlying land vests in PPL as lessee thereof, and SPEC was in possession only as PPL's licensee for the purposes of performing works under the Contract and for the duration of the Contract. It was not SPEC's case that such license was coupled with an interest and was irrevocable under section 60 of the Easements Act, 1882. Consequently, on the termination of the Contract on 10-05-2019 such license was deemed to be revoked by virtue of clauses (c) and (f) of section 62 of the Easements Act, and thereafter SPEC had no right to retain possession of the site except a reasonable time to vacate the same as provided in section 63 of said Act.

28. Mr. Omer Memon, learned counsel for SPEC had then submitted that SPEC is nonetheless entitled to retain possession of the site to ensure a technical audit of the project by a neutral engineering firm so as to eventually prove the quantum of works carried out by it in its claim for damages/compensation before the arbitrator. While the Court is usually minded in such cases to facilitate a measurement of works carried out by the contractor before possession of the site changes hands, that is not to perpetuate the contractor's possession contrary to sections 62 and 63 of the Easements Act, nor to prejudice the project itself, but only as a window to the contractor to gather the relevant evidence for a claim for damages if need be before that evidence is subsumed. However, regardless of that facility, the burden to prove that damage remains on the contractor.

29. In the present case, an assessment of the works carried out by SPEC at the site had been undertaken by a reputed third-party engineering firm, NESPAK, in the presence of both parties and under the supervision of the Official Assignee pursuant to order dated 10-07-2020 passed in Suit No. 321/2020. The order dated 25-08-2020 shows that said firm had been nominated by SPEC itself. An assessment report had been submitted by NESPAK in November 2020 (after the subject CMAs had been heard and reserved). After NESPAK's inspection at least, if not before, SPEC's presence at the site is unjustified. Its CMA No. 6225/2020 for a technical audit of the project had served its purpose. Therefore, the order passed by the learned Single Judge on CMA No. 5148/2020 to restrain SPEC from interfering at the project site is completely justified. As regards CMA No. 6116/2020 by SPEC for inspection of alleged project equipment lying at its Dubai factory, that was premature to say the least when it had yet to lodge a claim against PPL for that equipment, and therefore merited dismissal.

30. With the aforesaid reasons we do not arrive at a conclusion different from that of the learned Single Judge. Therefore, both appeals are dismissed. The interim order stands vacated. Having upheld the order that restrains SPEC from the project site, we are not inclined to examine allegations and counter-allegations of dispossession under the contempt applications. All applications are disposed off accordingly.

JUDGE

CHIEF JUSTICE

Karachi
Dated: 18-09-2023

Announced by & on: