

THE HIGH COURT OF SINDH, KARACHI

**Suit No. 304 of 2020**

[Husein Industries Ltd., versus Sui Southern Gas Company Ltd., & others]

Plaintiff : Husein Industries Ltd., through M/s. Muhammad Umer Lakhani, Ishfaq Ahmed & Aamna Pirzada, Advocates.

Defendant 1 : Sui Southern Gas Company Ltd., through Mr. Asim Iqbal, Advocate.

Defendant 2 : Nemo.

Defendant 3 : Fida Hussain, Representative of HBL.

Date of hearing : 09-03-2020.  
[On CMA No.2548 of 2020]

Date of decision : 09-03-2020.

**ORDER**

**Adnan Iqbal Chaudhry J.** - The Plaintiff (principal debtor) prays for a temporary injunction to stay encashment of seven (07) bank guarantees issued by banks (Defendants 2 and 3 - the surety) in favor of the SSGC (Defendant No.1 - the creditor) to guarantee payment of gas charges under clause 3.01 of a contract for supply of gas for power generation (the underlying contract) between the Plaintiff (principal debtor) and the SSGC (creditor).

2. By letters dated 17-02-2020 and 18-02-2020, the SSGC made a call on four (04) of the bank guarantees totaling Rs. 36,843,000/-. Per the SSGC, the outstanding gas bills in respect of three of the meters/accounts is far greater, totaling Rs.171,303,900/-. The banks have yet to make payment on the bank guarantees.

3. The Plaintiff had earlier filed Suit No.152/2012 against the SSGC before Senior Civil Judge Malir, Karachi, praying *inter alia* for an injunction against disconnection of gas supply [and the seven (07) bank guarantees that are now subject matter of this suit were also subject matter of the previous Suit No.152 of 2012.] That suit was dismissed under Order XVII Rule 3 CPC and against such dismissal

the Plaintiff has preferred Civil Appeal No.03/2020 which is pending before the District Court Malir, Karachi. The SSGC has also filed Suit No.643/2016 against the Plaintiff for recovery which is pending before this Court.

4. Vide order dated 26-02-2020 passed in this suit, learned counsel for the Plaintiff was confronted with the test for restraining encashment of bank guarantees as laid down by the Supreme Court in *National Construction Ltd. v. Aiwan-e-Iqbal Authority* (PLD 1994 SC 311); *National Grid Company v. Government of Pakistan* (1999 SCMR 2367); and *Shipyard K. Damen v. Karachi Shipyard & Engineering Works Ltd.* (PLD 2003 SC 191). Mr. Muhammad Umar Lakhani, learned counsel for the Plaintiff submitted that it is the Plaintiff's case that the SSGC has over-billed the Plaintiff and had also billed for gas supplied through meters that stood disconnected. He submitted that clause 3.01 of the underlying contract has to be read with the terms of the bank guarantees and he cited *Pak Consulting & Engineering (Pvt.) Ltd. v. Pakistan Steel Mills* (2002 SCMR 1781), a leave granting order, to submit that an injunction against encashment of a bank guarantee can follow where the encashment is dependent on a determination whether there was a breach of the underlying contract between the principal debtor and the creditor, and where a suit for recovery by the creditor is pending in a Court of law. Mr. Lakhani further submitted that the billing dispute between the Plaintiff and the SSGC had been pending since 2012 when the Plaintiff had filed Suit No.152/2012; that it is only now, in 2020, that the SSGC has moved for encashment of the bank guarantees; and therefore there is a 'special equity' in favor of the Plaintiff to maintain *status quo*.

5. On the other hand, Mr. Asim Iqbal, learned counsel for the SSGC (Defendant No.1) submitted that in the previous Suit No.152/2012 filed by the Plaintiff against the SSGC, the learned Senior Civil Judge had stayed encashment of the very bank guarantees, which stay continued until Suit No. 152/2012 was eventually dismissed in 2020; that in view of the said stay order, the SSGC was prevented from making a call on the bank guarantees,

which call was made as soon as the SSGC learnt of the dismissal of that suit. He submitted that the outstanding amount of the gas bills is far greater than the amount guaranteed. He submitted that since the previous application to restrain encashment of the very bank guarantees was dismissed along with Suit No. 152/2012, the instant application for the same relief is hit by the doctrine of *res-judicata*. Mr. Asim Iqbal relied on *Shipyards K. Damen v. Karachi Shipyards & Engineering Works Ltd.* (PLD 2003 SC 191); *Sahara Trading International (Pvt.) Ltd. v. Bank Alfalah Ltd.* (PLD 2004 SC 925); and *Montage Design Build v. The Republic of Tajikistan* (PLD 2015 Islamabad 13) and submitted that it is settled law that a bank guarantee is to be construed on its own terms; and that a perusal of the subject bank guarantees will show that those are an unconditional undertaking by the banks to pay the guaranteed sum on demand.

6. It is settled law that a bank guarantee, a 'guarantee' within the meaning of section 126 of the Contract Act, 1872, is an independent contract between the surety (bank) and the creditor (beneficiary of the guarantee), and as such the bank guarantee is to be construed on its own terms independent of the underlying contract between the creditor and the principal debtor, and irrespective of claims pending *inter se* the creditor and principal debtor. Accordingly, the nature and language of that independent contract, namely the bank guarantee, assume great importance<sup>1</sup>. Generally, the Courts in Pakistan have created two categories of bank guarantees. One category relates to those situations where a person on whose behalf the bank guarantee is given (the principal debtor) has received a mobilization advance. The second category relates to situations where the surety guarantees the performance of certain works/acts to be done by the principal debtor. The first category of bank guarantees is commonly referred to as "Mobilization Guarantees", and the second kind is commonly referred to as "Performance Guarantees".

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<sup>1</sup> See *National Construction Ltd. v. Aiwan-e-Iqbal Authority* (PLD 1994 SC 311); and *Shipyards K. Damen International v. Karachi Shipyards & Engineering Works Ltd.* (PLD 2003 SC 191).

7. The Courts in Pakistan have generally construed Mobilization Guarantees as not being subject to a restraining order even if there is a dispute between the parties to the underlying contract. However, in cases of guarantees other than Mobilization Guarantees, the Courts have granted or refused injunction to restrain encashment depending upon the literal words used in the guarantee. If the bank guarantee contains a stipulation to the effect that the surety shall pay “if default is committed by the principal debtor”, an injunction may follow on the theory that until ‘default’ is proved by evidence, there is no default. On the other hand, where the language used in the bank guarantee is to the effect that the guaranteed sum is payable unconditionally; or irrespective of any dispute between the creditor and principal debtor; or that the creditor shall be the sole judge of the alleged default; the Courts have refused to grant injunction to restrain encashment unless the plaintiff demonstrates fraud by the creditor which is in the knowledge of the bank, or unless it is a case giving rise to a special equity in favor of the plaintiff<sup>2</sup>.

8. The reliance placed by Mr. Umer Lakhani on *Pak Consulting & Engineering (Pvt.) Ltd. v. Pakistan Steel Mills* (2002 SCMR 1781) to argue that there the Supreme Court had taken a different view, is misplaced. What was observed there by the Supreme Court was that if the bank guarantee itself contained a condition tying the encashment to the determination of breach, for which a case was pending, then an injunction may follow. That was a reiteration of the rule already laid down in *National Construction Ltd. v. Aiwan-e-Iqbal Authority* (PLD 1994 SC 311). In fact, the case of *Pak Consulting & Engineering* had been considered by the Supreme Court in the case of *Shipyards K. Damen* in para 25 of the latter judgment where it is referred to as “C.P. No. 383-K of 2002 decided on 17-04-2002”, and the same argument as the one advanced by Mr. Lakhani here, was rejected by the Supreme Court.

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<sup>2</sup> See *National Grid Company v. Government of Pakistan* (1999 SCMR 2367); and *Shipyards K. Damen International* *ibid*.

9. The terms of the subject bank guarantees, which are more or less identical, are as follows:

“IN THE MATTER OF CONTRACT FOR SUPPLY OF GAS

*Whereas by contract for supply of gas made at Karachi between M/s. Husein Industries Ltd. Karachi, (therein and hereinafter referred to as the consumer of the one part) and Sui Southern Gas Company Limited, (therein and hereinafter referred to as the company of the other part) the company agreed to supply gas to the consumer and the consumer agreed to pay for supply of gas at the rates and in the manner therein set out and to secure payment thereof, the consumer agreed to procure, for the benefit of the company, an irrevocable bank guarantee for due performance and observance of the covenant, namely payment for supply of gas, by the consumer to the company.*

NOW THESE PRESENTS WITNESSETH AS FOLLOWS: -

1. *That we, the ..... Bank, Karachi, ..... at the request and for and on behalf of our constituent, the consumer, hereby agree and undertake that we shall within three days of the receipt of written intimation from the company that the consumer has failed to settle the demand for payment of gas consumed in accordance with the bill or bills made out, within the time noted on the bill or bills, we shall unconditionally and without reference to the consumer, pay to the company the sum outstanding, not exceeding Rs. .... We further agree that in the event of our failure to comply with the company's written requisition as aforesaid, we shall pay the company late payment surcharge @ 2% per month or part thereof until final payment.*

2. *That this guarantee shall be a continuing guarantee for a sum not exceeding ..... and shall continue to be in force in terms hereinafter mentioned notwithstanding any indulgence shown and/or extension of time given and/or facilities aforesaid and/or part payment accepted and/or variation of any terms of the contract between the consumer and the company.*

3. *That this guarantee shall be a continuing guarantee and shall remain in force initially for a period of one year from the date hereof and shall, thereafter continue to remain in force until determined by three months' notice in writing but shall, notwithstanding such determination, continue to be in force in respect of all claims received upto and inclusive of the date of the expiry of such notice of determination.*

4. *And that nothing herein contained shall prejudice the rights of the company as against the consumer due to the failure of the consumer to pay the gas bills in terms of the said contract.*  
(underling supplied for emphasis)

10. In my view, if the subject bank guarantees are to be categorized at all, those will be more in the nature of Performance Guarantees. In my view, there is nothing in the text of the subject guarantees that can be construed to makes payment thereunder conditional on the determination of any dispute between the Plaintiff and the SSGC. In fact, the text is to the effect that it is an unconditional undertaking to pay without reference to the Plaintiff. That is further reinforced by the

text that on a failure to pay within 3 days of the demand, the bank has agreed to pay SSGC a late payment surcharge. Thus, the subject guarantees are independent of the underlying contract and of any dispute pending in that regard between the Plaintiff and the SSGC. The argument advanced on behalf of the Plaintiff that a special equity arises in favor of the Plaintiff when the bank guarantees have not been invoked since 2012, that has no force, especially when it has not been denied by the Plaintiff's counsel that a call on the bank guarantees was earlier prevented by an injunctive order passed in a previous suit filed by the Plaintiff. Therefore, the Plaintiff has not been able to demonstrate a case for restraining encashment of the subject bank guarantees. Having concluded so, I need not discuss the argument whether the instant application was otherwise barred by the doctrine of *res-judicata* on account of the dismissal of the Plaintiff's earlier suit. Resultantly, this application is dismissed.

**JUDGE**

Karachi:

Dated: 09-03-2020

SHABAN/PA\*