IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A.NO.66 of 2008

Present :-
Mr. Justice Syed Sajjad Ali Shah,
Mr. Justice Muhammad Junaid Ghaffar

M/s Ayaz Builders ----------Appellant

Versus

Board of Trustees of the
Karachi Port Trust & another ----------Respondents

Date of hearing:	**28.09.2015**
Date of judgment:	**06.10.2015**
Appellant:	**Through Mr.Bilal A.Khawaja, Advocate.**
Respondent No.1:	**Through Mr.Ravi R.Pinjani Advocate**

J U D G M E N T

Muhammad Junaid Ghaffar, J:- Through instant appeal, the appellant has impugned Judgment dated 3.3.2008, whereby, the prayer of the appellant Under Section 20 of the Arbitration Act, 1940, for referring the matter for Arbitration has been declined by a learned Single Judge of this Court by directing the appellant and the respondent No.1 to approach the Engineer/Consultant under the terms of contract between the parties.

2. Briefly, the facts are that the appellant, who is engaged in the business of Engineering contracts, participated in the tender floated by respondent No.1 for Development and Rehabilitation of M. T. Khan Road, Karachi, ("Project") and was awarded the said project for a sum of Rs.206,742,280/- being the lowest bidder. Thereafter, the appellant furnished Performance Bank Guarantee as well as Mobilization Advance Guarantee and entered in a formal contract. It has been further stated that thereafter the respondent No.1 failed to fulfill certain conditions on its part, such as removal of encroachment and execution of works which were required to be carried out by the Utility Companies, which resulted in delay in the completion of the project and vide letter dated 15.12.2005, the

appellant was directed to suspend the work immediately and handover the Site to the project consultant. Such letter was replied by the appellant on 16.12.2005, wherein, a request was made for according 30 days time to monitor the Site work, however, as stated, without any lawful authority, the respondent No.1 vide its letter dated 14.1.2006 informed the appellant that the work has now been entrusted to Frontier Work Organization on emergency basis. Thereafter, vide letter dated 28.1.2006, the respondent No.1 directed the appellant to stop the work and handover the possession of the Site to the Consultant of the Project. However, once again vide letter dated 15.2.2006, the respondent No.1 allowed the appellant to continue with the project after reducing the scope of the contract work, but once again vide letter dated 25.2.2006, the contract was unilaterally terminated. It is further stated that the appellant having left with no option accepted such termination of the contract and approached the Consultant/Engineer in terms of Clause-67.1 of the contract and also filed a Suit on 24.3.2006 under Section 20 of the Arbitration Act, 1940 along with an application under Section 41 of the Act for restraining respondent No.1 from encashment of the Guarantee provided by the appellant, which has been declined by the learned Single Judge through the impugned order.

3. Learned Counsel for the appellant has contended that insofar as delay in the execution and timely completion of the project is concerned, the same was due to the reason that respondent No.1 miserably failed to clear the encroachment on the work Site and to carry-out other Civil works, which were required to be executed by the respective Utility Agencies. Therefore, any delay so alleged, has not occurred due to fault on the part of the appellant. Learned Counsel has further contended that after termination of the contract and acceptance of the same, the appellant pursuant to Clause-67.1 of the agreement for settlement of dispute, approached the Consultant/Engineer, who was required to give its decision after passing of 84 days of receiving such reference from the appellant. Learned Counsel has further contended that since in the given situation when the appellant has been put in a no win situation, a Suit Under Section 20 of the Arbitration Act is maintainable, whereas, Court has all the jurisdiction to restrain the respondent No.1 from seeking

encashment of the Bank Guarantees pending Arbitration between the parties. Learned Counsel has further contended that since the statutory period of 84 days provided in Clause 67.1 has since expired, therefore the Engineer has not and cannot act any further to settle the dispute between the parties. Hence, the matter must now be referred for Arbitration in terms of the agreement and pending such Arbitration, the encashment of the Guarantees may be stayed. In support of his contention, learned Counsel has relied the case reported in *PLD 1978 Supreme Court 220 (Mst.Abina Begum and others Vs Mehar Ghulam Dastgir), PLD 1964 Supreme Court 106 (Abdullah Bhai and others Vs Ahmad Din), 1982 CLC 580 (Younus Vs Mrs.Hameeda), SBLR 2001 Karachi 482 (China International Water & Electric Corporation & another Vs Pakistan Water and Power Development Authority & another), and 2010 SCMR 524 (Standard Construction Company (Pvt) Limited Vs Pakistan through Secretary M/O Communications and others).*

4. Conversely, the Counsel for respondent No.1 has contended that the appellant has not stated the facts correctly, whereas, the termination of contract was accepted by the appellant vide letter sated to be issued on 17.3.2006, however, the same was received in the office of respondent No.1 on 20.3.2006. Similarly, per learned Counsel, the appellant after referring the matter to the Engineer on 20.3.2006 immediately filed a Suit before this Court on 24.3.2006 without waiting for the decision of the Engineer in the instant matter and obtained a restraining order. Thereafter, the Engineer could not proceed any further. Counsel has referred to Clause-67 of the Agreement in question and has contended that the matter could only have been referred to the Arbitrator, after announcement of the decision by the Engineer; hence, Suit filed by the appellant was premature and has been rightly declined by the Learned Single Judge while passing the impugned order. Counsel has further contended that insofar as guarantees in question are concerned, they are unconditional, and have no nexus with the settlement of dispute, either through the Engineer or through Arbitration, therefore, this Court has no jurisdiction to restrain encashment of such guarantees. Per Counsel at the most and without prejudice, the appellant could have filed a Civil Suit under Section 9 CPC, and not under the Arbitration Act, as the matter till date is not ripe for any Arbitration between the parties. Counsel

has further submitted that neither the balance of convenience nor equity is in favour of the appellant, whereas, no irreparable loss would be caused to the appellant as even after encashment of guarantees, the appellant if successful, can lodge a claim of recovery from respondent No.1 which is a Statutory Organization. In support of his contention, the Counsel has relied upon the Judgment reported in *2003 CLD 309 (Shipyard K.Damen International Vs Karachi Shipyard and Engineering Works Ltd), 1993 SCMR 530 (Board of Intermediate and Secondary Education, Multan through its Secretary Vs Fine Star & Company, Engineers and Contractors).*

5. We have heard both the learned Counsel and have perused the record. By consent, instant appeal is being decided finally at Katcha Peshi Stage. It appears that the appellant admittedly participated in a tender floated by respondent No.1 and was awarded the contract for renovation and Rehabilitation of M.T. Khan Road, Karachi and pursuant to such contract, furnished Performance Bank Guarantee for a sum of Rs. Rs.20,674,228/- and Mobilization Advance in the same amount. It further appears that after award of the contract and carrying out some work initially, a dispute arose between the parties, which finally culminated in the termination of the contract vide letter dated 25.2.2006 issued by respondent No.1. Such termination of the contract was accepted by the appellant vide letter dated 17.3.2006 which was received by respondent No.1 on 20.3.2006. Thereafter, the appellant vide letter dated 20.3.2006 pursuant to clause 67.1 of the agreement, referred the matter to the Engineer, who was required to pass and give its decision within 84 days from the date of receiving of such reference and the appellant without waiting for such outcome, within a span of 4 days filed Suit under Section 20 of the Arbitration Act before this Court on 24.3.2006 praying therein that respondent No.1 be directed to file Arbitration Agreement and the dispute between the parties as narrated in the plaint be referred for Arbitration. It further appears from the record that interim orders were passed in the said Suit, whereby, encashment of Guarantees was stayed which continues till date in the instant appeal.

6. At the very outset, learned Counsel for the appellant while confronted as to how, a Suit under Section 20 of the Arbitration Act was maintainable before this Court when admittedly the period of 84 days available to the Engineer to give its decision with regard to the termination of the contract had not expired, could not satisfactorily respond. However, learned Counsel contended that since as of today, the said period stands expired and therefore it will not serve any useful purpose by referring the matter to the Engineer and instead this Court by exercising its discretion in moulding the relief, may refer the matter to the Arbitrator and pending such Arbitration the guarantees may not be en-cashed. We are afraid such contention of the learned Counsel for the appellant does not seems to be appropriate and is rather misconceived. It is in fact the conduct of the appellant, whereby they had rushed to this Court by filing Suit under Section 20 of the Arbitration Act that the period of 84 days available with the Engineer to pass and give its decision has expired. This very contention of the learned Counsel for the appellant is in fact an admission that the dispute between the parties was not ripe for referral to the Arbitrator, as contract itself provides that before the matter could be referred for Arbitration, the Engineer to whom reference had already been made by the appellant has to give its decision. It would be advantageous to refer to the relevant Clause(s) of the Agreement, which reads as under:-

Engineer's Decision Settlement of Disputes

67.1 If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to ay opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eight-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given. If the Engineer has given notice of his decision as to a mater in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

67.3 Any dispute in respect of which:
(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and
(b) Amicable settlement has not been reached within the period stated in Sub-Clause 67.2 shall be finally settled unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute. Arbitration may be commenced prior to or after completion of the works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

7. Perusal of the aforesaid provision very clear reflects that the Suit of the appellant was premature as no decision as yet has been given by the concerned Engineer, before whom the reference of the appellant is still pending. Agreement between the parties is binding inter-se and the appellant cannot resile from the covenants of such agreement. The contention of the learned Counsel for the appellant that this is a no win situation for the appellant as pending decision of the Engineer, guarantees would be en-cashed by respondent

No.1, does not appear to be justifiable as it is for the appellant to blame themselves for having entered into such an agreement. Even otherwise, guarantees furnished by the appellant are independent in nature and there is no nexus between encashment of the guarantees with the settlement of the dispute between the parties. Therefore in our opinion, the appellant was not justified to rush to this Court by filing a Suit under Section 20 of the Arbitration Act and seek a restraining order. At the most and without prejudice, as rightly contended by the Counsel for respondent No.1, the appellant could have come to this Court by filing a Civil Suit under Section-9 of the Civil Procedure Code and make out a case, either of hardship or fraud on the part of the respondent No.1 and to seek injunction in respect of the encashment of Bank Guarantees. Insofar as the contract between the parties is concerned, they are bound to follow such contract including the terms and conditions for settlement of dispute including Arbitration, which in the instant case has in fact not arisen till date by virtue of the agreement between the parties. Therefore a Suit under Section 20 of the Arbitration Act, 1940, for referring the matter to Arbitration is not competent in the given facts of instant case.

8. Insofar as encashment of Bank Guarantees which are unconditional in nature, pending settlement of disputes in like matters was considered by a Divisional Bench of this Court in the case of ***SHIPYARD K. DAMEN INTERNATIONAL V. KARACHI SHIPYARD & ENGINEERING WORKS LIMITED (2003 CLD 309)*** by holding as under:-

> "Admittedly the Bank Guarantee furnished are unconditional, there are no pre-requisite conditions or impediments for encashment in the said Guarantees for which the respondent has been made the sole judge. It is also not disputed that respondent is statutory organization of the Government of Pakistan and possess sufficient assets to ensure payment of such amount under the decree determined as due and payable in pursuance of the arbitration proceedings, the award and decree."

9. The aforesaid Judgment was impugned before the Hon'ble Supreme Court of Pakistan in the case of ***SHIPYARD K.DAMEN INTERNATIONAL v. KARACHI SHIPYARD & ENGINEERING WORKS LIMITED (PLD 2003 SC 191)*** in which it has been held that guarantee once given cannot be avoided, except on the ground

of fraud and misrepresentation. In the above reported case it has been further held as under:-

> "In the light of what has been discussed hereinabove it can be inferred safely that encashment of bank guarantee has no nexus with the spirit of the contract executed between the parties being an independent contract containing its own terms and conditions to be performed by the concerned parties. The encashment of the bank guarantee had nothing to do with the alleged dispute between the petitioners and the respondent, which must be decided independently on the basis of terms of that contract without involving the contract of bank guarantee. It must be noted that 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. If any authority is needed reference can be made to case titled as National Construction Company Limited v. Aiwan-e-Iqbal (PLD 1994 Supreme Court 311)."

10. In view of hereinabove facts and circumstances of the case, we are of the view that the learned Single Judge through the impugned order while declining referral of the matter to the Arbitrator has already granted substantial relief to the appellant by directing respondent No.1 to seek encashment of Mobilization Advance Bank Guarantee only for the remaining unadjusted advance amount, whereas, encashment of Performance Guarantee is also subject to adjustment of the pending bills of the appellant. Therefore, we do not see any reason to interfere with the impugned order, which otherwise appears to be correct in law and facts and is premised on sound reasoning. Accordingly instant appeal having no substance and merits is hereby dismissed with cost of Rs. 50,000/- as the appellant has throughout since 24.3.2006, enjoyed the benefit of an Ex-parte restraining order, for which otherwise the appellant was not entitled under the law. The cost be deposited with the Nazir of this Court within 7 days hereof. To come up on 20.10.2015 for compliance.

Dated: 06.10.2015

JUDGE

JUDGE